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PRIVY COUNCIL LAW.

1876–1891.

PRIVY COUNCIL LAW.

A SYNOPSIS

OF ALL THE

APPEALS DECIDED BY THE JUDICIAL COMMITTEE

(*INCLUDING INDIAN APPEALS*)

FROM 1876 TO 1891 INCLUSIVE;

TOGETHER WITH

A PRÉCIS OF ALL THE IMPORTANT CASES FROM THE SUPREME COURT OF CANADA

IN WHICH SPECIAL LEAVE TO APPEAL HAS BEEN GRANTED OR REFUSED, OR IN WHICH APPEALS HAVE BEEN HEARD.

BY

GEORGE WHEELER,

OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW,

(AND OF THE JUDICIAL DEPARTMENT OF THE PRIVY COUNCIL).

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PREFACE.

Two motives have induced me to publish this work. When the original notes of the cases were in manuscript, a resort to them was often found useful in bringing to the recollection of the Judges—and not infrequently to the Bar—rulings and points of practice which have not been mentioned in any of the ordinary Law Reports. As years went on and the manuscript increased to large proportions it became a question whether the synopsis, covering as it does *every* appeal heard in the Council Chamber for sixteen years, should not be put in print.

The second incentive to publication arose from the consideration of the important changes made during the period which this Book covers, not only in the constitution of the Judicial Committee itself, but also in the additions made to the Empire; the expansion of administrative powers in the older, or the introduction of applicable laws into the newer Colonies, and still newer Possessions and Protectorates. The area of judicial authority and precedent keeps on growing more perfect, and yet increases year by year, a more than abundantly fruitful epoch of development having marked the time now under review.

Lord Brougham, whose Act of 1833 for the establishment of the Judicial Committee, with the object of carrying on more effectively and with modern light of experience the work of the ancient Court of Delegates, whose existence dated from Henry VIII.'s reign (25 Hen. VIII. cap. xix.), thus spoke (*History of the British Constitution*) of the Tribunal he had improvised: "It has been admitted even by those who first objected,

that this Body has worked admirably. From the variety of its Judges and from some being always present, uniformity of decision is preserved, while whatever be the nature of the case coming before it, Judges may easily be obtained of the peculiar qualifications required well to decide each." If these words had their weight of truth and significance half a century ago, how much more glowing eulogy might be pronounced now, when a long series of unalterable decisions have raised up a mosaic of the law, diversified, no doubt, to suit the varied possessions of our multiform Empire.

In contemplating the duties now devolving on the Judicial Committee it is necessary to bear in mind the numerous changes which have been made in the composition of the Tribunal itself. In 1871 was passed the Statute by which, for the first time, paid Judges were appointed, and for several subsequent years these Jurists, assisted often by the Members eligible to sit under Lord Brougham's Act (but still unpaid), worked ably, sitting, contrary to the traditions of centuries, regularly throughout the year. The four paid Judges under this Act (Sir James Colvile, Sir Barnes Peacock, Sir Montague Smith, and Sir Robert Collier (Lord Monkswell)) are now dead, and their offices died out with them, but the legislation which followed the Act of 1871, viz., the Appellate Jurisdiction Acts of 1876, 1881, and 1887, have brought into action the invaluable services of the four Lords of Appeal, who share the duties of the House of Lords concurrently with those of the Privy Council. The present Lords of Appeal, Lord Watson, Lord Macnaghten, Lord Morris, and Lord Hannen, need no words in any book from living lawyer to extol their reputation. By these Acts also the services of the Lords Justices of Appeal, of all Members who from time to time hold or have held "high Judicial offices" within

the meaning of the Appellate Jurisdiction Acts of 1876 and onwards, and of certain other Members of the Judicial Committee (as, for example, Lord Hobhouse and Sir Richard Couch, nominated under Lord Brougham's Act and a provision of the 1887 Act), have been utilised.

Viewing the changes for the dispensation of Law during the last sixteen years, there come first in importance the various classes of petitions for leave to appeal from the Supreme Court of the Dominion of Canada, founded in 1867 by the British North America Act. The Act was at first applicable only to the four Provinces of British North America which then joined in the bond of Federation. Now, in 1893, every Province and all adjunctive territories—some inhabited only by fur and seal hunters—of British North America, save alone Newfoundland, have entered into the homogeneous whole of the great Dominion. By the Dominion Act of 1875 (38 Vict. c. xi.), there was established, with the approval of Her Majesty's legal advisers, a *final* Court of Appeal for the combined Provinces. To this Supreme Court every Province could appeal, and its decisions were by the Act to be final, saving only Her Majesty's prerogative to allow an appeal to England.

The exercise of Her Majesty's prerogative to grant an absolutely last hearing in England has been frequently invoked. For convenience of reference, the cases are grouped together in Part II. of this work. In the period named, petitions or appeals have also come before the Judicial Committee *for the first time* from the new Colonial possessions of Bechuanaland, Cyprus, Griqualand, and Zululand. An appeal has been heard from Benin in the Niger Protectorate. Even the places just named fall far short of exhausting the lately opened avenues of litigation. North Borneo under its chartered

company has now a right of appeal. The Africa Order in Council of 15 October, 1889, has created a large number of Consular Courts, with rights of appeal through the Appeal Courts of the Cape and Bombay to the Queen. Almost every West African Colony has now a separate Supreme Court of Appeal of its own, instead of, as formerly, one Supreme Court for the series. Furthermore, the Samoan group of islands, in the Western Pacific, under the Order in Council of 13 August, 1877, has a right of appeal to the Supreme Court of Fiji, and thence to England. By like Orders in Council, 28 November, 1889, and 13 December, 1889, the Consul-Generals in Morocco, Siam, and Persia are authorized to allow to British subjects a right of appeal to the Privy Council.

The work has cost me many laborious hours, but these were at the same time brightened by hopeful anticipations that the Book will prove useful. My object has been to give a synopsis of the appeal work of the Judicial Committee for the past sixteen years. This appeal work is the main duty of the Committee. It is not to be forgotten, however, that the labours of the Tribunal are frequently demanded for the consideration of other crucial subjects as to which the approval or disapproval of the Sovereign in Council has to be sought. These include the numerous questions of Colonial administration which come before the Committee by *special reference* from Her Majesty in Council.

I have to thank my brother, Mr. Gerald John Wheeler, Barrister-at-Law, of Lincoln's Inn, for his assistance in preparing the "Index of Subjects" at the end of the Volume.

G. W.

COUNCIL OFFICE, WHITEHALL,
July, 1893.

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PRIVY COUNCIL LAW.

EXPLANATION.—*Immediately under the title of each case is given* (1) *the territory from which the case comes;* (2) *the name of the member of the Judicial Committee who delivered the judgment of their Lordships' Board;* and (3) *the date on which each judgment was delivered.*

At the end of the synopsis of every case the law book or books in which the matter has been reported are given in brackets. If no report of the case is mentioned, the letters P. C. Ar. denote that the reasons of their Lordships for their report to Her Majesty are to be found in the Privy Council Archives.

As regards practice, it is to be hoped that this work does not leave it unnoticed. Dicta on established practice or of innovations thereon are put in italics.

1876.

Mahomed Altaf Ali Khan *v.*
Ahmed Buksh and Others.

N. W. P. Bengal. SIR ROBERT COLLIER. *Jan.* 11, 1876.

Mahomedan Law regarding validity of wills. No writing necessary. Intention of Testator must be ascertained. Judicial Committee concur with the High Court in considering that on the will and on the evidence the whole of the property was devised as contended by the respondents. Affirmed.

[25 *W. R.* 121.]

Keet *v.*
Smith and Others.

Court of Arches. LORD CHANCELLOR (LORD CAIRNS).
Jan. 21, 1876.

Right of Ministers of Denominational Religions to affix word "Reverend" to their titles. The word "Reverend" not a rightful or legal title, but epithet used as mark of respect and reverence. It does not necessarily always mean that the

person using it is in Holy Orders. Faculty to be issued to erect a tombstone in a Church of England graveyard with the word "Reverend" upon it.

[1 *Prob. Div.* 73; 45 *L. J. P. C. C.* 10.]

Petition under the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56).

Funds of Dulwich College.

Charity Commission. LORD SELBORNE. *Jan.* 27, 1876.

Head master's claim for compensation. Effect of Act. Head master has vested interest in his office and emoluments. His rights not being saved by the scheme, it is remitted to the Commissioners. Head master's costs to be paid. *Vide* observations of Lord Selborne as to the alteration in procedure effected by the Endowed Schools Amendment Act, 1873 (36 & 37 Vict. c. 87). Endowed schools cases to be treated as appeals.

[1 *App. Cas.* 68; 45 *L. J. P. C. C.* 28.]

Phoolbas Koonwur and Another *v.*

Lalla Jogeshur Sahoy and Others.

Bengal. SIR JAMES COLVILE. *Feb.* 1, 1876.

Suit by co-sharer in joint estate against the alienees of his moiety. "Law of the Mitakshara." Liability of Hindu widows for debts of their husbands. Inconvenience of embracing in one suit titles to various parcels of land. Limitation in the case of a minor. Act VIII. of 1859, s. 246. Act XIV. of 1859, ss. 11 and 12. Ten appeals. Nine reversed. One affirmed.

[*L. R.* 3 *Ind. App.* 7; *I. L. R.* 1 *Calc.* 226; 25 *W. R.* 285.]

Moung Shoay Att *v.*

Ko Byaw.

Rangoon. SIR MONTAGUE SMITH. *Feb.* 4, 1876.

Validity of an agreement made by an agent under duress. Action for damages by principal. Customs and laws in relation

to the timber trade between British Burmah and China. Conditions of treaty as to jurisdiction of Siamese Courts where British subjects are concerned. An agreement made under duress not voidable in English law if not unconscionable; but imprisonment in a country where there is no settled system of procedure is duress of a wholly different kind. Varied, by a declaration that the agreement was not binding on the principal, but that as he had obtained certain timber belonging to the defendant under it, there should be a deduction in damages caused by the taking over of elephants and other property of the principal under the agreement.

[*L. R.* 3 *Ind. App.* 61; *I. L. R.* 1 *Calc.* 330.]

Mayor of Lyons *v.*

Advocate-General of Bengal and Others.

Bengal. SIR MONTAGUE SMITH. *Feb.* 5, 1876.

Will of late Major-General Claude Martin, of Lucknow (the Martinière Benefactor), the founder of charitable institutions at Lucknow, Calcutta, and Lyons. Claim by Mayor of Lyons as residuary legatee under will. If certain bequests fail, what share, if any, falls into residuary estate? Application of the principle of *cy-près*. Affirmed in favour of respondents.

[*L. R.* 3 *Ind. App.* 32; 45 *L. J. P. C.* 17; *I. L. R.* 1 *Calc.* 303; 26 *W. R.* 1.]

O'Shanassy *v.*

Joachim and Others.

New South Wales. SIR ROBERT COLLIER. *Feb.* 5, 1876.

Claims under Crown Lands Alienation Act, 1861. Minors. Is a grant to a minor null and void? *Emery* v. *Barclay*, *Drinkwater* v. *Arthur*, 10 S. C. R. 193. *Respondents lodged a printed case, but did not appear by counsel. Costs allowed to them up to lodging of case, inclusive.* Affirmed.

[1 *App. Cas.* 82; 45 *L. J. P. C.* 43.]

Colonial Sugar Refining Company *v.*
George Richard Dibbs.

New South Wales. SIR MONTAGUE SMITH. *Feb.* 10, 1876.

Charters of ships. Captains and agents. Dunnage. Import of conversations understood by men of business. Affirmed.
[*P. C. Ar.*]

Jumoona Dassya *v.*
Bamasoondari Dassya.

Bengal. SIR JAMES COLVILE. *Feb.* 10, 1876.

Adoption. Age of adoptive father. Evidences of adoption. Influence of Hindoo mother in her family. Adoption not invalid. Affirmed.
[*L. R.* 3 *Ind. App.* 72; *I. L. R.* 1 *Calc.* 289; 25 *W. R.* 235.]

Bank of British North America *v.*
Strong.

Nova Scotia. SIR BARNES PEACOCK. *Feb.* 10, 1876.

Appeal against the discharge of a *rule nisi* for new trial. Conditions under which arrest for debt was abolished in Nova Scotia. Misdirection of judge. New trial ordered to take place. Costs given to appellant. [1 *App. Cas.* 307.]

Ranee Sonet Kooer *v.*
Mirza Himmut Bahadoor.

Bengal. SIR JAMES COLVILE. *Feb.* 11, 1876.

Property left to illegitimate Mahomedan child. Disposition of property on her death. Doctrine of escheat in cases of vacant inheritance. Superior title held to be in the Crown. Affirmed.
[*L. R.* 3 *Ind. App.* 92; *I. L. R.* 1 *Calc.* 391; 25 *W. R.* 239.]

Guthrie and Another *v.*
Simson.

Victoria. SIR ROBERT COLLIER. *Feb.* 12, 1876.

Action brought by assignee of an insolvent against stock salesmen for the alleged conversion of the goods of the insolvent, or the assignee. Validity of transfers of stock given as security for advances. Transactions before insolvency. Was there fraudulent preference of creditors? Verdict below for assignee affirmed. [*P. C. Ar.*]

Jenkins *v.*
Cook (Clerk).

Court of Arches. LORD CHANCELLOR (LORD CAIRNS). *Feb.* 16, 1876.

Clergy Discipline Act, 3 & 4 Vict. c. 86. Alleged refusal to administer sacrament. Would-be communicant's disbelief in Satan. Sentence of Dean of Arches reversed, and in remitting the cause respondent to be admonished; but their Lordships express their opinion that the respondent has acted in good faith, and in the conscientious belief that he was discharging a duty imposed upon him.

[1 *Prob. Div.* 80; 45 *L. J. P. C. C.* 1.]

Owners of the Barque "Arabie," and Paul Auschitzky & Co., of London, **The Owners of her Cargo** *v.*
The United Dry Docks.

Vice-Admiralty, Mauritius. SIR ROBERT PHILLIMORE. *March* 3, 1876.

Validity of an appraisement and sale of a ship and cargo to meet a claim for ship's repairs and necessaries. Absence of *mala fides* and *crassa negligentia*. Decree below reversed, being erroneous as to the sale of the cargo, but upheld as to the ship. No title to damages. No costs. [*P. C. Ar.*]

Rani Sarat Sundari Debya and Another *v.*
Soorjya Kant Acharjya and Another.

Bengal. SIR JAMES COLVILE. *March* 10, 1876.

Chur case. Recession of rivers and claim to land. An "accretion." Demarcation. Cases of *Mussumat Imam Bandi* v. *Hurgovind Ghose*, 4 Moore's Ind. App.; *Lopes* v. *Muddun Mohun Thakoor*, 13 Moore's Ind. App. 472. Right to original site—which was capable of identification—upheld.

[25 *W. R.* 242.]

Bell *v.*
Receiver of Land Revenue of the District of Southland.

New Zealand. SIR BARNES PEACOCK. *March* 11, 1876.

Dispute with the Government respecting price to be paid for Crown lands. The Southland Waste Lands Act of 1865. Act 29 Vict. c. 59. What construction is to be put on certain sections? Alteration of price after application for grant sent in. Decision below in favour of Receiver affirmed.

[1 *App. Cas.* 707; 45 *L. J. P. C. C.* 47.]

Ridsdale *v.*
Clifton. Motion.

Court of Arches. THE LORD CHANCELLOR (LORD CAIRNS). *March* 14, 1876.

Motion for relief from an inhibition prohibiting the use of vestments, wafer bread and wafers, particular position at communion table, and the placing of a crucifix on the top of a screen in the church of which petitioner was the vicar, pending an appeal on the merits: *Herbert* v. *Herbert*, 2 Phillimore, 438. Act 6 & 7 Vict. Rules. Public Worship Act, 1874, 37 & 38 Vict. c. 85. Their lordships in this case order all parts of decree to be executed pending appeal, except the removal of a crucifix from a screen in the church.

[1 *Prob. Div.* 383; 45 *L. J. P. C. C.* 12; vide also, for later proceedings, 2 *Prob.* 276.]

Sri Virada Pratapa *v.*
Sri Brozo Kishoro Patta Deo.

Madras. SIR JAMES COLVILE. *March* 24, 1876.

Validity of an adoption. Evidence in relation to trustworthiness of written authority to adopt. *Ramnad case*, 12th Moore's Indian App. 269. Madras law. Assent of Sapindas to adopted children in the Dravada Country. Widow's rights. Affirmed with modifications. Adoption upheld, although judgment is given on other ground than that of High Court.
[*L. R.* 3 *Ind. App.* 154; *I. L. R.* 1 *Mad.* 69; 25 *W. R.* 291.]

Damodhar Gordhan *v.*
Gunesh and Others.

Bombay. LORD SELBORNE. *March* 28, 1876.

British jurisdiction in Kattywar States. Status of Kattywar with respect to British law. Treaty of Bassein, 1802. Rights of the Peishwa. Thakoor of Bhownuggur: his relations and engagements with our Government. What constitutes cession of territory to a Native State? 24 & 25 Vict. c. 67, s. 22. The Judicial Committee dismiss appeal, declaring there was no valid cession. [*L. R.* 3 *Ind. App.* 102; 10 *Bom.* 37.]

Tully *v.*
Richardson and Others; and
Tully *v.*
Thomas (the "Norma").

Vice-Admiralty, Quebec, Lower Canada. SIR ROBERT PHILLIMORE. *March* 30, 1876.

Collision between sailing ship and steamship. Pleadings and mode of taking evidence in the Court below. Benefit of applying "Preliminary Acts" of the High Court of Admiralty to

Vice-Admiralty Courts. Rules for preventing collisions at sea. Steamship to blame. Decision below upheld.
[*Aspinall, Vol. III., New Series*, 272.]

The "Sierra Nevada."

Vice-Admiralty, N. S. Wales. SIR ROBERT PHILLIMORE. *April* 7, 1876.

Collision between two sailing vessels, a brig and a barque. Bad look-out on both vessels. Court below found that the barque was alone to blame. Judicial Committee reverse that decision, holding both vessels to blame. [*P. C. Ar.*]

Hollyman and Others *v.*
Noonan and Others.

Queensland. SIR BARNES PEACOCK. *April* 7, 1876.

Alleged trespass in the goldfields, and removal of gold, and gold-bearing quartz. Colonial Act, 20 Vict., No. 29, "An Act to amend the Laws relating to the Goldfields." Defendants below, appellants in England, claimed a right to take the gold and quartz under an ordinary quartz claim. Verdict for respondents for 1,000*l.* Rule for new trial discharged below. The Judicial Committee endorsed this ruling.
[1 *App. Cas.* 595; 45 *L. J. P. C. C.* 62.]

Moore and Another *v.*
Harris.

Lower Canada. SIR MONTAGUE SMITH. *April* 7, 1876.

Alleged damage to cargo of tea. Susceptibility of tea to injury. Damage not within exceptions of bill of lading. Delay in claim. Peculiar conditions in relation to cargo. Bill of lading made in England. Is a contract to be governed by English law? Affirmed in favour of the steamship owner, the respondent. [1 *App. Cas.* 318; 45 *L. J. P. C. C.* 55.]

Pierre Gravel *v.*
Pierre P. Martin and Another.

Lower Canada. SIR BARNES PEACOCK. *May* 5, 1876.

Liability to account for money. Appeal on question whether money was stolen from the person to whom it was entrusted. Theft not proved. Judicial Committee rarely interfere when judgment of higher Court affirms that of lower one on question of fact. Affirmed. [*P. C. Ar.*]

Bisheswari Debya *v.*
Govind Persad Tewari and Others.

Bengal. SIR MONTAGUE SMITH. *May* 6, 1876.

Purchase of landed property. "Consideration," alleged breach of a provision in the instrument of sale. Agent of sale. Proceeding below without evidence. The Judicial Committee remand the case for trial to the civil judge.
[*L. R.* 3 *Ind. App.* 194; 26 *W. R.* 32.]

John Colclough *v.*
Richard Johnson and Others.

Victoria. SIR JAMES COLVILE. *April* 7 *and May* 16, 1876.

Partnership disputes. Did the interest of any of the parties as partners cease; and, if so, whose interest? Accounts. Decision below varied. Decree discharged, and a new decretal order made. Several parties to pay their own costs.
[*P. C. Ar.*]

Mayor of Montreal, &c. *v.*
Drummond.

Lower Canada. SIR MONTAGUE SMITH. *May* 16, 1876.

Powers of Montreal Corporation to discontinue or close up the ends of streets. Construction of bye-laws made in pursuance of

Quebec Act, 23 Vict. c. 72. Rights in the nature of servitudes: French law. Decision below reversed, and the action against the corporation dismissed.

[1 *App. Cas.* 384; 45 *L. J. P. C. C.* 33.]

Rani Khujooroonissa *v.*
Roushun Jehan.

Bengal. SIR ROBERT COLLIER. *May* 18, 1876.

Claims to estate. Mahomedan law in relation to a deed of gift and a will. Was the Mahomedan law contravened in making certain bequests? Consideration. Rights of an "inferior wife" as distinct from a concubine. Affirmed with slight variation in the case of one of the claims.

[*L. R.* 3 *Ind. App.* 291.]

Girdhari Singh *v.*
Hurdeo Narain Sahoo.

Bengal. SIR BARNES PEACOCK. *May* 19, 1876.

Judgment debtor objecting to sale of his immoveable estate. Act VIII. of 1859 in relation to limitation and notification of sale. Confirmation of sale. Decree below against the judgment debtor is upheld.

[*L. R.* 3 *Ind. App.* 230; 26 *W. R.* 44.]

Lala Sham Soondur Lal *v.*
Sooraj Lal and Others.

Bengal. SIR MONTAGUE SMITH. *May* 20, 1876.

Suit for possession of property under a mortgage. Concurrent judgments of two Courts below necessitate the judgment of High Court being affirmed. The form of the decree is ordered to be amended, in order specifically to set out to what the plaintiff is entitled. [26 *W. R.* 48.]

Ramasami Chetti *v.*

Ranga Christna Muttu Vira Puchaya Naikar.

Madras. SIR ROBERT COLLIER. *May* 23, 1876.

Validity of a bond. Concurrent decision of Courts below necessitates dismissal of appeal. [*P. C. Ar.*]

Reasut Hossein *v.*

Hadjee Abdoollah and Another.

Bengal. SIR JAMES COLVILE. *May* 24, 1876.

Registration of wills under the Indian Registration Act, No. VIII. of 1871. Alleged false will. Is a Court at liberty under certain circumstances to admit a review of the order passed by it? Act VIII. of 1859, ss. 376 to 378, and 38th section of the Amending Act of 1861. The District Court had rejected the application for registration of the will, but afterwards admitted a review. The High Court, on appeal, decided that the admission of the review was *ultra vires.* The Judicial Committee now held to the contrary. Reversed.

[*L. R.* 3 *Ind. App.* 221; *I. L. R.* 2 *Calc.* 131; 26 *W. R.* 50.]

Issur Chunder Shaha *v.*

Doyamoyi Dasi.

Bengal. SIR BARNES PEACOCK. *May* 25, 1876.

Right to shares of family property. Effect of Ikrar. Whether Kabulyut was executed. Affirmed. [*P. C. Ar.*]

Garden Gully United Quartz Mining Company *v.*

Shmidt (in Equity).

Victoria. SIR MONTAGUE SMITH. *May* 26, 1876.

Question whether respondent's shares in a company were duly forfeited. Whether laches or delay constitute abandon-

ment. See *Garden Gully United Quartz Company* v. *McLister*, 1 Ap. Cas. 39; also *Clarke and Another* v. *Hart*, 6 H. L. C. 633. The Judicial Committee pronounce a decision (affirming decree below) to the effect that the appellants have failed to establish the forfeiture. [*P. C. Ar.*]

Hurpurshad and Others *v.*
Sheo Dyal and Others;
Ram Sahoy *v.*
Sheo Dyal and Others;
Balmakund *v.*
Sheo Dyal and Others;
(Consolidated appeals. Oudh.)
and
Ram Sahoy *v.*
Balmakund and Others.

N. W. P. Bengal. SIR BARNES PEACOCK. *May* 30, 1876.

Succession to estates situated in Oudh and in the North West Provinces. "Self-acquired property." Effect of Lord Canning's Proclamation of March, 1858, and of Act I. of 1869. Alienation. If there was power to dispose of property in Oudh, was there none or any to dispose of property in the North West Provinces? Transfer by Hindu Law. Construction of will. Nuncupatory wills. Evidence of testator's intention. Was there custom in this Hindu family which disentitled the several members of the family to receive, on partition of the joint family property, the shares to which they were entitled under the Mitacshara? Mitacshara on Inheritance, cap. 1, sec. 5, par. 12. The Judicial Committee recommend the reversal of the decrees of the Judicial Commissioner of Oudh, and of the High Court for the North Western Provinces, and allocate the property *per stirpes.* [*L. R.* 3 *Ind. App.* 259; 26 *W. R.* 55.]

Cowasjee Nanabhoy *v.*
Lallbhoy Vullubhoy and Others.

Bombay. Sir Robert Collier. *June* 21, 1876.

Cotton twist factory at Bombay. Construction of the contract between partners and co-partners. Right to dissolve partnership. Right of a partner to compensation if the partnership was dissolved. Affirmed.
[*L. R.* 3 *Ind. App.* 200; *I. L. R.* 1 *Bom.* 468; 26 *W. R.* 78.]

Mahomed Aga Ali Khan Bahadoor *v.*
The Widow of Balmakund and Others.

Oudh. Sir Barnes Peacock. *June* 22, 1876.

Action against parties who hold a deceased judgment debtor's property to recover from them a sum of money which the plaintiff was owed by the judgment debtor. Has a judgment creditor, by virtue of the judgment for the debt, a right *without execution* to enforce his claim against the debtors of the judgment debtor, or those who hold his property? The Judicial Committee endorse the decree below, that the procedure of the plaintiff was irregular, and that the suit is not maintainable. Sect. 201 of the Civil Code of Procedure (Act VIII. of 1859).
[*L. R.* 3 *Ind. App.* 241; 26 *W. R.* 82.]

Mussumat Mehdi Begum and Others *v.*
Roy Huri Kissen and Others.

Bengal. Sir Montague Smith. *June* 28, 1876.

Fruitless claim for recovery of possession of Mouzahs and shares of Mouzahs. Validity of instruments of sale. Whether there was concealment from, or fraud on, a Purdanasheen lady. Their Lordships concur with the Court below that the claim of appellants fails, and that no fraud was practised. [*P. C. Ar.*]

Nidhoomoni Debya *v.*
Saroda Persad Mookerjee.

Bengal. SIR ROBERT COLLIER. *June* 29, 1876.

Widow's claim for half her husband's property. Attempt to set aside husband's, and husband's father's wills. Construction. *Persona designata* in husband's will., viz., an adopted son. The Judicial Committee agree with Court below that widow has failed to establish her case, and that she is entitled to maintenance alone. [*Rep.* 3 *L. R. Ind. App.* 253; 26 *W. R.* 91.]

Petition of **Syud Gholam Guffer.**

Bengal. SIR BARNES PEACOCK. *July* 1, 1876.

Petition to appeal *in formâ pauperis* from a judgment delivered 1869. Claim to property on the plea of alleged adoption. Rival claimants. Objections to Ikrar. Defendants in possession over quarter of a century. Serious lapse of time since decree of High Court. *Sarchet's Case*, 10 Moore, P. C. C. 533. Petition dismissed. [*P. C. Ar.*]

Prosonno Gopal Pal Chowdhry and Others *v.*
Brojonath Roy Chowdhry and Others.

Bengal. SIR BARNES PEACOCK. *July* 6, 1876.

Claim for possession of portions of a Talook. Effect of partition. Held by the Court below that on the evidence the appellants had not proved title to maintain the suit. Affirmed. [*P. C. Ar.*]

Robertson *v.*
Grant.

Nova Scotia. SIR MONTAGUE SMITH. *July* 6, 1876.

Claim against a ship for debts. Five creditors' sale. Replevin. Objections to the award of the master in equity. Can a "ship's husband" bind co-owner of a vessel by policies of

insurance to which they were no parties? Accounts. Judgment of Court below which supported the ruling of the master affirmed. [*P. C. Ar.*]

Marsters *v.*
Durst.

Court of Arches. LORD PENZANCE. *July* 11, 1876.

Suit against parishioner's churchwarden for having removed from a ledge called a "re-table" at the back of the communion table a moveable cross of wood. Respondent is vicar. Legality of the position of the cross. "Inert" things in a church: *Liddell* v. *Westerton*, Moore's Special Report, 176; *Liddell* v. *Beal*, 14 Moore's P. C. C. 1. Position of cross forbidden. No costs, both parties having acted without a faculty.
[1 *Prob. Div.* 373; 45 *L. J. P. C. C.* 51.]

Chowdri Murtaza Hossein *v.*
Bibi Bechunissa.

Oudh. SIR JAMES COLVILE. *July* 13, 1876.

Objections to have an award filed and enforced. Act VIII. 1859. Validity. Mahomedan law. Appeal dismissed without costs; but appellant is ordered to pay to the respondent the costs of the application for leave to appeal, as those costs were ordered to abide event. [*L. R.* 3 *I. A.* 209; 26 *W. R.* 10.]

Rai Nursingh Doss *v.*
Rai Narain Doss and Others, and Cross Appeal.

N. W. P. Bengal. SIR BARNES PEACOCK. *July* 21, 1876.

Appeal and cross appeal arising out of complicated partition arrangements of a Hindu family. Joint, yet divided, Hindu family. Dispute over accounts in a banking business. Extraordinary agreement. Was the general principle on which accounts

were ordered to be taken in the principal appeal correct? The Courts below held, and the Judicial Committee endorse, the view that it was. In the cross appeal the Judicial Committee are not on the whole disposed to disturb the decree of the High Court. Both appeals disallowed. Each party to pay his own costs.

[*P. C. Ar.*]

Rajah Vellanki Venkata Krishna Rao *v.*
Venkata Rama Lakshmi and Others.

Madras. Sir James Colvile. *Nov.* 3, 1876.

Claim to a Zemindary by an adopted son. Validity of an adoption by a widow after the death of a natural son to whom she had succeeded as heiress. Was there authority by her husband? Effect if there was no authority. Effect of acquiescence of Sapindas. Macnaghten's Principles and Practice, Vol. I. 80; *Bhoobun Moyee* v. *Ram Kishore*, 10 Moore's Indian Appeals, 279; the *Ramnad Case*, 12 Moore's Indian Appeals, 397. Appeal allowed, and adoption declared to be not inconsonant with law. The presumption to be held that the widow acted from the proper motives which should actuate a Hindu female unless the contrary is shown.

[*L. R.* 4 *Ind. App.* 1; *I. L. R.* 1 *Mad.* 174; 26 *W. R.* 21.]

Narain Singh and Others *v.*
Shimboo Singh and Others.

N. W. P. Bengal. Sir Barnes Peacock. *Nov.* 4, 1876.

Sons and heirs of a mortgagee seek to recover 20 biswahs of the Zemindari right of Mouzah Lallpore. Appellants represented a second mortgagee, who, under a decree, had at one time been in possession. A prior mortgagee ousted the second mortgagee, and the mortgagors, represented by respondents, having paid up the demand of the first mortgagee, got possession from him. The appellants now asked for possession under the decree

obtained by their ancestor. The Judicial Committee, reversing High Court decree, declared that the entry of respondents into possession gave a cause of action to the appellants. They upheld the decision of the subordinate judge so far as it gave possession of the land only to the appellants.

[*L. R.* 4 *Ind. App.* 15; *I. L. R.* 1 *All.* 325.]

Corporation of Montreal *v.*
Brown and Another.

Lower Canada. SIR HENRY S. KEATING. *Nov.* 7, 1876.

Respondents in the case had held office in Corporation of the City, as Commissioners in Expropriation (27 & 28 Vict. c. 60, Quebec Statutes), and had, under a decree of the Superior Court, been removed for alleged excessive assessment of land. Court of Queen's Bench reversed the judgment below, and restored the respondents. Preliminary point raised, "Was case susceptible of appeal?" Decided in affirmative—1115th section "Manual of Procedure," Canadian Law. Valuation of land in Montreal. Meaning of *diligence* in assessing valuations, &c. Affirmed. [2 *App. Cas.* 168.]

Hamel *v.*
Panet.

Lower Canada. LORD SELBORNE. *Nov.* 18, 1876.

Validity of a notarial act executed by parties possessing goods in community. Nature of the instrument. Onus of impeaching the deed. Hypothec and reprise. Canadian law. Evidence of notaries as to custom in preparing and arranging deeds. The Judicial Committee, holding that the *bona fides* of the Notarial Act was unimpeachable, reversed decision below.

[2 *App. Cas.* 121; 46 *L. J. P. C. C.* 5.]

Mississippi and Dominion Steamship Co. (of Liverpool), Owners of the "Quebec," *v.*
John Hendry and Alexander Ferguson, Owners of the "Princess Alexandra."

Vice-Admiralty, Quebec, Lower Canada. SIR ROBERT PHILLIMORE. *Nov.* 22, 1876.

Collision between steamer and sailing vessel in St. Lawrence. Disinclination of Judicial Committee to reverse sentence founded on the deliberate opinion of the judge below, when that opinion has been sustained by the advice of nautical assessors.
[*P. C. Ar.*]

King *v.*
Miles.

South Australia. SIR BARNES PEACOCK. *Nov.* 23, 1876.

Loss of shipped goods. Responsibility of agents. In estimating damages value ought to be fixed at a particular time. Salvage expenses to be deducted. Affirmed. [*P. C. Ar.*]

Rajah Jugmohun Singh *v.*
Doolhun Dabee Kustoor and Doolhun.

Oudh. SIR ROBERT COLLIER. *Nov.* 24, 1876.

Claim for a sub-settlement with respect to under proprietary rights in a Talook. When did the property for which the sub-settlement was demanded first become merged in the Talook? Title to sub-settlement under Act XXVI. of 1866, Schedule 2. Court below and Judicial Committee pronounce in favour of the claim. Affirmed. [*P. C. Ar.*]

Ram Coomar Coondoo and Others *v.*
Chunder Canto Mookerjee.

Bengal. SIR MONTAGUE SMITH. *Nov.* 25, 1876.

Demand for costs by successful parties to a suit, the defeated side being unable to pay. Defendant neither an original nor

added party in the first suit, but was, as alleged, a party to a champertous contract. Their Lordships are of opinion, on the beadroll of authorities quoted, that the law of maintenance and champerty has not been introduced into India, but it seems clear to them that contracts of this character ought under certain circumstances to be held invalid as being against public policy. *Per contra*, cases may easily be supposed where, to prevent oppression, principal parties might be assisted by others in the costs of litigation. The Judicial Committee held with the High Court that the action in this case cannot be maintained. Affirmed.

[*L. R.* 4 *Ind. App.* 23; *I. L. R.* 2 *Calc.* 233.]

Abedoonissa Khatoon *v.*
Ameeroonissa Khatoon.

Bengal. SIR ROBERT COLLIER. *Nov.* 28, 1876.

Suit by the widow of a judgment debtor against the widow of a decree holder to set aside the decree in question. Previous litigation in the Privy Council: L. R. 2 Ind. App. 87. Is a posthumous infant son a party in the suit? Act VIII. of 1859, s. 208, and Act XXIII. of 1861, s. 11. The issue of the legitimacy of the son was not *res judicata* by a competent Court in a competent proceeding. Affirmed.

[*L. R.* 4 *Ind. App.* 66; 9 *W. R.* 257; *L. R.* 2 *Ind. App.* 87; *L. R.* 4 *Ind. App.* 66; 17 *W. R.* 464.]

Konwur Doorganath Roy *v.*
Ram Chunder Sen and Others.

Bengal. SIR MONTAGUE SMITH. *Nov.* 30, 1876.

Suit by appellant to set aside alienations of two-thirds of an ancestral Mehal, made on the ground that the Mehal had been dedicated to an Idol. An *anumati patra.* Dewutter and Bromuttur property. Justifiable alienations for repairs of the

Idol. Position of Shebait analogous to that of a manager of an infant: *Prosunno Kumari Debya* v. *Golab Chand Baboo*, L. R. 2 Ind. App. 151; *Hunoomanpersand Panday* v. *Baboee Munraj*, 6 Moore's Ind. App. 423; cited as regards management of estates by widows and managers for infant heirs. The Judicial Committee consider that appellant cannot succeed in setting aside the deeds. The deeds would not be void by reason that some of the money raised was raised for another purpose than that of keeping the Idol in good order. Affirmed.

[*L. R.* 4 *Ind. App.* 52; *I. L. R.* 2 *Calc.* 341.]

Rajah Vurmah Valia *v.*
Ravi Vurmah Mutha.

Madras. Sir James Colvile. *Dec.* 1, 1876.

Uraima right, or management of a Pagoda. The property of the trust consists of land and jewels. Suit for specific performance of a transfer. Were the jewels *extra commercium?* Was the Uraima right transferable? Custom v. the General Law: *Greedharee Doss* v. *Mundokissore Doss Mohunt*, 11 Moore's Ind. App. 405. Custom has no effect when the assignment of a trusteeship takes place for the pecuniary advantage of a trustee. Affirmed. [*L. R.* 4 *Ind. App.* 76; *I. L. R.* 1 *Mad.* 235.]

The Credit Foncier of Mauritius *v.*
Paturau & Co.

Mauritius. Sir Barnes Peacock. *Dec.* 5, 1876.

This appeal arose out of an action brought by respondents to cancel a contract—one of the parties to it having failed to pay the price of certain machinery erected by the respondents. Alleged lien on the machinery by reason of previous claim against the estate. Sale. Credit Foncier have no *locus standi* as appellants. No appeal for costs alone. Appeal dismissed.

[*P. C. Ar.*]

Registrar of Titles *v.* Paterson.

Victoria. Sir James Colvile. *Dec.* 6, 1876.

Duties of the Registrar of titles (appellant) in registering transfers of land, and issuing certificates of title. Construction of the 106th section of the Victoria Transfer of Lands Statute, No. 301 of 1866. Whether Registrar, having registered a transfer under one writ of *fieri facias*, and refusing to register title on an *alias* writ of *fieri facias*, acted *ultra vires*. Common Law Procedure Act, Victoria, 28 Vict. No. 274. Appeal against three orders of the Supreme Court allowed, but considering that subsequent litigation would have been avoided if the Registrar had appealed against the first order at the proper time, the orders of dismissal of the two last orders would be without costs. The appellants, however, would have the costs of the appeal.

[2 *App. Cas.* 110; 46 *L. J. P. C. C.* 21.]

1877.

The English, Scottish and Australian Chartered Bank *v.*
Putwain and Another.
Cargo "ex Gothenburg."

Vice-Admiralty, Queensland. SIR ROBERT PHILLIMORE.
Jan. 11, 1877.

Derelict ship: no fixed sum to be awarded, but to be dealt with like any other case of salvage. Judicial Committee does not interfere with an award of salvage of Court below unless it be extravagantly large. [*P. C. Ar.*]

Deomoorut Kooar and Another *v.*
Rashbeharree Lal and Others.

Bengal. SIR ROBERT COLLIER. *Jan.* 12, 1877.

Case which went on special appeal to the High Court. Contention that Zillah Court was wrong in point of law not substantiated. Question of fact. Dismissed with costs.
[*P. C. Ar.*]

Kleinwort, Cohen and Company *v.*
The Cassa Marittima of Genoa.
The "Maria Luisa."

Ceylon. SIR MONTAGUE SMITH. *Jan.* 18, 1877.

Is a bottomry bond a good hypothecation as regards cargo? Captain cannot hypothecate without communicating with the

owners or shippers of cargo: *Australian Steam Navigation Company* v. *Morse*, L. R. 4 P. C. 222; *The "Onward,"* L. R. 4 A. & E. 38; *The "Oriental,"* 7 Moore, P. C. 389. Reversed.
[2 *App. Cas.* 156.]

Alfred Woolley and Others (on behalf of the Coliban Mining Company) *v.* The Attorney-General of Victoria.

Victoria. SIR JAMES COLVILE. *Feb.* 6, 1877.

Gold found on waste lands purchased from the Crown is not the property of the purchasers, unless there are words in the grants granting it. The prerogative rights of the Crown can be affected only by express words or necessary implication. Grants made under 5 & 6 Vict. c. 36, and before the passing of 18 & 19 Vict. c. 55. The latter statute transferred Crown rights in gold to Colonial Legislature. Affirmed.
[2 *App. Cas.* 163; 46 *L. J. P. C. C.* 18.]

Direct United States Cable Company *v.* Anglo-American Telegraph Company.

Newfoundland. LORD BLACKBURN. *Feb.* 14, 1877.

Alleged infringement of rights granted for cable purposes to the Anglo-American Company by Acts of the Legislature of Newfoundland (17 Vict. c. 2, and 20 Vict. c. 1, Newfoundland Statutes), and appeal against an order for injunction. Territorial rights in Conception Bay. Territorial rights over shore-lines of sea generally. Effect of Imperial Acts, 59 Geo. III. c. 38, and 35 & 36 Vict. c. 45, in asserting exclusive dominion over the Bay in question. Case of *The Bristol Channel; Regina* v. *Cunningham*, Bell's Cr. Cas. 72; *The Franconia*, 2 Ex. Div. 159; *Foley* v. *Fletcher*, 3 H. & N. 769—781. (Order for injunction affirmed, with reservation on one point which may be raised at the hearing.)
[2 *App. Cas.* 394; 46 *L. J. P. C. C.* 71.]

Wilson *v.*
The Canada Shipping Company.
The "Lake St. Clair," and the "Underwriter."

Vice-Admiralty, Quebec, Lower Canada. SIR ROBERT PHILLIMORE. *Feb.* 14, 1877.

Collision. Ship in stays. Justification for any practicable manœuvre to ensure safety. Decrees below reversed. Both ships to blame. Damages to be assessed according to the Admiralty rule. Each side to pay their own costs below and here. [2 *App. Cas.* 389.]

Pauliem Valloo Chetti *v.*
Pauliem Sooryah Chetti.

Madras. SIR ROBERT COLLIER. *Feb.* 16, 1877.

Joint and ancestral property. Manner of its disposal. "Self-acquired" property. The plea that a member of a joint Hindoo family receiving education from family funds is afterwards debarred from making a fortune for himself by separate industry, is one, in the minds of their Lordships, requiring considerable proof to substantiate it, if the proposition could be substantiated at all. Affirmed. [*L. R.* 4 *Ind. App.* 109.]

Vasudev Sadashiv Modak *v.*
The Collector of Ratnagiri.

Bombay. SIR JAMES COLVILE. *March* 2, 1877.

The "Pensions Act, 1871." The Sunnud of 1777. Deshmukh rights. Dues from ryots in recent years assessed by the Government, which had not accounted for such to the Deshmukh. Does the Deshmukh right come within the scope of the 1871 Act? The Revenue Settlement of 1868. Judicial Committee agree with the Courts below that by the Pensions Act the Civil Courts had no jurisdiction in the suit.
[*L. R.* 4 *Ind. App.* 119; *I. L. R.* 2 *Bomb.* 99.]

Royal Mail Steam Packet Company *v.*
Braham.

Jamaica. SIR MONTAGUE SMITH. *March* 10, 1877.

What is good service of a writ? Is service on the superintendent at Jamaica of the Royal Mail Steam Packet Company, whose head office and domicile is in London, valid, under the Jamaica Act, No. 41 of 1872, s. 19 (Supreme Court Procedure Law)? *Sheehy* v. *The Professional Life Assurance Company*, 3 C. B. N. S. 597. Decision below, declaring service good, upheld.
[2 *App. Cas.* 381; 46 *L. J. P. C. C.* 67.]

Irvine *v.*
The Union Bank of Australia.

Rangoon. SIR BARNES PEACOCK. *March* 10, 1877.

Charge upon property. To what extent is the charge to be made? Suit by the Union Bank against the Oriental Rice Company, Limited, and the purchaser of the property of the company (the present appellant), to enforce an equitable mortgage by the creation of a charge upon the estate. Articles of Association of the Oriental Rice Company. Did directors of the company borrow in excess of their powers? The Judicial Committee, holding that they had not authority to pledge the property as they did, reverse the decree below, and declare that the amount of the charge must be reduced to one half of the paid up capital of the company. Value of rupees to be at the rate of exchange current between England and Rangoon at the time of the filing of suit: *Royal British Bank* v. *Turquand*, 5 Ell. & Bl. 248; and *id.* in error, 6 Ell. & Bl. 327. [*P. C. Ar.*]

Prem Narain Singh and Others *v.*
Parasram Singh and Bholonath Singh; and
Prem Narain Singh and Others *v.*
Rooder Narain Singh. (Consolidated Appeals.)

Bengal. SIR ROBERT COLLIER. *March* 24, 1877.

Suit to set aside an Ikrarnamah. Ages of parties signing same; alleged undue influence, &c. Partition of Mouzahs in a

united Hindoo family. Disposition of property of deceased member of same. Punchayet, or arbitration tribunal. Want of consideration for the Ikrarnamah. Their lordships consider that it would not be equitable to uphold this Ikrarnamah. Affirmed.

[*L. R.* 4 *Ind. App.* 101; not reported below.]

Forester and Others *v.*
The Secretary of State for India in Council; and
The Secretary of State for India in Council *v.*
Forester and Others.

Punjaub. SIR JAMES COLVILE. *April* 18, 1877.

Interest on costs. Proceedings to give effect to an order of Her Majesty in Council of Feb. 5, 1873. If there is no provision in the Order of the Privy Council as to interest on costs, the Court below cannot award such interest when executing the Order in Council. The Dyce-Sombre litigation. Statutory provisions of the Law of India in relation to interest upon costs. Act XXIII. of 1861, ss. 10, 11. Decree affirmed with a variation as to interests.

[*L. R.* 4 *Ind. App.* 137; *I. L. R.* 3 *Calc.* 161.]

Bell and Others *v.*
The Master in Equity.

Victoria. SIR ROBERT COLLIER. *April* 24, 1877.

Probate. Question of legacy duty payable on will of a person who died while one Act of the Legislature was in operation, but just prior to date of another Act. Probate was applied for and granted before second Act was passed, but after the time fixed for its coming into operation retrospectively (Victorian Act of 1870, No. 388, and Victorian Act of 1876, No. 523). Judicial Committee decided that duty ought to be paid on the lower rate sanctioned by the Act in operation at the testator's death. [2 *App. Cas.* 560.]

Divisional Council of the Cape Division *v.*
De Villiers.

Cape of Good Hope. Sir Barnes Peacock. *April* 28, 1877.

De Villiers, who is proprietor of perpetual quit-rent tenure, brought action against defendants, who are curators of public roads under Cape of Good Hope Act X. of 1864, by sect. 3 of which they have rights which were vested in the Commissioners of Roads by Cape of Good Hope Act IX. of 1858. Cause of action: alleged wrongful removal of gravel from De Villiers' land. The proceeding of the Divisional Council is upheld by the Judicial Committee, the land from which gravel was removed not having been cultivated. If it had been, there would have been a right to compensation.
[2 *App. Cas.* 567; 46 *L. J. P. C. C.* 95.]

Hart *v.*
Avigno.
The ss. "Dacca" and barque "Michelino."

Bengal. Admiralty Jurisdiction, High Court. Sir Robert Phillimore. *May* 2, 1877.

Claim for damages for collision. Barque at anchor. Were her lights visible? Bad look-out on steamer. Sentence against steamer affirmed. [*P. C. Ar.*]

Sheo Soondary *v.*
Pirthee Singh and Others.

Bengal. Sir Montague Smith. *May* 3, 1877.

In a joint Hindu family is a brother of the half blood entitled to succeed equally with a brother of the whole blood to the share of a deceased brother? The Dayabhaga, 11th chap. The Judicial Committee hold that the preference should be

given to a brother of the whole blood, especially where there has been no separation. *Quære*, if brothers of the half blood separate and again become united, do they improve their position? *Tiluk Chunder Roy, &c.*, 2 W. R. 41; *Kylash Chunder Sircar, &c.*, 3 W. R. 43; *Shib Narain Bose, &c.*, 9 W. R. 87; and *Rajkishore Lahoory* v. *Gobind Chunder Lahoory*, 1 Ind. L. R. 1st Calc. Series, 27. [*L. R.* 4 *Ind. App.* 147.]

James Brown *v.*
John Campbell Dibbs.

New South Wales. SIR ROBERT COLLIER. *May* 4, 1877.

Specific performance. Contract to sell half of a mine, with plant and machinery. Value of coal *in the mine, according to the market price*, to be ascertained by finding out the value at the place where it was to be sold, and deducting therefrom the cost of taking it from the mine to that place. Their Lordships agree with the Supreme Court in holding that the master in equity acted upon a proper principle of valuation. Value *in situ naturali: Jegon* v. *Vivian*, 6 Ch. App. 742. [*P. C. Ar.*]

Hoare and Others (trading as John Fraser & Co.) *v.*
The Oriental Bank Corporation.

New South Wales. SIR JAMES COLVILE. *May* 9, 1877.

Debt against joint partnership estate, certain of the partners having become insolvent. Was one creditor (the bank) entitled to prove *pari passu* with the joint partnership creditors, or should the proof only be made against the partners' separate estate, and not against the partnership estate? The Colonial Bankruptcy Act (5 Vict. No. 15) has the same effect as the bankruptcy law as it existed in England in 1841. Their Lordships see no ground for disturbing decision that proof should be made against partnership estate. [2 *App. Cas.* 589.]

Ridsdale *v.*
Clifton and Another.

Arches Court of Canterbury. THE LORD CHANCELLOR (LORD CAIRNS). *May* 12, 1877.

Appeal against order of judge of Arches Court of Canterbury. Vestments during the Communion, alb and chasuble. Position of priest at Communion Table (west side). Wafer bread and wafers. Placing a crucifix on a screen in the church. Consideration given by their Lordships to the question as to when they might hold themselves at liberty to examine the reasons upon which previous decisions of the Board were arrived at, and when, if they should find themselves forced to dissent from those reasons, they might in a new case decide upon their own view of the law. Decision below affirmed as to first charge. As to second, held that penal offence was not established without further evidence that the people could not see the clergyman break the bread, &c. Rule laid down in *Hebbert* v. *Purchas* (L. R. 3 P. C. 605), that he should stand at north side, approved. As to third charge, Mr. Ridsdale is exonerated by reason of its ambiguity. As to fourth, the crucifix was, in the absence of a proper faculty, illegally set up, and is ordered to be removed.

[2 *Prob. Div.* 276; 46 *L. J. P. C. C.* 27.]

Burra Lall Opendronath Sahee Deo *v.*
The Court of Wards.

Bengal. SIR MONTAGUE SMITH. *May* 14, 1877.

Right of succession to estate comprising 7,000 villages belonging to impartible raj of Nagpur. Legitimacy. Case remanded to India for further inquiry. [*P. C. Ar.*]

Delhi and London Bank, Limited, *v.*
Melmoth Orchard.

Punjaub. SIR BARNES PEACOCK. *May* 14, 1877.

Proceedings to have a decree for a debt and costs executed. Limitation Act XIV. of 1859, sects. 20 and 21, cited with reference to the issue of process in the Punjaub. Judicial Com-

mittee, reversing the decree of the chief Court, decide that the application for execution was not barred. They also held that an order refusing such application is *res judicata* within the interpretation of Act VIII. of 1859, sect. 2.

[*L. R.* 4 *Ind. App.* 127; *I. L. R.* 3 *Calc.* 47.]

Mayor, &c. of Essenden and Flemington *v.* Blackwood.

Victoria. SIR MONTAGUE SMITH. *May* 14, 1877.

Racecourse. Trustees of racecourse. Is a racecourse held from Crown in trust for a club liable to be rated? Local Government Act, 1874 (38 Vict. No. 506). Privileges of the club: *Mersey Docks* v. *Cameron*, 11 H. L. C. 443; *Reg.* v. *Harrogate*, 2 E. & B. 184. Judgment below reversed, Judicial Committee holding that the liability for rating existed.

[2 *App. Cas.* 574.]

Nicosia *v.* Vallone.

(Appeal and cross-appeal.)

Malta. SIR ROBERT COLLIER. *June* 8, 1877.

Action *ex contractu.* Alleged excess charges. Seizure of lighters by way of pledge. Laws of organization of Malta. Damages claimed for deterioration of lighters, &c. Judicial Committee reverse judgment below, holding that no damages are due.

[*P. C. Ar.*]

Thakoor Hurdeo Bux *v.* Thakoor Jawahir Singh.

Seetapore, Oudh. SIR BARNES PEACOCK. *June* 9, 1877.

Settlement of property in Oudh. Lord Canning's Proclamation of March, 1858. List of Talookdars after the mutiny. [For complete list, see Oudh Government Gazette, August 7, 1869.] Under proprietary rights prior to summary settlement. Talookdari rights under Act I. of 1869. Talookdars as trustees.

Objection raised as to the susceptibility of appeal from certain Courts in Oudh. The case was remanded to India for trial on the issue whether the respondent had agreed or was bound to hold certain villages comprised in the summary settlement, or a Sunnud in trust for the appellant and another, or either of them: *Shunkur Sahai* v. *Rajah Kashi Pershad*, Note 4 L. R. Ind. App. 198. [*L. R.* 4 *Ind. App.* 178.]

Rajah Parichat *v.*
Zalim Singh.

Central Provinces of India. SIR JAMES COLVILE. *June* 12, 1877.

Conveyance by Sunnud of a village to illegitimate son, belonging to one of the twice-born classes of Hindus. Village given as maintenance. On the legitimate son and heir taking up estate, the illegitimate son, while not claiming proprietary rights, demands possession of the village, or money payment equal to the profits of the estate. Their Lordships decide in favour of the right of maintenance of the illegitimate son and the validity of the Sunnud.

[*L. R.* 4 *Ind. App.* 159; *I. L. R.* 3 *Calc.* 214.]

Corbett *v.*
Munro.

Victoria. SIR BARNES PEACOCK. *June* 12, 1877.

Suit for dissolution of partnership, and for a declaration that certain land and premises formed part of the assets. Dispute. *Dictum* on the point. "Property used by a partnership belongs to it," is an expression in law too broadly expressed. "Private accounts" of partners. Their Lordships agree with Court below that partnership did exist, and that the premises in question were purchased for the firm. [*P. C. Ar.*]

Mahomed Ewaz and Another *v.*
Birj Lall and Another.

N. W. P. Bengal. SIR MONTAGUE SMITH. *June* 13, 1877.

Validity and effect of deed of sale. Registration of deed compulsory. Certain persons signed. Registration Act (VIII.

of 1871). Counsel for appellants argued that although the mother did not appear to have taken part in the execution of the deed, still this circumstance should not destroy the operation of the deed as against the shares of the sons who admitted executing it. Sect. 35 of the Act is quoted by the respondents to prove that the execution of the deed not having been admitted by the mother—a Mahomedan—and her authority for its execution having been denied, it was improperly registered, and could not be received in evidence as against the sons. Arguments on various sections of the Act. "Registered instrument." Judicial Committee, reversing High Court decree, held that registration of a deed and its admissibility as evidence is not void by reason of non-compliance with certain provisions of the Act, otherwise innocent people might be deprived of their property through any defect on the part of the registering officer: *Sah Mukhun Lall Panday* v. *Sah Koondun Lall*, L. R. 2 Ind. App. 210. [*L. R.* 4 *Ind. App.* 166.]

Mungul Das *v.*
Mohunt Bawan Das.

Bengal. SIR BARNES PEACOCK. *June* 27, 1877.

Suit to recover Mouzahs, alleged to belong to the Mohunts of an Asthul. Was there *boná fide* conveyance? Evidence as to purchase or conveyance. There were several parcels of land in dispute. The Judicial Committee considered that the Mohunt (the respondent) had established preferential title to all the parcels save one. The judgment of the High Court therefore would be affirmed, except as regards that one parcel, as to which the decision below would be reversed. No costs either side. [*P. C. Ar.*]

Nawab Syed Ashgar Ali and Others *v.*
Dilrus Baunoo Begum.

Bengal. SIR MONTAGUE SMITH. *June* 28, 1877.

Suit under Act XX. of 1863 against a man (as the Matwali of a Mahomedan religious endowment) for malversation and

misappropriating the estate. Evidence in support of the validity of a deed. Question whether the endowment was of such a public character as would sustain a suit under the above-mentioned Act was not decided. [*P. C. Ar.*]

Benecke and Others *v.*
Whittall and Another.

Hong Kong. SIR ROBERT COLLIER. *June* 29, 1877.

Trustees under a deed. Suit to set aside conveyances of real property. Construction of the Hong Kong Ordinance of 1864 on the subject of bankruptcy, similar to the English Bankruptcy Act of 1861. "Trust deeds for the benefit of creditors." Their Lordships hold, upon the decided cases, and the construction of the Act, that the suit could not be maintained. The plaintiffs (respondents) have no right to sue for the purpose of setting aside the conveyances on the ground that they are a fraudulent preference within the meaning of that term in the bankruptcy law: *Ex parte Morgan*, 1 De Gex, Jones & Smith, p. 288; *Symons* v. *George*, 33 L. J. (N. S.) Exch. 231; *Pearson* v. *Pearson*, L. R. 1 Exch. 310; *Ex parte Atkinson*, L. R. 9 Eq. 736. Reversed, with costs.
[2 *App. Cas.* 602; 46 *L. J. P. C.* 81.]

Sri Gajapathi Vilamani Patta Maha Devi Garu *v.*
Sri Gajapathi Radhamani Patta Maha Devi Garu.

Madras. SIR JAMES COLVILE. *July* 3, 1877.

Respective rights of two Hindu widows in an estate. Document referred to which constitutes a family arrangement. Effect of it. Previous litigation in the matter before the Privy Council and the Queen's Orders thereon. Law of Madras regarding the separate rights of joint widows is taken to be in accordance with the decision in the 3rd Madras High Court Reports, in what is known as the *Tanjore Case*, 3 Madras H. C. R. 424; the *Salem Case*, Strange's Hindu Law, Vol. II. 90. Their Lordships,

affirming decree below, hold that a junior widow is entitled to an equal share with a senior widow, and not to maintenance only. The respective rights by survivorship remain unaffected. Their Lordships guard themselves from being supposed to affirm that either widow has power to dispose of the share allotted to her, or that they have any right to a partition in the proper sense of the term. [*L. R.* 4 *Ind. App.* 212.]

Atkinson *v.*
Usborne.

(Appeal and cross appeal.)

Lower Canada. SIR BARNES PEACOCK. *July* 6, 1877.

Claim for damages, *ex contractu*, for the sale of timber logs. The respondent (defendant below), a clergyman living in England, was the owner of extensive "limits," or tracts of pine forest in Canada. The contract was entered into by his agent. What was the proper measure of damages for breach of contract? Judicial Committee reported that the judgment of the Queen's Bench be reversed, and that the appeal of each party to that Court ought to be dismissed, each party to pay their own costs, and that the judgment of the inferior Court be affirmed. Atkinson to have the costs of the appeal and cross appeal.

[*P. C. Ar.*]

Lekhraj Roy and Others *v.*
Kunhya Singh and Others.

Bengal. SIR MONTAGUE SMITH. *July* 6, 1877.

Question whether a pottah or lease is hereditary, or for life only? Lease from government. Acknowledgment of the power of the government to end the lease. The government had not ended it. Their Lordships affirm decree below, declaring the lease to be hereditary. Though not a proper Mokurruri lease, inasmuch as the government could enhance the rent, it was a *Mourussi pottah* descendible to heirs.

[*L. R.* 4 *Ind. App.* 223.]

Dioré *v.*
Lachambre, Gantreari & Co.

Mauritius. SIR ROBERT COLLIER. *July* 7, 1877.

Distribution of the sale price of a sugar estate. Advances under a notarial deed for the benefit of the property. What balances due in respect to the advances? Construction of deed. Mortgage claims prior in rank to the appellant's claim. Adjudication of Master of the Court upheld. No part of the purchase applicable to the mortgage of the appellant. Affirmed, with costs. [*P. C. Ar.*]

Administrator-General of Bengal *v.*
Juggeswar Roy and Others.

Bengal. SIR ROBERT COLLIER. *July* 12, 1877.

Conveyance of land (on which was a coal field) by deeds. Intentions of the vendor and validity of the deeds. Allegations of wrongful transfer and abuse of fiduciary responsibility by the defendants (respondents) not proven, and validity of deeds upheld. [*P. C. Ar.*]

Simon Rose *v.*
Paola (widow of George Grant) and Others.
(*Ex parte.*)

Malta. SIR JAMES COLVILE. *July* 14, 1877.

Suit in relation to the character of accounts furnished by a testamentary executor (appellant) appointed under the provisions of the Municipal Law of Malta. Examination as to the particular or general nature of the executors' (appellants) accountability. Foreign form of the will. *Diritto Municipale di Malta*, or Code of Rohan. Declaration made remanding decree for correction. No order as to costs. [*P. C. Ar.*]

Maharajah Pertab Narain Singh *v.*
Maharanee Subhao Kooer and Others.

Oudh. SIR JAMES COLVILE. *July* 19, 1877.

Succession to a talook of one of the most considerable landholders (Maharajah Sir Man Singh) in Oudh, whose status and rights were settled by Act I. of 1869. May the will of a Hindu be revoked by parol in his lifetime? Their lordships are of opinion that there was a revocation of the will, and that it cannot be doubted that the will of a Hindu may be revoked by parol. Reversed, and appellant (who is grandson of Sir Man Singh) declared entitled to succeed as talookdar, in preference to the nominee of Sir Man Singh's widow. Costs as between solicitor and client out of estate.

[*L. R.* 4 *Ind. App.* 228.]

Baboo Deendyal Lal *v.*
Baboo Jugdeep Narain Singh.

Bengal. SIR JAMES COLVILE. *July* 25, 1877.

Undivided joint Hindu family estate. Right of an execution creditor under a decree to seize and sell an estate in order to recoup himself for a loan to the father of the joint family. Right generally of a member of a joint family to dispose of the whole or a share without the concurrence of coparceners. Mitacshara law. Difference of law in Lower Bengal, Southern India, and Bombay. The law in Bengal and Madras alike in certain respects. The High Court had ordered the estate as a whole to be given back by the purchaser to respondent, who was the son of the debtor. The Judicial Committee vary this decree by adding a declaration that after the estate is given back to the respondent, the appellant, as purchaser at the execution sale, has acquired the share and interest of the father in the property, and is entitled to take such proceedings as he shall be advised to have that share and interest ascertained by partition: *Nugender-Chunder Ghose* v. *Srimutty Ramunee*, 11 Moo. Ind. App. 241; *Baijun Doobey* v. *Brij Bhookun Lall Awasti*, L. R. 2 Ind. App.

275; *Sadabart Persad Sahu* v. *Phoolbash Koer*, 3 Bengal L. R. (Full Bench Rulings) 31; *Mahabeer Persad* v. *Ramyad Singh*, 12 Bengal L. R. 90, &c. [*L. R.* 4 *Ind. App.* 247.]

Ebenezer Vickery *v.*
Charles Wentworth Bucknell.

New South Wales. SIR MONTAGUE SMITH. *July* 26, 1877.

Claim of mortgagor (the respondent) to redeem properties, consisting of cattle runs and stock thereon, which were in the possession of the assignee of the original mortgagees, the appellant. Release of the equity of redemption and extinction of all right to redeem the mortgages: *Wright* v. *Gossip*, 32 L. J. Ch. 653. [*P. C. Ar.*]

Underwood *v.*
Pennington and Others.

New South Wales. SIR HENRY S. KEATING. *July* 27, 1877.

Action of ejectment by respondents as trustees to recover the possession of certain lands demised to the appellant for fixed periods by persons having at that time (1870) all the interest in the lands leased. The lands were part of a considerable estate belonging to one James Underwood, and were by him devised by will to trustees for the benefit of several families. Private Acts of the Legislature, 1873-74, ordering the estates to be sold. Action brought on an objection as to the position and powers of the trustees appointed under the aforesaid Acts. Is it maintainable? The Judicial Committee dismissed the appeal with costs, holding that the trustees had the power to maintain the ejectment. [*P. C. Ar.*]

Phillipps and Others *v.*
Graham and Others.

Cape of Good Hope. SIR BARNES PEACOCK. *Nov.* 7, 1877.

Damages for mis-delivery of goods from ships. Bills of lading. Agent. Question whether respondents are liable to

make good the damages which the appellants had to pay to other parties by reason of the mis-delivery. Held, affirming judgment below, that respondents were not guilty of laches, and were not liable. [*P. C. Ar.*]

Thakur Shere Bahadur Sing *v.*
Thakuram Dariao Kuar.

Commissioners' Court, Rae Bareilly, Oudh. SIR ROBERT COLLIER. *Nov.* 10, 1877.

Claim to an estate which underwent new settlement by the government after the Mutiny. Adoption. The appeal was remanded to India for new trial. [*P. C. Ar.*]

Brij Indur Bahadur Singh *v.*
Ranee Janki Kœr.
Lal Shunker Buksh *v.*
Ranee Janki Kœr.
Lal Settla Bux *v.*
Ranee Janki Kœr.

Oudh. SIR BARNES PEACOCK. *Nov.* 20, 1877.

The Talook underwent settlement after the annexation of Oudh by the Government. Effect of a Sunnud to a widow and her heirs and subsequent settlement. Law of inheritance through women and widows according to the Mitacshara and the Dayabhaga: *Mussumat Thakoor Deghee* v. *Rai Baluk Ram*, 11 Moore's Ind. App. 175. The three appeals were dealt with in one judgment. The Judicial Committee, upholding the decrees below, held that, under Clause 11 of sect. 22 of the Act of 1869, the Talook, which was the separate property of the widow, descended, in the absence of proved custom among the tribe of Chattris, to her daughter, in preference to the son of a rival widow, and the remote male heirs of her husband. Held, also,

that the mother at the time of her death was the Talookdar, and had a permanent heritable right in the estate.

[*L. R.* 5 *Ind. App.* 1.]

Radha Proshad Singh *v.*
Rancoomar Singh and Others. (No. 50 of 1874.)
Radha Proshad Singh *v.*
The Collector of Shahabad. (No. 57 of 1874.)

SIR JAMES COLVILE. *Nov.* 20, 1877.

These suits were dealt with in one judgment. Boundary cases. Land in dispute is alluvial land adjoining the River Ganges, and which for some time became covered by that river. Reappearance of the land, and distribution of it by the government. Old title to the land is in certain respects upheld. Varied.

[Map forms part of Her Majesty's Order in Council.]

[*P. C. Ar.*]

Norender Narain Singh *v.*
Dwarka Lal Mundur and Others.

Bengal. SIR MONTAGUE SMITH. *Nov.* 22, 1877.

Question arising out of proceedings foreclosing a mortgage on a Rajah's estate. Deed of conditional sale. What is proper service of notice of foreclosure proceedings and sale under Regulation XVII. of 1806, s. 8? The Judicial Committee, affirming judgment below, held, that due notification had not been served. Appeal dismissed with costs.

[*L. R.* 5 *Ind. App.* 18.]

Swire and Others *v.*
Francis.

China and Japan. SIR ROBERT COLLIER. *Nov.* 23, 1877.

Master and agent. Question of liability of principal agent for misappropriation by another agent. No consideration for bill made to the appellants who had paid it: *Barwick* v. *The*

English Joint Stock Bank, L. R. 2 Ex. 259; *Mackay* v. *The Commercial Bank of New Brunswick*, L. R. 5 P. C. 412. Judgment below reversed, and judgment ordered to be entered up for the appellants, with interest and costs of appeal.

[3 *App. Cas.* 106; 47 *L. J. P. C.* 18.]

Grice and Others *v.*

Richardson and Another (Trustees of Webster & Co., Insolvents).

Victoria. SIR BARNES PEACOCK. *Dec.* 6, 1877.

Trover. Appeal to discharge a rule absolute to set aside a nonsuit and enter verdict for respondents. Action by trustees of an insolvent company to recover damages for alleged conversion of tea, which had been sold by appellants to Webster & Co., who became insolvent. Appellants opposed the claim on the ground that they were unpaid vendors, and that they were entitled to retain possession of tea until paid by the purchasers. Was there constructive delivery? and were appellants now only to be considered as purchasers' warehousemen? Forms of delivery order. Actual possession not delivered. Were the vendors deprived of their lien? *Bloxam* v. *Saunders*, and *Bloxam* v. *Morley*, 4 Barn. & Cres. Rep. 949; *Miles* v. *Gorton and others*, 2 Cromp. & Mee. 504. The Judicial Committee, reversing decision below, held that no actual delivery by vendors had taken place, and that their lien was good when the vendees became insolvent. Rule discharged. Respondents held not entitled to recover, and are to pay costs.

[3 *App. Cas.* 319; 47 *L. J. P. C.* 48.]

Bannoo and Others *v.*

Kashee Ram.

Oudh. SIR MONTAGUE SMITH. *Dec.* 7, 1877.

Appeal brought by special leave. Claim for 8 annas share of property, consisting chiefly of moveable property; but the claim includes a pucka (good-conditioned) house and shop.

Hindu family. Partition. Was the respondent joint with Ram Dyal (from whom the property descended) at his death? The Judicial Committee reversed the decrees of the Courts below, holding that the property in dispute was not joint estate. Suit dismissed with all costs below, and respondent also to pay costs of appeal. [*P. C. Ar.*]

Davenport *v.*
Her Majesty The Queen.

Queensland. SIR MONTAGUE SMITH. *Dec.* 10, 1877.

Question arising out of the allotment of the Crown lands of the colony. Necessity on the part of the holder of Crown leases to cultivate and improve the land within limit of time. Breach of covenant by leaseholder. Was the forfeiture, if it accrued, waived by the Crown? Reference made to several statutes passed by the Colonial Legislature for regulating the sale and letting of waste lands. 31 Vict. No. 46. Agricultural Reserves Act of 1863, sect. 8. Leasing Act of 1866. "Certificate of fulfilment of conditions." Acceptance of rent by government, though aware of the breach of covenant: *Croft* v. *Lumley*, 6 H. L. C. 672. Opinion of Mr. Justice Williams given in *Pennant's Case*, 3 Rep. 64 A. Judicial Committee allow the appeal, deciding that government had waived the forfeiture as any other lessor might do. Verdict to be entered for appellant.
[3 *App. Cas.* 115; 47 *L. J. P. C.* 8.]

Williams (W. H.) and Others *v.*
Ayers and Others (Trustees of Insolvent Estate of P. Levi & Co.).

South Australia. SIR JAMES COLVILE. *Dec.* 10, 1877.

Claim against insolvent estate. Re-exchange on bills claimed in addition to the actual debt. Alleged custom between the trade of England and Australia in relation to bills which have been dishonoured in one country or the other. Their Lordships

decided that even if such a custom did exist it had not been shown to govern a transaction such as the one now in question. Affirmed, with costs.

[3 *App. Cas.* 133; 47 *L. J. P. C.* 1.]

Morrison and Others *v.*
The Mayor, Aldermen and Citizens of Montreal.

Lower Canada. Sir Barnes Peacock. *Dec.* 16, 1877.

Suit in relation to the amount of compensation to be paid for the expropriation of land for a public park. Action to increase indemnity. 27 & 28 Vict. c. 60 (Canadian Statutes), authorised extensive improvements in Montreal, and the taking up of lands compulsorily after award made. Construction of Quebec Act (35 Vict. c. 32) in regard to right of action. The award disputed. Was there an error in computing compensation? The Judicial Committee affirm decree of Court of Queen's Bench, declaring that there had not been error by the commissioners.

[3 *App. Cas.* 148; 47 *L. J. P. C.* 21.]

1878.

Hurropersaud Roy Chowdhry and Another *v.*
Shamapersaud Roy Chowdhry and Others.

Bengal. Sir Robert Collier.

History of litigation in 8 Moore's Indian Appeals, p. 308. Question of plaintiffs' (appellants') right to interest on mesne profits under a decree, and respecting the time from which such interest should run. Date and character of Wasilat Act XXXII. of 1839, sect. 1. The Judicial Committee, reversing the High Court decree, and considering the exceptional circumstances of this case, decide that interest at 6 per cent. should run from the commencement of the suit to date of decree of the principal Judder Ameen of 1861. They also hold that interest on the total amount to be decreed and disallowed by the decree as amended be paid at the rate of 12 per cent. per annum to date of realisation.

[*L. R.* 5 *Ind. App.* 31; *I. L. R.* 3 *Calc.* 654.]

Platt and Another *v.*
Attorney-General of New South Wales.

New South Wales. Sir Barnes Peacock. *Jan.* 23, 1878.

Legacy and succession duties. Information to recover the same as payable to the Crown in New South Wales. Stamp Duties Act, 1865. Question of domicile. Contended by appel-

lants that testator was not domiciled in New South Wales. The testator was a Scotchman, who had emigrated to New South Wales. He married, and came to England, and on his return went to that portion of New South Wales which, as Queensland, was separated from New South Wales by proclamation of December, 1859. Thereafter he built a house in New South Wales, and resided there, but still carried on certain duties in Queensland. Subsequently he was buried in Queensland. The Judicial Committee affirmed judgment below, declaring New South Wales his place of domicile. "It is always material, in determining what is a man's domicile, to consider where his wife and children live, and have their permanent place of residence, and where his establishment is kept up."

[3 *App. Cas.* 336; 47 *L. J. P. C.* 26.]

Prince and Others *v.*

The Oriental Bank Corporation.

New South Wales. SIR MONTAGUE SMITH. *Jan.* 24, 1878.

Dispute as to whether payment of a promissory note was made to a bank. Question dealt much with the status of branch banks, which their Lordships hold are agencies of one principal banking corporation with like responsibilities, though they may be regarded as distinct for such special purposes as fixing the time at which notice of dishonour should be given, or of entitling a banker to refuse payment of a cheque except at the branch where the account is kept: *Warwick* v. *Rogers*, 5 M. & G, 340; *Woodland* v. *Farr*, 7 E. & B. 519; *De Bernales* v. *Fuller*, 14 East, 590; *Garnet* v. *McEwan*, L. R. 8 Ex. 10. The Judicial Committee uphold decision below—that the money had not been received by the defendants (respondents), to the use of the plaintiffs. The mere fact of cancelling the signature on the makers of the note and writing "paid" upon it, corrected as it was before the note was sent back by a memorandum, "cancelled in error," cannot be effectual to charge the bank with the receipt of the money. [3 *App. Cas.* 325; 47 *L. J. P. C.* 42.]

Kershaw *v.*
Kirkpatrick.

Lower Canada. Sir Robert Collier. *Jan.* 25, 1878.

Action for money had and received. "Appropriation of money to the payment of a certain debt." Was there any change of the Appropriation Civil Code of Canada, sect. 1158; Code Napoléon, sects. 1160 and 1161? Evidence as to the particular appropriation. Judicial Committee agree with Courts below that there was no rescission of the appropriation.

[3 *App. Cas.* 345.]

Mayor and Corporation of Montreal *v.*
Harrison Stephens.

Lower Canada. Sir Barnes Peacock. *Feb.* 1, 1878.

Validity of an assessment. Acts done by Expropriation Commissioners. One of five actions, this being put forward as the test action. Decision of the Court of Queen's Bench was confirmed against the Corporation, and the remaining actions lapsed. This was an appeal against a decision which declared null an assessment for certain street improvements in Montreal, and that there was no warrant for a distress being made. 27 & 28 Vict. c. 60, and 29 & 30 Vict. c. 56 (Canadian Statutes). The Commissioners acted irregularly. They could not assess and apportion the amount after the report containing the appraisement had been homologated. They were then *functi officio*. Affirmed with costs.

[3 *App. Cas.* 605; 47 *L. J. P. C.* 67.]

Srimati Uma Deyi *v.*
Gokoolanund Das Mahapatra.

Bengal. Sir James Colvile. *Feb.* 5, 1878.

Succession to an estate. Validity of an adoption. Sir William MacNaughten's "Principles of Hindoo Law," and Sir Thomas

Strange on Hindu law quoted as to adoption. Hindu law of Benares as to succession of women. Is such adoption to prevail against claims of a daughter of the adoptive father, notwithstanding that such adoption was made in derogation of alleged preferential right of adoption of the son of a brother of the whole blood?

Having considered the effect of the writings of native pundits on the subject of the Hindu "Law of Benares," particularly with respect to the alleged principle that proximity of kindred should determine the choice of an adopted son in preference to a distant kinsman, the following observations were made:—"Their Lordships feel that it would be highly objectionable on any but the strongest grounds to subject the natives of India in this matter to a rule more stringent than that enunciated by such text writers as Sir William Macnaghten and Sir Thomas Strange. Their treatises have long been treated as of high authority by the Courts of India, and to overrule the propositions in question might disturb many titles." Judgment of High Court declaring adoption valid upheld. [*L. R.* 5 *Ind. App.* 40.]

Sreenutty Nittokissoree Dossee *v.*

Jogendro Nauth Mullick.

Bengal. SIR MONTAGUE SMITH. *Feb.* 5, 1878.

Widow's maintenance payable by the adopted son of her husband. Intestacy of husband, but statement of his intentions accepted. The Judicial Committee had no doubt that the High Court was right in declaring adoption valid. The only question, therefore, was whether the Court below had reduced the widow's due maintenance allowance as a kind of punishment to her for having defended a suit which it thought she must have known was properly brought against her. The Judicial Committee were first disposed to report that there should be a remand to India, considering that the Court below, in meting out a species of punishment, had, on the facts, de-

parted from true principles of justice. Before remanding, however, their Lordships made a suggestion of what in their opinion would be the fair course for the plaintiff respondent to pursue, and after an adjournment of a few days, counsel intimated that the matters would be amicably settled on the basis conveyed in their Lordships' views. Result being that the widow's allowance was increased. (Varied.) [*L. R.* 5 *Ind. App.* 55.]

Periasami *alias* **Kottai Tevar** and Others *v.*

The Representatives of Salugai Tevar. (Three Consolidated Appeals. Nos. 82, 83, and 84 of 1875.)

Madras. SIR JAMES COLVILE. *Feb.* 12, 1878.

Impartible zemindary. Claim to seven villages. Effect and validity of alienations to the appellants by the late proprietor. Title to maintain the several suits. Was it vested in Salugai Tevar (the plaintiff), or was he competent to sue? The Judicial Committee, reversing decrees below, held that he was not competent so to sue during the life of a particular widow. The case furnishes an important precedent on the question of joint and ancestral family estates, according to Hindu law. Rule of succession as laid down in the *Shivagunga case*, 9 Moore's Ind. App. Cas. 539 (and the lands now in dispute formed part of the Shivagunga properties). Held, that as between the descendants of the grantor and the son of the surviving grantee, the zemindary was the separate property of the latter, and that on his death his right passed to his widow, notwithstanding the undivided status of the family, according to the rule of succession in the *Shivagunga case*. The Judicial Committee advised her Majesty to reverse the decrees of both the High Court and the subordinate Court, and to dismiss the three suits, with costs in both Courts. Costs of bringing in fresh evidence to be paid by appellants, though they are to have the costs of the three suits and of the appeals. [*L. R.* 5 *Ind. App.* 61.]

Armytage and Others *v.*
The Master in Equity.

Victoria. SIR JAMES COLVILE. *Feb.* 22, 1878.

Question as to the Rate of Probate Duty chargeable upon an estate which was the subject of a will. Construction of the Duties on the Estates of Deceased Persons (Victoria) Statute, No. 388, 1870, and the amending Act, No. 523, of 1876. The Master in Equity had rated two-thirds of the residue on the higher scale. The appellants resisted this claim on the ground that the sum in question having been bequeathed to his children, or to them and his grandchildren, the duty properly chargeable was 5 per cent. and not 10 per cent. Jurisdiction of the Court to make an order of a mandatory character upon the Master in Equity in cases of gift over, and that the duty should be assessed at present on the lower scale. *Debitum in præsenti solvendum in futuro.* Reversed: *Bell* v. *Master in Equity*, 2 L. R. P. C. 570; *Queen* v. *Lords of the Treasury*, L. R. 7 Q. B. 387; *Queen* v. *Prince*, L. R. 6 Q. B. 419, &c. Their lordships held that the children's and grandchildren's interests were vested before testator's death, but subject to be divested hereafter. *Debitum in præsenti solvendum in futuro.* Reversed, and declaration made that in lieu of the judgment below an order absolute should be made upon the Master in Equity directing him upon payment by the appellants of duty upon the whole estate of the deceased at the rate of half the percentage mentioned in the schedule to the Act, to deliver to them probate of the will and codicil of the said deceased, with the usual certificate of payment of duty endorsed thereon. Each party to pay their own costs below, but appellants to have costs of the appeal. [3 *App. Cas.* 355.]

Archibald *v.*
Taylor and Others.

Nova Scotia. SIR BARNES PEACOCK. *March* 1, 1878.

Trespass. Conversion. Damage. Was there change of possession or transfer. *Rule nisi* for new trial made absolute.
[*P. C. Ar.*]

Smith *v.*
The Queen.

Queensland. Sir Robert Collier. *March* 12, 1878.

Action of ejectment under Crown Remedies Act, 1874. Appellant claimed the land under a lease from her Majesty, having been selector of a large number of acres under the Crown Lands Alienation Act, 1868. Plea by the Crown that there was abandonment of selection and forfeiture under the conditions of residence. Verdict for Crown is set aside, and a verdict entered for the appellant on the ground that appellant was not given a hearing in this matter such as would warrant the Government in declaring a forfeiture. Respondent to pay costs below and here. [3 *App. Cas.* 614; 47 *L. J. P. C.* 51.]

Gokuldas Gopuldas *v.*
Murli and Zalim (Heirs of Tarapat).

Central Provinces. Sir Barnes Peacock. *March* 12, 1878.

Question of levying interest by appellant after decree for foreclosure of mortgage. Effect of agreement between parties. Liability for interest under continuing mortgage. Such interest cannot be levied where decree was silent as to future interest, though it possibly might be recoverable in fresh action: *Pillai* v. *Pillai*, L. R. 2 Ind. App. 219. Judicial Committee report that decrees of three Courts below against the appellant's claim ought to be reversed, but looking at the circumstances of the case make a declaration in lieu thereof with the view of adjustment of disputes between the parties. No costs.

[*L. R.* 5 *Ind. App.* 78.]

Fisher *v.*
Tully.

Queensland. Sir Montague Smith. *March* 14, 1878.

Statutory engagement for grant of land. Crown Lands Alienation Act, 1868. Wrongful declaration of applicant for lease as to his place of residence. Being a resident in the

colony is one of the conditions for lease. Meaning of the word "live." Specific performance. Their Lordships, affirming decree below, held that appellant was not entitled to the relief prayed. Judgment below affirmed, with costs.

[3 *App. Cas.* 627; 47 *L. J. P. C.* 59.]

A. B. (Clerk in Holy Orders) *v.*
The Bishop of Bath and Wells.

Arches Court of Canterbury. SIR ROBERT PHILLIMORE. *March* 26, 1878.

Duplex Querela. A. B. having purchased the advowson of a living, the bishop refused to establish him in vicarage, his testimonials of living a pious life for three years before not being satisfactory. Charges against the clergyman gone into, their Lordships refuse to interfere. Appellant to pay costs.

[*P. C. Ar.*]

Bombay-Burmah Trading Corporation, Limited *v.*
Mirza Mahomed Ally Sherazee, and The Burmah Company, Limited. (No. 96 of 1872, and No. 44 of 1873; and Cross Appeals in the same suits.)

Rangoon. SIR ROBERT COLLIER. *April* 13, 1878.

First action was brought to recover damages for the conversion of a quantity of timber logs by the appellants. The second to recover damages for alleged obstruction raised by the appellants, to prevent the removal of timber in the woods of Burmah. Traffic in timber with the merchants of Rangoon—Government monopoly to export timber from a particular forest. In both actions the appellants were defendants. In the first damages were reduced, the basis of calculation being erroneous. In the second, an agent's responsibility as acting for a particular purpose not proven. Decree in first action varied, each side to pay their own costs of appeal. In second, reversed, appellants to be paid costs below and here. Both cross appeals dismissed, with costs.

[*L. R.* 5 *Ind. App.* 130; *I. L. R.* 4 *Cal.* 116.]

Sheo Singh Rai *v.*
Mussumat Dakho and Moorari Lall.

N. W. Provinces, India. SIR MONTAGUE SMITH. *April* 13, 1878.

Law of adoption among the Jains. How it differs from Hindu law. Special leave to appeal. Objection to decree on a particular ground, not stated in reasons for appeal, precluded from argument. "Wajibulurj," a village administration paper. Summary of evidence collected at Delhi, Jeypore, Muthra, and Benares, as to the customs of the Jains. Chief Justice Westropp's judgment in *Bhagvandas Tejmal* v. *Raginal*, 10 Bombay H. C. R. 241; *Ramalakshan Ammal* v. *Sivanatha Perumal*, 14 Moore's Ind. Ap. 585; *Strimathoo Moothoo Natchiar and Others* v. *Dorasinga Tevar*, L. R. 2 Ind. Ap. 169. Reference to different Hindu castes. *Declaration that argument on appeal should be consonant with grounds set forth in application for special leave.* Affirmed with costs. It being thus decided that a sonless widow among (the first respondent) the Jains has a larger interest in property and greater powers of adoption than an ordinary Hindu widow.

[*L. R.* 5 *Ind. App.* 87; 6 *N. W.* 382; *I. L. R.* 1 *All.* 688.]

Bhoobun Mohini Debia and Another *v.*
Hurrish Chunder Chowdhry.

Bengal. SIR ROBERT COLLIER. *April* 13, 1878.

Grant of a Talook by Sunnud. Subsequent disposal of estate by will. The right to do this denied on the ground that grantee had only a life interest through the Sunnud. Absolute estate in Hindu law. Principle laid down in the *Tagore Case*, 4 B. L. R. 183, and 9 B. L. R. p. 377. Held that as the grantee took the estate defeasible on the happening of an event which did not occur, she had therefore an estate which she could dispose of by will. Reversed, with costs.

[*L. R.* 5 *Ind. App.* 138; *I. L. R.* 4 *Calc.* 23.]

Dorab Ally Khan *v.*
Abdool Azeez and **Ahmedoollah**, the Executors of
Khajah Moheeooddeen.

Bengal. SIR JAMES COLVILE. *April* 13, 1878.

Seizure and sale of a talook on behalf of judgment debtors. Was this seizure regular? Implied warranty of title in chattels sold. Case remanded on fresh issue—whether evicted purchaser is entitled to get back his purchase-money.

[*L. R.* 5 *Ind. App.* 116; *I. L. R.* 4 *Calc.* 229; *I. L. R.* 6 *Calc.* 356.]

Pim, Owner of the "**Eliza Keith**," *v.*
John McIntyre, Owner of the "**Langshaw.**"

Vice-Admiralty, Quebec. SIR ROBERT PHILLIMORE. *May* 9, 1878.

Collision between sailing vessel and steamer in the River St. Lawrence. In this judgment their Lordships point out an error which the Canadian judge had made in the interpretation he has put on the Privy Council judgment in *Re The St. Clair* and *Underwriter*. Held, that the defence of the sailing ship, the "Eliza Keith," that there was justifiable necessity for a departure from a rule of navigation, is not supported. Decision below, that the sailing ship as well as the steamer was to blame, upheld. Affirmed, with costs. [*P. C. Ar.*].

Tekait Doorga Persad Singh *v.*
Tekaitni Doorga Koonwari and Another.

Bengal. SIR BARNES PEACOCK. *May* 17, 1878.

Claim to recover a Talook and other property. *Res judicata.* Inheritance according to Koolachar or family usage. Land bequeathed to three widows. Reversion. Judicial Committee affirm only a portion of the decree of the High Court. The result being that they decide that question of inheritance is fully within the principle of *res judicata* at present, until there be a revivorship. It will be open to any of the parties to raise the question of family custom hereafter. As the appellant fails

in the appeal to recover possession from the widow, he must pay the costs. [*L. R.* 5 *Ind. App.* 149.]

Urquhart *v.*
Macpherson.

Victoria. Sir Montague Smith. *May* 22, 1878.

Alleged breach of covenant in a partnership between certain sheep farmers and graziers. Action brought by appellant. Release impossible to sever it from a deed of dissolution which was also impeached. Contracts which are impeached on the ground of fraud are not void, but voidable. Finding of Supreme Court, by which a verdict for appellant was converted into one in favour of the respondent, is affirmed, with costs. Their lordships held that there was no breach of covenant by respondent, and that it was incorrect to describe certain transactions as assignments by the respondent of the credits of the firm.

[3 *App. Cas.* 831.]

Rajah Nilmoney Deo Bahadoor *v.*
Modhoo Soodun Roy and Others.

[*Ex parte.*]

Bengal. Sir James Colvile. *May* 24, 1878.

Suit by Rajah zemindar to enhance rent of lands occupied by respondents. Was the notice properly served? Concurrent finding that the notice was valid. Bengal Act, No. VIII. of 1869, s. 4. The Judicial Committee on the whole find it impossible to say that the High Court erred in holding that the Rajah had failed to sustain the burthen cast upon him by the statute—viz., to prove that the lands had not been held at a fixed rent. [*P. C. Ar.*]

Levi *v.*
Ayers and Others.

South Australia. Sir Barnes Peacock. *May* 28, 1878.

Winding up of a bank. Subsequent insolvency of a London and Australian firm who had shares in the said bank. Con-

current deeds by respective partners in London and Australia. Trustees for the creditors appointed. Were the deeds valid, and what liability on the joint estate did they comprehend? Colonial Insolvent Act, 1860. Assignees in insolvency (the respondents) are not bound either personally or out of the assets to indemnify bankrupt in respect of claims arising out of the estate, from which the bankrupt is not freed. Affirmed, with costs. [3 *App. Cas.* 842; 47 *L. J. P. C.* 83.]

Jardine, Skinner & Co. *v.*
Rani Surut Soondari Debi.

Bengal. Sir Barnes Peacock. *May* 29, 1878.

Claim by respondent to recover possession of land from Jardine & Co., who were "Ijaradars" under the Rani (respondent). Nature of a "Pottah." At the expiration of lease, Jardine & Co. remained in possession, offering old rent instead of a new assessment, and claiming right of occupancy. Act VIII. of 1869 (Bengal). Act X. of 1859. Affirmed, with costs. The Judicial Committee being of opinion that, although the appellants at the expiration of the lease had an equitable right to a renewal, they were now too late to exercise it. The respondent was entitled therefore to recover the possession of the land.

[*L. R.* 5 *Ind. App.* 164.]

Petition of Trilokinath (in the Matter of Maharajah Pertab Narain Singh *v.* Maharajah Subhao Koer and Others).

Fyzabad, Oudh. Sir James Colvile. *May* 31, 1878.

This was an application to rehear the appeal of *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Koer and Others* (L. R. 4 Ind. App. 228), on the ground that petitioner, Trilokinath, who had been respondent in Court below, had, as alleged, by accident been unrepresented in the hearing before the Judicial Committee. There was a second prayer, that the Queen's Order in Council should not be a bar to his future proceedings in the litigation. Petition dismissed, with a declaration pointing out

that if a new suit should ever be brought in India, the determination of the Indian Courts upon it would be subject to appeal.
[*L. R.* 5 *Ind. App.* 171.]

The Queen *v.*
Burah and Another.

Bengal. LORD SELBORNE. *June* 5, 1878.

Character of Indian legislation for states and territories outside of the Presidencies. The Garo, Khasi, and Jaintia hills, under control of Lieutenant Governor of Bengal; are they all and severally within the appellate jurisdiction of the High Court, Calcutta? Effect of Imperial Act, 24 & 25 Vict. c. 104. Burah and the other respondent (since deceased) were sentenced to death for murder in the Garo hills in 1876. The Chief Commissioner of Assam, under Lieutenant-Governor of Bengal, altered sentence to transportation for life. The Bengal High Court judges decided that the sentence of the Commissioner, which was appealed against, fell within the jurisdiction of the High Court, and sent for the record in the case. *Against this* there was now an appeal on special leave by the Government to the Queen in Council. Act of Indian Legislature, No. 22 of 1869, extending power of Lieutenant-Governor, was it *ultra vires?* Appeal allowed. Decree of High Court reversed, upholding powers of Lieutenant-Governor.
[*L. R.* 5 *Ind. App.* 178; 3 *App. Cas.* 889; *I. L. R.* 3 *Calc.* 63; *on appeal, I. L. R.* 4 *Calc.* 172.]

Petition against a Scheme of the Charity Commissioners for the administration of Hodgson's Schools at Wiggonby.

LORD SELBORNE. *June* 6, 1878.

Application of sections of Endowed Schools Act, 1869, to the school. Will of the foundress. Their Lordships remit the scheme to Commissioners, being of opinion it does not satisfy the

requirements of the 11th section of Act of 1869. It is pronounced defective, as not having "due regard" to the educational interests of the several classes of persons who were entitled under the will of the foundress, Margaret Hodgson, to the privileges or educational advantages which the school was intended to abolish or modify. Important observation is made as to the power of Commissioners to abolish or modify favours originally given to particular classes of students—students of the same name as the foundress for instance. Scheme remitted for amendment. No costs. [3 *App. Cas.* 857.]

Petition of Governors of Haydon Bridge School ("Shaftoe's Charity") against Scheme of Charity Commissioners.

LORD SELBORNE. *June* 6, 1878.

Objection raised to the hearing of this petition in accordance with 39th section, Endowed Schools Act prevails, and it is dismissed. "Vested interests" are not affected by scheme. Case of *Harrow* School determined on the 17th June, 1874, at this Board, was quoted as precedent for course now taken. Scheme approved. [3 *App. Cas.* 872.]

Ramjisdar and Imtiaz Ali *v.*
Rajah Bhagwan Bax and Another.

Oudh. SIR ROBERT COLLIER. *June* 22, 1878.

Mortgage of estate by predecessor of respondents. Financial difficulties of proprietor becoming burdensome, estate was placed under a manager, in accordance with provisions of Talookdar's Relief Act XXIV. of 1870. Appeal by the appellants arises from their dissatisfaction with the adjudication of the Commissioner in relation to their claim, on the money advanced for the mortgage and interest. [Varied, no costs.]
[*L. R.* 5 *Ind. App.* 197.]

Markar Tamby Mohideen Bawa *v.*
Sana Madar Saibo and Others.

Ceylon. SIR ROBERT COLLIER. *June* 25, 1878.

Action was brought by appellant to set aside a sale under an execution purchase. Allegations of fraud and collusion are groundless. Appeal dismissed with costs. [*P. C. Ar.*]

Hood (Trustee of an Insolvent's Estate in Liquidation) *v.*
Stallybrass, Balmer & Co.

Constantinople. SIR JAMES COLVILE. *June* 27, 1878.

Appeal to set aside orders of the Constantinople Court, in different suits on same evidence. Insolvency of a coal merchant of Cardiff who traded with Constantinople. Liquidation of his estate. Responsibility of the consignee of the coals at Constantinople (the brother of the insolvent). Was he an agent for his brother at Cardiff merely, or was he vested with ownership of the coal, so as to make it applicable for his judgment debts? What was his liability as acceptor of bills by Cardiff merchant? Appeal allowed, with costs, Judicial Committee holding that the coal could not be applied to meet the agent's debt. It was property which ought to have gone to the trustee to be utilized in the due course of the administration of the insolvent's estate. [3 *App. Cas.* 880.]

Zemindar of Pittapuram *v.*
The Proprietors of the Mutta of Kollanka.

Madras. SIR BARNES PEACOCK. *July* 2, 1878.

Claim by a Zemindar to recover certain houses and grounds which he alleged formed part of his Zemindari. Defence, that claim was barred by Statute of Limitations, and further, that the property in question was really owned by the defendants.

The principal question in this appeal was, whether the right to recover was not determined in a former suit, tried in 1862. Their Lordships decided that the cause of action in the present suit had not been determined in the former litigation, and remanded the case to India for trial on certain issues. *Vide* also suit decided in Privy Council, 7th June, 1883 (*P. C. Ar.*).
[*L. R.* 5 *Ind. App.* 206.]

Angers (The Attorney-General of Quebec, *pro* H. M. the Queen) *v.*
The Queen Insurance Company of Canada.

Lower Canada. The Master of the Rolls, Sir George Jessel.
July 5, 1878.

Canadian law affecting stamp duty on policies of insurance. Imposition of a stamp duty by a Quebec statute not warranted by the British North America Act. Is a Stamp Act direct or indirect taxation? What are the meaning of the words, as "words of art"? The Judicial Committee say that such a stamp is not "direct" taxation. Judgments of both Courts below affirmed. "The imposition of this stamp duty is not warranted by the terms of the second sub-section of sect. 92" of the British North America Act. [3 *App. Cas.* 1090.]

Webb *v.* **Giddy and**
Giddy *v.* **Webb.**

Griqualand (*West*), *South Africa.* Sir Montague Smith.
July 12, 1878.

Webb represents the South African Exploration Company, and Giddy is Civil Commissioner at Kimberley, capital of Griqualand West. Dispute arose out of the regulations under which licenses to dig for diamonds are granted by the South African Exploration Company. Effect of a proclamation issued in 1871 by Sir Henry Barkly, the governor. The "Dorstfontein Diggings."

Effect of Roman-Dutch law in regulating administration and development of diamond fields. Difference between usufruct only and actual right to minerals. Validity of Orange Free State grant. Alleged *emphyteutic tenure*. The Judicial Committee report that the appeal of the Crown (Mr. Giddy's appeal) ought to be dismissed. It related primarily to a claim in reconvention for the return of money paid to the company in respect of licenses. After the solemn recognition of Mr. Webb's title, by virtue of the Proclamation of 1871, to the minerals, it is too late for the Crown to impeach it upon a presumption derived only from the form of the Orange Free State grant. The appeal by Webb, wherein he sought to have altered the decision of the recorder for an account and payment of license moneys upon higher rate than the Crown has accounted for, would also be dismissed. Their lordships intimated, however, that they were not to be understood to affirm the principle on which the learned recorder based his judgment in dealing with the question of the power of the plaintiff to raise the license rents. The question is to remain open. Judgment appealed from affirmed. Both appeals dismissed. No costs. [3 *App. Cas.* 908.]

Les Sœurs Dames Hospitalieres de St. Joseph de l'Hotel Dieu de Montreal *v.* **Middlemiss.**

Lower Canada. Sir James Colvile. *July* 12, 1878.

Claim by appellants, as seigniors of a fief, to commutation fine for plot of land under a Canadian Act, intituled "An Act respecting the general abolition of feudal rights and duties" (cap. XLI., Consolidated Statutes of Lower Canada). Does the Act apply to this case? History of the devolution of the Fief, seignorial dues, &c. Had the property become acquired by the Crown with an extinction of feudal rights subject to an indemnity? Was that indemnity paid, and thereafter was the property alienated free of such charges to the respondent? The decision is in the affirmative. The Crown does not fall within the category of *gens de main-morte*. The Judicial Committee

affirm the decision of the Court of Queen's Bench, which declared against the claims put forward by appellants. Costs of appeal to be paid by the appellants. The case is of much importance as bearing upon the devolution of French law and its existing force in Lower Canada.

[3 *App. Cas.* 1102; 47 *L. J. P. C.* 89.]

Syed Bazayet Hossein and Others *v.*
Dooli Chund and
Moulvie Mahomed Wajid *v.*
Mussummat Bebee Teyabun and Others.
(Two separate appeals.)

Bengal. SIR BARNES PEACOCK. *Nov.* 9, 1878.

Mortgage by an heir. Mahomedan law. Suits instituted to ascertain purchaser's rights in respect of ancestor's debt due. Rights of dower of the widows of the ancestor. Sale. Is a purchaser without notice of debts on an estate holden to be subject to them? In the first suit, the sale of the mortgaged property, so far as the heir's own share was intended to meet sum due on the mortgage bond, is valid, and the title in the land secured to the purchaser. The property in question was alienated without any charge on the estate which would affect the dower of Mahomedan widows being decreed. (*Wahidunnissa* v. *Shabrattan*, 6 B. L. R. 54.) In the second suit, wherein the widows were plaintiffs, and now respondents, there was a charge on the estate decreed, and therefore the purchaser obtained the property subject to the charge. Both decrees below affirmed, with costs.

[*L. R.* 5 *Ind. App.* 211.]

Ramanund Koondoo and Another *v.*
Chowdhry Soonder Narain Sarungy and Others.

Bengal. SIR ROBERT COLLIER. *Nov.* 15, 1878.

Debt contracted by four persons. Two of the debtors pay off their debt. A claim is then brought against these two for the

default of the other co-sharing debtors. Question of liability of all the parties dealt with at length. Interest. The main question was, whether the whole of a mouzah which had belonged to one of the debtors had been sold. The effect, if not, would be that the plaintiffs (the appellants) were not, at the time they applied for it, in a condition to execute against the two defendants as sureties for the original debt. Both Courts below held that the whole of the mouzah in question had not been sold, and the Judicial Committee agree with them. There was a second question, as to interest. The subordinate judge intimated that if the plaintiffs sell what remains of the mouzah, they may be in a position to issue execution against the defendants. (On this, as there is no cross appeal, the Judicial Committee are not in a position to give any opinion.) The subordinate judge went on to say that, if so, interest can only be obtained up to 1867, when the estate was first ordered to be put up for sale. The Judicial Committee considered the subordinate judge was right. Some of the postponements in the proceedings were due to the plaintiffs, and, in consequence, an additional burden should not be thrown on the sureties. [*P. C. Ar.*]

Prince Mirza Jehan Kudr Bahadoor *v.*
Naw Afsur Bahn Begum.

Oudh. SIR BARNES PEACOCK. *Nov.* 16, 1878.

Claim by Prince Mirza to a mouzah and houses which had belonged to his grandmother, the "Queen Mother," and of which she was in possession just before Lord Canning's Proclamation of 15th March, 1858. Was the plaintiff, as heir, entitled to the same share of property as his father would have been? Case is remanded to India for trial on new issues. Their Lordships not being satisfied (as to the mouzah) whether the appellant acquired a title within twelve years after the government confiscation, or whether the respondent took the government settlement adversely to other heirs, or in trust for herself

and them, and (as to the houses) whether the appellant's claim to them was barred by the Act of Limitation, these issues to be tried as if there was no confiscation by government.

[*L. R.* 6 *Ind. App.* 76.]

Sir Drig Bijai Singh, K.C.S.I. (Maharajah of Bulrampore) *v.*

Uman Pal Singh, and **Ganesh Singh.**

[*Ex parte.*]

Oudh. SIR MONTAGUE SMITH. *Nov.* 19, 1878.

Respondents have held villagers as sub-tenants. Can they claim a sub-settlement as possessors of what Act XXVI. of 1866 (and the rules scheduled in that Act) describes as "under-proprietory rights" arising from continuous tenancy. Judicial Committee uphold decisions below in favour of respondents; the holding was under contract and valid, and the land was not granted on account of service or by favour of the Talookdar. Affirmed. [*L. R.* 5 *Ind. App.* 225.]

Joy Narain Giri *v.*

Grish Chunder Myti and Others; and

Joy Narain Giri *v.*

Grish Chunder Myti.

(Consolidated Appeals.)

Bengal. SIR ROBERT COLLIER. *Nov.* 19, 1878.

The suit arose out of disputes in a joint family. The question now raised was, whether or not there was partition at the time of the early quarrels. Their Lordships decided that there was. Affirmed. [*L. R.* 5 *Ind. App.* 228.]

Gouri Shunker *v.*
The Maharajah of Bulrampore.

Oudh. Sir James Colvile. *Nov.* 21, 1878.

The rebel Dirgh Narain Singh in 1856 mortgaged four of his villages in Tulsipore to Gouri Shunker for money borrowed. At the Mutiny, his people being still in rebellion, the whole of Tulsipore was created into a Talook, in favour of the loyal Maharajah of Bulrampore. On the passing of the Oudh Estates Act I. of 1869, the Maharajah's title as full Zemindar was completed. Gouri Shunker afterwards claimed the four villages as proprietary mortgagee. The assistant settlement officer dismissed the claim as one barred by the Proclamation of Lord Canning and the Estates Act. Subsequently the suit assumed the character of one for a sub-settlement of a sub-proprietary title. This claim was in terms of the mortgage deed, which described what was pledged as "the rights appertaining to a Birt Zemindari," or merely a sub-proprietary right under the superior lord. The Commissioner of the district having had the case before him, held that the effect of the mortgage was to create a tenure, subordinate to that of the Talookdar; that Gouri Shunker had an under-proprietary Zemindari title and possession until the lien was redeemed, or the foreclosure perfected. On appeal, however, the Judicial Commissioner, in effect, held that the plaintiff, being apparently in full proprietary possession at the time of Lord Canning's proclamation, his title was swept away. He accordingly dismissed the suit. This decision their Lordships now reversed, the Committee holding that the judgment of the Commissioner was the right one. Appeal allowed, with costs, but with a declaration that the Order in Council was to be without prejudice to the Maharajah's rights (if any) to apply to the Court to receive Malikana at not less than 10 per cent. *Widow of Shunker Sahai* v. *Rajah Kashi* (L. R. 4 Ind. App. 198) approved. [*L. R.* 6 *Ind. App.* 1.]

Sahibzada Zeinulabdin Khan *v.*
Sahibzada Ahmed Raza Khan and Others.

N. W. P. Bengal. SIR BARNES PEACOCK. *Nov.* 22, 1878.

Right of appeal from decree obtained *ex parte*. The High Court had rejected this appeal from the Court of first instance on a technical ground, the judges holding that the defendant (now appellant) had not followed, as to appearance, the procedure required by sect. 119 of the Civil Procedure Code (Act VIII. of 1859). The Judicial Committee declared this decision erroneous (the section applied, in their opinion, to a party who has not appeared at all in the suit), and *remanded* the case to the High Court for trial. [*L. R.* 5 *Ind. App.* 233.]

Chotay Lall *v.*
Chunnoo Lall and Others.

Bengal. SIR MONTAGUE SMITH. *Nov.* 23, 1878.

Laws of succession among the sect called *Jains*. Right to moveable property. The property in suit was the self-acquired property of Thakoordass Baboo, who died at Calcutta in 1860 without any male issue, but leaving a daughter who became the wife of Chotay Lall, the appellant and defendant, leaving no issue. The plaintiffs and respondents were grandsons of a brother of Thakoordass, and it is admitted that they would have been the heirs of Thakoordass if he had left *no issue*. The question now is, whether they or the defendant, as husband of Thakoordass' only child, became entitled to the property on her death. Is the succession to be determined by customs of the Jains or by the Mitacshara law of inheritance? Customs of the Jains (*vide* Mayne's Book on Hindu Law) discussed at length. Judicial Committee held that the issues in this suit were amenable to Mitacshara law, and that when the customs of the Jains are set up, and there is no evidence, in the setting up, adduced to vary the ordinary Hindu law, the ordinary law must prevail. Neither can the judgment of the High Court be impeached on the ground

that the customs of the Jains have not been fully ascertained. According to Mitacshara law, a *widow* inherits from her husband a restricted and limited share of his estate. The question of a *daughter's* inheritance is not a *res integra* for the whole of India; but in Bengal and Madras, at all events, a daughter's share, like a widow's, is restricted and limited. Courts ought not to unsettle a rule of inheritance affirmed by a long course of decisions, unless, indeed, it is manifestly opposed to law and reason. Decree appealed from affirmed, with costs. [*L. R.* 6 *Ind. App.* 15.]

The Great Laxey Mining Company, Limited *v.* James Clague.

(And Cross Appeal.)

Court of Chancery, Isle of Man. Sir Robert Collier. *Nov.* 26, 1878.

The Great Laxey Mining Company, under a grant from the Crown, are permitted to enter the lands of Clague, in order to conduct mining operations. There was an understanding that the company should pay Clague for damage done. The present appeal and cross appeal arise out of a dispute as to the assessment of certain damage incurred in consequence of the erection of a reservoir by the company. The case was adjudicated upon first (by consent) before a jury, who assessed damages, and then by the Court. In their appeal, the company objected to that part of the judgment which made it necessary for them to erect a stone wall round the reservoir, or subject themselves to a larger sum in damages if it was not built, when they had already erected a substantial fence. Clague, in his cross appeal, objected to any alternative for lesser or greater damages by reason of the wall. The damages assessed were for injury already done. The Judicial Committee considered the objection of Clague valid. Principal appeal dismissed; and, as regards the cross appeal, the judgment would be modified so as to meet objections. The company to pay costs of appeal and cross appeal. [4 *App. Cas.* 115.]

Rameshur Pershad Narain Singh *v.*
Koonj Behari Pattuk and Another.

Bengal. Sir Montague Smith. *Dec.* 3, 1878.

Right to the use of water. Alleged diversion. Respondent denies the appellant's right to have the water as overflow. Claim of appellant founded on prescriptive usage. Judicial Committee uphold appellant's contention, and reverse the divergent decrees below, with a declaration of limits and conditions under which the right to overflow "in accustomed channels and manner" is to be enjoyed by the appellant. The authorities on right and usage in the case of natural, as compared with artificial, water-courses, considered: *Major* v. *Chadwick*, 11 A. & E. 586; *Wood* v. *Waud*, 3 Exch. 777; *Greatrex* v. *Hayward*, 8 Exch. 281; *Sutcliffe* v. *Booth*, 32 L. J. Q. B. 136. The costs of the appeal to the High Court are to be paid by each party respectively, but appellant is to have costs of appeal. [*L. R.* 6 *Ind. App.* 33.]

De Gaspé and Others *v.*
Bessener and Others.

(Six Consolidated Appeals.)

Lower Canada. Sir James Colvile. *Dec.* 5, 1878.

Possessory actions on disturbance. The respondents, it was alleged, had unlawfully and forcibly entered and trespassed upon certain lots of land (of which the appellants the plaintiffs claimed absolute possession), thus disturbing the said appellants. French and Canadian law on the subject of possession reviewed at considerable length. Held, that the appellants had failed to prove such a possession of the land as was sufficient to maintain a possessory action within the terms of the Code of Civil Procedure, sects. 946—948, also sect. 52. Affirmed with costs.
[4 *App. Cas.* 135; 48 *L. J. P. C.* 1.]

Doolar Chand Sahoo and Others *v.*
Lalla Chabeel Chand, and
The Same *v.*
Lalla Biseshur Dyal and Others.

(Consolidated Appeals.)

Bengal. SIR BARNES PEACOCK. *Dec.* 6, 1878.

Sales of portions of an estate in execution of mortgages. Section 246 of Act VIII. of 1859, and section 59 of Act VIII. of 1869 (Bengal Council), construed with reference to the character of the interest sold under different decrees. The main question in both appeals was whether there was a sale of tenure free from all incumbrances and rights of others interested, or a sale of the interests of one judgment debtor only. The latter alternative is upheld by the Judicial Committee. Decree of the High Court in the first appeal is affirmed, and the decree in the second is amended, in order to set right a mistake below. By such mistake or oversight the respondents had been granted a share larger than that to which they were entitled. The respondents in both appeals are to have the costs of these appeals.
[*L. R.* 6 *Ind. App.* 47.]

Gulabdas Jugjivandas and Others *v.*
The Collector of Surat and Another.

Bombay. SIR ROBERT COLLIER. *Dec.* 13, 1878.

Surat was ceded to the East India Company in 1800. On that event taking place the company issued a Sunnud granting a Jaghire Estate and Pension to the Buckshee or commander-in-chief of the troops of the Nawab of Surat. The contention of the respondent, however, was, the government, by their grant, gave the estate *for life only* to the Buckshee as a reward for services, and that if continued to his descendants would with them also be for life only. One of these descendants effected a mortgage, and on his death was succeeded as repre-

sentative of the family by a sister (Fatima). The collector of Surat, acting for her, refused to pay a residue on the mortgage to the appellants, who were bankers, on the ground that the mortgagor having had only a life interest, Fatima was not liable. This lady had, moreover, never ratified the mortgage of her brother. This decision was now upheld. Costs of both respondents to be paid by the appellants.

[*L. R.* 6 *Ind. App.* 54.]

1879.

Gossain Luchmi Narain Poori *v.*
Pokhraj Singh Din Dyal Lal and Others.

Bengal. Sir Montague Smith. *Jan.* 21, 1879.

Mokurreri lease. Is it genuine or a forgery? Lease granted by a person whose property was afterwards confiscated in consequence of his having joined in the Mutiny. Claim under Mokurreri put in before sale. Delay in bringing present suit. Validity of lease upheld. Affirmed, with costs. [*P. C. Ar.*]

Nawab Malka Jehan Sahiba *v.*
Deputy Commissioner of Lucknow in charge of the Nazul Department.

Oudh. Sir Robert Collier. *Jan.* 23, 1879.

Claim by Queen of Oudh. Before the annexation of Oudh, King Momuddin Mohommad Ali Shah made four Sunnuds, in which he gave the Queen a tract of land and a palace within the city of Lucknow. On the issue of Lord Canning's Proclamation on March 15th, 1858, declaring the prerogative of Crown, the rights of loyal Talookdars, &c., all the property in Lucknow was confiscated, in view of ultimate settlement by our government. The palace claimed by the ex-Queen was included as nazul or state property, but the right of re-occupying the palace was granted to the Queen *for life only.* It was now contended she had a claim in perpetuity under the Sunnuds. This view is not accepted by Privy Council. Appeal is dismissed, with costs. [*L. R.* 6 *Ind. App.* 63.]

The Melbourne Banking Corporation, Limited *v.* Brougham.

Victoria. SIR MONTAGUE SMITH. *Jan.* 25, 1879.

Bill to set aside a sale following unredeemed mortgage. Plea in bar against this bill was overruled by Supreme Court, and the present appeal was against such overruling. Difficulties arose out of the property being sequestrated just after the default of mortgagor. The bank alleged that the official assignee, then appointed, released to them the equity of redemption. The mortgagor, on the other hand, contended that so far from the equity having been released, the estate had been repurchased from the official assignee by a third party, who subsequently reconveyed it to him. The chief point in case dealt with the authority the assignee had to release the property to the mortgagor, the consideration for such procedure being an agreement not under seal on the part of mortgagee to abstain from proving his mortgage debt. It was contended by the mortgagor that, under the Colonial Insolvency Statute (1865), the assignee had no such power. Their Lordships agreed to reverse the orders appealed from, and held the release was not *primâ facie ultra vires* of the assignee, and recommended that the plea ought not to be overruled. They considered that the benefit of the plea be saved to the hearing of the cause, and that the costs occasioned by the hearing of the plea in the Courts below should be costs in the cause. Appellant to have costs of appeal.

[4 *App. Cas.* 156; 48 *L. J. P. C.* 12.]

Suraj Bunsi Koer *v.* Sheo Prosad Singh and Others.

Bengal. SIR JAMES COLVILE. *Feb.* 1, 1879.

Joint ancestral estate. Execution sale. Rights of purchasers as opposed to those of members of the family. Powers of a father to alienate. What is the effect on children's interests if the father, who is a judgment debtor, dies before an execution sanctioned by him is complete? Mithila, Mitacshara, Bengal, Madras, and Bombay law, on the subject of alienation in cases of sale, and the circumstances under which sons are liable (by

payment out of the estate) for debts of a father. Judicial Committee, reversing decrees below, hold that the purchasers (the respondents) could only take the father's undivided share of the estate—his debt being incurred without justifying necessity; but this finding is to be subject to the title of the respondents to ascertain the extent of the father's share acquired by partition. On the second point, held, that this charge (for father's share) could not be defeated by reason of the father's death before the actual sale. Costs in Courts below to be apportioned according to the rule when the plaintiff is only partially successful. Appellants to have costs of appeal.

[*L. R.* 6 *Ind. App.* 88; 4 *B. L. R.* 226; *I. L. R.* 5 *Calc.* 148.]

Raj Bahadoor Singh *v.*
Achumbit Lal.

Bengal. SIR ROBERT COLLIER. *Feb.* 6, 1879.

Claim to estate by respondent as heir-at-law is opposed by appellant, who claimed through the widow of respondent's father. Construction and validity of a document called a *Waseeutnamah* (executed by the said widow's husband before his death). Was a widow's estate enlarged from the ordinary estate of a Hindu widow (as for life only) to an absolute estate? There were two subsidiary questions, one of which related to the limitation in suits arising out of an adoption. Limitation Act IX. of 1871. From what time does limitation run? Decree below setting aside the document, and declaring widow had simply a life estate, affirmed, with costs. [*L. R.* 6 *Ind. App.* 110; 6 *B. L. R.* 12.]

Hamon *v.*
Falle.

(Appeal *in formâ Pauperis.*)

Jersey. SIR JAMES COLVILE. *Feb.* 8, 1879.

The Jersey Mutual Insurance Society having refused to insure a vessel if it was placed under the captaincy of Hamon

(a master mariner), the latter instituted action for libel, in the hearing of which it was sought to prove that the reports of Hamon's drunken and violent habits, which had impelled the society to the course they took, were without foundation and arose from malice. The principal Court in Jersey reversed a decision of the inferior Court, which was in Hamon's favour. Hence this appeal. The Judicial Committee declared the Insurance Society had acted within their powers (laid down by rules), and this being so it was not necessary to go into the question whether or not Hamon had been guilty of drunkenness, about which there was much conflicting evidence in the record. Appeal dismissed. The plaintiff having been admitted to appeal *in formâ pauperis*, there was no order as to costs.

[4 *App. Cas.* 247; 48 *L. J. P. C.* 45.]

Mussumat Adit Kooer *v.*
Gunga Pershad Sing.

Bengal. SIR BARNES PEACOCK. *Feb.* 14, 1879.

Question of adoption. Its effect, if valid, on respective heritable parties. Validity of adoption is not proved. Dismissed, with costs. [*P. C. Ar.*]

Campbell *v.*
The Commercial Banking Company of Sydney.
(And Cross Appeal.)

New South Wales. SIR JAMES COLVILE. *Feb.* 15, 1879.

The appeal and cross appeal have arisen out of complicated mortgage transactions between Campbell and the bank. The bank having become mortgagees of certain landed property of Campbell's, had, on the failure to release, sold a portion of it to a third party. Campbell disapproved of the conduct of the bank in this transaction, and brought an action for damages, and he obtained a verdict in his favour. The decision, however, did not satisfy him, and he (followed by the bank) instituted

these appeals. The cross appeal of the bank was now allowed, and a new trial is ordered. Campbell having lost his appeal has to pay the costs in the Privy Council. The character of the litigation was much affected by the provisions of the New South Wales Real Property Act, and the regulations in reference to "Notice," "Registration," "Transfer," &c., in negotiations affecting the sale of mortgaged property. [*P. C. Ar.*]

Nawab Umat-uz-Zohra *v.*
Nawab Mirza Ali Kadr and Another.

Oudh. SIR ROBERT COLLIER. *Feb.* 21, 1879.

Question relates to genuineness of a transfer of property. The claim is made by the daughter of Sir Mansin-ud-Daula for restitution of elephants, horses, plate, &c., alleged to have been given her by her father, he being yet alive. Inquiry as to state of mind of Sir Mansin, who, by transferring the property to his daughter, is said to have made himself her pensioner. Transfer declared invalid and appeal dismissed, with costs. [*P. C. Ar.*]

Juggodumba Dassee *v.*
Tarakant Bannerjee and Others.

Bengal. SIR JAMES COLVILE. *Feb.* 26, 1879.

For earlier history of litigation in this case, see 10 Moo. Ind. App. 476. Proprietorship in land. Does it belong to a *Jote* held under Zemindar, represented by respondents, or to a Talook, owned by appellant? The Judicial Committee affirm the decree below in favour of respondents, with costs. [*P. C. Ar.*]

Thakoor Hurdeo Bux *v.*
Thakoor Jowahir Singh.

Oudh. SIR BARNES PEACOCK. *March* 1, 1879.

This appeal (*vide* L. R. 4 Ind. App. 178) was, in 1877, remanded to India for trial on one issue, and it was further

ordered that the result of such trial should be sent to the Judicial Committee, together with any fresh evidence that would be adduced. The litigants are cousins, and the disputes have arisen through one of them (respondent) claiming certain villages (alleged by the appellant to belong to them jointly) as his sole property, gained as rewards by services during the Mutiny. The *acquisition of estates in Oudh by summary settlement*, and the manner in which estates were conferred for loyalty during the Mutiny, described. Act I. of 1869. Held that the estates in this suit did belong to a joint Hindu family before Lord Canning's Proclamation; that since then the appellant had not become dispossessed of any share; that the respondent was entitled to hold the villages *in trust only* for himself and family; and further, that in accepting rewards from Government he acted as the representative of the family, the other members of which were as loyal as he was to the British. Reversed. Respondent to pay costs in both Courts below, and also of this appeal, out of the estate; but the whole direction is to be without prejudice to any agreement that may have been arrived at since the commencement of the suit. [*L. R.* 6 *Ind. App.* 161.]

Isaac Bartlett *v.*
William P. Bartley & Co.
(And Cross Appeal.)

Canada. Sir Barnes Peacock. *March* 8, 1879.

Action by respondents, a firm of shipbuilders and engine contractors, to recover an instalment of money due under terms of a contract for work done. Four thousand dollars, and interest, allowed to respondents. There were also claims for extras and interest. Extras disallowed by both Courts below. Article 1690 of the Civil Code of Lower Canada prohibits claims for extras, unless provided for in the original contract. Allegation *per contra* that works were not completed within the stipulated time, and that, therefore, the compulsion to pay more than was paid was extinguished. Decision below affirmed. Both appeals dismissed. No costs. [*P. C. Ar.*]

The Borough of Bathurst *v.*
Macpherson.

New South Wales. SIR BARNES PEACOCK. *March* 11, 1879.

Action against a corporation for damages. Macpherson (plaintiff) was riding in a street within the town of Bathurst, when his horse, falling into a hole, caused his leg to be broken. He instituted action against the Municipal Council, on the ground of their neglect in keeping the street and gutter where accident took place in repair. New South Wales Municipality Act, No. XII. of 1867. Difference of opinion in Colonial boroughs as to the meaning of the Act, with reference to the liability to repair. The Lords hold that the Act intends that all boroughs in the Colony of New South Wales must keep their roads under proper care and management, and in good repair. The order absolute for a new trial, and to set aside verdict which had been returned for appellants, is affirmed, and appeal dismissed with costs.

[4 *App. Cas.* 256 ; 48 *L. J. P. C.* 61.]

Cohen *v.*
Sandeman.

New South Wales. SIR ROBERT COLLIER. *March* 12, 1879.

Contract to build a hotel. Builder becomes bankrupt, and Cohen, the person for whom the hotel was being built, gives notice to the surety of the builder to finish the work. This is done, and the assignee of the bankrupt treating this completion of the work by the surety as a completion under the contract, sued Cohen for what remained due. Held by Supreme Court, assignee was entitled so to sue, and against this decision the present appeal was instituted. Affirmed with costs.

[*P. C. Ar.*]

Mussumat Imrit Konwar and Another *v.*
Roop Narain Singh.

Bengal. SIR BARNES PEACOCK. *March* 14, 1879.

Claim for landed property in reversion. The appellants were daughters of the original owner of the estates. The respondent claimed as the adopted son of this owner. "Kritima" form of

adoption. Variance in the allegations of the respondent. Proof of adoption not clear. Appeal of the daughters is allowed, with costs, by Privy Council. [*P. C. Ar.*]

Narayanrao Ramchandra Pant *v.*
Ramabai (Widow of Ramchandra Pant).

Bombay. Sir Montague Smith. *March* 18, 1879.

Claim by the widow of a Subhadar in the service of the ex-Peishwa for arrears of maintenance. The present appellant from whom the arrears were claimed was the widow's (Ramabai's) step-son. (For prior proceedings, see 9 Moo. Ind. App. 101.) Is the maintenance barred by limitation, sub-sect. 13 of the 1st section of Act No. XIV. of 1859? Does *separation* from the ancestral home affect the ordinary position of a Hindu widow or disentitle her to maintenance? Committee affirm the judgment in favour of widow. [*L. R.* 6 *Ind. App.* 114.]

Tiru Khrishnama Chariar and Others *v.*
Krishnasawmi Tata Chariar and Others.

Madras. Sir Robert Collier. *March* 18, 1879.

The question in this appeal was, whether or not the plaint of appellants of the Tenkalai sect disclosed any cause of action. Quarrel between Tenkalai and Vadakalai sects as to the exclusive right of reciting certain hymns and chants in a particular pagoda, and receiving dues therefor. The claim of the appellants for the due performances of the services in question is pronounced legitimate by the Judicial Committee, who, consequently, declare there is cause of action, and that trial ought to take place. Reversed. Appellants to have costs of the appeal. Case remanded for trial. [*L. R.* 6 *Ind. App.* 120.]

Burra Lall Opendronath Sahee Deo *v.*
The Court of Wards.

Bengal. Sir Montague Smith. *March* 19, 1879.

This appeal had been remanded to India by the Judicial Committee on certain issues. Claim to estates in Nagpur, on the ground of alleged adoption, having reference particularly to the

validity of entries in certain books. Defence: that the late Maharajah had two legitimate sons born to him, and that he had no need to adopt, and did not adopt, is now upheld. Appellant is to pay costs in India occasioned by the remand, and of this appeal. [*P. C. Ar.*]

Asad Ali Beg and Others *v.*
Zaffer Ali Beg and Others.

Central Provinces. SIR JAMES COLVILE. *March* 20, 1879.

Right of a widow of a Malguzar to certain villages. Rights arising out of possession by widow for nineteen years without molestation upheld. Government settlement. Deed of gift of the villages to present appellants. Mahomedan law as to heirship. No trust for others proved. Appeal allowed. Appellants to have costs. [*P. C. Ar.*]

Skinner *v.*
Orde and Others.

North-Western Provinces, Bengal. SIR MONTAGUE SMITH. *March* 21, 1879.

Question of law before hearing of suit in India. The appellant, who is a claimant to property under a will, filed a petition, *as a pauper*, to have his rights declared. Protracted legislation arising out of the case being brought or sent from Court to Court before being registered. The appellant, having afterwards paid the fees, caused his suit to be entered as an orthodox one, but it was then contended he had become a suitor too late to ensure for himself the privileges of limitation. This view is not upheld by the Judicial Committee, who declare that the plaint originated in the pauper suit, and must be considered as a plaint from the date on which it was filed, and not, as the High Court held, from the date on which the stamps were paid, and was not affected by alteration in the manner of prosecuting the suit. The cause in India is therefore ordered to proceed: Act VIII. of 1859, ss. 308—310. Reversed with costs, and case remanded for trial on the merits. [*L. R.* 6 *Ind. App.* 126.]

Maharajah Radha Proshad Singh *v.*
1. **Baboo Umbica Persad Singh** and Another. No. 52 of 1874.
2. **Shaik Himmut Ali** and Others. No. 53 of 1874.
3. **Meer Muddud Ali** and Others. No. 51 of 1874.
* (Three Appeals.)

Bengal. SIR ROBERT COLLIER. *March* 22, 1879.

Three of several boundary suits begun by the Maharajah Radha Proshad Singh. Two others of these suits were, in 1877, before the Judicial Committee. (*Vide* P. C. Ar. Nov. 29, 1877.) Deviations of the river Ganges. The claim to land by accretion and by adverse possession, as opposed to a claim on the grounds of ownership before deviation, is now upheld. The limitation of the possession after accretion by a claimant, who, before accretion, had no right, is an important feature in this decision on boundaries. In Nos. 1 and 2 appeals, costs in India are to follow the event, and each party is to bear the costs of the appeal. In No. 3 appeal appellant is to have all costs in India, and costs of the appeal. [*P. C. Ar.*]

Sayad Mir Ujmudin Khan Valad Mir Kamrudin Khan *v.*
Zia-ul-Nissa Begam and Others.
(Two Consolidated Appeals.)

Bombay. SIR JAMES COLVILE. *March* 27, 1879.

This appeal related to the disposition of property which had been possessed by a woman (the widow of the Nawab of Surat), who was before marriage a slave girl, and whose heirs now claimed inheritance. The whole matter resolved itself into the question whether the "Willa" law (by which the heirs male of an emancipator had preference over the freed slave's heirs) should in this case prevail against the provisions of Act V. of 1843, s. 3 (by which all disabilities against those who had been slaves in India had been removed). The Act, their Lordships decided, was

* Owing to the decision in the above causes, and in the previous cases, their Lordships, on November 22, 1879 (P. C. Ar.), allowed the three last of these appeals; Her Majesty in Council approving of an order in each for reversal.

paramount in all cases of succession of this character. The statute was a remedial one, to which the widest operation should be given. Appeal dismissed with costs.

[*L. R.* 6 *Ind. App.* 137.]

Rajah Kishendatt Ram *v.*
Rajah Mumtaz Ali Khan.

Oudh. SIR JAMES COLVILE. *March* 28, 1879.

Mortgage, in 1848, of villages. The collection of crops, &c. on the part of the mortgagee is opposed by a number of persons, who claim as holders of *birt* tenures. Purchase of these birt tenures by mortgagee. Subsequent claim by the son of original mortgagor to redeem the birt tenures. His right is admitted, but litigation ensues on the question on what terms is the right of redemption to be exercised, due regard being had to the purchase of encumbrances by the mortgagee, and the new interests he had created. Several cases (English law) quoted to exemplify the relative effect on the mortgagee and mortgagor by sale or purchase. Was the subject of the mortgage a Malikana allowance, or did it embrace the Talookdari interest with all its incidents? Their Lordships hold that the decision of the Judicial Commissioner is equitable, and that the son of the original mortgagor, under the circumstances of this case, had a right to redeem the estate on payment of the mortgage money, and the money paid for the birt tenures. Affirmed with costs.

[*L. R.* 6 *Ind. App.* 145; *I. L. R.* 5 *Calc.* 198.]

Bank of New South Wales *v.*
Owston.

New South Wales. SIR MONTAGUE SMITH. *February* 18, 1879, *and March* 28, 1879.

Preliminary objection on ground that sum involved is below appealable amount. *Interest* on a verdict (for damages) is given by statute in New South Wales. Objection overruled (*vide* 8 Moo. Ind. App. 166). *Although costs may not be added to make up the appealable amount, interest, under New South Wales law, may.* (N. S. W. Statute, 24 Vict. No. VIII.) Action is brought against

the bank for alleged malicious prosecution, instituted by one of its officers. Owston is awarded 500*l.* as damages. Question comes before Committee on appeal against a judgment discharging a rule for a new trial. Judicial Committee, taking the view that the bank in this instance may not have been responsible for the institution of a prosecution by its officer—although in their minds the question should be left open whether that officer gave directions to prosecute—reinstated the rule for a new trial, and directed it to be made absolute. Judgment of Supreme Court discharging the rule reversed, and rule for new trial made absolute. Owston to pay costs of appeal.

[4 *App. Cas.* 270; 48 *L. J. P. C.* 25; *P. C. Ar.*]

Hurro Soondari Debia Chowdhrani *v.*
Kesub Chunder Acharjya Chowdhry.

Bengal. SIR BARNES PEACOCK. *May* 7, 1879.

Suit by widow to recover villages from the sons of her deceased husband's brother. Partition. The whole question related to the interpretation to be put upon the *Goshwara*, or abstract statement, dividing an estate. Divergence between area and rental in the divided properties. Is appellant entitled to recover according to the quantity of the land, or the *Jumma* value? Held (affirming the decree of the High Court, with costs), that appellant was not entitled to recover according to quantity. If entitled to recover at all, it ought to be in proportion to the rents specified in the last column, in lieu of the second column, of the *Butwara*, which followed the arrangements for partition. Appellant derived no title from the *Butwara* to recover the proportion of lands claimed. [*P. C. Ar.*]

Ramasawmi Chetti *v.*
The Collector of Madura, and Agent to the Court of Wards for the **Zemindar of Ramnad** (a minor).

Madras. SIR MONTAGUE SMITH. *May* 8, 1879.

Claim by the collector to a village. The principal question related to the validity of an unregistered lease, or Pottah, relied on by appellant. Law as to *registration* of particular classes of

leases discussed at length. General Registration Act, No. XX. of 1866. The Madras Act, No. VIII. of 1865. Judicial Committee, affirming decree below, consider that the document was not a Pottah within the meaning of the Madras Act, and was inadmissible in evidence. Appeal fails. Decrees below affirmed, with costs. [*L. R.* 6 *Ind. App.* 170.]

Attorney-General of the Isle of Man *v.*
Mylchreest and Others.

Isle of Man. Sir Montague Smith. *May* 8, 1879.

The great Clay Case. The decision declares the right of the clay and sand, minerals, &c. of the Isle of Man to be vested in the people, and not in the Crown. Isle of Man Act of Settlement of 1703. Judicial Committee, having given consideration to the history of the island from time of Norwegian rule, hold that the custom set up by the respondents is established. Affirmed, with costs. [4 *App. Cas.* 294; 48 *L. J. P. C.* 36.]

Kishna Nund Misr *v.*
Superintendent of Encumbered Estates, Mahdowna.

Oudh. Sir Barnes Peacock. *May* 20, 1879.

Question of sub-settlement in tenure under the Maharajah Maun Sing. Character of tenant's agreement or leases are such that they last for appellant's life, and continue from one Maharajah to another. Question turned on effect of written words used by the late Maharajah, from which it was to be inferred that the appellant was entitled to a sub-settlement for life. Judgments below reversed, and decision of settlement officer affirmed. Costs in lower Courts and here to be paid to appellant. [*P. C. Ar.*]

Rani Surut Soondari Debya *v.*
Prangobind Mozoomdar and Others.

Bengal. Sir Montague Smith. *May* 21, 1879.

Suit by a Zemindar Ranee to recover enhanced rent from Talookdars. History of the lengthy litigation in the case. Evidence that the Talook was not held at a fixed and unvaried rent. *Rufunamah* or deed of compromise by one member of the family. She, however, having only limited estate, her compromise is not binding on her successors. Appeal of the Rani allowed, with costs. [*P. C. Ar.*]

London Chartered Bank of Australia *v.*
White and Others.

Victoria. Sir Robert Collier. *May* 23, 1879.

Agreement between a bank and a customer whereby in return for money advanced a lien on securities (deposited with the bank) of landed estates is given to the bank. Certain of these parcels of land are afterwards mortgaged by the customer to other parties, and he (the customer) having later on become bankrupt, the bank sold two of the properties. Litigation ensues on the question of accounts. What are the claims of the bank, and what are the claims of the second mortgagees (the respondents) on the properties also? Are the deposited securities to be treated by the bank as security for the customer's general account, or are they to be applicable only to particular advances? What benefits accrue to second mortgagees from reduction of customer's debt with bank? Law as to banker's lien. What interest is bank entitled to claim on their debt? The Judicial Committee said that the bank having acquiesced in the finding of the First Court, that the securities deposited were in respect of specific sums, and not having put any objection in to their grounds of appeal to the full Court, were precluded from raising the question now. Having made important obser-

vations on the chargeability of interest (which should in certain circumstances be simple interest), and on the ruling below as to costs in the Colony (with which their Lordships do not interfere), the Committee in the result affirm the judgment below. Appellants to pay the costs of the appeal.

[4 *App. Cas.* 413; 48 *L. J. P. C.* 75.]

Chidambaram Chettiar and Others *v.*
Gouri Nachiar and Another.

Madras. Sir James Colvile. *May* 27, 1879.

Claim by younger son of a Zemindar against his elder brother and others, who professed to be owners, or to have an interest in different villages of the estate, under titles from the Zemindar or from the aforesaid elder brother. Partition. Moieties of the brothers. Alienations under Hindoo law; what are valid and what are not. *Appovier* v. *Rama Subba Aujan*, 11 Moore's Ind. App. 75. Law as to succession to separate estate. Held, that there had been a partition, and that there was no ground for the contention that upon the death of the original plaintiff his interest passed to his elder brother, and not to his own representatives, in the course of succession to separate estate, as ascertained in the suit. Affirmed with costs.

[*I. L. R.* 2 *Mad.* 83; *L. R.* 6 *Ind. App.* 177.]

Kali Kishen Tagore *v.*
Jodoo Lal Mullick.

Bengal. Sir Robert Collier. *June* 11, 1879.

Dispute as to the boundary of a garden on opposite sides of a Khal, or tidal creek, in the Hooghly. Alteration of the direction of one boundary wall, thereby producing alleged injury to neighbour's property, and obstruction to public navigation. Inquiry into the precise extent of the encroachment: *Bickett* v. *Morris et ux.*, L. R. 1 Scotch Appeals, House of Lords, 47; *Orr*

Ewing et al. v. *Colquhoun*, L. R. 2 App. Cas., House of Lords, 839. Erroneous statements as to cause of action. Khal being Government property, the complaining riparian proprietor cannot raise objections to what the Government sanction. The appeal against the judgment of the High Court, which declared that injury had been done, is now allowed. Their Lordships holding that the complainant (the respondent) had shown no solid injury to his rights. Reversed. Judgment of subordinate Court affirmed. Appellant to have costs of the appeal in the High Court, and of this appeal. [*L. R.* 6 *Ind. App.* 190.]

Castle Mona Company *v.*
Jackson.

Isle of Man. SIR JAMES COLVILE. *June* 11, 1879.

Detinue. Jackson was owner of Falcon Cliff, an estate adjoining the Castle Mona Hotel, which was the property of the appellants. Jackson leased Falcon Cliff with use of furniture, and with option of purchase, to a man called Gough. Gough became insolvent, and Jackson was empowered by the Hotel Company to purchase for them Gough's interest in the lease. The Hotel Company paid him a sum of money for this, and, as they contend, for a right in the furniture also, which would enable them, when disposing of the lease, to pass the furniture with it over to new assignees. A new assignee called Forster eventually bought the lease. Jackson, relying chiefly on the "conditions of sale," which excluded furniture, contended that the company had no right to detain the latter. Judgment of Judicial Committee affirms decree below in Jackson's favour. [*P. C. Ar.*]

Ram Chunder Bysack *v.*
Dinonath Surma Sirkar.

Bengal. SIR BARNES PEACOCK. *June* 13, 1879.

A question of title to 12 annas share of Mouzahs. Question arose after a sale in execution of a decree of the Sudder Ameen of Fureedpore. Benamee sale. Plaintiff's (respondent's) claim

to recover is disallowed by the Judicial Committee, who prefer supporting appellant's title by reason of a second sale. Decree of High Court reversed. Decree of First Court, declaring the first sale fictitious, is upheld. Plaintiff's (respondent's) suit dismissed, and he is to pay all costs below and here. [*P. C. Ar.*]

National Bank of Australasia *v.*
United Hand-in-Hand and Band of Hope Company and Lakeland.

(Two Appeals consolidated.)

Victoria. Sir James Colvile. *June* 14, 1879.

The company was formed for the purpose of working certain mines at Ballarat. They executed certain mortgages on their property in order to provide a loan of large sum from the National Bank. Arrangement provided no specific time for repayment, but gave Bank a power of sale and other authority if demands from the Bank for the debt due were not met. Subsequent transactions of the Bank, including a sale of the mine to Lakeland, were impeached by the company. Although the Bank realised much, and might but for their own laches have realised more than they did from the mine, they ultimately claimed to possess an absolute title to the property mortgaged. Judicial Committee affirm decree and decretal order of Supreme Court, being satisfied the Bank had proved no absolute title, and had already been overpaid in its character of mortgagee when the bill was filed. Transfer of Lands Act (Victoria Statutes), Vol. III. p. 2467. *Campbell* v. *Commercial Bank of Sydney.* [*P. C. Ar., Feb.* 15, 1879.] *Vide* observations of Lord St. Leonards in the case of *Incorporated Society* v. *Richards*, 1 Dr. & W. 334, &c. [4 *App. Cas.* 391; 4 *L. J. P. C.* 50.]

Ramasami Aiyan and Others *v.*
Vencataramaiyan, *alias* **Chidambaram.**

Madras. Sir Robert Collier. *June* 14, 1879.

Rhangasawmi, a wealthy landowner, hands over by agreements certain lands to his relatives and to his agent, one

Ramasami. Rhangasawmi also leaves lands to his wife, Lokambal, daughter of Ramasami, with stipulation to her to adopt. This is a suit by Chidambaram, the adopted heir, to set aside considerable alienations to Ramasami and others (all of which alienations were the result of negotiations after the death of his father (by the adoption)). Appellants deny that Chidambaram has been unjustly ousted out of any lands, and maintain the validity of all transactions for the transfer from time to time of properties. Are agreements of a father binding on an adopted heir when he comes of age? *Chitko Raghunath Rajadiksh and Others* v. *Janaki*, 11 Bomb. H. C. Rep. 199. Their Lordships pronounce against Chidambaram, holding that he is bound by a deed he himself executed, purporting to be a final adjustment of all his family difficulties, in 1871, when he was of full age and capacity. Both decrees below reversed. The cause is, however, remanded to Trichinopoly for re-trial on the minor issue whether Chidambaram has been ousted out of property since the execution of his deed, and whether he is owed a share of certain compensation allowed by the Railway Department. Each party to pay their own costs of this appeal. Costs below to abide final result.

[*L. R.* 6 *Ind. App.* 196; *I. L. R.* 2 *Mad.* 91.]

Petition for leave to appeal *in formâ pauperis* in the cause of **Kishen Dutt Misr** *v.* **Tameswar Parshad.**

Bengal, N. W. P. Sir Barnes Peacock. *June* 14, 1879.

Pauper petition. Alleged alienation of joint estate. Great delay in bringing the petition, but in any case no probability of petitioner making his cause good. Dismissed. [*P. C. Ar.*]

S.S. "Earl of Lonsdale" *v.* **Sims & Co.**

Vice-Admiralty, Quebec, Canada. Sir Robert Phillimore. *June* 18, 1879.

Appeal in four suits brought by respondents, owners of a schooner and three barges against a steamship in a case of col-

lision. Steamer was proceeding up the St. Lawrence when she ran into collision with a train of barges which were being towed down river. Length of steamer, wrongful direction of helm by steamer at critical point of the river. Affirmed with costs.

[*P. C. Ar.*]

"Byfoged Christensen" *v.*
"William Frederick" and
Cross Appeal.

Vice-Admiralty, Gibraltar. Sir Robert Phillimore.
June 19, 1879.

Collision off Cape Spartel (mouth of the Mediterranean), between a barque and a schooner. Sailing rules applicable to case are the 12th and 18th of Rules of the Road at Sea. Direction of the wind relatively for each vessel of greatest importance in this cause, in order to prove which vessel was bound to make room for the other, and which ship had most points of wind in her favour, and was, therefore, most free. The Judicial Committee, discharging the decree below, pronounced the "Byfoged Christensen" alone to blame, and allowed the cross appeal. The appellants are to pay costs of both suits below, and of these appeals. [4 *App. Cas.* 669.]

Happuatchigey Baba Appoo and Others *v.*
The Queen's Advocate.

Ceylon. Sir Robert Collier. *June* 21, 1879.

Dispute with the Crown as to title to forest land in a portion of which plumbago existed. Claim by appellants for possession through cultivation. Definition of Asweddumizing (rice culture), and the Chena process (clearing the jungle). Title of Crown to forest lands in Ceylon derived from an Ordinance of 1840. Grants of Dutch Government in 1736. Definition of an *Amonam.* Reference made to Thombo or land registry of

last century. Cultivation within the meaning of the Ordinance not proved. Affirmed with costs. [*P. C. Ar.*]

Rughoobur Dyal Sahoo and Others *v.*
Maharajah Kishen Pertab Sahee.

Bengal. SIR BARNES PEACOCK. *June* 25, 1879.

Effect of change in the course of a river when land settlements come to be renewed. Proprietorship by accretion. Was there a clear and definite "usage" that the river should be the boundary to respective Zemindaries? This suit was remanded by the Privy Council (Order in Council, August 4, 1873, P. C. Ar.), for re-trial on this very point of "usage." The lower Court found there was no evidence of such, but High Court reversed that decision. The Privy Council now upheld the decision of the lower Court, and declared that the land in dispute, though temporary, was an alluvion to the estate owned by appellants, and that they do now recover it with mesne profits and all costs. [*L. R.* 6 *Ind. App.* 211.]

Lala Dwarka Doss and Others *v.*
Rai Sita Ram.

[*Ex parte.*]

Bengal, N. W. P. SIR MONTAGUE SMITH. *June* 27, 1879.

Action by respondent, Rai Sita Ram, against Native bankers for recovery of quantity of gold deposited with them by one Luchman Dass. Rai Sita Ram claimed as the purchaser of Luchman's right and interest. Validity of *surkhut* or bank receipt. Evidence of possession on the part of Luchman, and of transfer to Rai Sita Ram, having all been subjects of much consideration, the Judicial Committee affirm the decree as against the bank. [*P. C. Ar.*]

Darimbya Debbya *v.*
Maharajah Nilmoney Singh Deo Bahadoor.
[*Ex parte.*]

Bengal. SIR ROBERT COLLIER. *June* 28, 1879.

Two suits involved in question. In the first, the widow of a pundit alleges her husband was induced to enter into a contract for the lease of an estate by alleged fraudulent misrepresentation (as to the value thereof) on the part of the Rajah of Pachete. In the second suit, Rajah instituted a suit against the widow for rent due. Their Lordships take view of High Court that charge of fraud is not made out, and that therefore Rajah is entitled to rent claimed. [*P. C. Ar.*]

Vadrevu Ranganayakamma *v.*
Vadrevu Bulli Ramaiya.

Madras. SIR BARNES PEACOCK. *July* 5, 1879.

Claim to zemindary which had belonged to a joint family estate. Partition of family and allotment of zemindary in question. Validity of Sunnud effecting partition. Claim of the present occupier (a widow) recognised by the Government. A further claim that the zemindary descended by "custom" to the respondent it was not necessary to go into, as the Sunnud dividing the estate is upheld. Appeal is allowed, with costs. [*P. C. Ar.*]

Bissessur Lall Sahoo *v.*
Maharajah Luchmessur Singh (minor under Court of Wards).

Bengal. SIR ROBERT COLLIER. *July* 15, 1879.

Action to set aside execution. Execution sale is held to recover rent due on leasehold property, which was purchased by

a member of a Hindu family with joint funds. Claim is set up after sale, alleging that the property confiscated was personal property, and not joint family estate. High Court, and now Judicial Committee, uphold the High Court's decree; held, that the complainants in the litigation were treated rightly, as representing their joint family, and that executions were properly levied (for a family debt) out of the family estate. Affirmed, with costs. [*L. R.* 6 *Ind. App.* 233.]

Seths Sameer Mull and Another *v.* Choga Lall.

Ajmere. SIR ROBERT COLLIER. *July* 18, 1879.

Dispute as to dealing in cotton. Suit to recover money alleged to have been paid by appellants, as guarantors of respondent. The Pauri custom. Trading with "Araths" as mercantile guarantors, a class of persons peculiar to Nyanuggur. Held, reversing decision of Judicial Commissioner, that the appellants, who advanced the money to the respondent's vendors, were entitled to treat the use of their name by the respondent as an authority to make the payment on his behalf, and that the respondent cannot dispute their right to do so.

[*L. R.* 6 *Ind. App.* 238.]

Rajah Bijai Bahadur Singh *v.* Baboo Bhyron Bux Singh.

[*Ex parte.*]

Oudh. SIR MONTAGUE SMITH. *July* 19, 1879.

Concurrent judgments upholding a claim made by the respondent, the illegitimate son of Rajah, to certain villages, or other villages in the same Talook in substitution of the aforesaid villages. These had been conferred by Pottahs of the father. The legitimate son disputes claim on the following, among other, grounds, that the gift was abrogated; and secondly, that the

arrangement of possession has, since the decease of the father, been altered by the settlement officer. Appeal fails. Judgments below affirmed. [*P. C. Ar.*]

Oriental Bank Corporation *v.*
Justus Lembke.

Hong Kong. SIR HENRY S. KEATING. *July* 22, 1879.

Alleged improper surrender of shipping documents. The respondent had a letter of credit from Im Thurn & Co., London, authorising him to draw upon them to a certain amount in return for his shipped produce. Wishing to negotiate some bills with the appellants' bank in Hong Kong, Lembke takes the bill to them, and as security handed them the London letter of credit, and (as *further* security) a letter of hypothecation on the shipping documents. Later on the appellants parted with all the documents when obtaining acceptance of the bills from Im Thurn & Co. in London. This firm subsequently failed, and Lembke instituted action, contending appellants were bound to withhold these papers. Judicial Committee allowed appeal, with costs, holding that, according to the construction of letter of hypothecation, taken together with the letter of credit, and the form in which the bills were drawn, the appellants, though they might have retained the documents, were justified in taking the course they did. [*P. C. Ar.*]

Ashutosh Dutt *v.*
Doorga Churn Chatterjee and Another.

Bengal. SIR BARNES PEACOCK. *July* 26, 1879.

Attachment of property for debt. Allegation by the respondents, that the estate was not liable to attachment, inasmuch as they held it in trust (as debuttur property) for an idol by virtue of a will executed by their mother. The Judicial Committee upheld the *bonâ fide* character of the will, but are of opinion

the property disposed of under it was not wholly debuttur, and that the "surplus," as, indeed, the testatrix had desired, went to the several members of the joint family, of which the principal respondent, Doorga Churn, was a member. His personal beneficial interest out of the surplus *was* liable to attachment, and sale in execution. A clause in the will, that none of the surplus could be attached for debt, was *ultra vires*. Reversed, but as *bona fides* of will is not upset, appellant does not obtain costs of appeal. [*L. R.* 6 *Ind. App.* 182.]

Collins *v.*
Locke.

Victoria. SIR MONTAGUE SMITH. *July* 26, 1879.

Several persons, including the appellant and respondent, had covenanted to undertake the business of stevedoring ships arriving in the Port of Melbourne. By the terms of the covenant, each of the parties respectively agreed to stevedore particular ships, and in no way trespass on the business of their fellow covenantors. There were several other conditions. Locke had sued Collins for breach of contract, and had been awarded damages. Collins now sought to prove that the *prohibitions* of the covenant deed *were unreasonable and created restraint in trade.* (For cases on such subjects, see notes to *Mitchell* v. *Reynolds*, in 1st vol. of Smith's Leading Cases.) This contention is partially proved to the satisfaction of Judicial Committee. The two judgments of the Supreme Court (one discharging a rule *nisi* for new trial, and the other allowing demurrer to pleas advanced by Collins) are varied. Their Lordships uphold the rule for a new trial on certain issues, and pronounce on the demurrers in one case for the respondent, and in others favourably to the appellant. The appellant having succeeded only on the point of the partial invalidity of the agreement, in respect to which both parties are equally in fault, their Lordships make no order as to the costs of the appeal. [4 *App. Cas.* 674; 48 *L. J. P. C.* 48.]

De Cordova and Others *v.*
De Cordova.

Jamaica. SIR BARNES PEACOCK. *July* 26, 1879.

This is an appeal against a decision which re-instated a son as a beneficiary under his father's will, and condemning the contention of the executors and executrix of the parent-testator that a compromise with creditors of one executor and agreed to by other legatees, but not by the present respondent, was valid. Their lordships endorsed the opinion below that this compromise was invalid against the respondent, and quoted *Cooke* v. *Collingridge*, 1 Jac. 607, and *Ex parte Lacey*, 6 Ves. 625, as deciding that an executor cannot compromise a debt due from himself to the estate. It appeared also that payments were made prior to the compromise with certain of the signatories thereto. Their lordships upheld the decision below on the main point as to the invalidity of the composition. The first appellant ought to pay the costs of the appeal. As regards the other two appellants, the decree would be varied in a material point: they ought not to receive or pay any costs of appeal.
[4 *App. Cas.* 692.]

Robertson and Others *v.*
Day.

New South Wales. SIR ROBERT COLLIER. *Nov.* 13, 1879.

Appellants are lessees of a "run" of land in the colony, and they brought an action against the respondent, a neighbour, for trespass thereon. Respondent's defence was that he had obtained the land as a "free selector." The whole question related to the manner in which title is acquired under Colonial Crown Land Acts. The case rested on the construction to be put upon certain words in one of these Acts (the Alienation Act of 1861), and particularly on the expression "square mile." Their lordships reversed the judgment, holding that the words expressed area rather than absolute geometrical symmetry, and were to be

used in the popular rather than the strictly mathematical sense. Verdict obtained before the case went on appeal is to stand. Appellants to have costs of appeal.

[5 *App. Cas.* 63; 49 *L. J. P. C.* 9.]

Dewan Manwar Ali *v.*

Unnoda Pershad Roy.

Bengal. SIR JAMES COLVILE. *Nov.* 14, 1879.

The present appellant was original plaintiff, and he sued to set aside an alleged lakhiraj ("rent free") tenure within his share of an ijmali or joint zemindary. The respondent-defendant claimed the tenure on the ground that it was purchased at a sale in execution of the interest therein of a previous holder. The chief question was whether the appellant's right to sue to set aside the claim of lakhiraj was barred by limitation. Their Lordships reversed appeal, holding that the lands in question belonged to a family zemindary, and were khalisha lands and not lakhiraj, and, moreover, that appellant (by 145 Article, 2nd Schedule, Act of 1871) was within the twelve years' limitation, and could sue for recovery of his rights. Reversed, with costs.

[*L. R.* 7 *Ind. App.* 1.]

Pearson and Others *v.*

Spence.

Court of Appeal and Supreme Court of New Zealand. SIR ROBERT COLLIER. *Nov.* 19, 1879.

Waste lands case. The question arose on demurrer to a declaration of title. An application on the part of Spence to buy waste lands at the government figure is received by the Waste Lands Commissioners. They adjourn sending reply, and pending the delay the government raised the price per acre from 1*l.* to 3*l.* (Southland Waste Lands Act, 1865). The appellants (de-

fendants) were the commissioner and other persons who claimed a right to purchase in preference to that of the respondent. Court of Appeal decreed that Spence should have land at the valuation in force when he applied for it, and their Lordships uphold this view and declare the demurrers unsustainable. Affirmed, with costs. [5 *App. Cas.* 70; 49 *L. J. P. C.* 13.]

Nagardas Saubhagyadas *v.*
The Conservator of Forests and the Sub-Collector of Kolaba.

Bombay. SIR BARNES PEACOCK. *Nov.* 21, 1879.

Claim against the Conservators of Forests at Bombay for a certain share of teak and Izaili timber (inferior wood). Plaintiff (appellant) claimed that while the Government were entitled to a share of the timber in a certain village and certain forests, he was a larger owner; and he alleged the conservators had illegally cut down both kinds of wood in his plantations: *Watani Khoti and Isafati* (hereditary village). Their Lordships agree to report that the appellant has made out no title to teak wood, and that as regards the Izaili wood there is no evidence that the Government had cut down Izaili wood, nor of their having recovered the value of Izaili wood cut in any part of the village, except the Government reserves. The appeal is dismissed, with costs. [*L. R.* 7 *Ind. App.* 55.]

Bell *v.*
The Mayor and Corporation of the City of Quebec.

Canada. SIR MONTAGUE SMITH. *Nov.* 22, 1879.

This litigation arose out of the construction of a bridge by the Corporation of Quebec over a tributary of the St. Lawrence River. Bell, who has land below this and another (older) bridge, demanded damages, on the ground that the new bridge obstructed

navigation. The cases of *Caledonian Railway Co.* v. *Ogilvy*, 2 Scotch App. H. of Lords, 229; and *Attorney-General* v. *Conservators of the River Thames*, 1 H. & M. 1, are quoted to point out the distinction between the right of access from the river to a riparian frontage, and the right of navigation upon it. The bridge was built for the improvement of the city, and conferred great benefits on the citizens. Their Lordships considered that it did not interfere with the access to the appellant's land. It was therefore necessary by the law of Canada that some special damage should be proved, but none had been established. Appeal dismissed, with costs.

[5 *App. Cas.* 84; 49 *L. J. P. C.* 1.]

Petition of F. W. Quarry.

N. W. P. Bengal. SIR JAMES COLVILE. *Nov.* 25, 1879.

Application by a Vakeel for leave to appeal against an order of suspension for three months made by the High Court. The period of suspension had expired prior to this application, but this alone would not induce their Lordships to refuse the application if any lasting stigma on a man's character had been passed. The Judicial Committee were of opinion that the High Court had acted within their jurisdiction. Application refused.

[*L. R.* 7 *Ind. App.* 6.]

Rani Lekraj Kuar *v.*
Baboo Mahpal Singh, and
Rani Rughubans Kuar *v.*
Baboo Mahpal Singh.
(Consolidated Appeals.)

From the Courts of the Commissioner of Lucknow and the Judicial Commissioner of Oudh. SIR MONTAGUE SMITH. *Nov.* 25, 1879.

Heirship to a Talook in Oudh. According to Hindu law a daughter is entitled to the inheritance of her sonless father

in preference to male claims by cousins. The appellant, Rughubans Kuar, is daughter of last holder. Lekraj Kuar is widow of last holder's father, and she considered she ought not to be ousted from possession unless and until respondent proved title to oust the daughter. The chief question in this cause is whether in the *Bahrulia clan*, to which this family belonged, a custom exists debarring daughters from succeeding to their father's estate. Were the Wajibularz (or village administration papers, made in pursuance of Regulation VII. of 1822) admissible in proof of this custom? Indian Evidence Act, 1872, ss. 34, 35 and 48. Their Lordships report that they were admissible, and that the effect of them, as upholding custom, was not disproved. Judgments below affirmed. Appeals dismissed with costs. [*L. R.* 7 *Ind. App.* 63.]

Badri Parshad *v.*
Baboo Murlidhur and Others.

N. W. P. Bengal. Sir James Colvile. *Nov.* 27, 1879.

This is a suit brought by the purchaser of a mortgagor's interest (the appellant) against the purchasers and assignees of the mortgagee's interest. Mortgage was for the Malikana interest of certain Talookdars. Validity of the contract made with mortgagee's interests. Were accounts properly made? Effect of Regulation XXXIV. of 1803, regulating Malikana collection, accounts, &c. Concurrent judgments in favour of validity of contract, and that there was no evasion of the law. Under what circumstances must mortgagees file accounts? Difference when the accounts are fluctuating and when they are fixed and unvarying. Affirmed, with costs. [*L. R.* 7 *Ind. App.* 51.]

Dinomoyi Debi Chowdhrani *v.*
Roy Luchmiput Sing Bahadoor.

Bengal. Sir Montague Smith. *Dec.* 3, 1879.

Suit by a banker to recover alleged balance of banking account. The defendant, Dinomoyi (now appellant), denied (first)

that any balance was due, and (second) if it ever was due, the right to recover was barred by the Statute of Limitations: Act IX. of 1871, sect. 20. Signatures on accounts. Alleged delay by the banker in adjusting accounts. Did appellant give authority to an agent to make acknowledgment to bank on her behalf, and was such authority continued or not within the limitation period? Remarks of their Lordships on the great value of producing actual documents rather than accepting parol evidence of what these documents may have contained. The Judicial Committee pronounce in favour of Dinomoyi (the customer of bank), holding that authority to make acknowledgments did not continue to the time when the acknowledgments were made, and recommend the reversal of the decrees appealed against, with costs. [*L. R.* 7 *Ind. App.* 8.]

Sir Maharajah Drig Bijai Sing *v.*

Gopal Datt Panday (*Ex parte*).

Oudh. Sir Robert Collier. *Dec.* 5, 1879.

Birt tenure case. "Birt-shankallap." Plaintiff, now respondent, made a claim to certain villages in virtue of an alleged under-proprietary right. Effect of settlement. Circular Order of 1861. Circular Order treated as law. The settlement officer dismissed the suit on the ground that the plaintiff had not proved he was actually in possession in 1855, the year before the annexation of Oudh. Subsequently the matter was remanded back from the Commissioner of Oudh to the settlement officer, and that officer, as well as the Commissioner himself, found that plaintiff *was* entitled to the claim under a "birt-shankallap" right. The Maharajah appealed to Privy Council (Limitation) Act XVI. of 1865. "Continuous holding," as demanded by the Act, is proved, and the judgment below is upheld by the Judicial Committee. Affirmed. [*L. R.* 7 *Ind. App.* 17.]

Indromoni Chowdhrani *v.*
Behari Lal Mullick for Self, and as Guardian of
Haran Krishna Mullick (*Ex parte*).

Bengal. Sir James Colvile. *Dec.* 11, 1879.

Adoption. Claim to property. Testamentary gift. The appellant alleged that the respondent was fraudulently holding the property as against the appellant's right under a will, upon the pretence that the previous heir and possessor had adopted the (respondent's) brother Haran Krishna, and that he was that heir's guardian. Form of adoption among *sudras* of Bengal. This adoption is established to the satisfaction of their Lordships, and the title claimed by respondent being sustained, it was unnecessary to consider the question of the testamentary gift. Affirmed. [*L. R.* 7 *Ind. App.* 24.]

Rajah Venkata Narisimha Appa Row Bahadoor *v.*
The Court of Wards, acting on behalf of the minor Children and Heirs of the late Respondent **Rajah Narayya Appa Row Bahadoor** and Others.

Madras. Sir Barnes Peacock. *Dec.* 13, 1879.

The Nuzvid Zemindary case. The appellant was the original plaintiff, and claimed a sixth part of a Zemindary by inheritance as one of the six sons of a Rajah thereof. The Zemindary originally formed part of ancient estates which formed a military jaghire. Held, on the tenure of military service, *impartible, and descendible only to the oldest male heir.* The estates were resumed by government, and early in this century two Zemindaries were carved out of them, and two descendants of the family were made heirs respectively over these. One of these Zemindaries is the subject of this litigation. It is contended by appellant that, in accordance with the terms of the Sunnud issued by government, when dividing and distributing the property, the intention was to make the Zemindary partible

among the heirs and successors of the Rajah in future, and not to resuscitate the ancient rule. Other questions were involved, including one as to whether an act of state creating Zemindaries superseded the titles under which the estates were first held. The Judicial Committee allow the appeal, and decide that, on the proper construction of the Sunnud of 1802, the Zemindary was not impartible, or descendible otherwise than in accordance with the usage of Hindu law. Appeal allowed, with costs. Mesne profits during dispossession to be assessed and paid to the appellant. [*L. R.* 7 *Ind. App.* 38.]

Musgrave *v.*
Pulido.

Jamaica. SIR MONTAGUE SMITH. *Dec.* 13, 1879.

Right of the Governor of a colony (the appellant) to seize and detain a ship. Can he claim immunity from liability for such an act? The ship in question was supposed to be carrying munitions of war, and the Governor pleaded that he acted in the *bonâ fide* discharge of his duty. "Act of State." Authorities quoted—*Cameron* v. *Kyte*, 3 Knapp, 332; *Hill* v. *Bigge*, 3 Moore's P. C. 465; *Phillips* v. *Eyre*, L. R. 6 Ex. 31; *Tandy* v. *Earl of Westmoreland*, 17 State Trials, 1246; *Luby* v. *Lord Wodehouse*, 17 Irish Common Law Reports, 618; *Rajah of Tanjore's case*, 13 Moore's P. C. 22, &c., &c. Held that a Governor is not a Viceroy. Held, also, that the Court had jurisdiction to entertain the questions raised. Affirmed, with costs.
[5 *App. Cas.* 102; 49 *L. J. P. C.* 20.]

Petition and Doléance of N——.

Jersey. SIR JAMES COLVILE. *Dec.* 16, 1879.

Appointment by the Jersey Court of a curateur of the person and property of a man alleged to be intemperate. In 1868 the petitioner, after being interdicted for ten years, and believing that he was in sound health and fit to manage his property, applied for restitution of his civil rights. This was refused, and hence the appeal. In accordance with the law of Jersey, no appeal lies in cases of this nature as of right, but this fact does

not interfere with her Majesty's prerogative to grant leave, nor with a procedure (as their Lordships preferred to take this matter) by way of doléance. Evidence of petitioner's capability. The annulment of the curatelle, and the rehabilitation of the petitioner with all civil rights, is recommended.

[5 *App. Cas.* 346; 49 *L. J. P. C.* 51.]

Trimble *v.*
Hill.

New South Wales. Sir Montague Smith. *Dec.* 16, 1879.

Suit arising out of a racing bet. A revocation of the authority to pay the money was sent to the stakeholder before the day fixed for the race. The question then arose, was the depositor of the stake entitled to have it returned to him. On the grounds laid down in *Diggle* v. *Higgs*, 2 L. R. Ex. D. p. 422, their Lordships decided that he was, and recommended accordingly. Appeal allowed with costs. Nonsuit set aside, and judgment entered for the plaintiff-appellant.

[5 *App. Cas.* 342; 49 *L. J. P. C.* 49]

Dias *v.*
De Livera.

Ceylon. Sir Robert Collier. *Dec.* 19, 1879.

Mutual will case. Roman Dutch Law of Ceylon. The plaintiff-appellant, Engeltina Dias, was granddaughter of Don Adrian Modliar and his wife Cornelia (the makers of the will), and daughter of the only daughter of those persons by name. The chief question in the cause was whether the children of Engeltina's mother by a second marriage were entitled to shares of property to her (Engeltina's) disadvantage, she being a daughter by the first marriage. Construction of the will, and particularly of a passage containing words of gift to "other children to be hereafter procreated." Various authorities cited to support the contentions that the bequest was confined to the mother, her first husband, and her then existing daughter, and that after the death of the settlors, other children born to the mother by her second husband (the respondent) did not succeed

to shares. "Class" or offspring of wife and husband in first marriage alone are heirs: *Storr* v. *Benbow*, 2 Milne & Keen, 46; *Sprackling* v. *Ranier*, 1 Dick. 344; *Ringrose* v. *Bramham*, 2 Cox, 384; *Butler* v. *Lowe*, 10 Sim. 317; *Whitbread* v. *Lord St. John*, 10 Ves. 152; *Parker* v. *Tootal*, 11 H. L. Cas. 164; *Gooch* v. *Gooch*, 14 Beav. 565; Williams on Executors, &c. On the question of the relative shares of husband, wife, and daughter, Roman Dutch Law assumes husband and wife two people, and this view their Lordships follow in the decision, in opposition to the English maxim that they are one person in law. Judgment below reversed, and in lieu thereof their Lordships declared that the children of Merciana by her second husband took nothing under the will of Don Adrian and Cornelia, his wife; that upon the death of Don Adrian, his half of the property dealt with by the will became divisible in three equal shares among Merciana, Dias, and the appellant; that upon the death of Cornelia, her half of the property became divisible in equal shares between Merciana and the appellant; and that the appellant is entitled to half of the property held in community by Dias and his wife, and the cause be remitted, with these declarations, to the Supreme Court. No costs of appeal.

[5 *App. Cas.* 123; 49 *L. J. P. C.* 26.]

Wise and Others *v.*
Ameerunnissa Khatoon, and
Wise and Others *v.*
Collector of Backergunge and Others.
(Heard *Ex parte.*)

(Two Consolidated Appeals.)

Bengal. Sir Barnes Peacock. *Dec.* 19, 1879.

Claim to several churs formed in the bed of a river. Right of Government to possession, as the lands had originally formed an island surrounded by water not fordable. Title is set up by appellants on the ground of Prescription. Limitation. Act XIV. of 1859, s. 15. Judgment below, that title by prescription is not proved; affirmed. [*L. R.* 7 *Ind. App.* 73.]

1880.

Sturge and Others *v.*
Field and Others.

Leeward Islands. Sir Barnes Peacock. *Jan.* 29, 1880.

This was an appeal against a direction for a new trial. Litigation arose out of an alleged debt to a testator's estate. Action to recover the alleged debt is continued by respondents, devisees under the will, notwithstanding that the executors (the appellants) revoked their sanction to its being proceeded with. The appeal is allowed, with costs, and the verdict of first Court, which was to the effect that the litigation had been carried on without lawful authority and that no debt existed, was affirmed.

[*P. C. Ar.*]

Lambkin *v.*
South Eastern Railway Company of Canada.

Canada. Sir Robert Collier. *Feb.* 3, 1880.

Appeal brought by special leave. Action by appellant for damages against a railway company. Seven thousand dollars awarded. Demolition of bridges during a storm. Negligence of company's servants in not (with sufficient time at disposal) giving warning to advancing train. Rule for new trial. Their Lordships recommend the discharge of the Rule and the re-

instatement of Lambkin in $7,000 damages. Appellant to have costs of the appeal in Canada and of the appeal to England.

[5 *App. Cas.* 352.]

Baboo Dooli Chand and **Others** *v.*
Baboo Birj Bhookun Lal Awasti.

Bengal. Sir James Colvile. *Feb.* 4, 1880.

Validity of a Kobala, or conveyance, set up by appellants, by which the property of an infant ward was alleged to have been alienated. Does the Kobala come within the rules which enable a guardian to alienate? Can the interest of an infant heir on a mere expectancy of an estate be the subject of a conveyance? Absence of proof for justifying necessity for the conveyance fatal to the suit. Affirmed, with costs. [*P. C. Ar.*]

The New Beerbhoom Coal Company, Limited *v.*
Boloram Mahata and Others.

Bengal. Sir Barnes Peacock. *Feb.* 6, 1880.

Terms of a contract with a family named the Mahatas for the settlement of land. Was the power to lease adjoining land granted or implied under the contract? Use to which any or all the land may or may not be applied. Their Lordships recommend as their decision that the appellants are not entitled to compel the Mahatas to lease additional land to them at reasonable rates except for the purpose for which the original lease for land was granted. Affirmed.

[*L. R.* 7 *Ind. App.* 107; 1 *L. R.* 5 *Calc.* 175, 932.]

Petition to rescind Order granting leave to appeal in **Goldring** *v.* **La Banque D'Hochelaga.**

Canada. Sir James Colvile. *Feb.* 7, 1880.

Petition to rescind the order granting leave to appeal. Competency of Court of Queen's Bench, Canada, to grant leave from

an interlocutory judgment as opposed to a final one. What is a final judgment? Code of Canada. Recommended that order be rescinded but, the point being *novel, without costs.*

[5 *App. Cas.* 371; 49 *L. J. P. C.* 82.]

Dorion *v.*
Les Ecclésiastiques du Séminaire de St. Sulpice de Montréal.

Canada. Sir Montague Smith. *Feb.* 10, 1880.

Action *en garantie* relating to the expenses of keeping a road. Is an obligation to repair a road granted in a seignorial deed quashed by a sheriff's sale of the property? Articles of the Code of Procedure on Sheriffs' Sales. Did the original deed of grant of the estate create a servitude? Definitions of servitude under Canadian and French Codes. Committee agree that the Court of Queen's Bench was right, that a servitude did exist and could not be quashed by sheriff's sale; that it was kept alive by force of Article 709 of the Code of Procedure. Their Lordships also recommended her Majesty to order that the right of servitude had not ceased by prescription.

[5 *App. Cas.* 362; 49 *L. J. P. C.* 32.]

Barclay (registered public officer of the Commercial Bank) *v.*
The Bank of New South Wales.

New South Wales. Sir Robert Collier. *Feb.* 12, 1880.

The question in this appeal arose upon demurrers and other interlocutory proceedings in an action between two banking companies. Alleged breach of contract. *Delivery* of bills of lading and exchange. Loss of value of goods in consequence. Accord and satisfaction in an agreement.

[5 *App. Cas.* 374.]

Karunabdhi Ganesa Ratnamaiyar and Others *v.*
Gopala Ratnamaiyar and Others.

(Two Consolidated Appeals.)

Madras. SIR BARNES PEACOCK. *Feb.* 20, 1880.

Suits for division of family property. Adoption. Had a widow authority from her husband to adopt, or had she proper assent on the part of Sapindas; or if she had any assent, was it given from interested motives. The validity of the adoption of the appellant is disputed on several grounds:—1st, that the widow had no authority from her husband to adopt; 2ndly, that she had not got the assent of the Sapindas; and lastly, that her deceased husband could not have married the mother of the adopted boy, that is, his half-sister's daughter, and consequently that the adoption was invalid. "Forbidden affinities," *Menu*, Cap. III., r. 5; Dattaka Mimansa, s. 2, r. 57; Strange's Hindu Law, 101. Judicial Committee affirmed decision of High Court declaring adoption invalid, the assent obtained not being one which would be binding against other heirs. Appellants to pay costs. [*L. R.* 7 *Ind. App.* 173; *I. L. R.* 2 *Mad.* 270.]

Marcar and Another *v.*
Sigg and Another.

Madras. SIR JAMES COLVILE. *Feb.* 21, 1880.

Commercial transactions between appellants, who are coffee and general merchants at Cochin, Madras Presidency, and respondents, who are merchants in Switzerland. Purchase accounts and cross-accounts between the parties. Litigation arises out of advances made to the appellants. Character of the mortgage deeds lodged as security. Liquidating debts by returns of goods. Implications on covenants. Sufficiency of the demand of the respondents for realization of their securities. Affirmed with costs. [*I. L. R.* 2 *Mad.* 239.]

Symes and Another *v.*
Cuvillier and Another.

Canada. Sir Montague Smith. *Feb.* 25, 1880.

Called the *Bassano case.* Marie Symes, the appellant, is the wife of the Marquis de Bassano. While still unmarried Marie Symes, being a young Canadian of considerable wealth, made certain donations to her relatives, among whom were the respondents. The action arose out of claim of Marie Cuvillier and her husband, Mr. De Lisle, for the recovery of certain instalments of the annual donation due to them. *Since the birth of children*, the Marquis and Marquise were informed, and they now contended, that the gifts were, in accordance with the law of Lower Canada, revocable.

The law of France in force in Canada before the institution of the Code of Civil Procedure was exhaustively considered during the hearing of the cause. Held, affirming decree of Court below, with costs, that a gift was not revoked on birth of children by virtue of French Canadian Law.

The facts showed that the lady appellant, soon after she came of age, had given about one-hundreth part of her whole estate to the respondent, in trust for the respondent's five daughters, "*pour partie de leurs frais de toilette et autres petits besoins personnels.*"

Held, by the Judicial Committee, that by the law of Canada, prior to the Civil Code (being that which existed in the jurisprudence of the Parliament of Paris before the Ordinance of 1731), the gift was not revocable on the birth of children to the appellants. This had never been registered in Canada, and was not *proprio vigore.* The French law introduced into Canada by the Edict of Louis XIV., in 1663, remained unaffected by the Ordinance. This Ordinance, which by Art. 39 enacted that all gifts made by persons who had not children at the time of the donation, "*du quelque valeur que les dites donations puissent être, et à quelque titre qu'elles aient été faites . . . . demeureront révoquées de plein droit par la survenance d'un enfant légitime du donateur.*" Their Lordships say, "This Ordinance not having

been registered, it was incumbent upon the appellants to show that the French law introduced into Canada, in 1663, and which presumably continued to be the law there, became altered and modified in consequence of the jurisprudence of the Province having adopted the rules contained in it. The learned counsel for the appellants was unable, after great research, to produce any evidence that the law had been thus changed or modified, and, in its absence, their Lordships think that such a change cannot be presumed."

[5 *App. Cas.* 138; 49 *L. J. P. C.* 54.]

Bourgoin and Another *v.*

La Compagnie du Chemin de Fer de Montréal, Ottawa, et Occidental, and Ross.

(Four Consolidated Appeals.)

Lower Canada. SIR JAMES COLVILE. *Feb.* 26, 1880.

Four suits arising out of an *award* for landed property expropriated, which award the Court of Queen's Bench had annulled as invalid. Arbitration, as regulated by the Canadian Railway Act of 1868. Particulars of the obligations of the lessees under the award. Was some of the compensation properly and some improperly awarded? and is it possible to make the two classes of awards severable? These questions related to the first two appeals, and as to these the Judicial Committee upheld the decision of the Court of Queen's Bench setting aside the award as invalid. The Committee arrived at their judgment with regret, as they feel the appellants, as leaseholders of property expropriated, were entitled to a fair compensation for the expropriation of their quarry, and hope some means will be found for providing this, and for damages. A second question was raised as to whether the railway authorities were competent to transfer their company to another corporate body without the sanction of a competent legislature. The facts showed that the combined effect of a deed and of the Quebec Act of 1875, 39 Vict. c. 2, was to transfer a federal railway—the Montreal, Ottawa and Western Railway Company—to the Quebec Government, and through

it to another company. Held by Committee that an Act of the Dominion Parliament was necessary before such transfer could be validated; the transfer could not be validated by a Provincial Act. (British North America Act, ss. 91, 92, sub-s. 10(c).) The Judicial Committee recommend that the two latter appeals be allowed. A declaration is also made deciding in what manner certain of the findings in the Courts below should be varied in respect to the intervention by the Attorney-General of Quebec (which was not warranted), and in regard to the *opposition à fin de distraire* by the Attorney-General, which should only have been allowed with regard to particular lands. No order as to costs.

[5 *App. Cas.* 381; 49 *L. J. P. C.* 68.]

Mussumat Basmati Kowari *v.*
Baboo Kirut Narain Singh.

Bengal. SIR ROBERT COLLIER. *Feb.* 27, 1880.

Kritima form of adoption. Was it proved? Question wholly of fact. Evidence, documentary and oral, of the alleged adoption. Present appellant opposing the adoption is the widow of the reputed adoptive father. Proof of possession of the estates by other relatives after the death of the alleged adopting father is inconsistent with the claim set up by the alleged adopted son. Other evidence in favour of defendant-widow, who is now appellant. Committee intimate opinion that the High Court was wrong in reversing the decision of the subordinate Court. They are of opinion the adoption had not been proved. Reversed, with costs; thus upholding decision of the subordinate judge, a Hindu gentleman. [*P. C. Ar.*]

Ram Krishna Das Surrowji *v.*
Surfunnissa Begum and Others.

Bengal. SIR JAMES COLVILE. *Feb.* 28, 1880.

Suit by mortgagee (appellant) on alleged completed title by foreclosure to obtain possession of estate from respondent, who

held it as purchaser at an execution sale in a suit against the mortgagor. Alleged execution of mortgage during the subsistence of an attachment. Is a private alienation of property null and void as against attaching creditors and those deriving title under them? Were proper formalities in procedure observed? Principle of Civil Procedure Code on the question of validity of attachments. Act VIII. of 1859, sects. 239 and 240. Judicial Committee consider that upon this record the judgment of the High Court was right. *The objection on one point (the proof of the non-observance of formalities) could not be raised here on appeal for the first time.* That point should have been raised below, when the High Court might have directed further inquiries. Appeal dismissed with costs.

[*L. R.* 7 *Ind. Ap.* 157; *I. L. R.* 6 *Calc.* 129.]

Adrishappa bin Gadgiappa *v.* Gurushidappa bin Gadgiappa.

Bombay. Sir Robert Collier. *Mar.* 5, 1880.

Desai Case. Claim by younger brothers to certain landed property which formed part of the Deshgat Watan of an elder brother (the present appellant), who held the ancient office of Desai. Elder brother contended that by right of custom property was impartible, but admitted that his brother had claims for maintenance. The *onus probandi* in proof of impartibility lies upon the Desai who seeks to show that the property devolves upon him alone, in contravention of the ordinary rule of succession according to the Hindu law. No general presumption in favour of impartibility of estates of the kind. Judgment of High Court declaring that property is partible is now upheld, but the Committee recommend that the decree of the High Court should be accompanied by a declaration that it is without prejudice to the right of the appellant to such emoluments for the performance of the duties of his hereditary Desaiship as he may be entitled to under any law in force. Costs to be added to costs of cause, and to be paid out of estate.

[*L. R.* 7 *Ind. App.* 162.]

Gour Chunder Roy *v.*
Protap Chunder Das.

Bengal. SIR JAMES COLVILE. *Mar.* 5, 1880.

The question in this appeal related to the liability of this appellant as accommodation acceptor of two *hundis*, or native bills of exchange. It was sought to prove that the liability had been discharged in consequence of the respondent (holder of the bills) giving, for valuable consideration, time to the principal debtor (the drawer of the bills). Their Lordships agreed to report in favour of the respondent, and to declare that the appellant (a solvent debtor) could not be relieved from liability. Affirmed, with costs. [*I. L. R.* 6 *Calc.* 241.]

Hira Lall *v.*
Budri Dass and Others.

North Western Provinces, Bengal. SIR BARNES PEACOCK. *Mar.* 9, 1880.

Limitation. The question was whether legal proceedings taken to enforce a decree against the respondents were sufficient to prevent the operation of the Limitation Act (XIV. of 1859, s. 20). Did certain steps taken before a judge who was believed, though wrongly believed, to have had jurisdiction, constitute a proceeding so as to bar limitation. Recommended that the theory of bar by limitation be quashed, and that decree be reversed, with interest and costs in favour of appellant: *Roy Dhumput Singh* v. *Mudhomatee Dabia*, 11 Beng. L. R. 23.
[*L. R.* 7 *Ind. App.* 167; *I. L. R.* 2 *All.* 792.]

Moniram Kolita *v.*
Kerry Kolitany.

[*Ex parte.*]

Bengal. SIR BARNES PEACOCK. *Mar.* 13, 1880.

Chastity Case. Is a widow who has inherited her husband's estate liable to forfeit it under the Hindu law, as administered

in the Bengal school, because of unchastity? Hindu text-book extensively quoted and considered. Their Lordships consider the authorities make it plain that forfeiture of an estate once vested does not take place for unchastity subsequent to the death of a husband. The great mischief, uncertainty, and confusion of such a law in India would be considerable. It might make some difference had the widow been degraded in caste. [Affirmed.]

[*In this case, the somewhat unusual course was adopted of granting leave to appeal, on condition that the appellant, who was wealthy, should pay the costs of the respondent in any event.* See also *Spooner* v. *Juddow*, 6 Moore, 257; and *Main and others* v. *Stark* (Victoria), Order in Council of 17th Nov. 1888, P. C. Ar.]

[*L. R.* 7 *Ind. App.* 115; *I. L. R.* 5 *Calc.* 776.]

Ganesh Lal Tewari *v.*
Sham Narain and Others.

Bengal. Sir Montague Smith. *April* 13, 1880.

Suit to recover mesne profits. A certain Mouzah had passed to appellants through a *zur-i-peshgi* mortgage. A prior claim to the Mouzah was set up on an alleged Mokururee lease by the respondents, but this was subsequently set aside, and a decree in their favour was secured by appellants. On the authority of another separate decree for debt, the interest of the appellants in the zur-i-peshgi lease was attached and sold. The question now was, did the right to the mesne profits pass from the appellants under the attachment and sale, or was it still good and sustainable under first decree. Reported that mesne profits be made good to the appellants, with costs to them here and in India. [*I. L. R.* 6 *Calc.* 213.]

Bimola Soondari Chowdhrani and Others *v.*
Hurri Churn Chowdhri.

Bengal. Sir Robert Collier. *April* 14, 1880.

Title to a Putni right. Concurrent judgments. Counsel for appellants admit at the opening that they cannot sustain their case. [*P. C. Ar.*]

Cushing *v.*
Dupuy.

Lower Canada. SIR MONTAGUE SMITH. *April* 15, 1880.

Prerogative of Her Majesty to allow appeals from the Court of Queen's Bench, Canada, in matters of insolvency. (*Vide* 38 Vict. c. 16, Dominion Act.) Special leave granted, and appeal heard on merits. Held, that 40 Vict. (Canada Act), c. 41, providing, by sect. 28, "that the judgment of the Court under this section shall be final," in no way affects the royal prerogative to give special leave to appeal. Seizure by an assignee under an attachment in insolvency. The appellant is a notary who demanded from the assignee the delivery of the plant, &c. seized, on the ground that the property had been sold to him by the insolvents previous to their failure. Canadian law respecting *déplacement*. Their Lordships having analysed the documents in the case, declared that whatever might be the real nature of the transaction in question it had not the *indicia* of a *bonâ fide* sale. Affirmed, with costs.

[5 *App. Cas.* 409; 49 *L. J. P. C.* 63.]

Dumbell and Others *v.*
Isle of Man Railway Company, "Watson & Smith," and John Pender.

Isle of Man. SIR BARNES PEACOCK. *April* 22, 1880.

Attachment of money under a decree barred by previous assignment. 5,000*l.* was due from the railway company to Watson & Smith, but Watson & Smith, for money advanced, had made an assignment to Mr. John Pender, M.P., of all the moneys they received from the railway company. The appellants, Dumbell, Son & Howard, attached the 5,000*l.* to meet a sum of 3,000*l.* odd due to them under a decree they had obtained against Watson & Smith. The equitable interests (under assignment and contract) of the various parties to the transactions having been discussed, the assignment to Mr. Pender

and his lien on the money are upheld in the Report of the Judicial Committee. Appellants to pay costs. [*P. C. Ar.*]

Grish Chunder Chuckerbutty and Another *v.* **Jibaneswari Debia** (No. 46 of 1876), and

Grish Chunder Chuckerbutty and Another *v.* **Biseswari Debia** (No. 47 of 1876).

Bengal. SIR ROBERT COLLIER. *May* 4, 1880.

Title to an estate. Decree of the Civil Court. Purchase of the decree-holders' interest in the estate. What passed to appellants by the sale of that decree? Attachment by Government. Was possession given while the Talook was under attachment? What was sold was the unexecuted portion only of the decree. Affirmed. No costs. [*I. L. R.* 6 *Calc.* 243.]

Her Majesty the Queen and Another *v.* **Casaca** and Others.

Ship "Ovarense."

Vice-Admiralty Court, Sierra Leone. SIR ROBERT PHILLIMORE. *May* 6, 1880.

Seizure on behalf of the Governor of Sierra Leone of a sailing ship and her appurtenances under slave-trade statutes. Appellants alleged that the brig in question was fitted up for carrying on the slave trade, and had actually slaves on board. The respondents alleged that the brig was not a slaver but an emigrant ship, and that the alleged slaves were in reality free immigrants. At the trial below, evidence was conflicting, but the present appellants were condemned in costs and damages. From this condemnation, though not from the release of the ship herself, the seizors appealed. Ship's papers—Slave Trade Acts—and treaty between England and Portugal (3rd July, 1842; *vide*, as to this Act, 6 & 7 Vict. c. 53)—examined. International Law. Effect of the law of one foreign state upon

the vessels of another. Distinction as to liability to seizure of a Portuguese vessel on the high seas and that lying in a British port. Decision below upheld. Appeal dismissed, with costs.
[5 *App. Cas.* 548; 49 *L. J. P. C.* 41.]

Pitts *v.*
La Fontaine.

(*Vide* also Judgment.)

Constantinople. Sir James Colvile. *May* 11, 1880.

Jurisdiction of Her Britannic Majesty's Consular Court at Constantinople over landed property in the Ottoman Empire. More particularly (in this case) in the matter of Bankruptcy. Improper and irregular orders of the Court to carry out the design of a trustee in liquidation, to have a sale of landed estate without the concurrence of a mortgagee, and for ousting the appellant, who, together with his wife, had large beneficial interest in the property. Recommended that certain orders were improperly and irregularly made, and that the Consular Court be ordered to effect such restoration of the appellant to a part or parts of the estate as it was within its jurisdiction to do. Order that all costs under most of the orders under appeal be paid to appellant, with liberty to him to sue for damage. The respondent to pay costs of appeal.
[5 *App. Cas.* 564.]

[*In this case the not often-called for course of applying for a peremptory order of Her Majesty in Council to carry out imperatively Her Majesty's earlier Order in Council* (*May* 19, 1880) *had to be resorted to.* (Vide *P. C. Ar.*, *Nov.* 20, 1880; vide also *post*, p. 125.) *Respondent to pay costs.*]

Lakshman Dada Naik *v.*
Ramchandra Dada Naik.

Bombay. Sir James Colvile. *May* 11, 1880.

Case dealing with ancestral estate and business. Issues as to whether the respondent, original plaintiff, was restricted in

getting his share of the property through being barred by sect. 2, Act VIII. of 1859, dealing with questions *res judicata*, or by clause 13, sect. 1, Act XIV. of 1859 (*limitation*). Case governed by Mitacshara. Who was the person from whom the joint property descended? Question relates to respondent's original share as well as to his moiety as a coparcener, when whole property descended from grandfather. Claim as to moveable property. Alienation of coparcener's share. Decisions of Madras and Bombay Courts quoted as to the power of a coparcener to alienate by gift or by will his undivided share without consent of his co-sharers. Affirmed, with costs; but Judicial Committee express a hope amicable arrangement may be arrived at, for if not ancestral business may be seriously impaired, if not destroyed. [*L. R.* 7 *Ind. Ap.* 181; *I. L. R.* 5 *Bom.* 48.]

Baboo Het Narain Singh *v.*
Baboo Ram Pershad Singh and Another.

Bengal. Sir Barnes Peacock. *May* 12, 1880.

Question as to whether a suit claiming an eight annas share out of sixteen annas of a mouzah is *maintainable*. Was a former suit a bar to the present? Construction of former decree. Sect. 2, Act VIII. of 1859; sect. 2 Act XXIII. of 1861. Usli and Dakhili. Held, that the former suit was not a bar to the maintenance of the present proceedings. Affirmed, with costs. [*P. C. Ar.*]

Belchambers (Executor of Tiery) *v.*
Ashootosh Dhur

Bengal. Sir Robert Collier. *June* 10, 1880.

Boundary case. The respondent had claimed that the land in dispute belonged to a particular lot. Appellant, the representative of Mr. Tiery, who had been manager of the Nawab Nazim, answered that the land belonged to another lot, over which respondent had no authority or lien. The disputed land

adjoined conterminous lots. Appellant contended also that the action was not maintainable. *Res judicata* and limitation. Reference to previous legislation before Privy Council respecting these estates, and misunderstanding as to a sentence. A previous judgment of their Lordships is explained. Report now recommends decision in favour of appellant, with costs.

[*P. C. Ar.*]

Sophia Orde and Another *v.*
Skinner.

Bengal, N.-W. P. Sir James Colvile. *June* 22, 1880.

This is one of several appeals which have been before this Board in suits concerning the estate of Colonel James Skinner, the construction of his will, and the relations of his descendants *inter se.* The appellants are children of James, one of the deceased sons of Colonel Skinner (*Barlow* v. *Orde*, 13 Moore, Ind. Ap. 277), and they sued for an account of money due to them out of the family estate. The respondent is a son of Colonel Skinner, and, under terms of his will, present manager of the Skinner estates. Question raised as to the limits of the jurisdiction of the Meerut Court. The High Court held that the Court at Meerut had no jurisdiction to entertain the suit against the respondent. Where did respondent dwell? Did he dwell at Bilaspur, where the family residence and fort were situated, or did he dwell at Saharanpur, or elsewhere? Construction of Act VIII. of 1859, s. 5. Point raised as to what was the proper Forum for the trial. Point as to the right of the manager to charge commission on the gross income of the estate. Judicial Committee advise reversal of High Court decree, which had been given in favour of the manager, and hold that he so dwelt at Bilaspur to make himself subject to the Meerut Court. They also express their findings on the accounts and question of interest. Decree of subordinate Court affirmed, with costs, in the High Court. Decree of High Court reversed, with costs. [*L. R.* 7 *Ind. App.* 196; *I. L. R.* 3 *All.* 91.]

Lulloobhoy Bappoobhoy and Others *v.* Cassibai and Others.

Bombay. SIR MONTAGUE SMITH. *June* 24, 1880.

Gotraja-Sapinda Inheritance Case. Hindu Law in Western India. Authority of "West and Buhler" on the subject. The question in this appeal is whether the widow (respondent) of the Gotraja-Sapinda of a nearer collateral line is entitled to precedence in inheritance over the male. More remote collateral male relatives of the *propositus.* Gotrajas in a more remote line. The main contention by the appellants was that descent is not by consanguinity, but according to the power of offering religious oblations. Achara Kanda of the Mitacshara, Mayukha, Menu, and all the learned commentators on the subject, are discussed during the hearing, also decisions of the Courts on questions in some respects identical. Doctrine of the right of widow is upheld. Affirmed, with costs.

[*L. R.* 7 *Ind. App.* 212; *I. L. R.* 5 *Bom.* 110.]

Juggarnath Bhramarbar Roy *v.* Ram Gobind Juggodeb.

Bengal. SIR BARNES PEACOCK. *June* 29, 1880.

Claim by respondent to sevas of an idol. Hindu law as to inheritance to office of illegitimate children. Question also of heirship in the family of titular Rajahs. Were the sevas appurtenant to the Raj, as claimed by the respondent? The Judicial Committee hold they are not, and that the respondent fails to give sufficient evidence to prove that he is the heir to the Raj. Though both Raj and sevas were acquired by the ancestors of the plaintiff (the respondent), there is no evidence to show that the sevas were appurtenant to the Raj. Held, that the Raj had been sold, but the sevas did not pass with the sale, and that the respondent (plaintiff) could not lay claim to the sevas. Reversed, with costs. [*P. C. Ar.*]

Mussumut Kamarunnissa Bibi *v.* Mussumat Hussaini Bibi.

Bengal N. W. P. SIR MONTAGUE SMITH. *July* 1, 1880.

Claim to estates by a niece of a deceased landed proprietor. Was there a gift of them, or of a share of them, by the owner to his wife; and if so, was he in a state of mind to make it, or comprehend the effect of the act? Proceedings in lunacy against landowner. Evidence of gift and the ceremony observed in making it. Evidence of gift having been made verbally is supported by a Mukhtarnama. Gift made in consideration of unpaid dower not necessary to be declared before marriage according to Mahomedan law. Reported that the decree ought to be affirmed and validity of gift sustained. Affirmed, with costs. [*I. L. R.* 3 *All.* 266.]

Radha Gobind Roy Saheb Roy Bahadoor *v.* Inglis and Another.

Bengal. SIR ROBERT COLLIER. *July* 6, 1880.

Question as to title to tract of soil which had originally been covered by a bheel or lake, but which was now dry land. Suit brought by respondents' predecessor. Alleged adverse possession by defendant (appellant) for more than twelve years before the institution of the claim. Pre-existent *Julkur* rights, or rights of fishery in the bheel, brought forward by appellant in support of ownership. Burden of proof, where plaintiffs (respondents) have established their title, is on defendant if he intends to prove that plaintiffs have lost their title through adverse possession. Paragraph in an ancient Mehalwari register is brought forward in proof of proprietorship by respondents. Their Lordships, believing in authenticity of this and other evidence, report that the respondents' (plaintiffs') title is good, and also that they are not barred by limitation on the point of alleged adverse possession or lateness in bringing their claim. Affirmed, with costs. [*P. C. Ar.*]

Mahashoya Shoshinath Ghose and Others *v.* Srimati Krishna Soondari Dasi.

Bengal. SIR JAMES COLVILE. *July* 8, 1880.

Adoption among Sudras. Adoption suit. Owing to the inability of the adopted child to be taken from his real parent, litigation to cancel deeds of adoption instituted. Various complications adverse to final completion of adoption. Present suit is instituted on his coming of age by the adopted son to enforce all rights as if no annulment of adoption had been acquiesced in. Hindu law and usage as to adoption. Important point laid down. "*The giving and taking in adoption ought to take place by the father handing over the child to the adoptive mother, and the adoptive mother declaring that she accepts the child in adoption.*" No such positive proceeding was recorded in this case, and accordingly their Lordships report that the adoption should be pronounced invalid. Affirmed, with costs.

[*L. R.* 7 *Ind. App.* 250; *I. L. R.* 6 *Calc.* 381.]

Oriental Bank Corporation *v.* Wright.

Griqualand West. LORD BLACKBURN. *July* 14, 1880.

Duty on Bank Notes. The Government Treasurer for Griqualand West called on the Kimberley (Griqualand West) branch of Oriental Bank, whose head office for Africa is in Cape Colony, to make a return of notes issued by them at Kimberley. The bank denied that this branch was a *bank of issue*, and declared that notes used there were "Oriental Bank" notes from Cape Colony on which duty had already been paid, and, urging these and other contentions, refused to make the return. Cape of Good Hope Statute No. 6 of 1864 (Bank Notes Duty Act). Their Lordships report in favour of the appellants. There was no doubt the Cape Act applied to the province of Griqualand in respect to direct issues of local notes

made payable at Kimberley, but it did not apply to notes originally issued from Cape Colony and simply circulated in Griqualand through a branch of the Cape Bank. Decree discharged, and declaration made that in lieu thereof the application of the respondent be dismissed. Respondent to pay costs of appeal. [5 *App. Cas.* 842.]

Maharani Rajroop Koer *v.*
Syed Abul Hossein and Others.

Bengal. Sir Montague Smith. *July* 14, 1880.

Obstructions in a Pyne, or artificial watercourse. Effect of Statute of Limitations in regard to their removal. Act IX. of 1871, sect. 27, Second Schedule, Part V., Art. 34. The obstructions were so placed as to divert the water for irrigation purposes. Their Lordships hold that the obstructions were made *recently*, and their removal, therefore, was not barred by limitation (over two years from date of suit). A second claim was set up by the appellant to a Tal, but their Lordships were satisfied that in this the respondents had a distinct proprietary right, and that the appellant was only entitled to the use of the overflow. As appellant succeeded in part of the appeal, no costs awarded to either side.
[*L. R.* 7 *Ind. Ap.* 240; *I. L. R. Calc.* 394.]

Rajah Leelanund Singh Bahadoor *v.*
Maharajah Luchmeswar Sing Bahadoor, Nos. 7 & 8 of 1878.

Consolidated Appeals.

Bengal. Sir James Colvile. *Nov.* 9 *and* 10, 1880.

Question of disputed boundaries and title to various respective portions of a huge divided zemindary. Lengthy and repeated litigation before this Board. *Vide* 10 Moore's I. A. p. 81. *Judgment* 26th May, 1865 (P. C. Ar.), &c. Claims of new proprietors on the basis of surveys and admitted rights of

previous holders. Exact meaning of a certain boundary laid down in a previous Order of Her Majesty in Council. Their Lordships, in recommending that the decrees of the High Court be affirmed, with costs, express regret that litigation had been again thought necessary, but *express satisfaction at the course taken by the Courts in India in this case* of marking on maps the precise areas decreed. [*P. C. Ar.*]

Pedda Ramappa Nayanivaru *v.*
Bangari Seshamma Nayanivaru.

Madras. SIR MONTAGUE SMITH. *Nov.* 11, 1880.

Right of inheritance to a *Poligar-ship.* Poligar father of appellant and respondent *married two wives on same day.* Present appellant is son of wife first married on that day, but the present respondent, son of the later wedded wife, was born before him. Whole question, which of sons is heir? The question as to the right of succession in the case of sons born of different younger wives was decided by Judicial Committee in *Ramalakshmi Ammal* v. *Sivanantha Perumal,* 14 Moore's I. A. p. 570, but the question of rights of son of a "first married" of several wives did not occur, only rights of sons of younger wives. Their Lordships, however, now, after discussing religious and other reasons in favour of such a decision, decide that *first-born* son (respondent) ought to be declared heir, *notwithstanding priority of marriage* of the other mother. Concurrent findings below affirmed, with costs.

[*L. R.* 8 *Ind. App.* 1; *I. L. R.* 2 *Mad.* 286; *I. L. R.* 8 *Calc.* 315.]

Bhoobuneswari Debi *v.*
Hurri-Sarun Surma Moitra.

Bengal. SIR ROBERT COLLIER. *Nov.* 12, 1880.

Suit to decide amount of share of family estate due to a younger son's widow. Secondary evidence as to the existence of a deed, showing that the disposition of this property by the

deceased head of the family was somewhat different from that which would have been made by law. The non-production of the original by the appellant not accounted for. Accretions. Were they made by the manager (the younger son) when alive out of the family funds, or his own separate funds. On all points their Lordships endorse the opinion of the High Court, and report to Her Majesty that the decree ought to be affirmed with costs. [*I. L. R.* 6 *Calc.* 720.]

Sri Rajah Row Venkata Mahapati *v.*
Mahapati Suriah Row and Another.

Madras. SIR JAMES COLVILE. *Nov.* 16, 1880.

Purchase by widow of an estate out of *Stridhanam.* Testamentary power of a Hindu female over Stridhanam is commensurate with her power of disposition in her lifetime—both being absolute. *Vide* 19 Weekly Reporter, p. 295. Contention that property, if it had been partially bought with funds of the husband, would come under the law which governed the devolution of immoveable estate generally was not, in their Lordships' opinion, supported by any tangible authority. It is clearly the law that from the time funds were given to the widow by the husband they became her Stridhanam, and that she had full power of disposition over them. Judgments below, in favour of widow's purchase, affirmed, and appeal dismissed, with costs. [*I. L. R.* 2 *Mad.* 333.]

Her Majesty's Attorney-General for British Honduras *v.*
Bristowe and **Hunter.**

British Honduras. SIR MONTAGUE SMITH. *Nov.* 18, 1880.

Information of intrusion to oust two respondents from a tract of land in British Honduras. Respondents claimed land through a devise under a will. Appellant claimed from the Crown the title to the land. Treaty of 1763 between Spain and England regarding Honduras. Also Treaty of Versailles

of 1783. Also Treaty of London of 1786, each of which defined or enlarged the privileges of English settlers. Subsequent history of the colony traced in order to discover the complete rights of the settlers. Regulations in force from early times providing for allotment of lands. Date of will devising the tract, 30th January, 1779. Evidence as far as living memory goes as to the testator's estate being held by devisees as he desired. In old survey map belonging to the Crown, evidence is traceable, through the tract being uncoloured, that in 1862 the tract belonged to private owners. Length of time the devisees have had possession adverse to the Crown taken into consideration. Appeal fails. Appellant to pay costs.

[6 *App. Cas.* 143.]

Rani Anund Kunwar and Another *v.*
The Court of Wards, on behalf of **Chundra Shekhar,** a Minor, and Talookdar of Sessendi.

Commissioners' Court, Seetapore. Oudh. SIR ROBERT COLLIER. *Nov.* 19, 1880.

Suit by respondents to set aside adoption of the second appellant by the first appellant on ground of fraud and collusion. Previous cause of *Rani Anund Kunwar* v. *Rajah Kashi Pershad* before Judicial Committee in 1873, referred to (*vide Widow of Shunker Sahai's Case*, L. R. 4 Ind. App. 208), alleged obnoxious sub-proprietor forced on minor respondent (a Talookdar, if adoption declared valid), also postponement of reversion. *Contingent* reversionary interest as opposed to *vested* reversionary interest. Presumptive heirs ought to bring action of this kind in preference to contingent heirs like the minor respondent, and not remote reversioner. Committee recommend reversal of decisions below, with all costs, thereby holding that the respondents were not entitled to maintain the suit. *Huridoss Dutt* v. *Rangamoni Dassee*, 2 Taylor & Bell, 279.

[*L. R.* 8 *Ind. App.* 14; *I. L. R.* 6 *Calc.* 764.]

Ajrawal Singh and Others *v.*
Foujdar Singh and Others.

Bengal, N. W. P. SIR ROBERT COLLIER. *Nov.* 19, 1880.

Heirship. Claim to a Talook and houses. Degrees of descent from a common ancestor claimed by appellants and respondents respectively. Evidence of appellants having treated respondents as having equal rights with themselves, even to permitting their names to be registered in the Collector's books as having such a status. Value of documentary as opposed to oral evidence. No dispute as to respondents' title raised until eleven years after the opening of the succession. Comment on the fact that respondents were able to call very old member of the family, whereas on the side of the appellants those who really ought to be the principal plaintiffs in this suit, and who were now very old, had not come forward in support of their pedigree. Appeal recommended to be dismissed, with costs. [*P. C. Ar.*]

Pitts *v.*
La Fontaine.

Constantinople. SIR JAMES COLVILE. *Nov.* 20, 1880.

Petition for peremptory order to enforce a previous order (dated 19 May, 1880) of Her Majesty in Council. (*Vide* judgment on which previous order was founded: *ante*, p. 115; 5 App. Cas. 564.) *Ratio decidendi* of the judge of the Consular Court at Constantinople for not obeying Her Majesty's order. Sect. 20, Bankruptcy Act, 1869, discussed in relation to the contention that a trustee in liquidation (the respondent) can be personally liable for costs: *Angerstein's Case*, L. R., 9 Chan. App. 479; *Stapleton's Case*, L. R. 10 Chan. Div. 586. Peremptory order recommended to be issued with all costs to petitioner. [*P. C. Ar.*]

Baboo Kameswar Pershad *v.* Run Bahadoor Singh.

Bengal. SIR JAMES COLVILE. *Nov.* 23, 1880.

Suit to enforce a bond and mortgage on an estate by sale. High Court found the debt was due by the widow, who contracted the debt, and who appeared to have put the next reversionary heir into possession by Ikrarnamah. The High Court, however, determined that the mortgage deed had not been *properly explained to her*, and that consequently all that could be given against her was a decree in the nature of an ordinary money decree, and not one binding upon the estate. The widow having died, the second original respondent, the reversionary heir, was now the only respondent left in the appeal. *Remarks of the Lords on the necessity of explaining deeds and such documents to interested parties, and the injustice likely to be caused by a failure of such process.* The question now on appeal was, Could the property in hands of respondent be made liable to satisfy the bond debt for which a decree had been made against the widow? *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonwaree* (6 Mo. I. Ap. 393), cited in proof that Judicial Committee have before decided that a *bonâ fide* creditor, when he has acted honestly, but is himself deceived, is still under obligation to do certain things. The Lords thought the evidence failed to prove a pledge of her husband's estate in excess of the ordinary powers of a widow, and pronounced a recommendation that there was no lien on the estate. Affirmed.

[*L. R.* 8 *Ind. App.* 8; *I. L. R.* 6 *Calc.* 843.]

Clark *v.* Elphinstone and Another.

Ceylon. SIR MONTAGUE SMITH. *Nov.* 25, 1880.

Dispute as to the title to a piece of land lying between conterminous estates. Owners of the estates derived titles under Crown grants. Action by appellant for Trespass. Respondent

claimed not only that the land in dispute formed part of his estate by title, but also that it was his according to the provisions of the Ceylon Ordinance 22, 1871, by reason of undisturbed possession for ten years. Latent ambiguity as to boundary in the respective grants. Concurrent judgments on question of fact as to true boundary. The only question really now gone into related to the *alleged ten years' possession.* Acts done, such as surveying, &c., which might justify claim of possession; proof of possession must be by overt acts. *Jones* v. *Williams* (2 Meeson & Welsby, p. 326) quoted as to acts done in one part of river being evidence of right over other parts. Whole question of riparian proprietorship discussed. In the end the claims of the respondents are declared to be without title. Reversed, with costs. [6 *App. Cas.* 164; 50 *L. J. P. C.* 22.]

Simmons *v.*
Mitchell.

Windward Islands. Sir Robert Collier. *Nov.* 26, 1880.

(Question for the Jury.)

Alleged slander by a Government official. Discharge of a rule for a new trial. At the trial the judge had withdrawn the case from the jury. Importance of words used in declarations. Innuendo. If the words of the averment setting out the alleged slander convey only suspicion, only motives, and not a declaration of an actual charge of felony, the action cannot be sustained. *Daines and Braddock* v. *Hartley* (3 Ex. 200) quoted as to whether a witness can be asked with respect to spoken words in a slander case, "What did you understand by those words?" The ruling there was that the question could not be put. Order discharging rule upheld, but although the dismissal of appeal was recommended, no order was made as to costs.

[6 *App. Cas.* 156; 50 *L. J. P. C.* 11.]

1881.

Dinendronath Sannyal and Another *v.*
Ram Coomar Ghose and Others.

Taruck Chunder Bhuttacharjya *v.*
Bykuntnath Sannyal and Others.

Bengal. SIR BARNES PEACOCK. *Jan.* 26, 1881.

Effect of private sale of attached property. Great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. Two families, the Sannyals and the Bhuttacharjyas, had engaged in litigation from the year 1828. At that time the Sannyals obtained a decree against the Bhuttacharjyas. In 1860 the Bhuttacharjyas obtained a decree against the Sannyals, in which mesne profits were awarded. Meanwhile, in 1858, the respondent Ram Coomar Ghose's father obtained a decree against the Bhuttacharjyas for money advanced, and in May, 1863, the decree of 1860 was attached. In May, 1865, the respondent Ram Coomar Ghose obtained an order for sale thereof, and on 27th March, 1866, before proceeding to execution on the decree he held, purchased from the Bhuttacharjyas by *private sale*, the whole of the mesne profits due under the 1860 decree. The Bhuttacharjyas meanwhile, in September, 1865, consented to an order of set-off regulating their old differences with the Sannyals, and the question now was whether Ram Coomar, as the purchaser at a private sale, was protected against the consequences of the alienation by the Bhuttacharjyas in September, 1865, and before his purchase from them. The Judicial Committee, reversing the decree of the High Court, held that title obtained by the purchaser on a private sale in

satisfaction of a decree differs from that acquired upon a sale in execution. Under a private sale a purchaser derives title through the vendor, and can acquire no better title than he has, *i.e.*, Ram Coomar took his title subject to the order of September, 1865. Under an execution sale the purchaser, notwithstanding that he acquires merely the right, title, and interest of the judgment debtor, acquires that title by operation of law and unfettered by alienation or incumbrances effected by him after the attachment of the property sold. Decree in favour of appellants in the first appeal, with costs. *Anund Loll Doss* v. *Jullodhur Shan*, 14 Moo. Ind. Ap. 549, 550. Civil Procedure Code, Act VIII. of 1859. The second appeal (*which, in consequence of the death of Sir James Colvile, had to be re-argued*) related purely to the calculation and rate of interest, and also to a question of set-off; and as to the former, the decree of the High Court was only in a slight respect varied, and the suit was remanded to India for settlement on the point of set-off. Appellants to pay costs.

[*L. R.* 8 *Ind. App.* 65 ; *I. L. R.* 7 *Calc.* 107.]

Haji Mahomed Ismail Khan and Another *v.*
Haji Ghulam Ahmed Khan and Another.

Bengal, N. W. P. Sir Montague Smith. *Jan.* 27, 1881.

Construction of documents. A deed of gift and a deed of agreement. Title to two Mouzahs. Rival claims between the respondents, as heirs of a sister, a widow (to whom the gift was made by her brother-in-law), and the sons as representatives of that brother-in-law. Mahomedan law as to descent and co-heirship. Share of widow. Deed of gift (*Hibehnama*) by the brother-in-law by way of settlement of disputes. Was it absolute, a "*hiba*," or what is called in Mahomedan law an "*ariat*" (a loan), revocable by the donor? Consideration. Were the widow's rights in the ancestral estate forfeited by her. Technical signification of certain words in the deed of gift. Meaning of the words "*Mahz*" (unconditional gift), *Hibeh-bil-ewaz* (gift

for consideration), according to Mahomedan authorities. Their Lordships agreed with the Courts below that an absolute gift was made to the widow by her brother-in-law, and that it was not resumable; that the transaction was a gift for consideration, and that the words in the deed relied on to cut the gift down to an *ariat* have not that effect. Affirmed, with costs.

[*L. R.* 8 *Ind. App.* 25.]

Sastry Velaider Aronegary and Another *v.*
Sembecutty Vaigalie and Others.

Ceylon. SIR BARNES PEACOCK. *Feb.* 3, 1881.

Suit by appellants, husband and wife, to recover property which the wife claimed as widow of one Pattenier. Validity of a marriage alleged to have taken place according to Tamil customs disputed by respondents. Evidence as to performance of ceremony. Presumption of marriage arising from cohabitation and repute. Principle of Roman Dutch law on subject. *Piers* v. *Piers*, 2 H. L. Cas. 331; *De Thoren* v. *Att-Gen.*, 1 App. Cas. 686; *The Breadalbane Case*, L. R. 2 H. L. 269. Presumption of marriage not rebutted. Reversed, with costs.

[6 *App. Cas.* 364.]

Sudisht Lal *v.*
Mussumat Sheobarat Koer.

Bengal. SIR MONTAGUE SMITH. *Feb.* 4, 1881.

Suit by a banker to recover large sum of money from a Purdanashin lady in an alleged adjustment of a banking account and on terms allowed to be settled and stated. The account it was alleged had been settled not by the respondent herself but by her husband, who, it was said by the appellant, had authority from her to state and settle accounts. The evidence, including a Mooktarnama, which is produced in proof of authority to the husband, is not relied on by their Lordships

sufficiently to induce them to recommend an alteration of the decree. Observations on the distinction between borrowing by an agent for his own purposes, of which conduct the lender also might be cognisant, and borrowing for and on behalf of the principal. In this case there was no satisfactory proof that the money had been borrowed with the wife's authority or knowledge. Affirmed, with costs.

[*L. R.* 8 *Ind. App.* 39; *I. L. R.* 7 *Calc.* 245.]

Mussumat Soorujmookhi Konwar *v.*
Mussumat Bhagwati Konwar.

[*Ex parte.*]

Bengal. Sir Richard Couch. *Feb.* 8, 1881.

Claim by appellant to estate. Whole question was, had there been *separation* in the estate of two brothers (heirs of their father) or not. Suit now instituted was between the widows of those sons. Evidence of alleged partition, whether as regards the moveable or immoveable property, very unsatisfactory. Mental incapacity of eldest brother clear proof there was no separation so far as he was concerned, and the authority of the agent who acted for him, or was alleged to act for him, was far from sufficient. Affirmed. [*P. C. Ar.*]

Daniell *v.*
Sinclair.

New Zealand. Sir Robert Collier. *Feb.* 22, 1881.

Suit instituted for the redemption of a mortgage, and for *an account* of the principal and interest due. The chief question before the Committee was, whether the interest was to be simple or compound. Their Lordships were of opinion that the accounts were drawn up and assented to by the parties under a common mistake as to their respective rights and obligations. Effect of signature on a particular "*half-yearly rest*" account (accepting compound interest instead of simple) occurring in a

series of accounts, all alike drawn up in error. Is that particular acceptance a bar to that account being reopened upon the general accounts under the mortgage being taken? Cases quoted on the point of recovery of money paid under a mistake of law. If parties contract under a mutual mistake as to their relative and respective rights, the agreement is liable to be set aside: *Cooper* v. *Phibbs*, 2 H. L. (E. & I.) Appeals, page 170, &c. The Judicial Committee holding that the settled account could be re-opened, affirmed the judgment below, with costs.

[6 *App. Cas.* 181; 50 *L. J. P. C.* 50.]

Bateman *v.*
Service.

Western Australia. Sir Richard Couch. *Feb.* 23, 1881.

Debts and engagements incurred by the agent of a joint stock company (formed in Victoria) who carried on operations in Western Australia. The question in the suit was, Are the individual shareholders of the company liable for the debts of their agent in another colony? What is the effect (if any) of the Joint Stock Ordinance of Western Australia of 1858 with respect to companies doing business in that colony, but which were incorporated in other colonies? Difference between a "partnership" and a "corporation": *Bulkeley and another* v. *Schutz and another*, L. R. 3 P. C. 764. Their Lordships recommend the appeal to be affirmed, with costs, on the ground that a company incorporated and registered in one colony could not be again registered in another.

[6 *App. Cas.* 386; 50 *L. J. P. C.* 41.]

Ram Lal Mookerjee *v.*
Secretary of State for India in Council and Others.

Bengal. Sir Robert Collier. *March* 1, 1881.

Hindu will. Suit by the Government and the widow and granddaughter of the testator against a brother of the testator

to arrange the administration of trusts under the will. Law on inheritance as to gifts conditional on events which may happen. What were the *real intentions* of the testator as conveyed by the various clauses of the will in regard to the devisees under the will and the position of the present appellant (the brother)? *Tagore case*, 4 Beng. L. R. 182; and 9 Beng. L. R. 377; *Juttendro Mohun Tagore and another* v. *Ganendro Mohun Tagore* [Sup. Vol. Ind. App. p. 47]; *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*, L. R. 5 Ind. App. p. 138. Was the gift to a granddaughter absolute? and was a gift over to the Government, should incapacity on her part be created, valid, to the exclusion of the brother? Words "*Putra Poutrádi Kramé*" defined ("from generation to generation"). In the Upper Provinces of India the words with a correlative meaning are "*Naslan bad Naslan*." Their Lordships affirmed the decree of the High Court with a variance in the words of the decree. As it stood it was neither in accordance with the will nor the judgment. Their Lordships held that the will did confer an absolute estate on the granddaughter on the death of the widow, and that the gift over to the Government would be valid in the event of that granddaughter being disqualified or dying a sonless widow at the death of the testator's widow. They did not decide what would happen on the occurrence of the granddaughter predeceasing the widow, having borne a son. In declining to declare the rights of the parties in this contingent event they were acting in accordance with the rule laid down in the case of *Lady Langdale* v. *Briggs*, 8 D. M. & G. 391, explained, as it was, in the *Tagore case*. Affirmed. Costs of all parties to be paid out of testator's estate.

[*L. R.* 8 *Ind. Ap.* 46; *I. L. R.* 7 *Calc.* 304.]

Maharaval Mohansingji Jeysingji *v.*
Government of Bombay.

Bombay. SIR MONTAGUE SMITH. *March* 8, 1881.

Claim by an adopted son to recover from the Government of Bombay certain payments in respect of a TODÀ GARAS HUKK

(exactions from villages for the benefit of particular persons) formerly levied by his ancestors upon certain villages in the Surat District. The father had been recipient of the payment, but since 1865, the year of his death, the Government had declined to recognize the title of the alleged adopted son to the payment. Origin of these Todà Garas Hukks. *Maharana Fattehsangji Jaswatsanji* v. *Dessai Kallianraiji Hekoomutraiji*, L. R. 1 Ind. App. 46. They are recognized as a species of property, however unlawful their origin may have been. Resolution of the Government in 1862 to make payments in lieu of Hukk. Terms of the Pensions Act of 1871 (XXIII. of 1871), make it clear that the Civil Court can entertain no suit relating to Government grants. This suit, therefore, has been allowed to be instituted in the Civil Court erroneously. Several cases quoted in support of this view. Affirmed, with costs.

[*I. L. R.* 4 *Bom.* 437; *L. R.* 8 *Ind. App.* 77.]

Rajah Nilmoni Singh Deo Bahadoor *v.*

Ram Bundhoo Roy and Others.

Bengal. Sir Robert Collier. *March* 9, 1881.

Compensation for lands appropriated by Government for public purposes. Land Acquisition Act X. of 1870. Mal lands of a Zemindari. To whom does award for compensation fall? Disputes between the Zemindar Rajah of Pachete and his tenants as to the apportionment of the award between them. This suit instituted by the Rajah, but their Lordships are of opinion that the proviso in the Act on which he relied in bringing it, had no such effect as the appellant contemplated, namely, to give him a right to re-open in another suit a claim already adjudicated upon, and *finally settled* by a competent Court. Their Lordships recommended that the decree be affirmed, with costs.

[*I. L. R.* 7 *Calc.* 388; *L. R.* 8 *Ind. App.* 90.]

The "Brenhilda" *v.*
British India Steam Navigation Company.

(Admiralty Side of High Court.)

Bengal. SIR BARNES PEACOCK. *March* 15, 1881.

Motion on part of respondent company to relax and dissolve the inhibition and citation issued in this appeal, and to quash it for want of competency. Collision and damages. Delay in the *assertion* of the appeal "within fifteen days" to the High Court on the part of the owners of the "Brenhilda," fatal to its valid admission now. Recommended, that the motion be granted, and the leave to appeal set aside.

[*I. L. R.* 7 *Calc.* 547; *L. R.* 8 *Ind. App.* 159.]

Renny and Others (Inspectors of the estate of Bartley, an insolvent) *v.*
Moat.

Lower Canada. SIR BARNES PEACOCK. *March* 22, 1881.

Appeal heard on special leave. Claim (by respondent) for 2,295 dollars, and interest, against the estate of Bartley. Contestation by inspectors (appointed under Canadian Insolvent Act, 1875) of the insolvent's estate. Mortgage. Transfer to respondent by deed of the rights of the registered mortgagee. Question, was this transfer valid, and was it completed before an extinction of the mortgage? Judgment of the Court of Queen's Bench in favour of respondent for full amount claimed upheld. Appellants to pay costs.

Dooli Chand *v.*
Baboo Ram Kishen and Others.

Bengal. SIR MONTAGUE SMITH. *April* 5, 1881.

Suit by respondents to recover Rs. 78,397, paid to prevent the sale of a mouzah which had been attached in execution of a

decree. Money was paid to satisfy the mortgage and decree of the Land Mortgage Bank of India. Complicated financial transactions in regard to this and other mouzahs. Lien of appellant. Evidence showed that, at the time of the payment of the 78,397 rupees by the respondents to the appellant, the debt on the particular mouzah in question had been satisfied by the terms of appellant's purchase of another mouzah, against which the respondents held a mortgage and a decree. He had, therefore, been paid the debt twice over. The Judicial Committee, agreeing with the Courts below, though not altogether on the same grounds, held that the payment was an involuntary one, and that the respondents are entitled to succeed in their action and recover the money. Compulsion of law. *Vide Valpy and Others* v. *Manley*, 1 Com. Bench, 594. Affirmed, with costs.

[*I. L. R.* 7 *Calc.* 648; *L. R.* 8 *Ind. App.* 93.]

Rajendronath Dutt and Others *v.* Shaik Mahomed Lal and Others.

Bengal. Sir Richard Couch. *May* 13, 1881.

Non-joinder. Claim by the representatives of three out of four joint shebaits, to set aside an alienation by the fourth shebait of a mouzah. The mouzah was alleged to be debutter, *i.e.*, dedicated to idols. Religious trusts declared on appointment of shebait. Alleged division of the debutter property. Effect of previous litigation in 1871 before the Privy Council (14 Moore's Ind. Appeals, p. 299). *Sale.* Was the making away of property endowed for religious purposes valid? If improper, ought not compensation to the vendee come from the vendor shebait in his personal capacity, and not from the other shebait members of the family? Was the appointment of several shebaits legitimate? Limitation. Omission of vendor shebait, *i.e.*, the fourth shebait, as a party in the suit is fatal to the maintenance of it. Affirmed, with costs.

[*I. L. R.* 8 *Calc.* 42; *L. R.* 8 *Ind. App.* 135.]

Gibbons *v.*
Gibbons.

New South Wales. Sir Richard Couch. *May* 14, 1881.

Claim to estates. Respective rights, under a will, of grandfather (the appellant) and grandson (the respondent). Construction of a proviso in the will regulating the entail. Meaning of the words, "If any person whom I have made tenant in tail, &c., shall be born in my lifetime?" Do they give the father of the respondent, *i. e.*, the son of the appellant, only a life estate, or did he become a tenant in tail male? also question whether the said father having agreed to a disentailing deed in favour of his share going to the appellant, that appellant was not now entitled to receive it. Cases quoted: *Loring* v. *Thomas*, 1 Drew. & Sm. 523; *Sheppard's Trust*, 1 K. & J. 269; *Sturgess* v. *Pearson*, 4 Mad. 411; *Trappes* v. *Meredith*, 7 L. R. Ch. App. 248; *Giles* v. *Melsom*, 1 L. R. Eng. & Ir. App. 31. Are the words "shall be born" to apply to futurity only, and not to persons born before and after the date of the will in which they were used? The Judicial Committee decide that the respondent's contention, that his father took only a life estate, is erroneous. The judgment of the Supreme Court in this view would be reversed, and in lieu thereof it would be declared that the father of the respondent being born before the date of the will, was not included in the proviso; that he was entitled to a share in tail male, and that this now belonged to the appellant. Costs of appeal to be paid out of corpus of appellant's share.

[6 *App. Cas.* 471.]

Muttu Vaduganadha Tevar and Others *v.*
Dorasinga Tevar.

The Shivagunga Case.

Madras. Sir Arthur Hobhouse. *May* 14, 1881.

This appeal related to the important Zemindary of Shivagunga, in the Madras Presidency, which has been the subject of litigation in the Privy Council on several previous occasions. (See 3 Moo.

Ind. App. 278; 9 Moo. Ind. App. 539; 11 Moo. Ind. App. 50; and L. R. 2 Ind. App. 169.) History of the Zemindary, and Lord Clyde's proclamation (the time the East India Company assumed the sovereignty of the Carnatic) of 1801 quoted to prove the settlement of the Zemindari and the heirship thereof. Regulations of 1793 also quoted with respect to the question, whether the estate is partible or impartible. On death of the Istamrar Zemindar, disputes arose between the immediate family and the collateral relations as to the succession. In 1863, the Privy Council found the family were still "undivided," but that the Zemindary was to be taken as "self-acquired" property in the hands of the Istamrar Zemindar, and that the Zemindary then (in default of other heirs) devolved upon a daughter, Kathama, of the previous Zemindar. The present respondent is the eldest surviving grandson of that last male Zemindar, being a son of the daughter of the Istamrar Zemindar's second wife, and he contends that, on the daughter's (Kathama's) death, her interest, which only lasted for life, died with her, and that he was now the heir. The first appellant was also grandson, but was a son of Kathama, who was a daughter of the third wife, and the other appellants were his sisters. Was Kathama's male family a new stock of heirs, or did the Mitacshara law, as is administered in the Carnatic, prevail, that heirship went back on the line of the last male owner. This view is upheld in the judgment of the Committee. Agreeing with Courts below, their Lordships hold that Kathama had only a life interest; that on her death, the heirship did go back to the first male line; that primogeniture did prevail, and that the estate was impartible. *Hunsapore case*, 12 Moo. Ind. App. 34; *Ramnad case*, L. R. 5 Ind. App. 61; *Nuzvid case*, L. R. 7 Ind. App. 38, discussed. Affirmed, with costs.

[*I. L. R.* 3 *Mad.* 290; *L. R.* 8 *Ind. App.* 99.]

Blackburn *v.*

Flavelle.

New South Wales. SIR BARNES PEACOCK. *May* 20, 1881.

Case respecting waste lands of the Crown. Construction to be put on sects. 13 and 18 of the Alienation Act of 1861.

Forfeiture. Is sale by public auction of forfeited lands compulsory, or can there be a conditional sale? Does sect. 20 give Government the option of selling or not, as they think best? Their Lordships are of opinion Government has an option to sell by auction, or retain forfeited lands in their own hands—not to throw them open to free selection. *Drinkwater* v. *Arthur*, 10 N. S. W. Supreme Court Reports, 193; *vide* Mr. Justice Hargrave's judgment. If Government intended sale by auction, a month's notice must be given, so that all competitors may have fair and equal intimation. The report to her Majesty amounts to this: that the Government are not bound to sell a forfeited selection, but that if they elect to sell, they can only sell by auction and with notice, so that all would-be applicants should have information. Affirmed, with costs.

[6 *App. Cas.* 628; 50 *L. J. P. C.* 58.]

Turner *v.*
Walsh.

New South Wales. Sir Montague Smith. *May* 21, 1881.

Conditions of trespass in case where lands are purchased under Crown Lands Alienation Act, 1861. Contention of alleged trespasser (the respondent) was, there was a highway over the Crown lands in question, and that he was justified in using it. Question in suit is, has respondent proved existence of such a highway? Evidence of user. Is user in the colony relied on in the same manner as in England to prove dedication to the public? Does Crown Lands Alienation Act place restrictions on the power of the Crown to dedicate roads, &c.? In this case there was a power of dedication before the passing of the Act, and there was such continuous and connected user before and after as to raise sufficiently presumption of valid dedication. *Queen* v. *Inhabitants of East Mark*, 11 Q. B. 877; *Queen* v. *Petrie*, 4 E. & B. 737. Affirmed, with costs.

[6 *App. Cas.* 636; 50 *L. J. P. C.* 55.]

Prince Suleman Kadr *v.*
Dorab Ali Khan.

Oudh. SIR ROBERT COLLIER. *May* 24, 1881.

Claim to legacy under the will of one of the Queens of Oudh. Mahomedan law. Test action against the son (the principal devisee). No less than ten servants or retainers claimed legacies out of the Queen's estate. The King, before his death, deposited large sums of money with Government to secure an annuity to his Queen. The Queen, before death, made a will also, in which she handed on or continued certain legacies to her dependants. The question was, were the legacies sued for to be paid out of the Government stock, or out of the general estate of the late Queen? Question also raised was, had the Queen a life interest or an absolute interest in the Government stock left by the King? Did the terms of the will constitute a bequest, or was the Queen's direction in her will a mere expression of a wish? Their Lordships recommend that the decree ought to be affirmed, with costs, thus agreeing that there was a bequest, and that the legacies should be out of the whole general estate of the Queen. Their Lordships guard themselves against its being supposed that they assent to the proposition that, even if there had been a specific legacy payable out of the specific fund mentioned, it would have been invalid. They are by no means satisfied either that the gift to this lady by her husband of Government promissory notes, subject to a condition that she is to have the interest only for life, and that after her death there is to be a trust in perpetuity for all her heirs to all time, is not, according to Mahomedan law, in its legal effect, a gift to her absolutely, the condition being void. It is not necessary to determine the latter point for the decision now arrived at.

[*L. R.* 8 *Ind. Ap.* 117; *I. L. R.* 8 *Calc.* 1.]

Hurro Persad Roy Chowdhry *v.*
Gopal Das Dutt and Others.

Bengal. SIR ARTHUR HOBHOUSE. *May* 26, 1881.

Suit for absolute possession of lands after purchase from the Government. Title alleged Chukdhari rights antecedent to

Government settlement. Did the Government when in khas possession recognize the Chukdhari title set up by respondents? The Government in any event had not ousted them from their possession or voided the sub-tenures. Meanwhile time has run in their favour, and it can no longer be declared that the respondents have not a right to possession. Affirmed, with costs.
[*L. R.* 9 *Ind. App.* 82; *I. L. R.* 9 *Calc.* 255.]

Ramswamy Setty and Another *v.*
Koosoo and Another.

Bengal. Sir Barnes Peacock. *May* 27, 1881.

The Burmah Ruby Case. Execution, by respondents, of promissory note to provide for payment of a large quantity of rubies. It was at first expected that the sale of rubies in Calcutta would yield sufficient money to take up the note. This hope not being realised, arrangement was made by a fresh bond to pay upon the result of a sale in England. Only certain of the rubies were sent to London, and even for these market prices had gone down and they were brought again to Calcutta, where certain of the rubies were sold. This suit was for the recovery of the loan advanced on the promissory note and bond, and their Lordships report that the liability should be met. Decree of High Court on appeal reversed, with costs. Decree of High Court in its original jurisdiction upheld. Respondents pay costs of appeal.

Fakharuddin Mahomed Ahsan Chowdry *v.*
Official Trustee of Bengal. (No. 34 of 1878.)

Same *v.*
Official Trustee and Others. (No. 35 of 1878.)

Alimunissa Khatun and Another *v.*
Official Trustee. (Nos. 38 and 39 of 1878, Consolidated.)

Bengal. Sir Robert Collier. *June* 16, 1881.

One Najamunnissa Khatun, a Mahomedan lady, in 1861 brought a suit against her husband for the purpose of obtaining

possession and mesne profits of lands which she alleged had been conveyed to her by her husband by a deed described as a *Kabinnama*, in lieu of dower. Previous litigation on the part of husband in 1873 before Privy Council quoted. Pending the result of the litigation then, the lady, being in want of funds, obtained money from one Pogose, a money lender, by executing in his favour a hibehnama, or deed of conveyance of a 6 anna share in the decree. In 1865 Pogose, on the strength of the hibehnama, applied to be, and later on was, admitted as a respondent with the lady. The appeal in 1873 went in their favour, and Pogose took steps to obtain execution of the decree. He died, and having beforehand been obliged to make an assignment for the benefit of his creditors, he was then, and is still, represented by the Official Trustee. The Official Trustee having seen that Pogose had from time to time augmented his lien by purchasing portions from the heirs of the Mahomedan lady (also now deceased), claimed to be put into possession of a 13½ anna share. These four appeals arose out of this and other claims, which by the decrees below had been established in respect to the estate, and out of disputes thereon between the Official Trustee, the husband of the lady, and her son and daughter. Limitation (Act IX. of 1871, Sched. 2, Clause 93). Express meaning of "possession with Wasilat," the principles on which mesne profits and interest are to be calculated, validity of the hibehnama, and the genuineness of a sale, formed the subject-matters of the questions at issue. All the appeals are dismissed, with costs in favour of the Official Trustee.

[*L. R.* 8 *Ind. App.* 197.]

Chaudhri Ujagur Singh *v.*
Chaudhri Pitam Singh and Others.

Bengal, N. W. P. Sir Richard Couch. *June* 17, 1881.

Suit for possession of share of so called joint ancestral estate. Appellant, who was plaintiff below, sought to get rid of the effect (so far as he was concerned) of an arrangement entered into during appellant's minority by his father and the respondents, by which,

upon partition, his father had accepted *one quarter* of the joint ancestral estate instead of *one half*, to which he and appellant were, it was now alleged by Mitacshara law, entitled. First Court held that appellant was not concluded by his father's acts. High Court reversed this. The Committee having heard the evidence, agreed with High Court that the property in question was a *grant* from Government before birth of the appellant. Property had no doubt originally been divisible in a particular way, but in consequence of great arrears of revenue Government seized it, and later on re-granted it to the heirs of the first holders on certain conditions. In accordance with the conditions, which were agreed on then, a division was made among four "old proprietors" and appellant's father being one, he bound himself to them. Appellant was now bound by the aforesaid conditions, and could only have a right to the share which his deceased father had. There was no further right open to him by "Mitacshara law of inheritance." Affirmed, with costs. [*L. R.* 8 *Ind. App.* 190.]

Mungul Pershad Dichit and Another *v.*
Grija Kant Lahiri Chowdhry.

Bengal. SIR BARNES PEACOCK. *June* 18, 1881.

Suit to enforce the execution of an old judgment decree. The appellants were children of original decree holder, and respondent was son of original judgment debtor. Appellants now petitioned that the amount due under the decree might be realised, together with interest for the time of pendency, and the costs of the execution by sale of the property under attachment. *Effect of striking off* the case under certain circumstances. Objections raised on grounds of limitation, that *bonâ fide* proceedings had not been taken for years to keep the decree alive. It was further alleged that the decree holder, actuated by *mala fides*, not having realised the money for so long a time, simply with the desire of increasing the interest, was not entitled, according to law and justice, to enforce it. Indian Limitation Act No. IX. of 1871. Their Lordships thought the

present case did not come within that Act, having been instituted before April 1, 1873; neither was there a bar under Act XIV. of 1859, sect. 20; and reversing the decrees and orders of both lower Courts, reported that prayer of petitioners should be granted. Respondent to pay costs of appeal.

[*I. L. R.* 8 *Calc.* 51; *L. R.* 8 *Ind. App.* 123.]

Venkateswara Iyan and Another *v.*
Shekhari Varma Valiya Raja Avergal of Palghat.

Madras. Sir Arthur Hobhouse. *June* 18, 1881.

Stanom Case. It is a custom with the Malabar Rajas to have a number of palaces, to each of which there are lands attached, and each is called a Stanom. Various of the Rajas of Palghat, for loans of money mortgaged lands of their Stanoms to the (Iyan) appellant's family, and in 1851 a Kanom (a species of mortgage) was executed, giving certain lands for ever to the Iyan family. The Raja of Palghat sought to recover the lands by testing the validity of the Kanom, or, if valid, testing his right to redeem it like a regular mortgage. He also sought to prove, and this was the main question, that the 1851 Kanom could not be binding on the Stanom, as the lands in dispute were *devaswam*, or religious endowments, and that devaswam lands could never be assigned in perpetuity. He also alleged grant of 1851 was illegally obtained. On all the issues their Lordships pronounced in favour of the Iyan family, and report that the decrees below should be reversed and the suit dismissed. The appeal was heard *ex parte*, but Raja is ordered to pay all costs. There were concurrent decisions below on the point as to whether the property was *devaswam*. "But though the question may be called in its result one of fact, its decision turns upon the admissibility or value on many subordinate facts, and involves the construction of documents and other questions of law."

[*L. R.* 8 *Ind. App.* 143.]

Pulukdhari Roy and Others *v.*
Raja Radha Pershad Singh.

Bengal. SIR BARNES PEACOCK. *June* 23, 1881.

Suit arising out of the steps taken by respondent to put in execution a judgment decree for attachment and sale of the debtor's property. Preliminary question argued as to whether an order of the Subordinate Judge of Shahabad (disallowing the debtor's plea of limitation and substantially granting the prayer for attachment) was appealable in the High Court within the meaning of sect. 588, Clause J., Act X. of 1877 (Civil Procedure Code). The Committee being of opinion that the order was appealable, proceeded to do what the High Court should have done, viz., try case on merits. Grounds of appeal pronounced frivolous. A decree had been obtained against estate (afterwards affirmed by the Privy Council), and before it was executed the Government altered the boundaries of the district in which the land lay. By reason of the change of locale, doubts had arisen as to which Court, Shahabad or Ghazeepore, should carry out the execution, and when finally the judgment got back to Shahabad, it was contended that the judge had no power to execute it.

[Decree on point of competency reversed, but appeal dismissed on reasons different from those of the High Court. Judgment of first Court affirmed; appellants to pay costs.]

[*I. L. R.* 8 *Calc.* 28; *L. R.* 8 *Ind. App.* 165.]

Whitfield and Another *v.*
Howell and Others.

Barbadoes. SIR ARTHUR HOBHOUSE. *June* 28, 1881.

Bill and answer. The bill was one to carry into effect trust under a deed signed by Mrs. Howell, wherein she gave security to the Messrs. Whitfield for advances made by them under specified conditions to her son, Conrade Howell. Difference defined between "drawing account" and "general trading business." It was made clear that Mrs. Howell, by the deed alone, gave securities to meet any claims under the "drawing

account," but never agreed to meet liabilities under the trading account. All claims on drawing account were met, and Mrs. Howell now asked that her securities might be re-assigned. Their Lordships' report is in her favour, and appellants are ordered to pay costs. [*P. C. Ar.*]

Rajah Udaya Aditya Deb (Rajah of Patcum) and Another *v.*

Jadub Lall Aditya Deb.

[*Ex parte.*]

Bengal. SIR RICHARD COUCH. *July* 1, 1881.

Suit to recover certain Mouzahs permanently leased to a younger son. Primogeniture is in vogue in this admittedly impartible raj, and also (it was alleged) a custom of giving maintenance to other sons, with the proviso that this custom ceased with the life of each Rajah grantor. The last Rajah had leased the Mouzahs in permanence to a younger son, and the present Rajah (on taking up his estates as eldest son), and the manager of the estates (the other appellant) disputed the validity of such transaction in the face of the alleged custom. Inalienability of an impartible raj must be proved by custom. *Anund Lall Singh* v. *Maharajah Gobind Narain*, 5 Moo. Ind. Ap. 82. Their Lordships agreed to report that the evidence as to custom was by no means clear, and pronounced for the lease. Affirmed.

[*I. L. R.* 8 *Calc.* 199; *L. R.* 8 *Ind. App.* 248.]

Webb *v.*

Wright (No. 1).

Griqualand West, South Africa. SIR MONTAGUE SMITH. *July* 9, 1881.

Appellant Webb, as the representative of the "London and South African Exploration Company," instituted this suit against the Civil Commissioner of the district of Kimberley,

claiming an indefeasible British title, under the seal of the province, to a farm called Bultfontein. Webb had got a judgment from the Land Court confirming a grant of the farm made by the President of the Orange Free State. The High Court varied the grant as one given under British dominion, which did not bestow an indefeasible British title. Counsel for the Crown now urge that the Land Court really meant to uphold a British grant, and not the one from the Orange Free State, and that therefore the decrees of the Land Court and the High Court are consistent. Their Lordships, however, declare that the High Court decree ought to be reversed, but they also report that the award of the Land Court was unsatisfactory. They recommend that the suit should be dismissed below, without prejudice to any right or title the appellant company may have in the farm, or to any claim they may be advised to prosecute in the Land Court, or otherwise. No order for costs. History of the province will be found in the judgment of this Board in *Webb* v. *Giddy*, L. R. 3 App. Cas. 908. Proclamation of Sir Henry Barkly in 1871. Land Court Ordinance No. V. of 1875.

[*See post, p.* 211, *and* 8 *App. Cas.* 218; 52 *L. J. P. C.* 40.]

Seth Jaidial *v.*
Seth Sita Ram and
Seth Sita Ram *v.*
Seth Jaidial.

(Two Appeals Consolidated.)

Oudh. Sir Arthur Hobhouse. *July* 9, 1881.

Cross appeals between a nephew and adopted son (Seth Jaidial) and his uncle and adopting father (Seth Sita Ram) to ascertain and enforce their respective rights in regard to certain moveable and immoveable property which had been the subject of family transactions since 1864. History of the property before it devolved to Sita Ram or Seth Jaidial after the mutiny. Oudh Estates Act I. 1869, s. 10. Adoption of the appellant, Seth Jaidial, by the respondent. Disputes. Compromises.

Suits for declaration of rights. Injunctions against transfer, &c. Unjustifiable issues. Law of Mitacshara as to an adopted son's right of succession and inheritance. Rights to immoveable property as between adopting father and adopted son clearly defined. The report of the Committee adjusts the interests of both parties. The vested interests of Jaidial, and his title to a declaration, are supported by their Lordships, but his rights of possession or injunction as against Sita Ram are denied. Held, also, that the entry of Sita Ram's name on the Talookdar's list is no bar to the assertion of Jaidial's interest. All the costs of the litigation are to be paid by Sita Ram out of the property taken by him under one of the erroneously founded decrees pronounced during the litigation. The declaration made provides for the discharge of several of the decrees and orders below. [*L. R.* 8 *Ind. Ap.* 215.]

Secretary of State for India in Council *v.* Rani Anundmoyi Debi.

[*Ex parte.*]

Bengal. SIR ROBERT COLLIER. *July* 9, 1881.

Salt case. Government on relinquishing the manufacture of salt on certain lands offered to settle them on the plaintiff in the suit, within the ambit of whose zemindary they were situated. The plaintiff's interests are now represented by the Rani respondent. The plaintiff had denied the right of government so to deal with them, whereupon they were settled on two other persons. He then brought this suit against the government, claiming the lands to be mal lands of his own permanently settled estates, and denying the right of government to re-settle. History of salt revenue. Regulation I. of 1824 in regard to it. When a salt mehal is assumed by government they assume it in perpetuity, but a remission is made from the Jumma (or total of all the revenue paid in by the zemindar) on khalari (salt land) rent, in order to relieve the zemindar from assessment which would be unjust, if the rated lands are transferred to others. Sect. 9 of the eleventh

clause of Regulation I. of 1824 gave power to government to re-settle on relinquishing salt manufacture, but the condition always remained that the zemindar should be compensated by a remission of khalari rent out of the whole Jumma or land revenue paid to government by him. To assess the plaintiff for land which he could no longer occupy would be clearly unjust. Their Lordships, in discharging the decree below, and dismissing the suit, gave their opinions as to the relative rights of the parties, the government's claim to re-settle the lands being sustained. Each party to pay their own costs in the Courts below. Any payments which may have been made in respect to costs are to be refunded.

[*I. L. R.* 8 *Calc.* 95; *L. R.* 8 *Ind. App.* 172.]

Mussumat Bibee Sahodra *v.*
Roy Jung Bahadoor (Nos. 51 and 52 of 1877).
(Consolidated Appeals.)
Luchmun Sahai Chowdry *v.*
Roy Jung Bahadoor (No. 61 of 1877).

Bengal. Sir Arthur Hobhouse. *July* 12, 1881.

Suits instituted by Roy Jung Bahadoor to recover shares of mouzas. Litigation had its origin in the disputes of members of a family owning an ancestral estate. Effect of a compromise, and of a solehnama prohibiting alienation. Sale. Was it a sale of life interest only? Principal question in the appeals arises on the point of limitation as to whether reversioner's rights were claimed in time. (Act IX. of 1871, Sched. 2, Art. 144.) The twelve years' rule. Time from which the statute began to run very important. Decisions of both Courts below affirmed, and appeals dismissed with costs on the ground that there was no adverse possession till a certain time, and therefore the suits brought by respondent as reversioner were not barred.

[*I. L. R.* 8 *Calc.* 224; *L. R.* 8 *Ind. App.* 210.]

Palmer *v.*
Hutchinson.

Natal. SIR BARNES PEACOCK. *July* 15, 1881.

The appellant was one of the principal commissariat officers of Her Majesty's Forces in the Field during the Zulu war. To carry on his duty he was obliged to make contracts with colonial traders (one of whom was the respondent) for the supply of oxen and waggons, &c. The suit was brought by the respondent to recover certain large sums of money on the contracts made, also an amount for damages as value for oxen "killed or dead through over-driving and illegal acts" of the commissariat officer and the soldiers in charge. Mr. Palmer had tendered what he considered the proper sum due to respondent; and when the cause came before the Supreme Court he excepted to *its jurisdiction against him, he being an officer in the Queen's service acting under the directions of the commander of the forces in South Africa, and through him subject to the instructions of the Secretary of State for War.* He also filed exceptions against the claims for damages, negligence, detention, &c. The Court overruled the exception to jurisdiction, and this was the main question now before the Committee. *The suit was not a petition of right.* Supreme Court held that Mr. Palmer was liable in his official character, but their Lordships are of opinion that the officer *could not be sued either personally or in his official capacity* upon a contract entered into by him on behalf of the commissariat department; holding that the law on the subject had been laid down in several cases. *Macheath* v. *Haldemund*, I. Term Reports, 180; *Gidley* v. *Lord Palmerston*, 3 Brod. & Bingham, 275. They report that the judgment of the Natal Court should be reversed with costs.

[6 *App. Cas.* 619; 50 *L. J. P. C.* 62.]

Hurro Doorga Chowdhrani *v.*
Maharani Surut Soondari Debi.

Bengal. SIR BARNES PEACOCK. *Nov.* 8, 1881.

This suit was originally one to recover lands with mesne profits. The Courts below having given the respondent the

lands, the appeal came here on a question of re-adjusting the scale of mesne profits and interest. Meaning of the term "mesne profits" is defined to be "the amount which might have been received from the land, deducting the collection charges." Ought the High Court to have allowed interest "year by year"? Their Lordships held that the decision of the High Court to add interest from year to year exceeded the original decree. Their Lordships, in recommending that this part of the High Court decision should be reversed, condemn the policy of an appellant bringing forward grounds which are untenable with those which are tenable, in order to make the amount claimed appealable here, and refuse to allow costs.

[*L. R.* 9 *Ind. App.* 1; *I. L. R.* 8 *Calc.* 332.]

Elliott *v.*

Turquand.

Jamaica. SIR MONTAGUE SMITH. *Nov.* 10, 1881.

Suit by a trustee in bankruptcy to recover from the appellant, the Jamaica agent of certain London bankrupts, the sum of 560*l.* paid to him by one Mac Cormack as an instalment of the purchase-money of an estate. Defence was a set-off on the ground that a much larger sum was due to appellant by the bankrupts. Their Lordships are of opinion that the sum in dispute was an item in a mutual account between the parties, and that, therefore, the case fell within the 39th section of the Bankruptcy Act of 1869, which debars title of the trustee to the property of the bankrupt in the case of mutual debts and dealings arranged before notice of bankruptcy issues. Decision in favour of appellant (thus reversing the judgment of the Supreme Court), which discharged a rule that the verdict be entered for appellant, with costs. Respondent to pay costs of appeal.

[7 *App. Cas.* 79; 51 *L. J. P. C.* 1.]

Sirdar Sujan Singh *v.*
Ganga Ram and Another.
[*Ex parte.*]

Punjaub. Sir Richard Couch. *Nov.* 11, 1881.

Suit to recover a sum of money which the person now represented by the respondents had paid as surety. The appellant is representative of parties who contracted to supply timber clear and without knots for the State of Bhawalpur, but it was left optional with the Political Agent whether he should take it or not. The representative of the appellant was advanced 10,000 rupees by the Bhawalpur State on the security of the original plaintiff, now represented by respondents. Subsequently the plaintiff had to meet the still unpaid balance of the surety, and the question now was, could he recover from the appellant? Failure of the contract. The Indian Courts had decided that the respondents were entitled to be recouped by the appellant, and this view their Lordships upheld in their report.

[*L. R.* 9 *Ind. App.* 58; *I. L. R.* 8 *Calc.* 337.]

Pudma Coomari Debi Chowdhrani and Another *v.*
Juggut Kishore Acharjia Chowdhry (Minor under the Court of Wards) and **Gogun Chunder.**

Bengal. Sir Richard Couch. *Nov.* 12, 1881.

Rival claims set up for possession of ancestral property. Previous suit on the litigation in this family was heard before the Privy Council: *vide* 10 Moore's Indian Appeals, p. 304. It is contended by appellants (collateral heirs) that the right of an adopted son (Gogun Chunder) to succeed in preference to collateral relations was limited by Hindu law. Their Lordships considered that they had decided this point in *Sumboochunder Chowdhry* v. *Naraini Dibeh,* 3 Knapp, P. C. C. 55, where they said: "An adopted son succeeds not only lineally, but collaterally, to the inheritance of his relations by adoption." They

now say: "An adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances." *Dattaka Chandrika* and *Dattaka Mimansa.* Question eventually resolved itself into one of preferential heirship, viz., as to whether the adopted son of a maternal grandfather of a deceased estate holder inherits, though of a different gotra, and is a nearer heir in preference to such maternal grandfather's grand nephew. Held by the Judicial Committee, upholding Court below, that this preferential heirship must be maintained in favour of the adopted son (Gogun Chunder). Judgments below affirmed, with costs (one set).

[*I. L. R.* 8 *Calc.* 302; *L. R.* 8 *Ind. App.* 229.]

In the Matter of the **Scheme of the Charity Commissioners for the administration of the Sutton Coldfield Grammar School,** and

In the Matter of the **Scheme for apportioning and applying for Educational Purposes part of the Endowment of the Warden and Society of Sutton Coldfield,** and

In the Matter of the **Endowed Schools Acts, 1869, 1873, and 1874.**

SIR GEORGE JESSEL, M.R. *Nov.* 15, 1881.

Two petitions, one from the wardens of the royal town (otherwise the corporation), and the second from the inhabitants of Sutton Coldfield, against the schemes of the Charity Commissioners. By these it was proposed, among other things, to withdraw 15,000*l.* from the funds of the corporation, to be applied as part of the foundation of the Sutton Coldfield Grammar School. The corporation were entitled to appeal under 39th section of Endowed Schools Act of 1869, as a large sum of money was to be drawn from their funds, but they had no right of appeal on a second ground, namely, against the scheme for the new administration of the school. The inhabitants had no *locus standi* whatever under the Acts to

appeal to Her Majesty in Council; accordingly their petition was not taken into consideration. *Vide* also decision in *Shaftoe's Charity*, L. R. App. Cas. vol. 3, part 2, p. 872. In the opinion of their Lordships, the scheme was in no way obnoxious, nor was there any ground for the objection that the 11th section of the Endowed Schools Acts of 1869, amended by 6th section, Act of 1873, had not been carefully complied with.

[7 *App. Cas.* 91 ; 51 *L. J. P. C.* 8.]

Thakur Raghbir Singh *v.*
Raja Norindur Bahadur Singh.

Oudh. SIR ARTHUR HOBHOUSE. *Nov.* 17, 1881.

Boundary suit. Claim by two Talookdars to accreted lands. Uncertainty as to the measurements in different surveys. The river Gogra cuts to the north, and throws land up to the south. Effect of this phenomenon. What was the intention and bearing of a decree delivered in respect to these disputed boundaries in 1870? Did the *custom of Dhardhura* (that the boundary of estates should vary with the main stream of the river) prevail in the locality? In the Courts below, in a previous suit, it was said that the custom of Dhardhura was displaced, and that the original rights of the different parties depended much upon the Sunnuds. In the present litigation, decrees (after due examination of the survey maps) were made declaring that a gradual accretion to the respondent's lands had taken place, and gave him title to certain areas. The report is in accordance with concurrent findings of fact. Affirmed, with costs. [*P. C. Ar.*]

Nawab Muhammad Azmat Ali Khan *v.*
Mussumat Lalli Begum and others.
(Chief Court.)

Punjaub. SIR MONTAGUE SMITH. *Nov.* 22, 1881.

Appeal arising on a suit in which a Nawab's widow had sought to recover her own share and certain shares of minor

children to landed estate left by the Nawab. The opponent in the suit and the present appellant is the undoubted son of the late Nawab, and older than the minor children. The Courts below found that by family custom, widows did not inherit. The last tribunal, the Chief Court of the Punjaub, however, found in favour of the minors' inheritance, and hence this appeal. No question now arises as to the widow's own claim. Was the widow the Nawab's lawful wife, and are the minors legitimate? Did the Nawab recognize them as his sons? *Customs as to ignoble wives among the Mandals.* Did these customs vary the general rule of the Mahommedan law relating to inheritance, or the effect of the acknowledgment of a son? Evidence of marriage of the mother, who was a slave girl in the Nawab's house, not quite satisfactory, but their Lordships think the evidence as to the acknowledgment of both of the minor sons proved beyond all controversy. The well-established principle of Mahommedan law, namely, that acknowledgment gives legitimacy, holds good in the cause, and the appeal is dismissed with costs. [*L. R.* 9 *Ind. App.* 8; *I. L. R.* 8 *Calc.* 422.]

Thekkiniyetath Kirangatt Manakkal Narayanan Nambutiripad (styled **Deva Narayanan**) *v.* **Iringallur Tharakath Sankunni Tharavanar** and Others.

Madras. Sir Arthur Hobhouse. *Dec.* 9, 1881.

Otti mortgage case. Appellant was plaintiff in the suit. Properties have from time to time been mortgaged by appellant's family to the respondents in order to secure loans of money. This suit was instituted to recover from the respondents certain lands as being part of the ancient *Jenm* or domain of his family. The appellant's family have been out of possession of the property for nearly 120 years, and the Tharavanar family have been in possession for nearly 100 years. The appellant relied chiefly on an otti, or a usufructuary mortgage, for a term of 55 years; and had it been found valid in every particular, he

no doubt would now be within the limit of time within which he might attempt to be reinstated. The ill-advised defence was set up by defendants that the jenm had been their property from time immemorial. Evidence to support mortgage. No accounts of rents. No interest. No reserved rent. In the result their Lordships consider the allegations as to a mortgage unsatisfactory, whereas, on the other hand, respondents have had too long possession to be disturbed. Appeal dismissed, with costs. [*P. C. Ar.*]

Watson *v.*
Sandeman (Official Assignee).

New South Wales. SIR BARNES PEACOCK. *Dec.* 10, 1881.

Appeal against refusal to make rule nisi for new trial absolute. This was an action by an official assignee of the estate of one Marshall to recover sums of money paid, by payment of promissory notes, to the appellant Watson by Marshall in alleged contravention of the Insolvency Acts (5 Vict. No. 17, s. 12). Marshall and Watson had business accounts, and it was contended that certain debts due from Marshall to Watson were paid at a time when Watson may be presumed to have known Marshall to be insolvent, and, if so, the money really ought to have enured to the estate in the assignee's hands. There was no finding below that Marshall knew of his own insolvency, but the circumstances were such that Marshall may be presumed to have known of it, and the payments were therefore void. This view was upheld by their Lordships in their report. Justice Willes's definition of Insolvency, as given in 10 H. of L. Rep., p. 425. The Judicial Committee think that the Supreme Court was right in refusing to make the rule for a new trial absolute, and they therefore advised Her Majesty to dismiss this appeal, and to affirm the decision of the Court below. Appellant to pay costs. [*P. C. Ar.*]

1882.

Chooramun Singh *v.*
Shaik Mahomed Ali, Bebee Jeean, his Wife, and **Ahmed Kabir,** his Son; and
Ahmed Kabir *v.*
Chooramun Singh.
(Consolidated Appeals.)

Bengal. LORD BLACKBURN. *Jan.* 12, 1882.

Suit for declaration of title. The questions in these appeals are as to the respective rights, *inter se*, of purchasers of the same mortgaged property at sales in execution of decrees. Shaik Mahomed Ali, the first respondent in the principal appeal, is the husband of respondent No. 2 in the principal appeal, and father of Ahmed Kabir (respondent No. 3 and appellant in the cross appeal). Shaik Mahomed Ali and his wife had lent large sums of money to one Rughubuns Sahai, who mortgaged his estates to them, on two mortgages, as security. Not releasing his mortgages, sales of the properties in execution took place, when the plaintiff-appellant, Chooramun, bought the estates at the sale under Mahomed Ali's own decree. It was sought by the respondents (in the first appeal the husband, in the second the son) to set up their rights under a decree of the wife, and also to set up a specific purchase by the son of the property hypothecated under her mortgage. It was decided by both the Lower Court and the High Court that not only in the loans, but in the alleged purchase by the son, the husband and father was all along the acting party, and whatever the wife (as lender)

and son (as purchaser) did, they did as benamee for him. As therefore he was the mortgagee, the sale under his own decree was held paramount to all other transactions, and the purchase of the properties by Chooramun at the sale in execution of his decree, was held good and valid. The plaintiff, Chooramun, in the principal appeal, objected only to the words of the decree of the High Court, viz., "that he was entitled as second mortgagee," as tending to litigation in the future, and sought to have them altered. In the main he did not object to the decree. The cross appellant (the son), however, reopened the whole of the questions. Their Lordships, in the principal appeal, made a variation in favour of the appellant, declaring that the objectionable words in the High Court decree ought to be omitted, and also the words saying that he had not acquired the equity of the redemption of the mortgagor; if that point was to be raised at all it could only be raised in a suit in which the mortgagor was a party. The cross appeal was dismissed. Chooramun to have costs in both appeals.

[*L. R.* 9 *Ind. App.* 21.]

Doorga Persad *v.*
Baboo Kesho Persad and Another.

Bengal. Sir Barnes Peacock. *Jan.* 13, 1882.

Question of liability under a bond. Decree to enforce execution. Question is, are infant heirs to an estate liable in respect of this decree? Was the bond given for a debt for which the infant heirs (the respondents) were liable. The bond was executed by a person who, though a member of the joint family and uncle of respondents, was not manager of the estate. On his death he was succeeded by his brother as heir. This heir's property was sold for satisfaction of several decrees. The appellant had thereupon attempted to enforce the decree against the estate of the minors. The High Court held that the heir of the uncle who executed the bond had not constituted himself the legal guardian of the infants, in that he had not obtained a

certificate of administration under Act XL. of 1858, s. 3 (The Minors Act). He could not therefore defend a prior suit against the minors in their names; nor was the money borrowed to benefit the estate. Had the appellant inquired into these matters, or into the question of necessity for the loans? The appellant obtained his decree in a case wherein the respondents were not in law represented. A portion of debt for which the bond was given was due by the father of the respondents, and the High Court decided that, although the minors were not liable to meet the decree, they were liable for a share of the amount borrowed on behalf of their parent. They could not be liable for all of it, as the debt was apportioned among members of a family in which they, the minors, held only a one-sixth share. These views their Lordships endorse in their report, and recommend the dismissal of the appeal, with costs.

[*L. R.* 9 *Ind. App.* 27.]

Dobie *v.*

The Board for the Management of the Presbyterian Church of Canada (in connection with the Church of Scotland) *et al.*

Canada. LORD WATSON. *Jan.* 21, 1882.

History of the foundation of *the Presbyterian Church in Canada*, in connection with the Church of Scotland. Management of the Temporalities Fund was in 1858 regulated by Act of Legislature of the Province of Canada, viz., 22 Vict. c. 66. There are other Presbyterian bodies in Canada; and in 1874, when the old Parliament of the Province of Canada had been abolished, and its legislative power had been distributed between the two provincial legislatures of Ontario and Quebec, and the new Parliament of the Dominion (all of which were brought into existence by the British North America Act of 1867), steps were taken to make a union of all the rival Presbyterian Churches. Acts were accordingly passed by Quebec and Ontario with this object in view, and the principal question in this suit is, whether the Legislatures who passed these Acts, and particularly the Quebec Act of 1875 (38 Vict. c. 64), which was the important

and most revolutionistic Act, had power to modify or repeal the old Province of Canada Act, and to alter the constitution of the managing board and the administration of the funds. The British North America Act is examined to show what were the exact powers granted to the Provincial Legislatures. Their Lordships were of opinion "that the appellant was entitled to have it declared that, notwithstanding the provisions of the Quebec Act of 1875, the constitution of the board and the administration of the Temporalities Fund were still governed by the Canada Act of 1858, and that the respondent board is not duly constituted in terms of that Act; and also to have an injunction restraining the respondents from paying away, or otherwise disposing of either the principal or income of the fund." Respondents ordered to pay costs as individuals, and not out of the moneys of the fund. Judgments below reversed, and cause remitted with directions. [7 *App. Cas.* 136; 51 *L. J. P. C.* 26.]

Apap *v.*
Strickland.

Malta. Sir Robert Collier. *Jan.* 21, 1882.

Suit by one Gerald Strickland to recover the Bologna Estates in Malta, which were settled in primogenitura with expressed preference for males. The respondent, Strickland, claimed to be nearest in collateral line to the Canon Bologna, who left the properties and founded the primogenitura; while, on the other hand, the appellant, the Marquis Apap, claimed through priority of birth. Pedigree of the family showed that Count Nicolo was the head of the family in 1830. With him, *then*, the succession opened. He left no children, but was succeeded by several sisters. Strickland was born in 1861 as *grandson* of sister No. 3; while Apap was *son* of sister No. 8, and was born in 1834. Construction of the deed. Survey of authorities in Malta as to primogenitura. Their Lordships reported that Strickland being the male descendant (though a grandson) of a sister nearer to Count Nicolo than Apap's mother, he, according to the clauses of the

deed of primogenitura, should be declared heir. Affirmed. Costs followed event. [7 *App. Cas.* 156; 52 *L. J. P. C.* 1.]

Chasteauneuf (Registrar of Ships) *v.*
Capeyron and Another.

Mauritius. SIR BARNES PEACOCK. *Jan.* 21, 1882.

Refusal by Registrar of British Ships to register a mortgaged ship, the property in which it was alleged passed in a sale by licitation, because a *bill of sale* is not produced in accordance with the Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104, ss. 55, 58). Refusal also to erase the mortgages from the register. What is a transfer of a ship according to the Act? And has the registrar any power whatever to erase entries of mortgages? Numerous cases cited to show that the right course was taken. Rule to show cause why registration and erased names of mortgagees should not be made, rescinded. Respondents to pay costs of appeal.
[7 *App. Cas.* 127; 51 *L. J. P. C.* 37.]

Thakurain Ramanund Koer *v.*
Thakurain Raghunath Koer and Another (from the Court of the Judicial Commissioner of Oudh); and
Anant Bahadur Singh *v.*
Thakurain Raghunath Koer and Others (from the Court of the Commissioner of Fyzabad).

Oudh. SIR ROBERT COLLIER. *Jan.* 21, 1882.

Validity of the gift of an estate. Suit by one widow (Ramanund Koer) of a Talookdar against another of his widows (Raghunath Koer), and Bisheshar Buksh Singh, to whom the latter widow had made a gift of the Talook. Ramanund sought to prove the gift invalid, and claimed on the death of Raghunath. The Talookdar died, leaving five

widows. Raghunath was third widow, and Ramanund fourth. And it was contended that, by summary settlement in 1858, by Sunnud, and by entry of her name on lists of Talookdars, Act I. of 1869, she had an absolute estate, with power to alienate. She held under the will of the Talookdar, but the principal question was, whether she had not a life interest only in the Talook. In the second suit, the appellant Anant was, by the will of the Talookdar, heir in remainder after the deaths of all the widows, and he sought for a declaratory decree, making him ultimate heir in terms of the will. Terms of the Specific Relief Act I. of 1877, as effecting the maintenance of suits. Effect of admissions at the time of summary settlement as constituting one person trustee for others: *Hardeo Bux* v. *Jawahir Singh*, L. R. 4 Ind. App. 178; L. R. 6 Ind. App. 163. Having considered several authorities, and notably *Hurpurshad* v. *Sheo Dyal*, L. R. 3 Ind. App. 259; *Thakorain Sookraj* v. *The Government and Others*, 14 Moore's Ind. App. 127; and *The Widow of Shunker Sahai* v. *Rajah Kashi Pershad*, L. R. 4 Ind. App. 198; Supp. vol. 220, discussed the will, and the equity of the case, their Lordships agree to decide that by the will of the Talookdar, Raghunath had alone a life interest, and the gift on her part could only be that conveyed in a life interest; that the appellants in both suits are reversioners, the one for life, and the second as remainderman. Decrees below reversed.

As regards costs. In the first appeal, costs of both parties are to be paid out of estate. In the second, costs of appeal, although appellant is entitled to decree, no costs are directed.

[9 *L. R. Ind. App.* 41.]

Mussumat Bilasmoni Dasi and Others *v.*
Rajah Sheo Pershad Singh.

Bengal. Sir Richard Couch. *Jan.* 21, 1882.

Lease of certain lands granted by a Rajah in 1798. Question before the Board is, whether the Pottah or lease was for perpetuity or for life only. Terms of the Pottah. Rulings of the

Sudder Court on the terms of a lease for life, and one importing perpetuity respectively. Rulings of this Board in a Bengal case, *vide* 13 Bengal L. R. 133, *vide* also 5 Moore's Ind. App. 498. The conduct and intention of the parties are considered with the view of making out the character of the lease. Was the hereditary character recognized by successive Rajahs? 11 Moore's Ind. App. 465. Their Lordships report that the lease was for life only. Appeal dismissed, with costs.

Allen *v.*
Pullay and Others.

Straits Settlements. Sir Richard Couch. *Jan.* 24, 1882.

Stamp Ordinance case. Action by a commission agent on a contract for commission. The great question was on the point as to whether a document which contained the contract could be received in evidence. The objection to its use was that it had not been "duly stamped," or that the stamp had not been effectually cancelled. Party holding it paid the penalty prescribed by the Straits Settlement Stamp Ordinance, No. 8 of 1873, under following circumstances:—In the first Court the document was produced, but the judge adjourned the hearing so that the alleged defects of stamping might be made good. The penalty was then paid, the agreement was admitted in evidence, and judgment was given allowing the claims of the commission agent. On appeal to the Supreme Court the document was not admitted, and the decree below was reversed. Their Lordships now reported that the document *was admissible*, and added that the judgment of the first Court ought to be upheld and that of Supreme Court reversed with costs.

[7 *App. Cas.* 172; 51 *L. J. P. C.* 50.]

Mussumat Jaimungul Koeri and Others *v.*
Mussumat Mohkem Koeri and Another.

Bengal. Lord Blackburn. *Feb.* 1, 1882.

Question of identity of a grantee. The principal appellant in this cause was the *mistress* of one Thakoor Lalit Narain. Her

real name was Rajmohun Kali. She declared that Lalit Narain had granted to her estates by two Mokurruri deeds and had altered her name to that of Jaimungul Koeri. The other appellants were people to whom she had sold part of the said estates. Lalit Narain had three wives, and the principal wife is now the principal respondent. She declared that the appellant was not *the* Jaimungul Koeri to whom her husband granted the deeds, and this question of fact was endorsed by the subordinate Court, by the High Court, and now by the Committee. This principal respondent, however, went further than denying the rights of the appellant, inasmuch as she set up a Jaimungul Koeri of her own, who now became second respondent. The subordinate Court and the High Court agreed that the appellant was not the right person, but did not draw the conclusion that the other (Jaimungul Koeri) was the right person either. Appeal dismissed, with costs. [*P. C. Ar.*]

Hira Lal *v.*

Ganesh Parshad and Another.

N. W. P. Bengal. Sir Robert Collier. *Feb.* 9, 1882.

Indemnity suit. Three persons, now represented by the appellant, sold lands reserving a certain portion to themselves, with, as they alleged, an agreement that the vendee of the other portions should be answerable for the Government revenue. They alleged that this condition was confirmed by an ikrarnamah, which was not now produced, though it was said to be in existence. The respondents to whose possession the purchased property had now descended denied liability. Appellant mainly relied on a judgment which had been obtained in 1853 by the original vendors against the widow of the original purchaser. It appeared that the above-named judgment was founded very much on *secondary* evidence given in support of the Ikrarnamah, though this deed was not produced below any more than elsewhere. Their Lordships held, therefore, that the judgment was

not to be too strongly relied on. Moreover, it appeared to them that although the widow of the original purchaser might be bound by his undertakings there was no evidence in proof that the undertaking was to run with the land no matter into whose hands the property might descend. Report recommends that the decree be affirmed with costs.

[*L. R.* 9 *Ind. App.* 64.]

Martin *v.*
Mackonochie.

Court of Arches. THE LORD CHANCELLOR (Lord Selborne). *Feb.* 22, 1882.

Suit under Church Discipline Act, 3 & 4 Vict. c. 86. Respondent in March, 1868, at the suit of appellant, was admonished for certain conduct during divine worship which was unlawful by above Act. It was found that respondent had acted illegally in two of the four charges brought against him. On further proceedings before the Privy Council in December, 1868, the Committee held that respondent had been guilty of breaking the law on all four points. A monition was issued, but respondent failed to obey, and on 4th December, 1869, and 25th November, 1870, he was, on reports of the Judicial Committee, further admonished and ultimately suspended *ab officio et beneficio* for three months. A second suit was instituted, and came before Sir Robert Phillimore in December, 1874, on certain new charges, and respondent was then suspended *ab officio* for six weeks. On 23rd March, 1878, the judge of the Court of Arches declared that the respondent had disobeyed Sir. R. Phillimore's monition, and a further monition was granted against him. In June, 1878, he was suspended *ab officio et beneficio* for three years. That suspension was in force when the suit which was the subject of the present appeal was instituted. In this suit, Mr. Martin complained of repeated acts of disobedience, that respondent did not desist from officiating, &c., &c. No proceeding had been taken by the appellant to put in force in the former suits the penalties for contempt (*vide* 53 Geo. III. c. 127). In the present suit the promoter at length prayed for deprivation or other canonical punishment. The judge of the Court

of Arches on 5th June, 1880, pronounced a decree with costs against the respondent, but he *refused* the prayer to deprive or canonically punish the respondent. The judge of the Court of Arches gave it as his opinion that, inasmuch as the promoter had taken no steps to enforce the orders in the previous suits, it was not consistent with the due maintenance of the authority of the Court to pass sentence now in the fresh attempt at a remedy undertaken by the promoter. The Committee dissented from this view. The suit was not one coming within the principle *Nemo debet bis vexari pro eâdem causâ*, as the acts complained of now were not identical with those in the former suits, though the promoter was the same. These complaints were against repeated offences of the same description as before but new and substantive in order. This being their view, and endorsing also the decision of the House of Lords (*Mackonochie* v. *Lord Penzance*, 6 L. R. App. Cas. p. 424) to the effect that a new suit for the mere purpose of punishing contumacy was not necessary, their Lordships (who cite *Head* v. *Sandars*, 4 Moore, 197, to the effect that, "except under peculiar circumstances, a Court of final appeal ought not to decide any cause in the first instance, as it ought to have the benefit of the discussion and judgment in the Court below, and there ought not to be an original judgment pronounced from which there is no appeal") report that the case be remitted back to the Court of Arches for that Court to complete the decree against the respondent by directing such lawful and canonical censure or punishment as to it shall seem just.

[6 *P. D.* 87; 7 *P. D.* 94; *vide also* 8 *P. D.* 191; 51 *L. J. P. C.* 88.]

[For earlier proceedings, *vide L. R.* 2 *Ad. & Ec.* 116; *L. R.* 2 *P. C.* 365; *L. R.* 3 *P. C.* 52, 409; *L. R.* 4 *Ad. & Ec.* 279.]

The Western Counties Railway Company *v.* The Windsor and Annapolis Railway Company.

Nova Scotia. Lord Watson. *Feb.* 22, 1882.

Each of these companies claim the exclusive right to possess and work a branch line of railway called the Windsor Branch

Line, in Nova Scotia. The respondents were original plaintiffs, and have had two decisions in their favour, and these were affirmed with costs in the present report of the Judicial Committee. Facts of the case are, the branch in question was intended to be part of a general railway system connecting Halifax and other towns of importance with the frontier of New Brunswick, and was leased in the first instance to the respondents in accordance with the terms of a Provincial Act of the 7th May, 1867 (30 Vict. c. 36). The Government of Canada, by the British North America Act of 1867, became the proprietors of all railways in the Dominion; and in September, 1871, the Dominion as then owners of the Windsor branch made a "traffic arrangement" with the Windsor and Annapolis Company, who in the first instance had much to say to the actual construction and working of the line. By this arrangement the exclusive use and possession of the Windsor branch was made over to the Windsor and Annapolis Company, and no right of re-entry was reserved in case of the company failing to keep one of the agreements, viz., to make payment to the Dominion Government in proportion to their earnings. The lease was to last twenty-one years from 1872. As the company were in arrear in 1873 with their payments, an Order of the Privy Council of Canada was passed recommending that the Government of Canada itself should proceed to work the Windsor branch line. On the same day as the Order was issued, the Governor-General in Council, subject to the sanction of Parliament, approved of a proposal made by the Western Counties Company, the appellants, for a transfer to them of the Windsor branch. On May 26th, 1874, an Act was passed by the Parliament of Canada (37 Vict. c. 16), to authorize the transfer to the Western Counties Company. The possession was duly understood to have been transferred on this Act coming into force. In June, 1875, however, another agreement was made with the Annapolis (respondents') company, by the Minister of Works in Canada, by which, after certain conditions as to gauge and rolling stock and paying up arrears had been carried out, the Annapolis Company were again to become sole user of the branch line. In order that these conditions should be carried

out, the Annapolis Company sued the Western Company for repossession. Hence this litigation. The appellants contended that by the British North America Act the Dominion had power to transfer railways as they liked, and that the early Provincial Act of 7th May, 1867, establishing the Windsor branch, was rendered valueless by the British North America Act, and the later (Dominion Government) Act of May, 1874, authorizing the transfer to them. The Courts below and the Committee now held that although the Dominion had acquired a right over the railways by the British North America Act of 1867, they took this line subject to the obligations under the Provincial Act passed earlier in the year, and by which the traffic arrangements of the respondent company had been ratified. Furthermore, they held that it was in pursuance of those obligations that the agreement of September, 1871, between the Dominion Government and the respondents had been made. It therefore followed that a new arrangement with a new company by a new Act was not binding, unless, at all events, the Dominion Government had distinctly alienated the possession by statute; but in the Act making provision for the Western Company to take the line, the rights of respondent company were not distinctly alienated, nor was compensation provided for such alienation. Affirmed with costs. [7 *App. Cas.* 178; 51 *L. J. P. C.* 43.]

Rhodes *v.*
Rhodes and Others.

New Zealand. Sir Arthur Hobhouse. *March* 8, 1882.

New Zealand will case. The plaintiff and appellant, Mary Ann Rhodes, was natural daughter, only child, and heiress of the deceased William Barnard Rhodes. He also left a widow, Sarah Anne Rhodes. The action was brought by the daughter against the executors, the claim set up being that, in addition to the handsome fortune specifically left to her, she was entitled to a life interest in all testator's residuary estate, real and personal, the stipulations in absolute favour of the widow being voided through her having no children of her own. Words alleged

to be inserted inadvertently in the will by the solicitor who made the draft of it for the dying testator. Lengthy consideration of the testator's real wishes in respect to his natural daughter. True meaning of the will. General rules and numerous authorities cited as to the construction of wills. Their Lordships, in the result, recommended that the decision of the Court below against the daughter ought to be reversed, and that it should be declared that, according to the true construction of the will and in the events which have happened, she has become entitled to a present enjoyment of a life interest in all the undisposed-of residue of the testator's real and personal estate. Costs on both sides to be paid out of the estate.

[*L. R.* 7 *App. Cas.* 192; 51 *L. J. P. C.* 53.]

Rajah Nilmoney Sing *v.*
Bakranath Sing and The Secretary of State for India in Council.

Bengal. SIR BARNES PEACOCK. *March* 10, 1882.

Jaghir tenure. This was a suit by Bakranath Singh against the Rajah Nilmoney Singh for confirmation of possession of a Jaghir Mehal, consisting of several Mouzas, to establish his title to the same, and for the reversal of a summary order for sale on account of a debt due from plaintiff's father to the Rajah. The case on the part of the plaintiff was that he was the holder of a Ghatwali tenure (as Government Service Jaghirdar), and the Government put in a statement in support, declaring the lands to be police lands, held in lieu of wages for the performance of police duties from before the permanent settlement, a contention which, it was further alleged, had been determined in the presence of the Rajah in a previous decision of the Deputy Commissioner of Manbhoom in 1863. The Rajah, on his part, declared the lands were not Jaghir lands constituting Government property, but part of his permanently settled Mal estates, and that they had been granted by his father to the plaintiff's father as a service tenure. The plaintiff's father having become

judgment debtor, he (the Rajah) had caused them to be sold. At the sale the Rajah purchased, and now claimed that his title should be maintained. Full inquiry into the origin and nature of Ghatwali tenures, and numerous cases quoted, notably, *Rajah Lelanund Singh* v. *Government of Bengal*, 6 Moo. Ind. App. 101; and *Rajah Nilmoney Singh* v. *Government of Bengal*, 18 W. R. 321. In their report, Committee declare the lands cannot be transferred without consent of Government, and the decrees of both Courts in favour of plaintiff are upheld, with costs. The office of Jaghirdar, on revenue-paying lands, is, according to the authorities, a hereditary one, unless there was some special objection to the person entitled to succeed.

[*L. R.* 9 *Ind. App.* 104.]

The Melbourne Banking Corporation, Limited *v.* Brougham.

Victoria. THE LORD CHANCELLOR (Lord Selborne).
March 11, 1882.

Mortgage of large estates to a bank. Appeal to set aside a decree in which it had been declared that the equity of redemption in certain stations and stock, which had been mortgaged by the respondent Brougham to the bank (in consideration of a loan), was not barred by a release of the equity of redemption, executed by the official assignee of the respondent's estate. In answer, the bank said that the said equity of redemption was honestly and effectually released in favour of the bank, and that a subsequent alleged conveyance back to respondent was invalid. Respondent's contention was that official assignee was induced to execute the said alleged release to the bank through the misrepresentations of the present appellants as to the amount really due to them and the real value of the mortgaged property. Onus of impeachment of transaction on respondent. Effect of lapse of time. Held, that there was no misrepresentation; that the bank was bound to realise property on which they had advanced money without burdensome delay. On all points their Lordships report in favour of the bank. There

were subsidiary matters dealt with during the litigation, such as the validity of a sale after release by the bank, and the form of the pleadings. On this last point the case had been before the Committee in 1879. *Vide* 14 App. Cas. 164. Decision below reversed with costs. [7 *App. Cas.* 307.]

Rajah Venkata Kannakamma Row and Others *v.* **Rajah Rajagopala Appa Row Bahadoor, The Court of Wards,** and Others.

Madras. Sir Barnes Peacock. *March* 15, 1882.

Suit for the recovery of share of a Zemindary and mesne profits. The partibility in accordance with the usage of Hindu law of the *Zemindary of Nuzvid* was established by the Privy Council judgment on the appeal of *Rajah Venkata Narasimha Appa Row Bahadoor* v. *Court of Wards and Others*, L. R. 7 Ind. App. p. 39. The present appellants belong to the same family of claimants as in Narasimha's case, and in consequence of the above decision are entitled to a declaration for their share of the Zemindary. In the present suit they also seek for mesne profits (on the shares assured them) from the death of their father in 1868, until they are put in possession of their shares. The principal respondents, who were minor sons of the original first defendant (now deceased), contended that up to the death of their father in 1878 he had acted properly in maintaining the impartibility of the Zemindary. The Lords, in their report, vary the decree of the High Court, and order mesne profits to be paid to the appellants from the time of their dispossession; provided that they shall not recover such mesne profits for a period exceeding three years next before the suit was commenced in 1873, subject to an allowance to the respondents for all or any portion of such mesne profits which the respondents may prove to have been applied for the benefit of the joint family. Case remitted in order that directions be carried out. Costs to be paid to appellants by the respondents out of the estate of the original first defendant. [*P. C. Ar.*]

Hussain Ali Khan *v.*
Khursaid Ali Khan and Another.

N. W. P., Bengal. SIR ROBERT COLLIER. *March* 16, 1882.

Action on accounts. In or about 1841, one Aftab Ali Khan died leaving three sons, two of whom are the present respondents. The appellant was Aftab's brother, and was entitled to half of the joint estate of the family. Each of the respondents (the plaintiffs), in addition to shares in the other half of the estate, had private properties of their own. The appellant acted as manager, but seems to have given no accounts, or only very limited accounts, till 1875, when such were demanded by the respondents, who had over and over again deposited moneys with the appellant. As a result the appellant gave the respondents a promissory note. This note the appellant, in the present suit, declares to be a forgery, albeit that it was deposed to by several persons, apparently of respectability. He also declares that the account which he is alleged to have signed is a forgery. While not putting weight on some of the evidence for the respondents, the Lords report that the decision below, in favour of the respondents, ought to be affirmed. Costs to respondents.

[*P. C. Ar.*]

Chundi Churn Sashmal *v.*
Doorga Persad Mirdha.

Bengal. SIR RICHARD COUCH. *March* 17, 1882.

Dispute as to title in land. Government leased certain lands and afterwards gave the lessees a like quantity of land in another position in exchange. A local Rajah successfully brought a suit against Government for the first portion, whereupon Government directed the lessees beforenamed to pay the rent to the Rajah on land they were given in exchange instead of on the first portion. Present appellant claimed certain small portion of the land given in exchange, alleging that as the first lessees had fallen in arrear with their rents, Government had been ousted from their claims to the first portion, and that it had been sold.

It was, moreover, alleged that the Government retaliated by seizing the new land given to the lessees, and made a fresh lease with this appellant. The whole question in suit was whether the first portion of the land had been sold as alleged, and of this the Committee thought there was no evidence. They agreed to report that the appellant had substantiated no claim to the land in suit. Appeal dismissed, with costs. [*P. C. Ar.*]

The Mussoorie Bank, Limited *v.* Raynor.

N. W. P. Bengal. SIR ARTHUR HOBHOUSE. *March* 21, 1882.

Preliminary objection was raised as to admissibility of appeal *on ground of alleged misstatement in petition for special leave* to appeal. The principle laid down in *Ram Sabuk Bose* v. *Monomohini Dossee*, L. R. 2 Ind. App. 82, also *Mohun Lal Sookul* v. *Beebee, Doss and Others*, 8 Moore's Ind. App. 195, as to effect of misstatements in petitions and limit of time for taking objection, is endorsed by the Lords. Objection in this case disallowed on ground that faults in petition are immaterial. This was a will case in which the contention of the bank was that no trust was created in favour of the respondent. The deceased Captain Raynor left "the whole of his property," real and personal, to his widow, "feeling confident that she will act justly to our children in dividing the same when no longer required by her." The widow borrowed various sums from her bankers, and at her death the Mussoorie Bank claimed the securities, viz., the shares left by her husband. The son, the present respondent, contended that the bank shares were left to his mother as a trust, and that she never had more than a life interest, and that the above quotation from his father's will revealed this view, rather than the one that the bank contended for, namely, that the property was absolutely a gift to the widow. Doctrine of precatory trusts. Their Lordships' report endorsed the view of the bank. No trust had been established. Several modern authorities quoted to show that there must be no uncertainty when a trust is set up. Reversed, and appeal to High Court dismissed with

costs. *No costs of appeal are given, having regard to the nature of the petition for leave to appeal which was presented.* Their Lordships, however, declare their opinion that there was no intention on the part of the appellants to mislead. [*L. R.* 9 *Ind. App.* 70.]

Hurro Pershad Roy Chowdhry *v.*
Gopal Dass Dutt and Others.

Bengal. SIR ROBERT COLLIER. *April* 20, 1882.

Suit to recover arrears of rent. Whole question is as to the application of the law of limitation (Act VIII. of 1869, 29th section). Two Courts in India had decided that the Act applied. Were there any peculiar circumstances in certain concurrent litigation which could cause exception to the operation of the statute? Effect of previous appeal to H. M. in Council, vide P. C. Ar., 26 May, 1881. Committee are of opinion that the statute *does* apply, and that appellant's case does not come within the exception to the operation of the Act, and recommend decree to be affirmed. (Vide *Ranee Surnomoyee* v. *Shoshee Mokhee Birmonia*, 12 Moo. Ind. App. 244, distinguished.) [*L. R.* 9 *Ind. App.* 82.]

Lalla Baijnath Sahoy *v.*
Baboo Rughonath Pershad Singh.

Bengal. SIR ARTHUR HOBHOUSE. *April* 25, 1882.

Claims to ancestral estate. Appellant was registered owner of a third part of a mouza. Question was, whether he was only benamidar for the respondent. Mortgages, sales, confiscations, suits for arrears of rent, compromises. Benami and other complicated transactions in which two families—the Singhs and the Sahus respectively—were the prominent actors, had at length led to doubt about the title. Subordinate Court of Shahabad decided in favour of the appellant, but the High Court gave decree in favour of respondent, in whom it considered lay a claim to title which was not to be upset by the appellant. This last decree their Lordships upheld in their report. Affirmed, with costs. [*P. C. Ar.*]

Purmanundass Jeevundass *v.*
Venayekrao Wassoodeo.

Bombay. SIR ARTHUR HOBHOUSE. *April* 26, 1882.

Bombay will case. Bequest in a will to establish a *Dhurum-sala* for the benefit of *Sadhoos* and *Sants.* The appellant is a son of a deceased brother of testator, and residuary legatee under the will, and he now sought to prove that the family was a joint one, and that this particular bequest was inoperative under Hindu law. The Bombay litigation began in consequence of the respondent declaring to the Court that, by reason of death and incapacity, new trustees were required under the order and direction of the Court. The appellant resisted the appointment of any new trustees. He contended that no effect should be given to the provisions of the will respecting this charity, except to such an extent as he might consent should be effective. It appeared that, subsequent to the proving of the will, the appellant had joined with the executors, with whom, by the wish of the testator, he was entitled to act in arranging and sanctioning the dedication of this particular charity. That arrangement, their Lordships held, could not now be altered. Nobody had the power to alter it. Subsidiary question was raised as to the costs of the appellant in the suit below. Important dictum as to discretion of Court below in this matter when decree remains unaltered. Their Lordships entirely acquit appellant of any covetous or sordid motives in the litigation. Decree of High Court below is now substantially affirmed, with costs. [*L. R.* 9 *Ind. App.* 86.]

Rao Karan Singh *v.*
Rajah Bakar Ali Khan.

North West Provinces, Bengal. SIR BARNES PEACOCK. *April* 27, 1882.

Suit to recover money and interest due on two registered mortgage bonds, also to recover the amount claimed by the sale

of a mouza hypothecated by the said bonds, of which property the present appellant was in possession. Suit was brought by Mussumat Latif-un-nissa, mother of present respondent, who is her sole heir. *Principal and interest on two mortgage bonds.* The main question was one of limitation. The appellant contended that he had been in adverse possession of the mouza in question for more than twelve years before the commencement of the suit, and that therefore the claim of the respondent was barred by the limitation in Article 145, 2nd Sched., of Act IX. of 1871. This question of limitation was, indeed, the only one in this appeal, as there were three concurrent judgments in the Courts below on the questions of fact. The Committee agreed with the High Court that the appellant was not in adverse possession (under the present law of limitation) within twelve years. He had tacked on to his possession a period during which the collector after whom he claimed was in possession, for the purpose of protecting the revenue, but that period was not to be counted, and did not assist appellant's title. Decree would therefore declare respondent entitled to recover. Affirmed with costs. [*L. R.* 9 *Ind. App.* 99.]

Muttayan Chettiar *v.*
Sangili Vira Pandia Chinnatambiar.

[*Ex parte.*]

Madras. SIR BARNES PEACOCK. *May* 10, 1882.

Claims by appellant against a Zemindary for moneys lent to respondent's father for the maintenance of an impartible Zemindary and liquidation of debts. Important circumstance that the Zemindary had descended through a maternal grandfather. Hypothecation by means of a Razinama of parts of the Zemindary for the money due. History of the Zemindary (Sivagiri). Was it self-acquired property, and, being therefore subject to alienation at the will of the Zemindar, was not the hypothecation enforceable? Decree for the amount due. Sale of the Zemindary, notwithstanding the protest of the appellant that he had a hypothecation lien under a decree which should be legally

respected. Order passed by District Court that appellant's attachment ceased with the sale. After appeal to High Court, case was remitted back to District Court. On its return to the High Court, that tribunal gave a partial decree to the appellant. Hence litigation to obtain more ample justice from the respondent. Defence was that the debt was not proved to be legally or morally binding on present Zemindar. Their Lordships held that the Zemindary had descended to the respondent under such conditions as made the heir liable for his father's debts, and recommended reversal of decrees below, and that a decree be passed for the amount found after enquiry to be due, with interest. Mitacshara law in the Madras Presidency on descent of Zemindaries: *Girdharee Lall* v. *Kantoo Lall*, L. R. 1 Ind. App. 321; *Deen Dyall Lal* v. *Jugdeep Narain Singh*, 4 L. R. Ind. App. 252; *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, L. R. 6 Ind. App. 104, &c., &c. Respondent to pay costs.

[*L. R.* 9 *Ind. App.* 128.]

Ana Lana Muttu Carpen Chetty *v.*
Kana Nana Chuna Letchimanen Chetty and Another.

Ceylon. Sir Richard Couch. *May* 10, 1882.

Suit was brought by Kana Nana to enforce alleged rights to estate as judgment creditor and mortgagee. The alleged judgment debtor was the second respondent, Meyappa. The suit was brought against the appellant, who was in possession of the property. The District Court found that the claims of the first respondent, supported by the second respondent, were not proved, and dismissed the suit; also that the appellant, Ana Lana, was holding under one Superamanien, to whom, subsequently to the date of the alleged debt and mortgages, all the title to the land had passed by the consent of the second respondent. Respondents now contended that the first respondent had sufficiently made out his right to enforce judgment against Meyappa, and the latter now, as intervener, supported his claims to title in preference to the appellant. It appeared that, with the consent of Meyappa, a perfectly legal Crown

grant had been made out, passing the property to Superamanien. The appellant subsequently became a purchaser for value of the Crown grants and the legal estate. Their Lordships reported that the decree of the District Court was right, by which the claims of the respondents were dismissed, and that the decree of the Supreme Court, whereby it was declared that the property was owned by Meyappa and was liable to be sold to Kana Nana, should be reversed, and appeal to that Court dismissed, with costs. Respondents to pay costs of appeal.

China Merchants' Steam Navigation Company *v.*
Bignold (and Cross Appeal).

China and Japan. SIR ROBERT COLLIER. *May* 10, 1882.

Collision between her Majesty's gun-boat "Lapwing" and the "Hochung," steamer, belonging to China Merchants' Company. Cross appeals. Collision at night, sea calm, no wind. "Meeting vessels." In Court below "Hochung" was found to blame for bad steering, and "Lapwing" for infringing the regulations as to lights. Provisions of Merchant Shipping Act (17 & 18 Vict. c. 104), s. 298; *vide* also 25 & 26 Vict. c. 63, s. 29, and 36 & 37 Vict. c. 85, s. 17, respecting collisions of this kind; case of the "Fanny M. Carvill," 2 Asp. Mar. Cas. 569, cited. Report of the Committee upholds the decision below, but varies the decree as to damages, holding that the Admiralty rule must be adopted, that where both vessels are to blame damages must be divided. Each party, therefore, will obtain from the other half of the damage which he has suffered.

[7 *App. Cas.* 512; 51 *L. J. P. C.* 92.]

Poreshnath Mookerjee *v.*
Anathnath Deb.

Bengal. SIR RICHARD COUCH. *May* 11, 1882.

Question of conflicting title as to land raised in a suit for rent. Respondent Zemindar, having purchased the dur-putnidar rights

of others in an estate, instituted a suit for rent and road cess against his tenant. This man resists the claim, on the ground that the present appellant is the real owner of the durputni. Validity of conveyance by absolute sale. The appellant intervenes in the suit, claiming title to the rent, as against the respondent, under a mortgage from the former defendant made subsequent to the dismissal of the former suit. Evidence of the relative conveyances. Sale. Registration of names in the Zemindar's Serishta. Estoppel againt the appellant by reason of a written statement in the former suit. Their Lordships, in their report, express the view that neither by reason of a purchase at a sale which he had brought about in execution of a decree on a mortgage bond, nor as mortgagee, does the appellant make out anything like so solid a title to the rent as that which the High Court adjudged to lie with the respondent. Affirmed, with costs. [*L. R.* 9 *Ind. App.* 147.]

Rajah Nilmoni Sing Deo Bahadoor *v.*
Taranath Mookerjee.

Bengal. SIR ARTHUR HOBHOUSE. *May* 18, 1882.

The question in this appeal was whether the Deputy Commissioner of Manbhoom, in the Presidency of Bengal, who had made decrees for arrears in rent suits under the Bengal Rent Act (Act X. of 1859), could transfer those decrees for execution into another district, where the person proceeded against had seizable property. The High Court, in the exercise of its jurisdiction of superintendence over inferior Courts given to it by the High Courts Act (24 & 25 Vict. c. 104), ordered one of the transfer orders of the Deputy Commissioner to be set aside and suspended all proceedings in the other. Important questions arose as to how far this Act (X. of 1859), as well as previous Acts (VIII. of 1859, and XXXIII. of 1852), went in allowing the transmission of rent suits to other districts (at all events from Manbhoom—in certain of the regulation districts outside Manbhoom the jurisdiction in rent suits having, by

recent enactments, been taken out of the hands of revenue authorities and placed solely under the control of the ordinary tribunals). The Committee were of opinion that the rent courts, as regulated by Act X. of 1859, were civil courts within the provisions of Act VIII. of 1859, s. 284, and that therefore the Deputy Commissioner had power to transfer his decrees for execution into another district. Reversed, with costs.

[*L. R.* 9 *Ind. App.* 174.]

Rani Badam Kunwar *v.*
The Collector of Bijnore (on behalf of Chaudri Ranjit Singh).

N. W. P., Bengal. SIR ROBERT COLLIER. *June* 21, 1882.

Claim to inheritance. In this suit one Ghasa Singh, now represented by his minor adopted son Chaudri Ranjit Singh, sought to obtain a declaration of his proprietary right to a large quantity of land in a Zemindary. The title set up by Ghasa Singh was, that he was one of two brothers, his brother being Bhup Singh, who died in 1850; that he was joint in property with Bhup Singh; that upon Bhup Singh's death, leaving two sons, Amrao and Basant, his estate went to those two sons, and that he, Ghasa Singh, then became joint with them; upon their both dying without issue the whole estate devolved on him. The appellant is the widow of Basant, and her case is, that Bhup Singh and Ghasa Singh were separate; that the whole of the property belonged to Bhup Singh (who was adopted by his grandfather, the previous holder), Ghasa Singh having no interest therein, but acting only as manager; that consequently it descended to the sons of Bhup; and that she, as the widow of the survivor, was entitled to the property. Ghasa Singh denied the adoption, and produced a copy of an agreement signed mutually between himself and Bhup Singh, and regulating the separation. One of the main questions in suit was, whether this was a forged document or not. The Lords agree with the High Court that it is genuine, and, Ghasa Singh having other parwanahs to support his case, and being so long

in possession, pronounce him, or rather his son (the respondent, Chaudri Ranjit Singh) the proper heir. Appeal dismissed, with costs. [*P. C. Ar.*]

Charles Russell *v.*
The Queen.

New Brunswick. SIR MONTAGUE SMITH. *June* 23, 1882.

Validity of Canada Temperance Act of 1878. Question raised was, whether having regard to the provisions of the British North America Act of 1867 relating to the distribution of legislative powers, it was competent for the Parliament of Canada to pass this Temperance Act. This Act was for the promotion of temperance, a promulgation in fact of the local option principle; and New Brunswick had adopted it. Russell was convicted for non-compliance with the terms of the Act. Hence the litigation to test its validity. Whole question of competency to pass the Act is raised. The objects of the Act relate to the peace, order, and good government of the Dominion, and not to a class of subjects defined as "property and civil rights." Their Lordships, after an elaborate discussion on sects. 91 and 92 of the British North America Act, agree to report that the Parliament of Canada had full power to pass the Act, and that it was valid.
[7 *App. Cas.* 829; 51 *L. J. P. C.* 77.]

S—— *v.*
Broughton (as Administrator-General of Bengal, and Administrator to the Estate of Sir Henry Tombs) and **The Government of India.**

Oudh. SIR BARNES PEACOCK. *June* 23, 1882.

Appeal on special leave *in formâ pauperis* by S——. He originally claimed 25,000 rupees as damages against Sir Henry Tombs, then in command of the military cantonments at Lucknow, for alleged illegal arrest and detention for three days, under

the supposition that he, S——, was either unsound or becoming unsound in mind. Examination of all the evidence in the case. In the first instance, the Civil Court of Lucknow gave the appellant 3,000 rupees damages. Sir H. Tombs, who is now deceased, appealed to the Commissioner of Lucknow, who reduced the damages to 300 rupees. He also directed the appellant to pay the Commandant's costs on the difference between the first decree and the second. Afterwards, the cause went on appeal before the *Judicial* Commissioner, who declared that no damages could be incurred by an officer over cantonments acting in a fair spirit for the good government and order of the district: Acts XXXVI. of 1858, and XVIII. of 1850. The Judicial Committee in the course of their judgment said it might be taken as a fact, both upon the finding of the Civil Court and the Commissioner's Court, that the appellant at the time when the acts complained of were committed, was not insane. Their Lordships discharged the order of the Judicial Commissioner, and reported that the damages for 300 rupees should stand, but that the portion of the Commissioner's order directing appellant to pay costs be annulled. Appellant obtained the costs of the appeal. [*P. C. Ar.*]

Merriman (Bishop of Grahamstown) *v.* **Williams.**

Cape of Good Hope. Sir Arthur Hobhouse. *June* 28, 1882.

The parties in this appeal were Dr. Merriman, Bishop of Grahamstown, in the Church of Africa, and Williams, the Colonial Chaplain appointed by the Crown. The site of the Church of St. George at Grahamstown had been vested in the Crown, and was held in trust for the ecclesiastical purposes of the Church of England as by law established. It seems also to have been the practice for the Crown chaplains to be officiating ministers of this church. The action arose in consequence of the present chaplain refusing to recognize the right of Bishop Merriman to preach in the church, though willing to allow him to preach by courtesy. He (the Colonial Chaplain) contended

that the Church of the Province of South Africa was a religious association independent of the Church of England as by law established. This was the whole question, and the history of the Church of South Africa was fully discussed in the arguments. Formerly the bishops were appointed by *Letters Patent* from the Crown; but upon independent Constitutional Legislative Assemblies being formed in the provinces of South Africa, the Crown ceased to issue letters patent. The English churchmen, moreover, took steps to organise their own Church as an independent religious society on a voluntary basis, by the action of synods. This present bishop was *elected* in Africa, and was not appointed by letters patent. The respondent won the appeal on the ground that whereas he himself was a Crown chaplain, there were difficulties in the way of the bishop claiming that the Church in Africa is in connection with the Church of England as by law established. The present constitution of the South African Church excluded portions of the faith and doctrine of the Church of England. This being so, the bishop had no right to claim to use property which was settled to uses in connection with that Church. It was competent to the Church in Africa to take up its own independent position with reference to the decisions on doctrine of the tribunals of the Church of England. But having chosen that independence they cannot also claim as of right the benefit of endowments settled to uses in connection with the Church of England as by law established.
[7 *App. Cas.* 484; 51 *L. J. P. C.* 95.]

Harris and Clay *v.*
Perkins and Enraght.

Court of Arches. Sir Barnes Peacock. *July* 4, 1882.

Bordesley Ritual Case. Perkins (then parishioners' churchwarden) made a representation against Enraght (incumbent) for alleged illegal practices in celebration. Monition issued against Enraght by Court of Arches. Subsequently, Perkins ceased to be a churchwarden, and it was then sought to have Harris and Clay, the new churchwardens, substituted in his stead in the

legal proceedings. Lord Penzance refused this substitution, hence this appeal. Whole question before Committee was whether upon the construction of the Public Worship Regulation Act, 37 & 38 Vict. c. 85, ss. 8, 9, the suit which was instituted abated by Perkins ceasing to be churchwarden, and whether the new churchwardens, or either of them, were to be permitted to take out of Mr. Perkins's hands the conduct of the proceedings in the suit, or to intervene. Their Lordships saw nothing in the Act consonant with the view that if a churchwarden who makes the representation ceases to hold that office or ceases to be a parishioner, he shall not go on with the suit. It would be most inconvenient if the case were otherwise, as among other reasons succeeding churchwardens might think that the acts of the clergyman were not unlawful at all. Without deciding what the effect of Mr. Perkins ceasing to be churchwarden may have upon the suit, the Judicial Committee endorse the view that the present churchwardens had no interest in the matter which entitled them to intervene in the suit, and affirmed the order of the Court of Arches, with costs.

[7 *P. D.* 31, 161.]

Rai Balkrishna (Son of Rai Narain Das) *v.*
Masuma Bibi and Others (including the Collector of Ghazipur on behalf of the Court of Wards).

(Two Appeals Consolidated.)

N. W. P., Bengal. SIR ROBERT COLLIER. *July* 6, 1882.

These appeals are preferred against two decrees of the High Court, which affirmed two decisions of the lower Court. The appellant sued on certain loans and mortgages executed by Mussumat Masuma Bibi, the holder of a Talook by inheritance, and two of the other respondents who were her son-in-law and daughter, and also by reason of his (the appellant) being the holder of a sale certificate for a portion of the estate, which had been sold in execution to meet the principal respondents' debts. The fourth respondent was a defendant as representing the Court

of Wards. He had assumed the superintendence of the estate of Mussumat Masuma Bibi, who had been held to be (and had herself acquiesced in the view) incompetent to manage it. *This estate lay in Benares, and therefore the Regulation* 52 *of* 1803, *extending jurisdiction of Court of Wards to this province, regulated the supervisorship.* The main question in both appeals was whether Mussumat Masuma Bibi, being under the Court of Wards when she effected the loans and mortgages, was or was not qualified to bind herself or the estate for these liabilities. A second question, not raised below, was sought now to be argued, namely, whether the Court of Wards had so conducted their supervisorship as to hold out the lady to the world as capable of contracting, and whether the plaintiff had been induced thereby to contract with her. Even if this question could be now gone into, their Lordships were of opinion that, as a matter of fact, no such case is made out by the appellant. It was true the Court of Wards had sanctioned the raising of money to meet a particular debt incurred antecedently to the assumption of the estate, but no general power of raising money could thus, their Lordships hold, have been created. The Lords agreed in finding that Masuma being legally incompetent, and her agreements not being ratified by the Court of Wards, they were not binding on the property, or on the ward herself. Their Lordships disagreed with the decision of the High Court in the first appeal, viz., that the appellant had not proved purchase of the first mortgage debt, and that it had no jurisdiction. The result, however, would be the same as in the second appeal, viz., that although Masuma is dismissed from it as not liable, the order made should have execution against the other respondents. The finding of the High Court in the second appeal was to this effect. One decree is affirmed with a variation, which declared the liability of the respondents other than Masuma Bibi and the Collector. The decree in the second appeal is affirmed *in toto. Collector to have costs of both appeals, except the costs incurred by opposing consolidation.* This appeal in its circumstances is different from *Mohummud Zahoor Ali Khan* v. *Thakdooranee Rutta Koer*, 11 Moo. Ind. Ap. 468.

[*L. R.* 9 *Ind. App.* 182.]

Ross and Others *v.*
The Charity Commissioners.
(Scheme for St. Dunstan's Charity.)

SIR MONTAGUE SMITH. *July* 7, 1882.

Petition against the Charity Commissioners by the rector, churchwardens, and other persons, trustees of the charities of St. Dunstan's in the East, which, prior to a scheme of the Charity Commissioners, were settled to be administered under a scheme of the Court of Chancery, approved in 1867. No decisive action had been taken to carry the objects of the Chancery scheme into execution before the passing of the Endowed Schools Act of 1869; but after that Act was passed, the Attorney-General being of opinion that the property which had been appropriated by the Chancery scheme to educational purposes fell within the provisions of the Endowed Schools Act, the scheme now opposed was formulated. A number of objections (all of which failed to convince the Committee) that the scheme was faulty, were urged at the Bar, the principal of which were—that the consent of the old Governing Body had not been obtained, that the endowment was not educational, but charitable, and that, if any part was now made educational by raising the fees for tuition, the scheme of the Charity Commissioners failed to have "due regard" to the educational interests of persons in a particular class of life as laid down by the provisions of the Endowed Schools Act of 1869, and by the Amendment Act of 1873. As to this, their Lordships observe that it was within the powers of the Commissioners to modify educational privileges, and they could not interfere unless they saw that the discretion of the Commissioners was wrongly exercised. Another objection was raised to the provision in the scheme of the Commissioners that a master would not be disqualified to act as such by reason of his not being, or not intending to be, in holy orders. As to this the Committee were satisfied that the original foundation of the endowments did not provide for the religious education of scholars. Therefore it was clear the proviso in the Endowed Schools Act to the effect that any

original instrument of any educational endowment which includes religious instruction should be respected had not been contravened. Petition to be dismissed. No order as to costs.

[7 *App. Cas.* 463; 51 *L. J. P. C.* 106.]

Misir Raghobardial *v.*
Rajah Sheo Baksh Singh.

Oudh. Sir Richard Couch. *July* 15, 1882.

Suit on a bond given by respondent for money alleged to have been due to the appellant. Respondent pleaded *res judicata*, want of full consideration for this and other bonds, challenged the way in which the debt had been made out, and alleged that he only signed this bond so that he might draw against the appellant. Two Courts held that the substantial issue had been decided in a previous suit, and declared there was no jurisdiction to try it again. Appellant contended that the money for which the bond was given was found to be due after adjusting accounts; that two Commissioners appointed by the consent of parties had reported favourably on appellant's account-books; finally, that there was no bar of *res judicata*. Effect of pecuniary limitation of value of subject-matter in first Court. The question before the Lords was whether the substantial issue involved had been decided in a previous suit by a *Court of competent jurisdiction*, within the meaning of sect. 13 of Act X. of 1877 (Civil Procedure Code). Their Lordships, reversing the Orders of both Courts below, remanded the cause for trial on the merits, observing that by "*a Court of competent jurisdiction the Act of* 1877 *means a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive, or, in other words, a Court of concurrent jurisdiction.*" Appeal was heard *ex parte*, but costs were ordered to be paid by respondent. As to "competent Court," see *Khagowlee Singh* v. *Hossein Bux Khan*, 7 B. L. R. 673. *Vide* also *Mussumat Edun* v. *Mussumat Beehun*, 8 W. R. 175.

[*L. R.* 9 *Ind. App.* 197.]

Jones (Master of the "Castleton") *v.*
Scicluna.

Malta. LORD FITZGERALD. *Nov.* 14, 1882.

Action was brought against the appellant, as master of the "Castleton," for damages to cargo caused by alleged irregular and faulty navigation when coming out of Valetta. Concurrent findings on questions of fact, viz., that on a squally night, the captain believing in error, as he said, that a vessel was coming into port, negligently steered his own vessel into a most dangerous position off shore, and she went on the rock. Decision below to the effect that negligence had been shown in the navigation is affirmed with costs.

Mussumut Lachho *v.*
Maya Ram and Others.

N. W. P. Bengal. SIR BARNES PEACOCK. *Nov.* 15, 1882.

Construction of a *wajib-ul-arz*, or village administration paper, in defining rights in a mouza. Appellant, who gained the decision of the first Court but lost her case in the High Court, sought to re-establish her right to pre-emption with regard to a one-third share which one of the respondents, Muhammad Ibrahim, had sold to a person who was father of some and grandfather of the rest of the other respondents, and these became the purchaser's heirs and representatives. The mouza was divided into three thokes or portions, of which one belonged to the appellant and a second belonged to Ibrahim. The *wajib-ul-arz* declared that transfer by sale or otherwise of any thoke could be made in favour of the holder's relatives, or, on their refusal, in favour of other owners of the thoke. The appellant sought to prove she being owner of another thoke had pre-emption, but their Lordships upheld the view of the High Court, that the words "other owners" of the (particular) thoke did not mean owners of another thoke. The appellant was neither an owner or shareholder in the share sold, nor had she any interest in it. Appeal dismissed, with costs.

[*L. R.* 10 *Ind. App.* 1.]

Hurrish Chunder Chowdry *v.* Srimati Kali Soondari Debi.

Bengal. Sir Robert Collier. *Nov.* 16, 1882.

Construction of a Sunnud conveying a talook, and of a will following it. Procedure with respect to enforcing orders of her Majesty in Council in India—regulated by Act 10 of 1877. The talook was conveyed by one Sumbhoo Chunder to a sister named Kassiswari, who treated the Sunnud as having conveyed to her an absolute estate, and she disposed of it by a will, one moiety to her daughter Chundermoni, and grand-daughters, and the other to her daughter-in-law, the present respondent, and her prospective adopted son. On Kassiswari's death the present appellant, Hurrish (who was a son of Sumbhoo), apparently ignoring the will, took possession, and an action was brought by Kassiswari's daughter Chundermoni, and the daughter-in-law (the present respondent, who had now adopted a son) to recover possession. During the pendency of the litigation in India Chundermoni died, and two daughters of hers went on with the suit, but the High Court decided that the testatrix only took the estate for life, and was incompetent to dispose of the property by will. The daughters of Chundermoni (but not Kali Soondari or her adopted son) then appealed to the Queen in Council. (*Vide* L. R. 5 P. C. 138.) Their Lordships reported that Kassiswari took absolute estate under the Sunnud, and that the disposal under the will was valid. They declared their opinion that the order of the Subordinate Judge, whereby the grand-daughters and daughter-in-law became entitled to possession, ought to be restored, but did not decide what their rights were *inter se*. As before stated, Kali Soondari did not join in the appeal to the Queen. On the return of the suit to India the grand-daughters, without resorting to execution, parted with their interest to Hurrish, and the present suit was brought by Soondari to obtain full title to her half share under Kassiswari's will. This their Lordships, affirming High Court decision, with costs, agree to report as established. They declare that their judgment is to be executed in respect only of Soondari's share by virtue of the will, declining to say anything

which might act as an estoppel to her adopted son's claims, should they ever be raised, or anything to affect Hurrish's right to test the validity of that adoption. Important explanation made by the Judicial Committee in this appeal regarding execution, &c., of Orders in Council. *In the absence of the production of an original Order in Council a copy of it is properly admissible. Sect.* 610 *of Act X. of* 1877 *cannot be construed as restricting the only possible evidence to the certified copy, but as directory words with the object of ensuring that proper information upon the subject of any Order in Council should be supplied to the Courts in India.* [*L. R.* 10 *Ind. App.* 4.]

J. C. Dibbs and Others *v.*
Brown and Others.
(Two Appeals, Nos. 2570 and 2717.)

New South Wales. Sir Arthur Hobhouse. *Nov.* 21, 1882.

Partnership transactions. Purchase of an interest in the partnership of the New Lambton Colliery, New South Wales. Nature of the partnership and its obligations and engagements. Powers of transfer of individual shares. Assertion of other partners to secure their rights in consequence of the sale of one share to new partners. The suits were instituted to ascertain the rights of all parties to profits and the property generally at the present time. The partnership, though now dissolved by death, is one of those continued for the purpose of completing current transactions and old contracts and mortgages. The Judicial Committee discharge the decrees below in the two appeals respectively, and make in lieu thereof a lengthy declaration, in which they direct how justice will best be meted out to all parties concerned. There would be no costs of the appeals. Their Lordships at the end of their judgment say:— "They are unwilling to conclude without impressing upon the parties that the interference of Courts of law with partnership transactions is usually disastrous, and that it is impossible for any Court to do for the parties what they may do for themselves by reasonable arrangements. Possibly they may see their way

to such arrangement now that their strict legal rights have been ascertained." [*P. C. Ar.*]

Maharajah of Burdwan *v.*
Srimati Tara Soondari Debia and Others.
[*Ex parte.*]

Bengal. LORD FITZGERALD. *Nov.* 23, 1882.

Suit to set aside sale of a Putni Talook for non-payment of rent. Respondents contended, and this was upheld, that the sale undertaken by agents of the appellant was invalid in consequence of non-observance of terms of Regulation VIII. of 1819, in respect to "due service," "notice," and "publication," when it was intended to sell up the tenures of defaulting debtors by public sale in liquidation. Affirmed.

[*L. R.* 10 *Ind. App.* 19.]

Macnaghten and Olpherts *v.*
Mahabir Pershad Singh and Another.
[*Ex parte.*]

Bengal. SIR BARNES PEACOCK. *Nov.* 24, 1882.

The sale of certain villages in execution of a decree obtained by the appellants was set aside by the High Court, on the ground of alleged irregularity in publishing or conducting the sale thereof, within the meaning of sect. 311 of the Code of Civil Procedure, Act X. of 1877. The appellants (respondents were not represented before the Privy Council) contended that High Court had arrived at an erroneous conclusion in deciding that an inadequacy of price was occasioned by a non-statement of revenue in the sale proclamation. Their Lordships recommended the decree below to be reversed with costs, thinking the objection made on the part of the respondents had been made too late when made for the first time in the High Court, the alleged omission not having been made one of the grounds for setting aside the sales when the litigation first began, but even if it were not too late they were of opinion there was not

evidence to justify the High Court in laying down that an inadequacy of price was occasioned by the non-statement of the Government revenue in the sale proclamation.

[*L. R.* 10 *Ind. App.* 25.]

Sillery *v.*
W. Don Juan Harmanis and Another.

Ceylon. SIR RICHARD COUCH. *Nov.* 28, 1882.

The question in this appeal was whether a sale of a coffee estate was valid. The appellant owned a coffee estate in 1871, but it was subject to mortgages and to a lease to third parties for some ten years. It had been agreed that the leaseholders should pay the rent towards the mortgages. In 1871, the first respondent did some work for the appellant, and a debt was incurred, which not being met, judgment was applied for, and in the result the property (subject to the mortgages and lease) was put up for sale and sold. In the present suit the appellant claimed he had not had sufficient notice. He also offered, but late in the litigation, to pay his debt with interest and cost of litigation if property was re-conveyed to him. Respondents argued that the matter in the appeal was *res judicata;* that sale was *bonâ fide;* and also that, even if there was any informality in or incident to the judgment or sale, respondents became purchasers for valuable consideration before the appellant took any step to set aside such judgment or sale. Their Lordships, in reporting that the appeal should be dismissed, were of opinion that sects. 53 and 54 of Ceylon Ordinance No. IV. of 1867, prescribing limits within which objections to sales on allegations of informality should be raised, were complete answer to action. They pronounced no opinion on the question of *res judicata.*

[8 *App. Cas.* 99; 52 *L. J. P. C.* 7.]

Omrao Begum and Another *v.*
The Government of India and Another.

Bengal. SIR ROBERT COLLIER. *Nov.* 28, 1882.

Action by daughters of the late Syed Mehdi Ali Khan, a half-brother of a predecessor of the present Nawab Nazim of

Bengal, against the Government of India and the second respondent, for arrears of an allowance, or in lieu thereof possession of certain immoveable property. There was also a claim that the allowance might be charged upon this property, and that if it be not paid the property should be sold for the purpose of payment. Medhi Ali had brought a suit to recover certain property from the Nawab Nazim, but an agreement was come to whereby he gave up his claim, the Nawab giving him 600 Rs. a month in consideration therefor. The appellants sued the Nawab for arrears of this annuity, and obtained a judgment against him in 1873, about a month after the passing of the Nawab Nazim's Debts Act (XVII. of 1873), an Act passed by the Government of India as a protection against legal process, and whereby all the properties of the Nawab were placed in the hands of Government Commissioners for the purpose of upholding the dignity of the Nawab, and for the purpose of exempting him from being sued. The High Court, and now the Committee, held that this Act, and the powers of the Commissioners (and these were not controlled by the preamble of the Act), were fatal to the suit, which could not proceed. The Commissioners had jurisdiction over the immoveable property sued on, and they were not bound by any previous agreement or judicial proceeding. Affirmed with costs. [*L. R.* 10 *Ind. App.* 39.]

Radha Persad Sing *v.*

Ram Purmeswar Singh and Others.

Bengal. Sir Arthur Hobhouse. *Dec.* 1, 1882.

Question, whether costs ordered to be paid to the appellants by parties now represented by respondents in an interlocutory decree in the same litigation could be set off against the several costs of that litigation, which in the result were ordered to be paid by the appellants. The Judicial Committee, reversing decision below, decided that the claim of set-off was good. The case is remitted for adjustment. Appellants to have costs of this appeal, and in the High Court (the claim for Court fee excepted). [*L. R.* 10 *Ind. App.* 113.]

Blackwood v.
The Queen.

Victoria. SIR ARTHUR HOBHOUSE. *Dec.* 9, 1882.

Duties on Estates of Deceased Persons, Statute of 1870 (Victoria Statute, No. 388). One James Blackwood died domiciled in Victoria, but besides his property there he left real and personal estate in New South Wales and New Zealand. The Crown claimed duty on so much of these "*foreign assets*" as consisted of personal estate. The question was, whether the personal estate outside Victoria was liable to duty under the above Act. Maxim of *Mobilia sequuntur personam.* Distinction between probate and legacy duty, not made in this statute as in England. This statute imposes a single duty (probate) on the property of deceased persons. Their Lordships reported that the judgment below ought to be reversed, or rather that judgment of *nol. pros.* with costs of defence be entered up in favour of the present appellant, holding that the Act was not intended for the levying of a tax in respect of property in the jurisdiction of other colonies, and that the representative of a person deceased *in Victoria*, when applied to for duty, was only bound to give a statement of so much as was under his control within the limits of Victoria. Costs of appeal to be paid by respondent.
[8 *App. Cas.* 82; 52 *L. J. P. C.* 10.]

Srimati Janoki Debi v.
Sri Gopal Acharjia and Others.

Bengal. SIR RICHARD COUCH. *Dec.* 9, 1882.

Shebait or Mohuntship Case. The appellant widow and heiress of the last Shebait claims the Shebaitship, with possession of other properties in suit. She contended that, in the absence of rules laid down by the founder of the Shebaitship, the office descended according to Hindu law of inheritance, subject to usage, and that in this case no usage which would defeat her claim as a lineal descendant of the Shebait families had been proved. The subordinate Court held that a childless Hindu widow would be incompetent to fill, and that the succession to

the office had been settled by a *bonâ fide* arrangement (under which the first respondent now had possession) entered into after arbitration by the members of that family who were now co-respondents, and that this ought not to be disturbed. By this a handsome allowance was made to appellant. The High Court, without accepting the view that females would be excluded, pronounced that the evidence did not establish the appellant's right to succeed under the Hindu law of inheritance, inasmuch as the ordinary rules of Hindu inheritance had not been followed in the mode of succession. The Shebait and properties (as Debsheba) were dedicated to an idol, and are now in the possession of Sri Gopal, the first respondent. He is, for the time being, the spiritual guide of the Rajah of Panchkote, whose ancestor had appointed his own spiritual guide. The Rajah now claimed authority and control over the office, and had agreed that the first respondent should hold it. The Rajah's power, however, the High Court did not endorse, but they decided that the succession had all along been disposed of in a manner approved by all parties concerned, and declared in favour of the arrangement that Sri Gopal, as lineal kinsman and as manager for previous Mohunts, was holder, and should continue in possession of the office subject to the allowance to the female appellant. Their Lordships agreed with the finding of the Courts below in the main. It was not for them to consider whether there was infirmity in the title of Sri Gopal, when, owing to absence of documentary or other direct evidence, it does not appear what rule of succession should be acted on. There were many cases (*Greedharee Doss* v. *Nundokissore Doss Mohunt*, 11 Moo. Ind. App. 428; *Rameswarem Pagoda case*, L. R. 1 Ind. App. 209; and *Rajah Vurmah Valia* v. *Rajah Vurmah Mutha*, L. R. 4 Ind. App. 76—*vide* p. 83) showing that it must be proved in evidence what was the usage, if any. The appellant, being out of possession, could only recover on the strength of her own title, and not on the weakness of the respondent's. Sri Gopal had been in possession for several years with the consent of the Rajah. They could not report to Her Majesty that the appellant had made out a title to heirship. Appeal dismissed, with costs. [*L. R.* 10 *Ind. App.* 32.]

1883.

Strickland *v.*
Apap.

Malta. Sir Robert Collier. *Feb.* 10, 1883.

Succession to the Mangion Estates. (*Vide* also the case of the succession to the Bologna Estates, reported in 7 App. Cas. p. 156.) One Canon Mangion made a will in June, 1737, and his immediate universal heir in 1739, purporting to act in accordance with powers and directions in the Canon's will, executed a deed regulating the mode of succession to the Canon's estates. The question to be decided now was whether, under the true construction of the will and the deed, Gerald Paul Strickland, born in 1861, the *grandson of an elder sister* of the last heir, or the Marchese Felicissimo Apap, born in 1834, *the son of a younger sister*, was entitled to the succession. The Marquis Apap relied on being nearer in degree of nature to the last male heir, and Gerald Strickland on being in the nearer line. General rules and authorities governing succession to a primogenitura are quoted. Decision (as was the case in the Bologna appeal, *vide* 7 App. Cas. 156) is in favour of Gerald Strickland, thus reversing the judgment of the Court of Appeal at Malta. The following ruling laid down in the Bologna case is adhered to. "A deviation from the ordinary mode in which a primogenitura descends is not to be construed as interfering with that mode of descent more than is necessary to give effect to that deviation." The general rule governing the succession to a primogenitura is thus expressed in Rohan's Dritto

Municipale di Malta, B. IV. c. ii. s. 10: "To succeed in primogenituras, in the absence of any particular rule, one must consider, in the first place the line, in the second place the degree, in the third place the sex, and in the fourth place the age." Decree of the Appeal Court of Malta reversed. Decree of the Court of First Instance affirmed. The respondent to pay all costs. [8 *App. Cas.* 106; 52 *L. J. P. C.* 1.]

Moore *v.*

R. M. Shelley, and **George W. Shelley.**

New South Wales. Sir Barnes Peacock. *Feb.* 13, 1883.

Trespass. Action was brought by the Shelleys against Moore and his partner for trespass on a cattle run, and seizing cattle, sheep, &c. At trial in the colony, 750*l.* as damages were awarded to the Shelleys, and the Court refused to grant a rule *nisi* for a new trial. It was on this refusal that the cause came here. The defence below was that the Shelleys had made default in certain payments specified in the mortgage deed under which they held the run, and that the seizure was justifiable. Their Lordships reported that the Shelleys had made no default (no opportunity having been afforded them to inquire into the *bona fides* of an agent who had made a demand on the wife of one of the Shelleys in their absence), and that the decision below for damages should be upheld with costs.

[8 *App. Cas.* 285; 52 *L. J. P. C.* 35.]

Thakur Debi Singh and **Another** *v.*

Kalka Singh and Another.

Oudh. Sir Arthur Hobhouse. *Feb.* 15, 1883.

Suit for the recovery of seven-sixteenths of family property. The respondents are in possession of property in question, partially as a result of previous litigation in the Privy Council (Vide *Thakur Daryao Singh* v. *Thakur Debi Singh*, L. R. 1 Ind. App. 1), and partly upon a recent decree of the Judicial Commissioner, which last the appellants now seek to set aside on grounds of fraud and surprise. Committee hold the allegations

of surprise and fraud baseless; but even if there were fraud or concealment, these allegations could not be raised here for the first time; and report in favour of the respondents, with costs. [*P. C. Ar.*]

Raja Ramrunjun Chuckerbutty Bahadoor *v.* **Baboo Ramprosad Dass.**

Bengal. SIR ROBERT COLLIER. *Feb.* 20, 1883.

Boundary of estates. This suit arose out of the repudiation by the appellant of an award defining the proper boundaries of conterminous lands. Pure question of fact. The Judicial Committee, affirming decrees below, declare that the appellant has been unable to impeach the award. Appellant to pay costs of appeal. [*P. C. Ar.*]

The Heirs of Martin (deceased) *v.* **Marie Boulanger** and Others.

[*Ex parte.*]

Mauritius. LORD BLACKBURN. *Feb.* 21, 1883.

Whether an award is binding. Code de Procédure Civile, Art. 474. The affairs of the Guildiverie Centrale (an association of distillers and sugar-cane growers for the manufacture of rum). Details of the litigation to have accounts between the association and its debtor stated. Martin, deceased, whose widow and heirs defended the action brought by respondents, who claimed to be creditors, and, as such, to exercise the rights of the association, contended that the effect of a reference and an award made in 1865 between the association and one of its debtors (Martin), bound the Guildiverie Centrale, and all parties claiming under it. As creditors, the respondents stood simply in the shoes of their debtors as respects the award, no taint of fraud or collusion being alleged. They could not impeach the award by way of *Tierce Opposition*, or otherwise. Custom of trade in Mauritius; *bons à livrer*. Are those who derived their rights under the parties to the reference as much bound as if they were parties themselves? The Judicial Committee uphold

the view that the matter is *res judicata* and the award binding, and reverse the orders below which directed certain accounts to be reopened. Doctrine of "*interest reipublicæ ut sit finis litium.*" Respondents to pay costs of appeal.

[8 *App. Cas.* 296; 52 *L. J. P. C.* 31.]

Miles *v.*
McIlwraith.

Queensland. LORD BLACKBURN. *Feb.* 27, 1883.

Important decision bearing upon the responsibility of members of the Legislative Assemblies in the colonies. The appellant, Miles, sued McIlwraith, a member of the Legislative Assembly and colonial treasurer. The appellant claimed five penalties of 500*l.* each, alleged to have been incurred because McIlwraith sat and voted in the legislative chamber while being part owner of a ship chartered by a shipping firm which had contracted with the Government to carry emigrants from England to Australia. Miles had to prove that McIlwraith, when he sat and voted, was under one of the disqualifications mentioned in the 6th and 7th sections of the Queensland Constitution Act (31 Vict. No. 38). Principal and agent. McIlwraith proved in the Court below, that although the contracting firm were his general agents to charter ships in which he held a share, he had directly withdrawn his authority to make any contract with the Government. The firm were still his agents in all cases to which the specific restriction did not apply. The evidence compelled the jury to give a verdict in favour of the colonial treasurer. A rule for a new trial being refused, the matter now came before the Privy Council, when the decision below was endorsed, and it is consequently held that Mr. McIlwraith was not disqualified. Appeal is dismissed with costs. "It is impossible to hold the defendant (respondent) bound by a contract, though purporting to be made on his behalf, if made contrary to his express directions." "There is neither allegation nor evidence here of what would have entitled the Government to hold the defendant bound to them in the same way as if there

had been no restriction on the firm's authority." Baron Parke's judgment in *Freeman* v. *Cooke*, 2 Exch. 663, cited.

[*Rep.* 8 *App.* 120; 51 *L. J. P. C.* 17.]

Balwant Rao Bishwant Chor *v.*
Purun Mal Chaube.

[*Ex parte.*]

N.-W. P. Bengal. SIR ARTHUR HOBHOUSE. *Feb.* 27, 1883.

Suit by appellant to remove the respondent from the management of the worship and service of the temple of the god Ganeshji at Muttra, and to be declared authorized to appoint another manager to carry out the object of endowment. Temple was founded by the appellant's ancestor. No misconduct in the trust proved. Temple had been in the management of respondent's family eighty years or upwards. Suit not brought in time. Their Lordships reported that the suit was barred by Limitation Act IX. of 1871. The sections referred to are 10, 118, 123, and 145. Affirmed.

[*L. R.* 10 *Ind. App.* 90.]

Hedges *v.*
Alexander.

Ceylon. SIR BARNES PEACOCK. *March* 1, 1883.

Action on a bond. Action brought by Major General William Alexander against Hedges to recover 1,500*l.* and interest due upon a bond. Defendant (appellant) set up the plea that, although he had executed the bond, he had received no consideration for it. Onus. Both the Supreme Court and their Lordships decided that it was impossible to contend that the money was not held by the defendant's agents on his account and that he did not receive full consideration for it. Judgment of the Supreme Court in favour of respondent affirmed, with costs.

[*P. C. Ar.*]

Petition for leave to appeal in the case of the Attorney-General of Jersey *v.* Esnouf.

Jersey. Lord Blackburn. *March* 3, 1883.

Alleged libel. Jersey law, effect of. Order in Council of Elizabeth (13 May, 1572) as to *definitive sentences* as opposed to interlocutory. The sentence which is the subject of this application, which was an order that the defendant should plead to the libel and that the case should be tried without a jury, is not, in their Lordships' opinion, a definitive one, and leave to appeal cannot therefore be granted. Opinion of Baron Parke in *Ames's Case* (3 Moo. P. C. 409) as to jurisdiction of the Privy Council in criminal cases. Leave in such cases should be granted very cautiously, and not until after the most careful consideration. [8 *App. Cas.* 304; 52 *L. J. P. C.* 26.]

Phillips and Others *v.*
The Highland Railway Company.

The "Ferret."
(Vice-Admiralty.)

Victoria. Sir Barnes Peacock. *March* 7, 1883.

Seamen's wages and compensation for wrongful dismissal. Effect of an Order in Council under an Act passed in 2 Will. IV. c. 51 (*vide* sect. 15), and of the Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104), ss. 188 and 189, in giving legal sanction to any number of seamen "not exceeding six" joining in an action for recovery of wages when the aggregate amount exceeds 50*l.* The "Ferret" belonged to the Highland Railway Company, and was bound on a legitimate voyage; but when at sea certain of the hands altered her course and took command, with the intention, as alleged, of stealing the ship. On arrival at Melbourne the ship was seized on behalf of the owners. No charge of complicity was set up against these particular complainants,

neither was *participes criminis* urged in defence: when the seamen were ordered off the ship in Melbourne, they instituted proceedings to obtain the moneys due to them and the cost of their journey to England. The action was one *in rem* in the Vice-Admiralty Court, where the judge held that he had no jurisdiction, but fixed the amount which he would have awarded had it been otherwise. Their Lordships recommended a reversal of the decision below, holding that the judge had jurisdiction under the statutory authority named above, and declaring the appellants (the six claimants) entitled to the sums fixed by the Vice-Admiralty judge. [8 *App. Cas.* 329; 52 *L. J. P. C.* 51.]

Elliott and Others *v.*
Lord and Others.

Lower Canada. SIR RICHARD COUCH. *March* 8, 1883.

Action by appellants. Owners of the steamship "Gresham" to recover damages in the nature of demurrage for undue detention of their ship at Sydney, Nova Scotia, whither she had gone under terms of a charterparty to load coal, and bring the same to Montreal for the respondents, who were the charterers of the vessel for this duty. The arrival of the "Gresham" at Sydney was to be notified at once to the agents of the respondents, who were to use all celerity in loading her and giving her prompt despatch from port. The evidence showed that the respondents' agents had not a sufficient supply of coals for this (and other vessels) ready to be shipped, as they should have had, on the quays, and a delay of the vessel for some days ensued. The Superior Court in Canada awarded the appellants 850*l.* damages. This decision was reversed by the Court of Queen's Bench, but this last decision was recommended to be discharged by the Judicial Committee, and the decree of the primary Court was affirmed with costs. Respondents to pay costs of the appeal. [52 *L. J. P. C.* 23.]

Hutton *v.*
Lippert.

Cape of Good Hope. Sir Robert Collier. *March* 14, 1883.

Colonial duties on Transfer of Property Act (Cape Act), No. 11 of 1863, sects. 2 and 3. Appellant, as Treasurer-General of the Colony, brought action to recover a sum of money, together with interest due as transfer duty on a sale of certain landed property. The question was whether there was or was not a sale by one Ekstein to Lippert. The respondent contended that there was no sale, that he merely had an authority to sell the estate as agent of Eckstein, that he was to retain for himself the surplus over a certain price, and that his receiving rents and arranging the purchases of portions of the property were acts done on behalf of Eckstein. There never was a complete transfer of the property such as would be liable to be registered as such in the Deeds Registry Office of the Colony. Law of the Cape as to contract of sale. Evidence of the transaction in question. Their Lordships, being of opinion that the object seemed to be "to obtain all the benefits of a sale without being subject to the duty on it by giving a contract of sale the colour of a contract of guaranty or agency," report that the appeal of the Treasurer-General should be allowed with costs below and of this appeal.

[8 *App. Cas.* 309; 52 *L. J. P. C.* 54.]

Miller *v.*
Sheo Parshad.

N.-W. P. Bengal. Sir Richard Couch. *March* 15, 1883.

Suit by the appellant as an official assignee of the estate of certain insolvent co-partners with whom respondent, a Lucknow banker, had monetary dealings. A debt due by another party to the co-partners was (in liquidation of their own liabilities to the respondent) transferred to him. Suit was brought by the assignee to recover sum so transferred, with interest, on the grounds that the transfer (Rukka) was a voluntary one, and

disclosed a fraudulent preference, and not made until after the estate had vested in the appellant, and, if made before, was also fraudulent and void under provisions of the Indian Insolvent Act (11 & 12 Vict. c. 21), s. 24. English cases cited to show what a voluntary payment of a debt is. Their Lordships, believing that the payment was voluntary, recommended the decree of the High Court to be reversed with costs, agreeing with the Subordinate Court that the transfer was fraudulent and void as against the assignee. Respondent to pay costs of appeal.

[*I. L. R.* 6 *All.* 84; *L. R. Ind. App.* 98.]

Mohesh Lal *v.*
Mohunt Bawan Das.

Bengal. SIR BARNES PEACOCK. *March* 15, 1883.

Mortgage suit. Intention of extinction. The appellant, a banker, sued the respondent, and one Mungul Das (not now a party in the appeal, and against whom the decree of the Subordinate Judge in respect to one parcel of the property still stood), on a mortgage bond to recover certain moneys, and also a balance on a running account, and for an order for sale of certain parcels of mortgaged lands. The respondent, Bawan Das, is Mohunt of an Asthul, and heir in that Mut of one Balgobind Das. The properties hypothecated by the bond, which were now in question (the High Court had decided), were not liable for any portion of the appellant's claim (there was another property under the bond, but the decree of the High Court was silent as to that, as in a suit between Mungul Das and Bawan Das, and heard by the Judicial Committee in 1877 (27th June, *vide* P. C. Ar.), that property was declared not to be the property of Bawan Das or the Asthul). The bond in question was executed by Mungul Das, who had been duly authorized agent of the Mohunts of the Asthul, and had for a time control of their property, at all events up to Balgobind's death; but the agency had been discontinued, and the circumstances, the Subordinate Judge considered, were such as to render it incredible that the bank was not fully aware of Balgobind's death

and of the termination of Mungul's authority. Instead of taking warning, the bank went on dealing with Mungul as if he was the proprietor of the estates, and not as an agent at all. It appeared that Balgobind, who had lost a decree for a large amount, had registered a deed of sale of the lands in suit in favour of Mungul Das while he was Mohunt, but the High Court decided that this was purely a benami transaction to protect the lands against the claims of the decree holder. Their Lordships agreed with the High Court in considering that the bond was not binding upon the Asthul or upon the respondent. It was further contended by the appellant that if this particular bond was not binding on Bawan Das, the appellant was entitled to fall back on an older bond still, in favour of one Luchmi Narain, and that it was binding on the Asthul, inasmuch as the relation of principal and agent then existed. This raised the question as to whether this older mortgage was extinguished when Luchmi Narain was paid, or was intended to be kept alive for the benefit of the banker. It was proved, however, that in the later debt contracted by Mungul Das when the later mortgage was completed, and when Mungul was no longer an agent, certain of the money then obtained by him was said to be for the balance of the debt due on Luchmi Narain's mortgage. There was nothing in the evidence to show that Mungul intended to keep the mortgage alive, or that this mortgage should be held by the appellant as an additional security for the later loan. On the contrary, the evidence went to prove that Mungul desired to finally extinguish the mortgage, and had borrowed the money to pay it off, and he it was who was answerable for that transaction. Equity could not give the appellant additional security because his security turned out to be bad. The Asthul may not be inalienable, and it may be liable to Mungul, but that must depend upon the state of accounts between it and him, which cannot be taken in the suit now under appeal. Acting on these views, the Lords report that the decree declaring Bawan Das not liable on the mortgages be affirmed with costs.

[*I. L. R.* 9 *Calc.* 961; *L. R.* 10 *Ind. App.* 62.]

McEllister and Others v.
Biggs and Others.

South Australia. SIR BARNES PEACOCK. *March* 15, 1883.

Allotment of land case. Two Courts below found that a person now dead, through whom the appellants claimed, had become registered proprietor of the allotment through fraud, within the meaning of the Real Property Act (South Australia, No. 22 of 1861), s. 39. One George Guthrie had obtained a judgment in ejectment against the person who is now dead, which decision, by the terms of the Act, gave Guthrie a right to apply to have the certificates of title cancelled, and he had then parted with his rights to the Biggs'. The concurrent judgments below decided the point of fraud, but in this appeal it was mainly sought to show that the deeds under which the Biggs' derived title from Guthrie had not been properly registered; that they were not qualified to sue for recovery of the land; and lastly, the appellants objected to the form of decree below. All these objections, raised on the hypothesis that above Act had not been complied with, are held to be of no force by the Judicial Committee, who affirm the judgment of the Supreme Court. Their Lordships are of opinion that, although the deeds did not pass an interest in the land, still they passed to the Biggs' the equitable right which Guthrie had to set aside the certificate of title to the person now dead upon the ground of fraud. He also had a right under clause 4 of sect. 124 of the Act to maintain the action of ejectment. *Their Lordships thought the objection to the form of decree not taken in the primary Court was now taken too late.* When the decree is carried out, and the certificates are delivered up to the Registrar-General to be cancelled, and are cancelled, an application may be made to the Registrar-General to obtain the proper certificates of title. Affirmed, with costs.

[8 *App. Cas.* 314; 52 *L. J. P. C.* 29.]

Ahmud Hussein Khan *v.* Nihaluddin Khan.

Oudh. Sir Richard Couch. *March* 16, 1883.

Suit for maintenance. Litigation is between two brothers who disputed as to the heirship to their father's estate, and on it being decided that the eldest brother (the present appellant) was heir, the younger brother, the present respondent, sued for maintenance from the date of dispossession. Two Courts below had decided in favour of the respondent's claims as to maintenance, although questions of law of *res judicata* and limitation were fruitlessly raised by the appellant. The main issue before the Committee was as to whether the respondent was or was not a person entitled to receive maintenance. The importance to be attached to a certain agreement, though it was not sued upon, was also discussed at length. By this agreement the respondent himself, at a certain stage of the dispute, agreed to a limitation being put upon the amounts he was to receive. Their Lordships reported that the decree of the Commissioner of Fyzabad ought to be varied, so that the arrears for maintenance would be calculated in the manner provided for in the agreement, and interest would be given thereon. The rate of interest, however, to be the same as had been given by the lower Courts on the sum they had awarded. The respondent would be given costs of this appeal, as the appellant had failed in the objections of law, without which he would have had no right of appeal.

[*I. L. R.* 9 *Cal.* 945; 10 *L. R. Ind. App.* 45.]

Appeal and Cross-Appeal of Kumar Tarakeswar Roy *v.* Kumar Shoshi Shikhareswar.

Bengal. Sir Robert Collier. *March* 17, 1883.

Hindu will case. Validity not disputed. Departure from Hindu law in excluding females. The testator by the will bequeathed his estates to three nephews, as payment of the

expenses of pious acts. The question in this appeal and cross-appeal arises upon the construction of clauses in a will, one of which ran thus: "The said three nephews shall hold possession of the same in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale, but they, their sons, grandsons, and other descendants in the male line, shall enjoy the same, and shall perform acts of piety as they shall respectively see fit for the spiritual welfare of our ancestors. If any of them die leaving a male child (which God forbid), then his share shall devolve on the surviving nephews and their male descendants, and not on their other heirs." The points now argued were whether the gift over to the nephews was for life or was absolute; whether there was a departure from Hindu law; whether, if the last surviving did take only a life estate, he took only a third share; or whether, upon the death of the second nephew, the share which he left behind him, made up of his *original* and *accrued* share, went to the surviving nephew. The suit was brought by the third and only surviving nephew (now appellant in the main appeal) against the son of the testator to recover possession. The son is appellant in the cross-appeal. Several authorities cited: *Juttendro Mohan Tagore* v. *Ganendromohun Tagore* (The Tagore Case), Supplemental Volume of L. R. Ind. App. p. 47; *Bhoobun Mohun Debia* v. *Hurrish Chunder Chowdhry*, L. R. 5 Ind. App. p. 168; *Sreemutty Soorjemony Dossee* v. *Denobundoo Mullick*, 9 Moo. Ind. App. p. 135. On principle of English law, which however does not apply to this case, see *Pain* v. *Benson*, 3 Atk. p. 80; *Worledge* v. *Churchill*, 3 B. & C. p. 465; *The Crawhall Trusts*, 8 De G. M. & G. p. 480; *Douglas* v. *Andrews*, 14 Beav. p. 347; and *Urland* v. *Fleurit*, 11 Jur. N. S. p. 820. The ruling of the High Court was that the appellant was entitled to life estate only. The respondent (appellant in the cross-appeal) objected to the decree on the ground that if entitled, even to life estate, it ought to be declared that it was only as to a third portion. Judgment below affirmed, and appeal and cross-appeal recommended to be dismissed. Held that a life estate only was created, and that

the attempt to create an estate of inheritance failed. "The attempt to confine the succession to males to the entire exclusion of females is, though not so great (as in the Tagore case), yet a distinct departure from Hindu law, 'excluding' in the terms of the judgment quoted 'the legal course of inheritance.'" Held also, that according to the natural sense of the will, "on the death his share goes to his two brothers, and that on the death of one of these the share which he had at his death, made up of his original and accrued share, goes to the surviving brother." [*L. R.* 10 *Ind. App.* 51.]

Lalla Sheoparshad *v.*
Juggernath.

Oudh. Sir Arthur Hobhouse. *March* 20, 1883.

Action on accounts. Deendial, the father of the present respondent, had commercial transactions with the appellant, a Lucknow banker. The respondent on his father's death became administrator to his estate, and it was alleged that at the death of Deendial a large sum of money was due by him to the appellant. The story of the appellant was that the respondent compromised the debt by engaging to give a bond for a reduced sum. No bond appears to have been executed. The suit began by the appellant claiming for the amount alleged to have been agreed upon (for insertion in the bond) with interest. In the Court of the Judicial Commissioner evidence was not set forth by the appellant of the foundation of the case, namely, Deendial's alleged debts. No account was produced by the appellant. Furthermore, the respondent Juggernath denied emphatically that he himself had made any agreement whatever for a bond or any offer of compromise. No entry was found in the appellant's books either of a compromise sum. Witnesses corroborated respondent's defence, and alleged that there had been a quarrel over the accounts and that it was an open quarrel still. The first Court had given a decision favourable to the appellant. The Judicial Commissioner reversed that finding;

and their Lordships agreed with his view, and recommended the decree in favour of the respondent to be affirmed with costs. "*They considered that it was a very dangerous thing to rest a judgment upon verbal admissions of a sum due without very clear evidence.*" If a plaintiff chooses to rely upon verbal admissions he should give the most clear and cogent proof of such admissions. [*L. R.* 10 *Ind. App.* 74.]

Rajah Nilmoni Singh Deo Bahadoor *v.*
Umanath Mookerjee and Others.
Nos. 31 and 32 of 1880.
(Two Appeals Consolidated.)

Bengal. Sir Richard Couch. *April* 4, 1883.

Validity of a will. Bamundas Mookerjee, a large landed proprietor, had made a will, the effect of which was to give the share of one of his sons, Taranath by name, to Taranath's wife, one Bhoyarini. The appellant, Rajah Nilmoni Singh, held judgment decrees for over 60,000 rupees against Taranath, and when Bamundas died he attached the share, alleging it was Taranath's by rules of Hindu succession. He disputed validity of will, contending that it was fabricated by Taranath and his co-sharers to deprive him of the money due. Taranath's wife and the other members of Bamundas's family applied for probate, and denied all the allegations of invalidity. (Hindu Wills Act XXI. of 1870.) Their Lordships came to the same conclusion as the High Court—that the will had been duly executed, and that the expression in the will was *boná fide*, that it was the distinct object of the testator to prevent Taranath's share falling into the hands of Taranath's creditors. Appeal dismissed with costs.

[*I. L. R.* 10 *Calc.* 19 ; *L. R.* 10 *Ind. App.* 80.]

Ruttoo Sing *v.*
Bajrang Sing and Others.

Bengal. SIR ARTHUR HOBHOUSE. *April* 4, 1883.

Suit by appellant (plaintiff) to recover land alleged to have been conveyed by deed in return for an alleged advance of 30,000 rupees. "Benamee transactions" in this case have been elaborated with a perfection that is uncommon, even in India. The High Court decided that the evidence did not prove the payment of this sum by appellant. The judges were of opinion that the Benamidar for the respondents never received it, nor was the evidence satisfactory that he had executed the deed. The Judicial Committee agree with the High Court that the consideration was not paid. It was unnecessary, they thought, to decide the question of the execution of the deed, though they were not prepared to dissent from the ruling below. Affirmed, with costs. [*P. C. Ar.*]

Webb *v.*
Wright.

Griqualand. LORD BLACKBURN. *April* 4, 1883.

Suit by Webb, managing director of the London and South African Exploration Company against Wright, Civil Commissioner at Kimberley, to compel him as the proper governmental authority to grant to the company an indefeasible British title to the farm "Alexandersfontein." Original grant from the President of the Orange Free State; and effect of proclamation, ordinances, and regulations made after the annexation of the territory by the British Crown (*vide* also *Webb* v. *Giddy*, 3 App. Cas. 908; *vide* also *Webb* v. *Wright*, No. I., *ante*, p. 146, involving similar claims to the estate of *Dorstfontein.* In the judgment in that appeal the Lords decided that the *full ownership* of the land was given to the grantee by the presidential grant.) A new title was tendered by the British, wherein there was a clause particularly obnoxious to the company, which was as follows: "That the issue of this title without the express reservation to Government of its rights to all precious

stones, gold, or silver, found on or under the surface of the said lands, shall in no degree prejudice the position of the said Government in regard to the same." The Lords were of opinion that they had not before them the materials to frame a proper deed for future observance. However, to avoid future litigation they would recommend as follows, and no doubt the parties would in any further proceedings have the spirit of their Lordships' judgment to act upon. The company to be entitled to an indefeasible title; that the title should be by a grant confirming the Orange Free State grant, subject to all duties and regulations as have been established in the Orange Free State grant or by the British authorities after the annexation. The final clause in their report, however, declared that the new title tendered by the British authorities contained conditions (namely, in the clause above mentioned), which were not contained in the Orange Free State grant, and which have not been shown to be incidents implied in that grant, nor to be duties or regulations since established concerning land granted upon the like conditions. The judgment of the Land Court is reversed, and the cause is ordered to be remitted to the High Court of Griqualand to do what is just and right in the premises, having regard to their Lordships' declarations. No costs.

[8 *App. Cas.* 318; 52 *L. J. P. C.* 40.]

Carter *v.*
Molson.

Lower Canada. LORD BLACKBURN. *April* 18, 1883.

Construction of articles in the Canadian Codes. The "Civil Code of Lower Canada," and the "Code of Civil Procedure." [On the opening of the arguments in this case (10th March, 1883), an objection was raised that the case in its present form (the case, one involving penalty of imprisonment, not being any one of those in which leave to appeal is given by Article 1178 of the Code of Procedure) was not appealable. Their Lordships upheld this view, but decided to go on with the hearing on the merits as in *Minchin's Case*, 6 Moo. P. C. C. 43 (*vide* also *Sauvageau* v. *Gauthier* (5 L. R. P. C. 494), and declared that if a petition

for special leave was presented, they would recommend her Majesty in Council to grant such application. The petition for special leave to appeal was lodged on 12th March, was reported 17th, and approved 19th March. The report on the appeal itself was made 18th April, 1883, and was approved 20th April, 1883.] History of the codes (one of which, the Civil Code, came into force ten months before the other) is gone into at length so as to ascertain what was the intention of the Legislature, and what the objects for which the codes were enacted. The respondent, a debtor under a writ of *capias ad respondendum*, was ordered to be imprisoned for a year on the allegation that he had not filed within a fixed time a statement of his property, and a declaration of abandonment. The sentence was said to be rendered legal by the Consolidated Statutes of Lower Canada, cap. 87, ss. 12 and 18, and the Civil Code, which laid down certain penal rules, to be carried out *until the Code* of Civil Procedure came into force. Respondent appealed against this view of the case, contending that this severe treatment was abrogated when the Code of Civil Procedure did come into force later. This view was taken by the Court of Queen's Bench, and now by their Lordships, whose report affirmed the decree below with costs. In their judgment their Lordships said, "*There seems nothing to prevent laws in both codes relating to the same subject from standing together, unless they are from their nature so inconsistent that the later enactment must be taken to repeal the earlier.*" In this later enactment many penalties were imposed, but no such penalty as imprisonment for a year.

[8 *App. Cas.* 530; 52 *L. J. P. C.* 46.]

Scicluna and Another *v.*
Stevenson.

S.s. "Alsace-Lorraine" and s.s. "Rhondda."

(Vice-Admiralty.)

Malta. Sir James Hannen. *June* 5, 1883.

Collision in the Strait of Messina between two steamers. What is a "narrow channel" within the meaning of Article 21 of the

Regulations (of 18th March, 1880) for Preventing Collisions at Sea? Relative conduct and duty of the two steamers. Duty of a captain when sudden change of course by an approaching vessel, or startling change of circumstances generally, takes place. Distinction between vessels approaching each other or following each other. Article 16 of Admiralty Regulations on this subject defined in this case, and in the case of *The Khedive*, L. R. 5 App. Cas. 894. What is the exact moment to carry into action the directions given in the regulations? The Judicial Committee held that the strait was a narrow channel within the meaning of Art. 21 of the regulations, and dismissed the appeal, holding the "Alsace-Lorraine" occasioned the collision by proceeding along the wrong side of the channel, and coming out suddenly from under the land on that side. The "Rhondda" was powerless to prevent disaster by reason of the current. Appellants to pay costs. [8 *App. Cas.* 549; 5 *Asp. Mar. Law Cas.* 114.]

Ravena Mana Chena Allagappa Chitty and Another *v.*
Tunku Allum Bin Sultan Allie Iskander Shah.

Straits Settlements. SIR BARNES PEACOCK. *June* 6, 1883.

Question as to the liability to assignment of a sum mentioned in a treaty. Distinction between the terms "heirs and successors," and "assigns." The action lay on a claim to 500 dollars per mensem, which, under one of the stipulations of the treaty, had been left by one Rajah to another and "his heirs and successors," in order to promote peace and goodwill between the families of the Rajahs. The Rajah who was recipient of this money *assigned* the money to the appellants, who were not "heirs and successors." Their Lordships recommended the affirmance of the judgments of both Courts below, being of opinion that the Rajah could not transfer or assign the sum to others who were not heirs or successors beyond the period of his own life. Appellants to pay costs of the appeal. [*P. C. Ar.*]

Sri Rajah Row Mahipati Surya and Another *v.*
Sri Rajah Row Mahipati Gangadhara Rama (Zemindar of Pittapuram).

Madras. Sir Robert Collier. *June* 7, 1883.

This cause was before the Committee in July and August, 1878. The suit had been instituted by the respondent to recover possession of houses and lands as forming part of his Zemindary of Pittapuram. Both the lower Courts had dismissed the cause on the ground that the plaintiff (now respondent) was concluded by a previous adjudication. In 1878 (*vide* Her Majesty's Order in Council, 14th Aug. 1878 [P. C. Ar.]) the Judicial Committee reported that the plaintiff was not so concluded, and remitted the case to have the issues as to limitation and proprietary right decided. The claim was made by respondent, and related to certain houses within the fort and ambit of his zemindary estates. The appellants (defendants) now raised questions of adverse possession, and a right of stridhanam. The High Court held that no fresh evidence on these subjects was forthcoming, and gave their decision in favour of the respondent's title. Affirmed. *Appellants must pay the costs of this and of the former appeal.* [*P. C. Ar.*]

Simon and Others *v.*
Vernon (Procurator of Wardlaw Cortlandt Anderson, and Margaret Jane Trotter, his wife, widow of Joshua Le Bailly).

Jersey. Lord Watson. *June* 12, 1883.

Jersey law. Marriage contract. Hypothèque. Margaret Jane Trotter (now the wife of Anderson) was previously married in 1863 to one Bailly. By an ante-nuptial contract with Bailly (which contract, by order of the Court, was at once registered in the public registry of the Island), the lady whose interest is now represented by the respondents renounced all legal claims competent to her as widow upon the estates, real and personal, of Bailly, and in consideration thereof Bailly engaged that upon

his death she should be entitled to receive out of his personal estate the sum of 500*l.*, and out of his estate real and personal an annuity of 200*l.* Some ten years later, the goods of the husband were declared *en désastre*, and sequestration followed. The Greffier called on the creditors to come in with their claims on the estate. In accordance with Jersey procedure, those creditors having a first charge were placed last, the unsecured creditors first, and from the lowest up each is called on to accept or reject the estate. Those who reject have their claims cancelled. When at length a creditor accepts the estate, he is made tenant of the estate, and another becomes tenant *subrogé*. These persons are, on appointment, in the position of purchasers of the estate, and are responsible for all proved claims. The demand of the widow, on being entered by the Greffier in the Codement, was placed *sans hypothèque* among the claims of unsecured creditors. This she resisted, and supported her plea by putting in her registered marriage contract. Subsequently a decree of the Court declared that the claim was to be treated as *hypothèque*, and the tenant (now represented by the appellant Simon) agreed to pay the 200*l.* annuity. The litigation later below arose as to diverse contentions over the *hypothèque décret*, the appellants contending that they were not answerable for the 500*l.*, but only for the annuity, and in their view that was as far as the *décret* went. The Royal Court however, and now the Judicial Committee, pronounced their decision the other way, namely, that the widow of Bailly was entitled to have both claims paid out of the estate. Appeal dismissed, with costs.
[8 *App. Cas.* 542; 52 *L. J. P. C.* 79.]

Roy Dhunput Singh Bahadoor *v.*
Doorga Bibi.

Bengal. SIR BARNES PEACOCK. *June* 13, 1883.

Appeal by special leave. Suit arising out of transactions on a bond. Bond was given to secure a sum of Rs. 26,000 and interest, and part of the security given was a *Kistbundi*, which had been executed in favour of the defendant, the

present respondent, by the Nawab Nazim, for a lac and Rs. 11,375. That security was in the hands of present appellant, who would have had a right to receive value for it had the Nawab Nazim paid his debts, but the Government arranged on his behalf to pay over Rs. 33,843 in lieu of the lac, and Rs. 11,375, and the principal question in this appeal was whether that sum in full was received by the plaintiff, the present appellant, to satisfy his bond, or whether a balance of it was retained by the respondent, or her agents in fraud of her. Their Lordships agreed with the High Court that after the money had been paid by the collector on behalf of Government, it had been put into the hands of the appellant's Sepahis, and it no longer remained under the control of respondent's agents, nor in any way under her own. No portion of the Rs. 33,843 had been returned to her, or detained by her. Appeal dismissed, affirming decision below, with costs.

[*P. C. Ar.*]

Baboo Situl Purshad *v.*

Baboo Luchmi Pershad Singh and Others.

(Consolidated Appeals.)

Bengal. SIR ROBERT COLLIER. *June* 29, 1883.

Interpretation of deeds. Situl Purshad (in the first appeal as assignee and in the second as execution creditor of one Chhuck Narain Singh) claimed to have derived from him a right to redeem certain villages which he alleged to have been mortgaged by Chhuck Narain. The respondents contended that the deeds, a Pottah and Ikrarnama, executed in the transfer of the property, did not create any mortgage, but were a sale of the property with a provision for its re-purchase on certain conditions personal to the mortgagor. Whole question turned on the history, character, and meaning of the deeds; and the Committee in their report to her Majesty endorse the view of both Courts below that the documents did not establish a mortgage, but were really provisions for sale. Appeals dismissed with costs.

[*I. L. R.* 10 *Calc.* 90; *L. R.* 10 *Ind. App.* 129.]

Bird and Others *v.*
Gibb and Others.

The "De Bay."
(Vice-Admiralty.)

Malta. SIR JAMES HANNEN. *June* 30, 1883.

Salvage. The "Mary Louise" having stood by a disabled steamer the "De Bay," gone out of her own course for sixty-two hours, and towed her with crew, passengers, and valuable cargo on board into Malta Harbour, instituted this suit (for salvage and losses) in the Vice-Admiralty Court of Malta. The judge awarded 8,535*l.* odd for the services rendered. The defendants (the present appellants) appealed on the ground that these damages were excessive. Authorities quoted to show how frequently the Court of Admiralty, besides awarding sums for salvage services, decrees in addition payment of damages and losses sustained by the salvor. The Judicial Committee pronounce that certain items in the total sum granted below should not have been admitted, although a proper principle of calculation was adopted, and that the total award should not be more than 6,000*l.* Varied. No costs.

[8 *App. Cas.* 559; 52 *L. J. P. C.* 57; 5 *Asp. Mar. Cases*, 156.]

Mina Konwari *v.*
Juggut Setani.

Bengal. SIR RICHARD COUCH. *June* 30, 1883.

Right of appellant to execution of decree. Is it barred by Limitation Act XIV. of 1859, sect. 22? Meaning to be attached to the words "Summary decision or award" in the Act. Did certain proceedings keep the decree in force so as to bring it within limitation? Irregularities in procedure. Description of estoppel given in the Indian Evidence Act I. of 1872, sect. 115 and following sections. Were petitions to postpone sale to be

treated as estoppel? Decision below that suit was barred upheld. *Ram Dhun Mundul* v. *Ramessur Bhuttacharjee*, 11 W. R. 117; 2 B. L. R. 235; *Mungal Pershad Ditchit and Another* v. *Grija Kaut Lahiri Chowdhry*, L. R. 8 Ind. App. 123.

[*I. L. R.* 10 *Calc.* 196; *L. R.* 10 *Ind. App.* 119.]

Mott and Others *v.*
Lockhart and Others.

Nova Scotia. SIR ARTHUR HOBHOUSE. *June* 30, 1883.

Construction of Nova Scotia Land Act. Revised Statutes of Nova Scotia, 4th Series, cap. 9, ss. 33, 35, and 42. The appellants and respondents are rival applicants for prospecting licences over lands containing *gold*, which lands to a certain extent overlap one another, and the point to be decided is which of the claims has priority. Mode of applying for and obtaining *prospecting licences* from the Commissioner of Public Works and Mines. Their Lordships held upon the evidence that the appellants were the first applicants and were entitled to the licences in preference to the respondents. Reversed, with costs.

[8 *App. Cas.* 568; 52 *L. J. P. C.* 61.]

Kali Komul Mozoomdar and Others *v.*
Uma Sunker Moitra.

Bengal. SIR RICHARD COUCH. *June* 30, 1883.

Heirship of an adopted son. Uma Sunker (the present respondent) was plaintiff in the first Court. The appellants are sons of the original defendant, and the question of law before the High Court and in the suit is as to the right of an adopted son (the respondent) to take by inheritance from the relatives of his mother-by-adoption as heir to his adoptive maternal uncle. A question raised in a cross-appeal before the High Court was as to the legal proof in the lower Courts of the alleged adoption. Primary and secondary evidence of adoption fully considered. Hindu law of Bengal as to succession. Their Lordships are of opinion that the decision of the High Court in favour of the

respondent's rights was to be upheld. Appeal dismissed. Appellants to pay costs. "An adopted son succeeds not only lineally, but collaterally, to the inheritance of his relatives by adoption." Vide *Pudma Coomari Debi* v. *The Court of Wards*, L. R. 8 Ind. App. 229. [*I. L. R.* 10 *Calc.* 232; *L. R.* 10 *Ind. App.* 138.]

The Canada Southern Railway Company *v.*
The International Bridge Company, and
The Canada Southern Railway Company *v.*
The International Bridge Company, The Grand Trunk Railway Company, and The Attorney-General of Ontario.

Ontario. THE LORD CHANCELLOR (The Earl of Selborne). *July* 4, 1883.

The questions involved in these appeals relate to the construction to be put on certain acts of the Canadian Legislature (20 Vict. c. 227, and 22 Vict. c. 124) (allowing the incorporation of a company to construct a bridge across Niagara, and regulating powers of traffic upon it), and also to the reasonableness of the tolls or imposts levied for the passage of traffic across the said International Bridge. The said tolls were levied by the company who projected the undertaking. The Canada Southern Railway, who were users, denied the reasonableness of the tolls. The Grand Trunk Railway Company appeared as parties, inasmuch as nearly all of the capital stock of the International Bridge Company was held by them. Their Lordships endorse the construction put upon the Acts below and the reasonableness of the tolls, and affirm the decrees of the Court of Appeal and the Court of Chancery. Decree of Court of Appeal affirmed. Appeals dismissed, with costs. [8 *App. Cas.* 723.]

Najban Bibi *v.*
Chand Bibi.

Seetapore Division, Oude. SIR ARTHUR HOBHOUSE. *July* 10, 1883.

Oral gift of a lease from a mother to her daughter. Resumption of the gift by the grantor. Whole question was as to

whether the lease was a gift for life or whether, according to the customs of the Ahbans, a tribe to which the parties belonged, a grantor has a right to take back a gift. All the Courts below have decided, and their Lordships now decide, in favour of the power of resumption. Appeal dismissed, with costs.
[*I. L. R.* 10 *Calc.* 238; *L. R.* 10 *Ind. App.* 133.]

Ward *v.*
The National Bank of New Zealand, Limited.

New Zealand. Sir Robert Collier. *July* 11, 1883.

Principal and Surety. Action on a guarantee. Surety and co-surety. The Bank instituted the action for the recovery of advances made to one John King on a guarantee of Ward, the present appellant. Ward pleaded that at the time of making his guarantee another guarantee to secure advances to King was given to the bank by one John Mackintosh. This last guarantee had been released by the bank on new terms, and Ward now claimed that Mackintosh had been his co-surety, and that, the agreement between Mackintosh and the bank having taken place without his knowledge, his surety ought to be discharged. Their Lordships, while agreeing that a long series of cases had decided that a surety is discharged by the creditor dealing with a co-surety in a manner at variance with the contract, held it quite a different matter where it was no part of the contract of the surety that other persons shall join in it; in other words, where he contracts only severally, the creditor does not break that contract by releasing another several surety. Ward cannot claim that his surety should be discharged on the ground of breach of contract. Although he averred in his pleas that Mackintosh was a co-surety with him for the payment of advances, he does not aver that the liability of Mackintosh and himself was joint, and it might be inferred from the instruments set out that it was not. Neither did he allege that any right to contribution arose. Affirmed, and appeal dismissed with costs.
[8 *App. Cas.* 755; 52 *L. J. P. C.* 65.]

Isri Dut Koer and Another *v.*
Hansbutti Koerain and Others.

Bengal. SIR ARTHUR HOBHOUSE. *July* 11, 1883.

Widows' Estate.—The appellants are the male presumptive heirs of one Budnath Koer, and they sought for a decision against the alienability of properties purchased after Budnath's death by his widows (the principal respondents). Authorities as to "*Stridhan,*" "*Life Estate,*" "*Profits,*" "*After Purchases,*" *and* "*Savings of Widows*" quoted. On these authorities their Lordships do not think it possible to lay down any sharp definition of the line which separates accretions to the husband's estate from income held in suspense in the hands of a widow, as to which she has not determined whether or no she will spend it. They hold the view that the object of the widows in this case in making after purchases, and their attempting to alienate them, as well as parts of the original estate of the husband, evinced a desire to give the inheritance to their own heirs in preference to their husband's. In their Lordships' opinion the circumstances here clearly established that the after purchases were accretion to the original estate, and were inalienable by the widows for any purposes which would not justify alienation of the original estate. Reversed. Respondents to pay costs.
[*I. L. R.* 10 *Calc.* 324; *L. R.* 10 *Ind. App.* 150.]

Rai Balkishen Dass *v.*
Run Bahadoor Singh.

Bengal. SIR BARNES PEACOCK. *July* 11, 1883.

Action on a Solehnamah or agreement in the nature of a compromise to pay back to a decree holder a debt by instalments. Effect of provisions inserted in the deed in case of default, and much discussion arises on the question of interest, which under certain circumstances was to be doubled. The Lords reversed, with costs, the decree of the High Court, which had held that stipulation for double rate of interest was a penalty, and in their

report present a lengthy declaration of what ought to be done by way of adjusting the accounts between the parties. Their Lordships considered that the stipulation for double rate of interest in the given state of circumstances was not unreasonable.

[*I. L. R.* 10 *Calc.* 305; 13 *C. L. R.* 392; *L. R.* 10 *Ind. App.* 162.]

Macdonald *v.*
Whitfield.

Lower Canada. LORD WATSON. *July* 11, 1883.

Action en Guarantie. Legal effect of indorsements on promissory notes made by directors of a company. Liabilities of the indorsers. The appellant and respondent were directors of the St. John's Stone Chinaware Company, who, in 1875, were indebted in a balance due to the Merchants' Bank of Canada. Appellant was president of the directors, and he had, with his co-directors, indorsed certain of the company's promissory notes for $65,000 to the Merchants' Bank. In July of that year the company applied through the appellant for further credit. The request was complied with on certain conditions of guarantee by the issue of promissory notes. The action in the present case was brought by the respondent against the appellant to indemnify the respondent in respect of a decree obtained against him by the Merchants' Bank. What was the true legal relation in which the appellant and the respondent as parties to these notes stand towards each other? The respondent contended that although neither the appellant nor himself gave or received value for the notes, but put their respective indorsations upon them for the accommodation of the company, the appellant, having first written his name upon the back of the notes, has thereby become liable to him in the same manner and to the same effect as if he had been a prior indorser upon a proper commercial bill (*Penny* v. *Innes*, 1 Crompton, Meeson & Roscoe, 439). It was also argued on his behalf that in the absence of some special contract or agreement between them, *dehors* the notes themselves, strangers giving their indorse-

ments successively must be held to have undertaken the same liabilities *inter se* which are incumbent on successive holders and indorsers of a note for value. The appellant on the other hand contended that all the directors who indorsed the notes in question must now be treated as co-sureties without reference to the order of their signatures. The Judicial Committee, reversing decision below, report in favour of the appellant. They "see no reason to doubt that the liabilities, *inter se*, of the successive endorsers of a bill or promissory note must, in the absence of all evidence to the contrary, be determined according to the principles of the law merchant. He who is proved or admitted to have made a prior indorsement must, according to these principles, indemnify subsequent indorsers. But it is a well established rule of law that the whole facts and circumstances attendant upon the making, issue, and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or as endorsers; and that reasonable inferences, derived from these facts and circumstances, are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law merchant would otherwise assign them. . . . The appellant has not attempted to establish an independent collateral agreement by the respondent, to contribute equally with him and the other endorsers in the event of the company's failure to make payment of the notes in question to the bank. He relies upon the facts proved with respect to the making and issue of these three promissory notes as sufficient in themselves to create the legal inference that all the directors of the company, including the respondent, put their signatures upon the notes, in August, 1875, in pursuance of a mutual agreement to be co-sureties for the company. And in the opinion of their Lordships, that is the proper legal inference to be derived from the circumstances of the present case." Their Lordships would advise Her Majesty that the judgment appealed from ought to be reversed, and that the action *en guarantie* at the respondent's instance ought to be dismissed, with the declaration that the appellant and the

respondent made their several endorsements upon the promissory notes in question, along with other directors of the company, as co-sureties for the said company, and are in that capacity entitled and liable to equal contributions *inter se* : *Reynolds* v. *Wheeler*, 10 C. B. N. S. 561, approved Civil Code of Canada, Arts. 2340, 2346. Respondent is ordered to pay costs of the appeal, and also the costs incurred by the appellant in the Courts below. [7 *App. Cas.* 733; 52 *L. J. P. C.* 70.]

Petition of Surendra Nath Banerjea *v.* The Chief Justice and Judges of the High Court of Bengal.

Bengal. Sir Barnes Peacock. *July* 18, 1883.

Contempt of Court.—Only question was whether the High Court had jurisdiction to commit the petitioner for a contempt of Court in publishing a libel on one of the judges of the High Court. *Powers of Courts of Record.*—Libel published out of Court while the Court is not sitting is not included in offences under Indian Penal Code, but is one punishable under the Common Law of England, introduced into the presidency towns where the late Supreme Courts were established by the charters of justice. Several authorities cited: *McDermott* v. *Judges of British Guiana*, 5 Moo. P. C. C. (N. S.) p. 466; *The Champion*, 2 Atk. 469; *Rainey* v. *Justices of Sierra Leone*, 8 Moo. P. C. 54. Acting on these cases their Lordships held that the High Court had jurisdiction to commit the publisher of the libel for contempt. They say nothing as to the character of the libel or as to the extent of the punishment awarded. Petition dismissed. [*I. L. R.* 10 *Calc.* 109; *L. R.* 10 *Ind. App.* 171.]

Barayene *v.*
Stuart and Another.

New South Wales. Lord Fitzgerald. *Nov.* 7, 1883.

Appeal against rule absolute for a new trial. Very difficult for their Lordships to sustain the rule if it was granted on the

ground of *surprise* alone. Mortgage suit. The trial in its course eminently unsatisfactory. If the case had been taken down to a second trial on the absolute order, and with reasons given thereupon by the Chief Justice, the presiding judge should necessarily have directed a verdict for the plaintiff. Their Lordships, however, report that the order of the Supreme Court ought to be affirmed so far as it directs a new trial to be held, not on the ground of surprise, but on the broader basis that the trial had and the verdict were unsatisfactory. No costs.

[*P. C. Ar.*]

Ram Sarup and Another *v.*
Mussumat Bela and Others.

(Two Appeals Consolidated.)

N. W. P. Bengal. SIR ARTHUR HOBHOUSE. *Nov.* 14, 1883.

Claim against estates. Gift. Consideration, moral or immoral. Appellants, who at one time lent money to a Captain Hearsey, are now seeking to establish a right to recoup themselves out of his estates. The principal respondent is a Mahommedan lady, who was alleged to be wife to Captain Hearsey, and the other respondents are their children. The defence of the lady and children was that Captain Hearsey had made her a gift of all his properties, and alleged that at the time the appellants took the bond for the sum sued on they knew of the alienation. Important issue thereon arose that Hearsey had really no transferable rights in the property at the time the money was lent. Formal ceremony accompanied gift. The questions in the appeal were: Had Hearsey made the gift before contracting with the appellants, and if so, viewing the relations of the parties, was the gift invalidated by the immorality of the consideration or the motive for it? Was the gift absolute or for life only? Concurrent findings that the transfer was *bonâ fide* and absolute. This view their Lordships endorse, and also that there was no evidence that there was an immoral consideration to vitiate the transaction. Gift in fact unconditional, and very difficult to treat the gift to the mother as different from that to the children. Rule of law referred to, though not applied to

this case, that a gift to which an immoral condition is attached may still remain a good gift though the condition be void. Both concurrent decrees affirmed, and appeals dismissed, with costs.

[*I. L. R.* 6 *All.* 313; *L. R.* 11 *Ind. App.* 44.]

Ajudhia Buksh and Another *v.*
Rukmin Kuar and Others.

Oudh. Sir Barnes Peacock. *November* 17, 1883.

Succession to a Talukdari. Will case. Widow's life estate. Acceleration of son's estate. *Lainson* v. *Lainson*, 5 De G. M. & G. 754. Validity of the will, which was unregistered. Construction of sect. 13, Act I. of 1869, on the point whether a will in favour of a widow was invalidated by want of registration. The principal appellant was the eldest son of the late Talookdar and heir-at-law, and the second appellant was the purchaser from him of a share in the estate. If the will was invalid he came in. The real question was whether, if the will was invalid through non-registration as regards the widow, was it also invalid with respect to the son, or was registration immaterial in the case of a widow entitled to maintenance. The respondents contended that the widow would have succeeded to maintenance both under the Act and under the general law, and that was the only interest, as distinct from the estate or a share, that the widow or anyone else could take by succession. But even if the gift to her failed, intestacy did not result either in whole or in part. The Judicial Committee held that on the principle laid down by Lord Justice Turner in *Lainson* v. *Lainson*, even if the widow was not a person who would have succeeded to any estate if the Talookdar had died intestate, the son's estate was accelerated. Upon the legal construction of the will, the appellant had no valid claim to any interest in the estate. Appeal dismissed, with costs.

[*I. L. R.* 10 *Calc.* 511; *L. R.* 11 *Ind. App.* 1.]

Emery and Others *v.* Cichero.
(Ships "Arklow" and "Bunin.")

Vice-Admiralty Court, New Brunswick. SIR JAMES HANNEN. *November* 21, 1883.

Collision. Proper rules of navigation in respect to lights. Principle in cases of this kind where there has been a departure from an important rule of navigation is:—that if the absence of due observance of the rule can by any possibility have contributed to the accident, then the party in default cannot be excused. "Considering the difficulty occasioned by the absence of lights on board the 'Bunin,' which prevented the possibility of seeing what course she was steering, their Lordships are of opinion that it has not been established that there was negligence on the part of those on board the 'Arklow' in not sooner porting the helm, as it is clear she had to some extent done before the collision."

The judge in the Court below said that the question of lights was immaterial when it appears that their absence did not cause the collision. The Judicial Committee are unable to concur with such a ruling. They would advise her Majesty that the judgment should be reversed, with costs, and the "Bunin" alone be found to blame.
[9 *App. Cas.* 136; 5 *Asp. Mar. Law Cas.* 219; 53 *L. J. P. C.* 9.]

Burjore and Bhawani Pershad *v.* Mussumat Bhagana.

Oudh. SIR ROBERT COLLIER. *November* 23, 1883.

Claim to a Mouza. Inheritance. Is the respondent Bhagana (grandmother of one Pirthi Pal, deceased, who himself inherited from Bhagana's husband) excluded from inheritance? Customs of the Pindi Brahmins. The claimants opposed to her are sons of her husband's brothers. Existence of a wajibularz, terms of

which qualify the contention of the present appellants that females are debarred. The one issue was settled by two Courts below in favour of Bhagana, and this is upheld in the Privy Council, with costs. The rights of a daughter of Pirthi Pal, not a party in this suit, are reserved in their Lordships' judgment. Preliminary point was raised in the appeal as to whether the Judicial Commissioner was right in extending the time for giving security. Important observations thereon. Act X. of 1877, sect. 602. Judicial Commissioner considered that provision therein with regard to extending time for giving security (which in this case was explained) is directory only, though not to be departed from except for cogent reason.

[*I. L. R.* 10 *Calc.* 557; *L. R.* 11 *Ind. App.* 7.]

Frechette *v.*

La Compagnie Manufacturière de St. Hyacinthe.

Lower Canada. Sir Arthur Hobhouse. *November* 24, 1883.

Flow of water on the river Yamaska. The parties are both riparian owners, the respondents of the upper lands, and the appellant of the lower land on the same side of river.

The suit was brought by the respondents, and their complaint was that the appellant had lately erected a barrier, which prevented the water flowing in due course for their benefit. The appellant alleged that the respondents had in 1878 intercepted the flow by enlarging a certain dyke, and the water was taken away from his watercourse. For the purpose of recouping he erected the barrier now objected to, so as to prevent escape of water from himself—to form a tail-race and head of water for a new mill which he had built. This diversion and the impingement of the head of water on the appellant's wheels bayed back the water on a point on the dividing line of the properties, and so caused injury, the respondents contended, to their workings. Civil Code of Canada, sect. 501, on rights to flowing water. Servitudes. Consolidated Statutes of Canada, c. 51. Rights of protection for artificial as well as natural flow. Appellant contended that the respondents had no grant or

title giving them rights to use the river as they did, and they had only themselves to blame if they now got water more abundantly than they liked in consequence of improvements by the landowner lower down. Their Lordships are of opinion that the respondents, who were the first to alter the flow, had not clearly proved legal title or right to relief, and that, by the augmented flow of water, the servitude of the lower proprietor was aggravated. (*Saunders* v. *Newman*, 1 B. & A. 258; *Tapling* v. *Jones*, 11 H. of L. 290.) Decrees below reversed, and action of the respondents (plaintiffs) dismissed. Costs of appeal to follow result.

[9 *App. Cas.* 170; 53 *L. J. P. C.* 20.]

Thomas (Commissioner of Railways) *v.* Sherwood and Another.

Western Australia. SIR ROBERT COLLIER. *Nov.* 24, 1883.

Resumption of lands by the Crown for the purposes of a railway. Proviso in the *grant* of these particular lands giving the Crown an option of resumption. Terms of the Act, "Western Australian Railways Act," 1878 (42 Vict. No. 31), authorizing the construction of railways. Claim for compensation. Distinction of the land being country land and not town land. Respondents (plaintiffs) contended that if the Crown had a right to resume (and this was not disputed) they did not properly exercise that right, and this was the view of the Chief Justice below. His honour also held that the notice of resumption given by the Railway Commissioner must be taken to have been given under the 12th section of the Act. Judgment was accordingly given for the plaintiffs. In reversing the decree, the Judicial Committee report that the land in question was land which the Crown had power to resume; that the notice given to resume was such as might lawfully have been given in the exercise of the power of the Crown to resume; and that if so, such notice must not be deemed to have been given (as contended) under sect. 12 of the Railway Act, the proviso of which had some appearance of being enacted expressly

to prevent claims like the present being made. The rights of the Crown to resume under certain defined circumstances were provided for in the old grant, and these defined circumstances were such as to preclude the application of the modern Railway Act to the claim. The judgment appealed against is reversed, and judgment with costs of the defence below is ordered to be entered up for the appellant (defendant). No costs of appeal.

[9 *App. Cas.* 142; 53 *L. J. P. C.* 15.]

Abdool Hye *v.*
Mozuffer Hossein and Another.

Bengal. Lord Fitzgerald. *Nov.* 30, 1883.

Attachment under a decree. The decree was obtained against a Zemindar, and it was sought to execute it against his heirs. It was sought by the decree holders to prove that transactions conveying grants of the attached property to his heirs were covinous and void as against them, the creditors. This view was taken by concurrent findings of Courts below, and their Lordships were of a like opinion according to equity and good conscience (13 Eliz. c. 5, which may not extend to the mofussil, though the principle has been given effect to by the High Courts). The heba made by the Zemindar was executed for the purpose of protecting the property from his just creditors. Affirmed. Appeal dismissed with costs.

[*I. L. R.* 10 *Calc.* 611; *L. R.* 11 *Ind. App.* 10.]

Achal Ram *v.*
Udai Partab Addiya Dat Singh.

Oudh. Sir Barnes Peacock. *Nov.* 30, 1883.

Ejectment. Superior title and descent according to the strict rules of primogeniture. Descent to a single heir amongst several in equal degree and strict rules of lineal primogeniture compared. Mode of succession to this estate as laid down by Government

rules after the confiscation of Oudh. Oudh Estates Act (I. of 1869). Effects in descent which follow the placing of names in the second and not in the third of the Talookdar lists. Their Lordships are of opinion that when a Talookdar's name was entered in the second and not in the third list, the estate, although it descended to a single heir, is not to be considered as an estate passing according to the rules of lineal primogeniture. He who seeks to turn another out of possession must recover upon the strength of his own title, and not upon the weakness of his adversary's. Decree gained by respondent. Execution. Dispossession of appellant by respondent. The Judicial Committee, reversing decree below, give judgment for appellant with restoration to possession. Respondent to pay costs in the lower Appellate Court and here.

[*I. L. R.* 10 *Calc.* 511; *L. R.* 11 *Ind. App.* 51.]

The Colonial Building and Investment Association *v.* The Attorney General of Quebec.

Lower Canada. SIR MONTAGUE SMITH. *Dec.* 1, 1883.

Attorney General of Quebec in the suit brought against the Colonial Building and Investment Association contended that the company was illegally incorporated. The broad question raised was whether the statute incorporating the society (Dominion Act of the Parliament of Canada, 37 Vict. c. 103) was *ultra vires.* It was sought to uphold the argument that, inasmuch as, by the British North America Act, sects. 91 and 92, the control of property and civil rights within the province of Quebec was left to the Quebec Legislature exclusively, and as the society had confined its operations hitherto to Quebec, therefore the incorporation by the Dominion was wrong. Their Lordships, however, saw no reason why the society, having been originally formed to carry on business all over Canada, should be disqualified because, up to this, they worked in Quebec alone. Neither would they report that the association should be prohibited from acting in future as a corporation within the province

of Quebec, for if in any way it was evident that the company had violated the provincial law there might be found proceedings applicable to such violation. Judgment of the Queen's Bench reversed, with costs.

[9 *App. Cas.* 157; 53 *L. J. P. C.* 27.]

Ram Kirpal Shukul *v.*
Mussumat Rup Kuari.

N. W. P. Bengal. SIR BARNES PEACOCK. *Dec.* 1, 1883.

Suit by appellant for mesne profits in execution of decree. Did the decree award mesne profits, or was it to be inferred that its intention was to give them? Sect. 13, Act X. of 1877, and general principles of law compared. What importance to be given to "*striking off*" in execution cases? *Vide Mungul Pershad Dichit and another* v. *Grija Kant Lahiri Chowdhry*, L. R. 8 Ind. App. 123. The Judicial Committee held that the decree in execution was intended to award future mesne profits, and that proceedings by the same parties on the same judgment afterwards were bound by it. Wrong construction of High Court of decree below. Reversed. Respondent to pay costs in the High Court and here.

[*I. L. R.* 6 *All.* 269; *L. R.* 11 *Ind. App.* 37.]

Chaudhri Hira Singh *v.*
Chaudhri Gunga Sahai and Another.

N. W. P. Bengal. SIR RICHARD COUCH. *Dec.* 1, 1883.

Suit for complete possession and declaration of inheritance after partition. Arbitration as to the relative shares of members of a family. Award. The question in this appeal was, What was the effect of the arbitration and award as regards the appellant, who, it was admitted, *was deaf and dumb and incapable of inheriting?* Appellant was one member of the family now litigating, but did not submit himself to them, but, being in joint possession, made that possession, and not the award, the foundation of his claim to partition. He was not entitled by law to

inheritance, and as he was not a party to the arbitration and award the High Court, and now the Judicial Committee, agree that he cannot claim advantage under it. Appeal dismissed with costs. [*I. L. R.* 6 *All.* 322; *L. R.* 11 *Ind. App.* 20.]

Hurdey Narain Sahu *v.*
Rooder Perkash Misser and Others.

Bengal. Sir Richard Couch. *Dec.* 5, 1883.

The main question in this appeal related to the limit of right which had been acquired by the appellant by his purchase at the sale in execution of a decree which he had obtained against the father of the respondents. *Deendyal Lal* v. *Jugdeep Narain Singh*, L. R. 4 Ind. App. 247; and *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, L. R. 6 Ind. App. 88, quoted as authorities in support of the judgment below and now of the report of the Committee, to the effect that the purchaser of an unpartitioned estate could only purchase to the extent of the father's actual interest or share. Subordinate point was raised as to what effect on the decree below was produced by a new claimant to inheritance being born during the progress of the litigation. The Judicial Committee decide that there is no ground for altering the judgment of the High Court, although it may have gone beyond what was necessary and proper. Although not strictly right, the appellant gets all that he would have been entitled to if a partition were made. Appeal dismissed, with costs.

[*I. L. R.* 10 *Calc.* 626.]

Syed Sada Kut Hossein *v.*
Syed Mahomed Yusoof.

(*Ex parte.*)

Bengal. Lord Fitzgerald. *Dec.* 7, 1883.

Claim to land. Heirship. The real issue in this case was as to the legitimacy of one Mahomed Selim, whose assignee by

purchase of interest the respondent now was. If Mahomed Selim was proved to have the "rights of a son," the assignee was now entitled to succeed to the estates which came to Selim from his father Ameer Hossein. The appellant was uncle of the aforesaid Ameer Hossein, and he alleged that Selim's mother was the wife of another man than Selim's father when he was born, and Selim's consequent illegitimacy. Legitimacy upheld by the Committee, this other marriage not being proved; and in the course of the judgment, *an important dictum is expressed endorsing the ruling laid down before by their Lordships* (*vide Nawab Muhammad Azmat Ali Khan* v. *Mussummat Lalli Begum*, L. R. 9 Ind. App. 8, 18), *that by Mahommedan law sons, even when illegitimate, may be legitimated* by the recognition of their father.

[*I. L. R.* 10 *Calc.* 663; *L. R.* 11 *Ind. App.* 31.]

Hodge *v.*
The Queen

Ontario. Lord Fitzgerald. *Dec.* 15, 1883.

Billiard saloon case. Conviction. Tavern open during prohibited hours. Bye-laws of Licence Commissioners. Main questions were, Was an Act passed by the provincial legislature of Ontario for the regulation of the liquor traffic rendered *ultra vires* by reason of either sect. 91 or sect. 92 of the British North America Act, 1867. If the Ontario Act (Liquor Licence Act, cap. 181, Revised Statutes of Ontario, 1877) was not *ultra vires* of the powers of the province, could the provincial legislature, instead of discharging the duty itself, delegate licensing powers to a body of commissioners, who should draw up bye-laws, and impose, among other penalties, imprisonment with or without "*hard labour*"? Their Lordships in their report, having drawn attention to the distinction in detail between this cause and that of *Russell* v. *The Queen*, 7 App. Cas. 829, which was explained and approved, came to the conclusion that the Ontario Act, with all its incidents, was fully within the powers of the province. Affirmed, and appeal dismissed with costs.

The following observations of the Judicial Committee relative to the powers conceded to provincial legislatures formed a portion of the judgment:—"The maxim *delegatus non potest delegare* was relied on. It appears to their Lordships, however, that the objection thus raised by the appellant is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial parliament, or the parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make bye-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect."

[9 *App. Cas.* 117; 53 *L. J. P. C.* 1.]

1884.

Baboo Narotam Das v.
Baboo Sheo Pargash Singh.

Oudh. SIR BARNES PEACOCK. *Feb.* 5, 1884.

Bond executed by a Talookdar hypothecating an estate or Talooka while it was still under management, and under the operation of the Encumbered Estates Act (Act XXIV. of 1870). Bond invalid within the meaning of sect. 4, clause 3. Decision of both Courts affirmed, with costs.

[*I. L. R.* 10 *Calc.* 740; *L. R.* 11 *Ind. App.* 83.]

The Union Steamship Company of New Zealand Limited v.
The Melbourne Harbour Trust Commissioners.

Victoria. SIR ROBERT COLLIER. *Feb.* 6, 1884.

Liability of the Melbourne Harbour Commissioners for damages to a ship by a *cable and dredge* which the appellants alleged were negligently moored. Principal questions were whether proper *notice* of action had been given and whether such notice was necessary. Harbour Commissioners set up defence that the alleged damage was caused after the passing of the Melbourne Harbour Trust Act of 1876, and that proper notice of action pursuant to sect. 46 of that Act was not delivered to them. *Smith* v. *West Derby Local Board*, 3 Com. Pleas 423; *The Eastern Counties and London & Blackwall Railway* v. *Marriage*, 9 H. L. Cases 32. The view of the

defence, viz. *want of notice*, was sustained below and in their Lordships' judgment. Appeal dismissed, with costs.

[9 *App. Cas.* 365; 53 *L. J. P. C.* 59.]

Laws and Others *v.*
Smith.

The ss. "Rio Tinto."
(Vice-Admiralty Court.)

Gibraltar. SIR JAMES HANNEN. *Feb.* 9, 1884.

Arrest of a ship for debt incurred for coals (supplied to previous owner of ship). "Necessaries." Was there maritime lien, or if so can it be enforced against the subsequent owners of the ship, viz., the (Appellants). Cases on "Maritime lien" reviewed. *The Neptune*, 3 Knapp 94; *The Two Ellens*, L. R. 3 A. & E. 345; 4 P. C. 161; *The Bold Buccleugh*, 7 Moo. 267. Vice-Admiralty Act (1863), 26 & 27 Vict. c. 24, s. 10, sub-s. 10, and kindred enactments. The Judicial Committee, reversing the decision below, come to the conclusion that there is nothing from which it can be inferred that by the use of the words "The Court shall have jurisdiction" the Legislature intended to create a maritime lien with respect to necessaries supplied within the possession. A ruling to this effect was long ago decided by this tribunal in the case of the "Neptune." Reversed, with all costs here and below.

[9 *App. Cas.* 356; 53 *L. J. P. C.* 54.]

Moung Hmoon Htaw *v.*
Mah Hpwah.

Rangoon. SIR RICHARD COUCH. *Feb.* 9, 1884.

Suit by a wife (respondent) for maintenance. Buddhist laws of marriage and divorce in Burmah. Burmah Courts Act, 1875, s. 4. Husband to provide subsistence for a wife where she has no property of her own. Property of married persons if each have some is separate and joint. Does a wife living apart at her own expense contract herself out of her rights. Authorities in Burmese law. The Judicial Committee declare that where the

wife has maintained herself they have not found any authority for saying that she can sue her husband for maintenance for the period during which she has done so. Having regard to the Burmese law as to the property of married persons, their Lordships do not see in the facts of this case any ground in equity or good conscience for making the appellant liable for maintenance. Reversed, with costs.

[*I. L. R.* 10 *Calc.* 777; *L. R.* 11 *Ind. App.* 109.]

Thakur Ishri Singh *v.*
Baldeo Singh.

Oudh. Sir Arthur Hobhouse. *Feb.* 12, 1884.

Devolution of estate. Validity of a particular instrument effecting a transfer of the property in favour of the respondent. Rival claims of two brothers. 1st. Was a document executed by a deceased Talookdar (elder brother of the parties) a transfer deed to operate *inter vivos*, or was it a will answering the definition of a will given in sect. 2 Act I. of 1869, to operate only after his death. 2nd. Did an impartible estate descend according to the Mitacshara law of primogeniture, or did it descend according to rules sanctioned by family usage. What effect (if any) should be given to reservation in the instrument of a life interest. Effect (if any) of the word "*Tamlik*" (assign) occurring in it, and effect (if any) of the document being stamped as a deed. Analysis of sects. 11 and 19 of Act I. of 1869. Allegation of undue influence and revocation. Importance of the Talooka being entered not in the No. 3 Talookdar list of estates which contains the primogeniture estates, but in the No. 2 list containing the estates which go to a single heir. Did other family property follow a line of devolution different from that of the Talooka. Their Lordships agree with the Court below in considering the document a will and not a transfer which would operate at once on execution and, therefore, by its terms could not take effect. They also decide that the law of primogeniture does not prevail, and on all his points the appellant fails. Appeal dismissed, with costs.

[*I. L. R.* 10 *Calc.* 792; *L. R.* 11 *Ind. App.* 135.]

Rao Bahadur Singh *v.*
Mussumats Jawahir Kuar and Phul Kuar (widows of Balwant Singh).
(Ex parte.)

Ajmere. SIR ROBERT COLLIER. *Feb.* 16, 1884.

Right of the Rajah of Masuda to resume, at will, a Sub Taluka or Jaghire, granted to the ancestor of a certain tenant on death of the tenant without issue, or without adopting an heir. Hawalah *tenure.* Answers of the Durbars held in Rajputana on the *question.* No positive law on the subject among Rajpoot clans. Balance of evidence against any customary right. Affirmed.
[*I. L. R.* 10 *Calc.* 887; *L. R.* 11 *Ind. App.* 75.]

Kali Krishna Tagore *v.*
Golam Ali Chowdhry.

Bengal. SIR ARTHUR HOBHOUSE. *Feb.* 20, 1884.

Assessment of accreted land. Was it to be at Pergunnah rates or any other rate, or was the assessment, as contended by the respondent, to be the same as the rate levied for the parent land. Construction of Bengal Regulation (XI. of 1825). Both Courts, and now the Judicial Committee, agree that the rate should be the same as that of the parent land. Affirmed, with costs. [*P. C. Ar.*]

Gooroo Das Pyne *v.*
Ram Narain Sahoo and Another.
(Ex parte.)

Bengal. SIR BARNES PEACOCK. *Feb.* 21, 1884.

Right of respondents (plaintiffs) to execute a decree for conversion of timber against a stranger thereto. Previous litigation before her Majesty in Council (12th December, 1873). One of two brothers only being mentioned in the decree as liable. Could a second brother (who obtained the money for the sale of the

timber, and who held a share with the first brother of certain attached property) be made liable, and could the execution be levied by the sale of the property of both brothers. Limitation Act (IX. of 1871), s. 118. Right within six years to sue. The previous litigation in the Privy Council resulted in the decision against the other brother, now deceased. Their Lordships, sustaining decree below, now held that execution might proceed against the surviving brother, who had benefited by the sale of the timber, and had not handed over the money received by him to his brother's widow. The respondents had a right to follow the proceeds of the timber, and to recover the amount from the appellant.

[*I. L. R.* 10 *Calc.* 860; *L. R.* 11 *Ind. App.* 59.]

Alimuddi Howladar and Others *v.*
Babu Kali Krishna Thakoor.

Bengal. SIR ROBERT COLLIER. *Feb.* 22, 1884.

Claim of the respondent (a landlord) to recover *Khas possession* of land which, since a Pottah and Kubulyut were executed, have accreted to the Chur of the appellants. Default of the appellants in not filing a Dowl Kubulyut, and in raising no objections to measurement before action filed. Affirmed, with costs, subject to a modification in the measurement of the land in favour of the appellants, on the basis of the original Pottah and Kabulyut. [*I. L. R.* 10 *Calc.* 895.]

Kishna Nand *v.*
Kunwar Partab Narain Singh.

Oudh. SIR RICHARD COUCH. *Feb.* 23, 1884.

Suit for further mesne profits than were decreed, and interest, upon recovery of villages (repossession of which was ordered by her Majesty in Council, June 26, 1879). Character of Ouster—two sets of mesne profits. The present respondent was not the person who received the mesne profits, and only

came into possession of the estate upon its being released by Government. Liabilities of relative defendants. No rules obliging Courts to give interest. Both Courts agree not to allow it, and the Judicial Committee support their exercise of discretion, and their decision not to allow more than a portion of mesne profits. Act XV. of 1877, 2nd Schedule, Art. 109. Explanation of mesne profits in Civil Procedure Act (XIV. of 1882) s. 211, discussed.

[*I. L. R.* 10 *Calc.* 792; *L. R.* 11 *Ind. App.* 88.]

Rai Bishen Chand *v.*
Mussumat Asmaida Koer.

[*Ex parte.*]

Bengal. Sir Arthur Hobhouse. *March* 1, 1884.

Transfer, or deed of gift, by the head of a joint family, a grandfather, to an only grandson, passing over the grandson's father. Was it made as a fraud upon creditors, or was it made (to save the wasting of an estate by an extravagant father) in good faith and with a proper provision for creditors. Appeal by a creditor of father against widow, the grandson now being dead. Mitacshara law. Transfer viewed in the light of a partition agreed to by the father, who received valid consideration. The contention that the gift was to a class—"grandchildren"—and that, some being unable to take not being born, it was invalid for the one grandchild born, fails. Certain sections of Indian Succession Act, 1865, cited, inapplicable: *Hurdey Narain* v. *Rooder Perkash*, L. R. 11 Ind. App. 26, quoted as illustrating a similar gift made from similar motives. Affirmed. Appellant's claim fails. [*I. L. R.* 6 *All.* 560; *L. R.* 11 *Ind. App.* 164.]

Jonmenjoy Coondoo *v.*
Watson.

Bengal. Sir Richard Couch. *March* 1, 1884.

Principal and agent. Importance of words in a power of attorney given by a depositor of securities to the bankers with

whom he made the deposit. The words of the power were "negotiate, make sale, dispose of, assign and transfer, or cause to be procured and assigned and transferred, at their or his discretion, all or any of the Government promissory notes." The appellant was placed in possession of a note for 20,000 rupees in return for a loan to respondent's attorney. In this particular case the authority to sell did not give an authority to endorse and pledge. Discussion on case of *The Bank of Bengal* v. *Macleod*, 5 Moore's Ind. App. 1; 7 Moore P. C. 35; are words used in a power of attorney to be construed conjunctively or disjunctively? Maxim of Lord Bacon—"*Copulatio verborum indicat acceptationem in eodem sensu.*" The Judicial Committee dismissed the appeal, with costs, holding with the High Court that there was no authority to pledge the note, and that the appellant had no title to it.

[*I. L. R.* 10 *Calc.* 901; *L. R.* 11 *Ind. App.* 94.]

Jugol Kishore *v.*

Maharajah Jotindro Mohun Tagore and Others.

(No. 51 of 1881 and No. 2 of 1882.)

(Two Consolidated Appeals.)

Bengal. Sir Barnes Peacock. *March* 13, 1884.

Sale in execution of a decree. Did the whole estate pass, or only a widow's interest. *Shivagunga Case*, 9 Moore's Ind. App. 604, quoted to show that for some purposes a whole estate is occasionally vested in a widow absolutely, though in some respects it may be for a qualified interest. The Court was at liberty to look at the judgment to see what passed. The words right, title, and interest may have a different meaning, according to the nature of the suit and of the decree under which the sale takes place. *Bisto Beharee Sapoy* v. *Lalla Byjnath Pershad and others*, 16 W. R. 50. The Judicial Committee, affirming decree below, find that in this case not only the widow's right, but the whole interest in the estate, passed under the sale. Decrees of High Court affirmed, with costs.

[*I. L. R.* 10 *Calc.* 983; *L. R.* 11 *Ind. App.* 66.]

Haji Abdul Razzak *v.*
Munshi Amir Haidar.

Oudh. SIR ROBERT COLLIER. *March* 14, 1884.

Will case. Two questions arise. 1st, Was it necessary, by the provisions of the Oudh Talukdars Act, Act I., 1869, s. 13, and also Act VIII. of 1871, that the will should be registered? and 2nd, was it registered? Their Lordships agree with the Judicial Commissioner that the will was not duly registered, and had no operation as far as the Taluk was concerned. As far as the personal property was concerned, however, it had an operation, inasmuch as the parts of the will relating to it did not require to be registered. Affirmed, with costs.
[*L. R.* 11 *Ind. App.* 121.]

Rajah Rup Singh *v.*
Rani Baisni and The Collector of Etawah.

Bengal. SIR BARNES PEACOCK. *March* 22, 1884.

Succession. Rights of a male collateral heir, the appellant, to succeed to an ancient raj and impartible estate, in a joint and not a separate family, superior to the right of a widow according to Mitacshara law. Cases on this head are all reviewed in the suit of *Maharani Hironath Koer* v. *Baboo Ram Narayan Singh*, 9 Bengal Reports, 274; *vide* also *Chintamun Singh* v. *Nowlukho Kowari*, L. R. 2 Ind. App. 263, 270; *vide* also, as to admission of evidence of custom, *The Marquess of Anglesea* v. *Lord Hatherton*, 10 M. & W. 218. The Judicial Committee reverse the decrees of both Courts below, declare in favour of the title of the male collateral, and that the law of succession, according to the Mitacshara, was not modified by a custom in favour of a widow. Appellant to have costs in the lower Courts, and of this appeal. [*I. L. R.* 7 *All.* 1; *L. R.* 11 *Ind. App.* 149.]

Gokuldoss Gopaldoss *v.*
Rambux Seochand and Another.

Court of the Resident, Hyderabad. Sir Richard Couch. *March* 22, 1884.

Mortgage suit. The principal respondent (a mortgagee and the plaintiff) was decreed possession of nine mortgaged houses. The appeal dealt with a claim for three of these. Purchase by appellant of mortgagor's right, title, and interest, with notice of prior mortgage. Payment by the appellant of all charges on the prior mortgage. Mortgage, however, not extinguished by him. Condition that mortgagor should recoup the payment of first mortgage before the respondent could claim under his (second) mortgage from the purchaser (*viz.*, the appellant). Held by the Judicial Committee that the doctrine of *Toulmin* v. *Steere*, 3 Mer. 210, is not applicable to Indian mortgage transactions, except as to law of justice, equity, and good conscience. Held, also, modifying decree below, that the appellant (the owner, through purchase of an ulterior interest, and who paid off the earlier mortgage debt) was not in the same condition as the mortgagor, and therefore that he had a good defence to the suit for possession of the three houses. As the appellant has failed on the question of the validity of the mortgage to respondent, there would be no order as to costs. Doctrine of Madras case, *Ramu Naikan* v. *Subbaraya Madali*, 7 Mad. H. C. Reports, 229, upheld. [This was the first appeal heard by the Privy Council from the assigned district of Hyderabad.]
[*I. L. R.* 10 *Calc.* 1035; *L. R.* 11 *Ind. App.* 126.]

Letterstedt (now **Vicomtesse Montmort**) *v.*
Broers (as Secretary to the Board of Executors of Cape Town) and Another.

Cape of Good Hope. Lord Blackburn. *March* 22, 1884.

Trusts case. This was an appeal by the appellant (the plaintiff) against part of a judgment of the Supreme Court of

11 July, 1879, an order of the 14 September, 1880, and a judgment of 2 July, 1881. The appellant was the only daughter of Jacob Letterstedt, a maltster and brewer, who died in 1862, leaving her a large amount of property, which came in from several businesses. This property was vested on the girl's behalf in the hands of "the Board of Executors of Cape Town," a body incorporated by an ordinance of the Cape of Good Hope. They were empowered to act as executors and trustees, and were to have remuneration for so acting. The appellant had in her suit demanded an account for a long series of years and the removal of the trustees, and alleged that the trustees had wrongly administered the trust. Counsel for the respondent Broers stated that he was ready to submit to inquiry, but inquiry was one thing and an account in the difficulties of this case another. Effect of a compromise in 1872. Their Lordships held that *mala fides* had not been proved. They considered that the compromise was binding. Therefore that much of the first judgment should stand. As regards the second order, their lordships held that it should be varied by declaring that the plaintiff was entitled to an inquiry as to how much she held in her own right absolutely and how much was only to be enjoyed in her life. The final judgment refused the removal of the executors. This ruling their Lordships, looking to the difficult and delicate duties which may yet have to be performed, and taking all the circumstances for the welfare of the beneficiaries and of the trust estate into consideration, agreed to recommend her Majesty to reverse. They would order the removal of the trustees, but (inasmuch as the appellant had failed to prove her main contention of breach of trust against them) their Lordships ordered her to pay her own costs. As the trustees were wrong in resisting an inquiry concerning the profits, and as their removal is necessary, they are also to bear their own costs. A third party, the second (nominal) respondent, who represented the interests of reversioners, is to have his costs out of the estate. [9 *App. Cas.* 371; 53 *L. J. P. C.* 44.]

The Trustees of St. Leonard, Shoreditch *v.*
The Charity Commissioners (in the matter of the Scheme for the Management of the Charity Commission Foundations).

The LORD CHANCELLOR (The EARL OF SELBORNE). *March* 25, 1884.

Objections to the scheme of the Charity Commissioners were raised on the grounds that in reality the charity was a denominational one under the meaning of sect. 19 of the Endowed Schools Act of 1869, 32 & 33 Vict. c. 56, and the 7th section of the Act of 1873, 36 & 37 Vict. c. 87, and also that under the meaning of the 9th section of the Act of 1869 the Commissioners had no power to employ endowments (which before the scheme were used for the education at school of girls and boys) in the creation of exhibitions. The Judicial Committee after elaborate discussion of the meaning of the word "founder" and of the specific regulation in the Acts as to "express terms" (written instruments or statutes being required to make any school denominational), also after declaring their inability to find any solid reason for saying that the application of endowments to exhibitions was not within the powers of the Commissioners, recommended her Majesty to approve the scheme.

[10 *App. Cas.* 304.]

The Oriental Bank Corporation *v.*
Richer & Co. and Another.

(Consolidated Appeals.)

Mauritius. SIR ARTHUR HOBHOUSE. *March* 29, 1884.

Bankruptcy case. Two questions. Was the adjudication of bankruptcy passed against Frederic Richer and Co. a valid adjudication against Frederic Richer, *who was the sole member of that firm*, and who himself was the petitioner for bankruptcy. The Judicial Committee were of opinion that a merely formal defect in the order afforded no ground for annulling the

adjudication. It did not injure anybody. The other question was, whether under sections 40, 43, and 50 of Ordinance No. 33 of 1853 (Mauritius) a creditor could challenge the validity of an adjudication against his debtor (who being a trader has been made bankrupt on his own petition) on the ground that he has not made it appear to the satisfaction of the Court that his estate is sufficient to pay his creditors at least 5*s.* in the pound clear of all charges of prosecuting the bankruptcy. Their Lordships holding that the words of the ordinance "made to appear to the satisfaction of the Court" pointed to the view that the judge should satisfy himself as to the requisite solvency of the estate. The use of that language in the ordinance indicates rather a satisfaction in the personal discretion of the judge than a judicial process on which issues may be taken and appeals presented. It was not provided by the ordinance that creditors should attend the adjudication, and it is not intended that they shall in any way put in issue the fact of qualified solvency. Their Lordships uphold the decision of the Supreme Court and pronounce the adjudication final. Both appeals dismissed.

[9 *App. Cas.* 413; 53 *L. J. P. C.* 62.]

Hettihewage Siman Appu and Others *v.*
The Queen's Advocate (Nos. 83,316 and 83,320 respectively, and on the cross action in appeal, No. 83,320).

Ceylon. SIR ARTHUR HOBHOUSE. *April* 7, 1884.

The main question raised in these appeals is whether the principal appellants (defendants) are entitled to recover by claim *in reconvention* damages from the Crown for alleged breach of certain engagements or representations made by the Government on the occasion of the annual sale of arrack rents in the central province, upon faith whereof the principal appellants are said to have purchased the privilege for one year of selling arrack rum and toddy within certain arrack rent divisions in Ceylon, and to have executed a bond to the Crown securing payment by monthly instalments; or whether they are liable to pay the

balance remaining unpaid of the purchase money. In the second appeal, a further question was raised, whether, even if not entitled to damages, they are not at least (as having been led into mistake by representations of the vendor) entitled to resist performance of the agreement to pay the purchase money, so far as regards two instalments remaining unpaid. In the cross appeal, the Advocate General submitted that the judgment of the Supreme Court giving damages to the principal appellants on account of the refusal to issue a licence for a particular tavern in accordance with a contract should be reversed. Another question in the cross appeal was whether the Crown Advocate could be sued at all. Authorities quoted at some length on liability of the Crown to be sued. The suits were originated by the Crown for balances due on two rents, and the defendants, the principal appellants, claimed a set-off, alleging, as stated above, that the Crown had broken its engagements to them in connection with the arrack rents, and that they have suffered damage which they are entitled to have ascertained in these actions, and to enforce against the Crown in reconvention. In action 83,316 the district judge found that the defendants had suffered damage to the extent of Rs. 4,500, and therefore that the Crown could recover only the amount of rent, minus the damage, viz. Rs. 25,283. 34 cents. In action 83,320 he found that the defendants had suffered damage to the extent of Rs. 70,000, which exceeded the claim of the Crown by Rs. 39,783. 66 cents. He then set the results of the two actions against one another, and made a single decree condemning the Crown to pay the defendants the sum of Rs. 14,500. 32 cents. The Crown appealed to the Supreme Court in both actions, and that Court made separate decrees. In action 83,316 they held that the defendants had not made out any case in reconvention, and they decreed to the Crown the whole sum claimed by them. In action 83,320 they held that the defendants had proved damages to the extent of Rs. 37,031. 25 cents, which exceeded the claim of the Crown by Rs. 6,814. 91 cents, and for that sum they gave the defendants a decree. The defendants have now appealed to her Majesty in Council from both decrees of the

Supreme Court, seeking in effect to restore the decision of the district judge. The Judicial Committee dismissed the appeals and the cross appeal, holding that there was no breach of covenant by the Crown over the sale of the arrack rents, and no contract had been proved at all in reconvention; that damages had, however, been incurred by the appellants, and were payable by the Crown in respect of the non-issue of a licence for the tavern which was, as has been said, the subject of a contract. The judgment of the Supreme Court on that head would also be affirmed. With respect to the other question, the Judicial Committee decided that, although not introduced by the Roman Dutch law into Ceylon, the suing of the Crown by a subject had now become recognized law in that island. *Hendrick* v. *The Queen's Advocate*, 4 Cey. Sup. Court Rep. 76; *Fernandez* v. *The Queen's Advocate*, *ibid.* 77. The case of the colony of Natal, *vide Palmer* v. *Hutchinson*, 6 App. Cas. 619, distinguished.

[9 *App. Cas.* 571.]

The Queen *v.*
Williams.

New Zealand. SIR RICHARD COUCH. *April* 9, 1884.

"Snag" case. Petition of right under New Zealand Crown Suits Act, 1881, s. 37. Steamship at anchor in a harbour which was under the control of the executive Government settled with the fall of the tide on a "snag," and was so damaged as to fill with water and sink. Alleged negligence on the part of Government officers in not removing the "snag." Their Lordships thought that there was evidence, if it was properly left to them, from which the jury might conclude that the executive Government, by their servant, the harbour master, had notice of danger at this point, such as to make it a want of reasonable care in them in not inquiring by their servants what that danger was. Definition of "public works." Was the negligence within the provisions of the Crown Suits Act, sect. 37, sub-sect. 3? Their Lordships held that it was. *Parnaby* v. *Lancaster Canal Co.*, 11 A. & E. 230; *Mersey Docks Trustees* v.

Gibbs, L. R. 1 Eng. & Ir. App. 93; *Jolliffe* v. *The Wallasey Local Board*, L. R. 9 C. P. 62. The verdict below, and the decision of the Supreme Court refusing a new trial, are both upheld. [9 *App. Cas.* 418; 53 *L. J. P. C.* 64.]

Petition of Doty in Re Brandon's Patent (improvements in lights).

LORD WATSON. *June* 10, 1884.

Patents Act of 1883, ss. 25, 113. This was a petition craving leave to be allowed to lodge a petition to extend letters patent *within "six months"* or in less than six months of the expiry of the patent. The 25th section of the 1883 Act laid it down that petitions in future should be lodged six clear months before the expiration of the letters patent. The petitioner now, however, submitted that the petition, though out of time, ought to be received, as sect. 113 of the 1883 Act made a provision that any *right* conferred by the provisions of the older Act (5 & 6 Will. IV. c. 83) on patents granted under that Act was not affected by the new statute. Among the old rights was that declaring that a petitioner might apply for extension, and no limit of time for presentation before expiry was named. Their Lordships reported in accordance with the prayer of the petition. The result will be that the six months limit mentioned in the 1883 Act will not be binding till all letters patent granted under the old Act have wholly lapsed, *i.e.*, in 1897.

[9 *App. Cas.* 589; 53 *L. J. P. C.* 84; 1 *Cut. Pat. Cas.* 154.]

Narpat Singh *v.*
Mahomed Ali Hussain Khan.

Oudh. SIR BARNES PEACOCK. *June* 10th, 1884.

Suit to obtain possession of a Mouzah, a non-Talukdari estate, and for a declaration of the invalidity of a deed of sale of the said Mouzah in respondent's favour. Both Courts below found

the deed valid, and that the vendor was in possession of her faculties at the time of the execution. The estates of three brothers were confiscated at the time of the mutiny, in which two of the brothers were killed. The appellant was the surviving brother. After confiscation, the Government divided certain of the family property into separate portions, viz. one part for the son of the first brother, one part for the widow and son and daughter of the second brother, and one part for the appellant. The children of the widow died, and she alienated by the deed of sale her portion and that of her children to the respondent, and soon afterwards she herself died. Thereupon the appellant instituted proceedings to prove his title to inheritance as heir to the son of the widow. The Courts below (and the Judicial Committee approve the decisions) found that the appellant could not prove his claim. The son in question was only a sharer or joint owner with his mother and sister in the property, and any arrangement he may have made with the appellant was ineffectual. On his death and that of his sister, the mother became sole owner and could alienate. Affirmed, with costs.

[*Ind. L. R.* 11 *Calc.* 1.]

Dyson and Another *v.*
Godfray.

Jersey. Sir Robert Collier. *June* 13, 1884.

Action arising out of a contract and sub-contract for the States market at Jersey. Does a right of set-off or claim by way of compensation exist in Jersey law? *Vide La Cloche* v. *La Cloche*, L. R. 3 P. C. 136; L. R. 4 P. C. 325. Le Geyt's Laws of Jersey (ed. 1847), vol. II. pp. 412, 414, 415. Basnage, p. 89, art. 21. Terrien (ed. 1578), b. VII. cap. 6. Pothier, Obligations, vol. I. part 3, cap. 4, par. 628. Upon a review of these decisions, the Judicial Committee come to the conclusion that the right of set-off does prevail, if it is for what is called a *liquid* debt. "Il faut 3° que la dette qu'on oppose en compensation soit liquide. Une dette est liquide lorsqu'il est constant

qu'il est dû, et combien il est dû, *cum certum est an et quantum debeatur*. Une dette contestée n'est donc pas liquide ; elle ne peut être opposée en compensation, à moins que celui, qui l'oppose, n'en ait la preuve à la main, et ne soit en état de la justifier promptement et sommairement." Pothier, Obligations. The Judicial Committee consider the Royal Court was right in deciding that the appellant Dyson, or in his default the second appellant, was indebted to his sub-contractor, now deceased, but represented by the respondent who administered his estate for a certain amount, but also hold that the Court should have dealt with the appellant's claim for set-off or compensation. The order below would be reversed as to a large portion of the amount stated in the decree, and the case would go back for the Court in Jersey to consider and determine whether appellants' counterclaims are in whole or in part liquid debts, or debts "*incontestées ou du moins incontestables*," as alleged by the appellants, and to proceed further in the cause as may seem just. No costs. [9 *App. Cas.* 726; 53 *L. J. P. C.* 94.]

Rajah Amir Hussan Khan *v.*
Sheo Baksh Singh.

Oudh. Sir Barnes Peacock. *June* 20, 1884.

Jurisdiction of particular Courts. Act X. of 1877, s. 622, as amended by Act XII. of 1879, s. 92. (Act XIII. of 1879. Effect also of sect. 21.) Suits for possession of property on redemption of mortgage. Court of the Judicial Commissioner. Second appeal. An appellate Court, District Court of Sitapur, having given a final decree, the Judicial Committee decide that there was no second right of appeal to the Judicial Commissioner, unless there was an illegality in jurisdiction or material irregularity below. Reversed, with costs: *Tej Ram* v. *Harsukh*, I. L. R. 1 All. 105; *Ex parte Lakhykant Bose*, I. L. R. 1 Calc. 180.

[*I. L. R.* 11 *Calc.* 6; *L. R.* 11 *Ind. App.* 237.]

Raja Ajit Singh *v.*
Raja Bijai Bahadur Singh and Another.
(Appeals and Cross-Appeals.)

Oudh. SIR ROBERT COLLIER. *June* 24, 1884.

Accounts between neighbouring Talookdars, one of whom was a money-lender, and the other, Bijai, a person of feeble intellect and likely to be easily influenced to borrow money by artful persons. Hypothecated property. Finding of undue influence, a finding of facts of two Courts. The lender Ajit Singh, and the manager of the estate, act together in the transactions. Extraordinary powers given to manager. Consideration for deeds. The appeals are in two suits, one against the weak-minded Talookdar and his wife, and the other a cross-suit by these two persons against the money-lender Talookdar. Their Lordships agree to recommend her Majesty to direct that decrees below, which directed the cancellation of the deeds of sale, but held that Bijai had received some consideration, and that the deeds should remain as security till it was paid, should be varied by directing accounts of the borrowed moneys to be taken on a basis still more favourable to the weak-minded Talookdar and his wife, the respondents and cross-appellants (namely, that the conditions of cancelment should be not the repayment of moneys proved to have been received by the manager, but of sums granted personally to Bijai, or of sums borrowed by the manager in the course of a *prudent management* of the estate), and these two are given the costs of the appeals.

[*I. L. R.* 11 *Calc.* 61; *L. R.* 11 *Ind. App.* 211.]

Plimmer and Another *v.*
The Mayor, Councillors, and Citizens of the City of Wellington.

New Zealand. SIR ARTHUR HOBHOUSE. *June* 25, 1884.

Compensation for equitable right acquired in land. The buildings on the land on the foreshore of Wellington Harbour

were originally erected by one John Plimmer, the appellants' lessor, with the permission of the Government. In the opinion of the Judicial Committee, Plimmer must be taken to have held the ground under a revocable licence, to use it in his capacity of a wharfinger, until the Government requested Mr. Plimmer to enlarge his warehouses and jetties for the purpose of landing coolies and goods. By thus giving him reason to believe his occupation would be permanent, the licence had ceased to be revocable, and he acquired a legal perpetual title to the jetty for the purposes of the original licence; and if the ground was wanted afterwards for public purposes, it could only be taken from him by the Legislature. The respondents claimed that the land became vested in them by the "Wellington Harbour Board and Corporation Land Act of 1880." Their Lordships did not agree with the decision of the Supreme Court, and in their judgment quoted numerous authorities: *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; *Gregory* v. *Mighell*, 18 Ves. 328; *Pilling* v. *Armitage*, 12 Ves. 78; *Winter* v. *Brockwell*, 8 East, 308; *Liggins* v. *Inge*, 7 Bing. 682. They were discussing a statute which gave power to take away land *for compensation.* The appellants had acquired a right and title in the land, and the interest in it would carry compensation under the Public Works Acts of 1880 and 1882. Declaration in favour of appellants made, with costs of appeal.

[9 *App. Cas.* 699; 53 *L. J. P. C.* 105.]

Bani Ram and Another *v.*
Nanhu Mal.

N. W. P. Bengal. Sir Richard Couch. *June* 25, 1884.

Question of interest. Interest to be added to the decree for payment of a debt. Proper interpretation to be put upon a final order of the subordinate Court of Aligarh in the matter. Erroneous re-adjudication of the High Court on the question of limit within which interest was to be paid. The Judicial Committee reverse High Court decree, declaring that the High

Court could not, in a later stage of execution proceedings, re-adjudicate on an order not appealed against. Ruling in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari*, L. R. 11 Ind. App. 37, followed. Reversed, with costs below, and here.

[*L. R.* 11 *Ind. App.* 181.]

Mackellar (Manager of the Natal Bank) *v.* **Bond.**

Natal. Lord Watson. *June* 25, 1884.

Action to enforce the suretyship of a wife under a mortgage bond given to the bank. Separate estate at marriage. By Natal law, a woman cannot be bound as a surety, even where she executes the deed under her own hand, unless she specifically renounces the right to plead the privileges secured to her by the *senatûs consultum Villeianum*, and another rule of law *de authenticâ*. Limits of a power of attorney given to her husband. Had he authority to renounce these privileges for the wife? The bond in question was executed in favour of the bank by one Granger, under a power of attorney given him by the husband, who in turn held a general power of attorney from the wife. Granger made the renunciation of privileges for the wife, and the question now was whether that renunciation was tantamount to a renunciation by the wife herself. The Court below held, and the Judicial Committee endorse the view, that neither the husband nor his attorney had any power to impose an obligation of suretyship on the wife, nor to renounce the protection which Natal law gave her against the consequences of entering into such an obligation. There are no express words in the power of attorney to the husband, giving the husband such authority, nor do there appear to their Lordships to be any words from which it can be fairly implied that the lady had in view the renunciation of her legal privileges, or that she intended to convey any authority to renounce them on her behalf. The deed was therefore void. Affirmed with costs.

[9 *App. Cas.* 715; 53 *L. J. P. C.* 97.]

Gunga Pershad Sahu *v.*
Gopal Singh.

Bengal. Sir Barnes Peacock. *July* 2, 1884.

Invalid sale in execution. Property advertised for sale in execution to meet a debt due by the respondent to appellant. Agreement made between the parties to have sale postponed is filed in the wrong Court. Meanwhile the sale is proceeded with in another Court (the District Court), and the appellant buys the estate at a price below its value. Suit by respondent to have the sale declared invalid. Concurrent decrees of both Courts below that the appellant could not have the advantage of his purchase. This decision the Judicial Committee sustain, and direct the sale to be set aside and possession given to the respondent. The decree of the High Court is affirmed, but slightly varied in the terms under which it declared that before possession is given the debt (with interest) due to the appellant under his decree and certain other debts due to the appellant's father are to be met by the respondents. Possession to be without wasilat. Appellant to pay costs of appeal.

[*I. L. R.* 11 *Calc.* 136.]

The Commissioner for Railways *v.*
Toohey.

New South Wales. Sir Richard Couch. *July* 12, 1884.

Action for damages for loss of a husband who was killed by a tram-motor. Provisions of New South Wales Tramways Acts, 22 Vict. No. 19, sects. 100, 115, and 141, and 43 Vict. No. 25, sects. 3—5. Powers and liabilities of the Commissioner for Railways under these Acts. A jury below had given a verdict for the appellant. A rule for a new trial was granted on two grounds:—(1) Was not the weight of evidence such as to show that the Commissioner should be held liable where there was negligence in the use of a steam-motor in consequence of

which the respondent contended her husband had been killed? (2) Was the use of steam-motors on tramways lawful? The Judicial Committee refused to reverse the rule on the first ground, but held as to the second that the use of steam-motors was lawful. As the appellant had failed to show that the order for a new trial ought to be reversed, he would have to pay the costs of the appeal.

[9 *App. Cas.* 720; 53 *L. J. P. C.* 91.]

David Guillan Clark *v.*
John Guillan Clark and **Jane Lawrence** by her next friend **George Clark Allen.**

Victoria. SIR ARTHUR HOBHOUSE. *July* 12, 1884.

Validity of a sale of the testator's estate to one who has been nominated an executor. Distribution of estate. Allegations (against a son of a person deceased) of wrongful dealing in the distribution of the deceased's estate and property to the other members of the family. The plaintiffs (respondents), who brought the suit, are the youngest children of the testator. The appellant is the eldest son. In 1864 John Clark (the testator) took his two sons John and George into partnership in his tannery business. In January, 1866, on the sudden and simultaneous deaths of John and George, David became the surviving partner. The impeached transaction is the purchase from the representatives of John and George of the partnership assets and the sale of the business. One of these representatives had also been nominated with David as co-trustee and guardian of the interests of the testator's infant children. When the news of John and George's deaths arrived, David had to consider his position, and was advised by counsel that if he wished to continue the business he had better not prove the will, and that arrangements should be made for winding up the business. Counsel also suggested that a fair arrangement might be entered into with the representatives of his brothers for the purchase of their shares, but that in such a case it was essential that he himself should not be one of the representatives. In point of

fact he never did prove the will. Moreover, he renounced by deed the office of trustee and executor, and never acted as if following either of those characters. At the same time, if such an arrangement was not arrived at he held himself open to act as executor. The co-trustee proved the will, and this co-trustee and the representative of George, with the sanction of adult beneficiaries, after much negotiation sold the partnership to David at a price arrived at after valuation. Years have elapsed since the transaction, and now on the original partnership deed—made, of course, with joint consent as to value by the partners years before the sale—coming to light, it was sought by the plaintiffs to contend that they were entitled to more than they received. The Supreme Court declared the sale invalid. Their Lordships reversed this decision. They could not agree that a sale was to be avoided merely because when entered upon the purchaser may, at his option, become the trustee of the property purchased, though in point of fact he never does become such. Their Lordships, being of opinion that there was no trace whatever of unfair dealing or misrepresentation in any of the transactions, declare that the suit should never have been brought, and pronounce in favour of the appellant.

[9 *App. Cas.* 733; 53 *L. J. P. C.* 99.]

Madho Pershad *v.*
Gajadhar and Others.

[*Ex parte.*]

Oudh. SIR ROBERT COLLIER. *July* 12, 1884.

Mortgage. Notice to mortgagor. Suit to obtain possession of a village after alleged foreclosure. Their Lordships affirm the decision of the Judicial Commissioner that the requirements of Regulation XVII. (sect. 8) of 1806 with respect to notification to the mortgagor had not been adequately complied with. Such due *notice* in proper form *essential* and a condition precedent. See *Norender Narain Singh* v. *Dwarka Lal Mundur and Others*, 5 L. R. Ind. App. p. 18.

[*I. L. R.* 11 *Calc.* 111; *L. R.* 11 *Ind. App.* 186.]

The Canadian Central Railway Company *v.* **McLaren.**

Ontario. LORD WATSON. *July* 12, 1884.

Action for damages caused by sparks coming from a railway engine and setting fire to a timber yard. Precautions taken on Canadian railways to prevent danger of fire from engines. Was there defective construction of the smoke stacks of the engine. The jury below declared in favour of the plaintiff respondent, and heavy damages were assessed. A rule for a new trial was discharged, hence the appeal here. Negligence. Admissibility of evidence. Decisions below affirmed, with costs.

In this case a *petition* to dismiss the appeal on the ground *that the Court of Appeal in Ontario was not a Court competent to grant an appeal to England, now that a Supreme Court of Final Appeal in Canada was established, was heard and dismissed in March,* 1884. [*P. C. Ar.*]

Partab Narain Singh *v.* **Trilokinath** (No. 12 of 1882).

Oudh. SIR MONTAGUE SMITH. *July* 23, 1884.

Heirship. Revocation of will. Suit by the respondent, Trilokinath, to succeed to certain estates which belonged to the late Talookdar Maharajah Sri Maun Singh. District judge of Fyzabad dismissed the suit. The Judicial Commissioner reversed this decision and sustained Trilokinath's claim, a result directly opposed to the report of the Judicial Committee to her Majesty in a former suit before them, viz., *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer*, L. R. 4 Ind. App. 228. (*Vide* also *ante*, p. 54.) Trilokinath now contended that appeal did not bind him as he was a minor when it was decided, and also on the ground that the manager of the estate was not a party to it. *Res judicata.* The Judicial Committee now reverse judgment below, and holding that the judgment against the Maharanee in the former suit binds Trilokinath, to whom she had alienated the property without power to do so, direct the

present suit to be dismissed. The true heir having come to the Talukdari under the provisions of Act I. of 1869, an Act framed by the deceased Talookdar himself at a later date than his will, in which he only expressed his desire for that "present time," and which he had revoked. The nonjoinder of the manager did not affect the validity of the former judgment of this Board. Respondent to pay costs below and here.

[*I. L. R.* 11 *Calc.* 186; *L. R.* 11 *Ind. App.* 197.]

Kali Das Mullick *v.*

Kanhya Lal Pundit (and on his decease, Behari Lal Pundit) and Others.

Bengal. Sir Richard Couch. *July* 23, 1884.

Construction of an *Ikrarnama* and deed of gift. Reasons for gift. Performance of religious ceremonies, and to provide support for donee. Limitation (Articles 134 and 144 of Act XV. of 1877). Was the deed of gift invalid? Passages from the Mitacshara and other authorities quoted with respect to the necessity or otherwise of the donee getting possession and transfer of the gift in order to secure the validity of the deed of gift, and complete the title. Their Lordships, reversing decrees below, report that the gift was valid, and that the appellant, husband of the donee, was entitled to possession of the property in suit with mesne profits, and to all the costs incurred. Respondent, Pundit, to pay costs of the appeal. This was one of five suits, and was a test appeal, as later on (*vide* Order in Council, Nov. 18, 1885—P. C. Ar.) the same result as in this appeal was followed in the four other suits.

[*I. L. R.* 11 *Calc.* 121; *L. R.* 11 *Ind. App.* 218.]

The Deputy Commissioner of Rae Bareli *v.*

Rajah Rampal Singh.

Oudh. Sir Richard Couch. *Nov.* 14, 1884.

Claim of a mortgagee to possession. Construction of the mortgage. Effect of certain Hindustani words—"yeh" (this),

"kabya karke" (having taken possession), and "si wakt" (at once)—in the instrument, which was executed in return for a debt of Rs. 50,000. The question was whether the mortgagee (or rather the manager of his estate—the appellant) could, according to the construction of the whole of the deed, take possession *at once* of certain villages on failure to pay instalment; or whether words in the later portion of the instrument conveyed that the villages could only be taken possession of subject to the consent of the mortgagor (now represented by the respondent), and whether, if this was so, a sale of some of the property for the debt was the only remedy. Construing the deed as a whole, the Judicial Committee reversed the decree, with costs, of the Judicial Commissioner, which was based on the alternative theory; their Lordships holding that there was a right to possession given *first* on failure to pay instalment, and that then the contingent words came in with effect, but only applied thus far, namely, that if the mortgagor, *after possession by the mortgagee*, objected to the latter applying the rents in reduction of the principal and interest, the mortgagee might sell the mortgaged property and other property which was brought into the security to satisfy the debt. This was the construction arrived at by the subordinate judge, and was the right one.

[*I. L. R.* 11 *Calc.* 237; *L. R.* 12 *Ind. App.* 1.]

Bishenman Singh and Others *v.*
The Land Mortgage Bank of India.

Bengal. Sir Arthur Hobhouse. *Nov.* 18, 1884.

Validity and limit of a sale in execution. Jurisdiction. Did the decree of the District judge affect the whole of the property mortgaged? Doubts raised as to the validity of a sale, and as to whether the decree of the Subordinate Court or that of the District Court should predominate. Judicial Committee affirmed decree below, holding with the High Court that the subject-matter of the first suit was drawn up into the second suit before the District Judge, and that his decree should prevail; and further, that his decree affected the whole property mortgaged,

and that his jurisdiction to order execution was clear. Remarks of the Lords on the wrongful practice of placing irrelevant matter on the record. Certain costs ordered to be disallowed on account of this improper insertion. Appellants to pay costs of appeal. [*I. L. R.* 11 *Calc.* 244; *L. R.* 12 *Ind. App.* 7.]

Sri Rajah Row Venkata Mahipiti Gangadhara Row *v.*
Sri Rajah Row Sitayya and Others.

Madras. SIR BARNES PEACOCK. *Nov.* 21, 1884.

Heirship. Alienation. Validity of an adoption. Their Lordships agree with the lower Courts, and decide that the suit was barred under Act X. of 1877, as being *res judicata* upon an issue raised in a cause previously tried in a court of competent jurisdiction. *Krishna Behari Roy* v. *Bropwari Chowdhranee*, L. R. 2 Ind. App. 285, and other authorities cited. Affirmed, with costs. Costs incurred by irrelevant matter in record disallowed. [*I. L. R.* 8 *Mad.* 219; *L. R.* 12 *Ind. App.* 16.]

Thakur Rohan Singh *v.*
Thakur Surat Singh.

Oudh. LORD FITZGERALD. *December* 6, 1884.

Ejectment suit. Right to resumption of villages claimed by a Talookdar on the one hand, claimed by appellant on the other. Under proprietary title. Ownership on mere resumable tenancy. Onus. Oudh Sub-settlement Act XXVI. of 1866. What was the title at the time of the confiscation of Oudh? The Government of India did not in their confiscation intend any such injustice as an absolute confiscation of rights except in the case of Talookdars who had committed crimes. Evidence of alleged prescription. Principal parties to the alleged agreement for tenure not called as witnesses. Remarks on their absence. No evidence to establish the nature of the grant which, it was said, was made long prior to the mutiny. The Judicial Committee

decide the case on the facts alone, not on the law, and agree that the appellant, who was defendant below, failed to establish his claim under a proprietary title to undisturbed enjoyment. He is not protected by any sub-settlement, nor has the Government, either at the confiscation of Oudh or later, ever recognised his rights. There was no more than a lessee's right established, subject to resumption by the landlord with proper notice. Affirmed, with costs. [*I. L. R.* 12 *Ind. App.* 52.]

[This case was twice argued before their Lordships' Board.]

Gunga Pershad Sahu *v.*
Maharani Bibi.

Bengal. SIR ARTHUR HOBHOUSE. *December* 11, 1884.

Amount of interest recoverable on a mortgage bond executed by a guardian on behalf of a minor. Conditions of mortgages for loans to benefit infants' estates regulated by Act XL. of 1858, s. 18. No proof of "legal necessity" to warrant a high rate of interest. *Skinner* v. *Orde*, L. R. 7 Ind. App. 210. Agreeing with the High Court that the rate of interest, 18 per cent., mentioned in the bond, was untenable, and that 12 per cent. was adequate, the Judicial Committee affirmed the decision below, with costs. [*I. L. R.* 11 *Calc.* 379; *L. R.* 12 *Ind. App.* 47.]

Ramdin *v.*
Kalka Parshad.

(Two Appeals Consolidated.)

[*Ex parte.*]

N.-W. P. Bengal. LORD FITZGERALD. *December* 11, 1884.

Limitation. Suits to enforce a mortgage (not under seal) against certain immoveable property, and against the mortgagor's person and his other properties. The mortgagor had bound himself and his properties, but ten years elapsed from the time

when the mortgage became payable before the suit was instituted. The Judicial Committee, agreeing with the Court below, held that the suit against the person was barred by limitation in three years (Act IX. of 1871, sched. 2, arts. 65, 132), but the right of the mortgagee to enforce his demand against the mortgaged property, being under the twelve years' limit, remains, by reason of art. 132 of the same schedule. Affirmed.

[*I. L. R.* 7 *All.* 502; *L. R.* 12 *Ind. App.* 12.]

Rajah Run Bahadoor Singh *v.*
Mussumat Lacho Koer, and
Mussumat Lacho Koer *v.*
Rajah Run Bahadoor Singh.

Bengal. Sir Robert Collier. *December* 13, 1884.

Suit to recover from a brother's widow possession of her late husband's property, on the ground that the brothers had been joint in estate. Cross-appeal by the widow. The issue whether the brothers were joint or separate had been determined by the Subordinate Judge in an early suit brought by one brother against another. There had also been a determination on the point in a rent suit brought by the widow in the Moonsiff's Court. Their Lordships reported their opinion that the brothers had become separate in estate, but they held that the question was not *res judicata* in favour of the widow by either of the above decisions, Act VIII. of 1859, sect. 2, and Act X. of 1877, sect. 13. *Vide Krishna Behari Roy* v. *Brojeswari Chowdhranee*, L. R. 2 Ind. App. 285. So far as that point was concerned, the High Court's decree was erroneous. Their Lordships held, however, that, the brothers being separate, and on the merits generally, the widow was entitled to a Hindu widow's estate. The plea of *res judicata* was against the widow, but as she gained her claims on the other point, she would be granted costs in both the appeal and cross-appeal, although both are dismissed.

[*I. L. R.* 11 *Calc.* 301; *L. R.* 12 *Ind. App.* 23.]

Hastie v.
Pigot.

Bengal. LORD FITZGERALD. *December* 17, 1884.

Libel. Petition of Hastie, the defendant, in a libel case, for leave to appeal against a decision of the High Court for damages. Points at issue. Was the occasion on which the libel was published privileged? If the occasion was privileged, has the privilege been lost by any evidence of ill-will or indirect or wrong motive on the part of the defendant, or has the plea of justification been proved? Their Lordships abstain from making any unnecessary observations on the evidence in the cause. They content themselves by refusing leave to appeal, on the ground that their Lordships did not see sufficient reason for questioning the finding, on the facts, of the High Court.

[*I. L. R.* 11 *Calc.* 451.]

1885.

Duffett *v.* McEvoy.

[*Ex parte.*]

Victoria. LORD BLACKBURN. *February* 5, 1885.

Jurisdiction. "Due delivery" of a bill of costs. English Solicitors and Attorneys Act (6 & 7 Vict. c. 73, s. 37), Victorian Act (Common Law Procedure Act), s. 396, compared. What are limits of time for delivery under particular circumstances? The Supreme Court had discharged a rule *nisi* obtained by the appellant to set aside an order directing him to deliver his bill of costs in a suit for dissolution of marriage, the respondent having been the petitioner therein. The peculiar circumstance of the case here was that 600*l.* was first paid by the client during the trial, and that he had then given a promissory note for the balance. Subsequently (five years afterwards) he took out a summons for his bill of costs to be delivered. To this objection was made. The Judicial Committee considered, with the Court below, that the provisions of the Colonial Act gave jurisdiction, even after a lapse of time, to order a bill to be delivered. Thus the Committee affirmed the decree below. Their Lordships, in so affirming, merely say this—that at present the order appealed from was rightly made, and that the attorney must deliver his bill, and then the Court will say what, if anything, is to be done if an application is made by the attorney, when the bill is delivered, to be allowed to argue that

the Court should not (considering the payment by promissory note and the lapse of time) direct the bill to be taxed.

[10 *App. Cas.* 300; 54 *L. J. P. C.* 25.]

Rani Bhagoti *v.*
Rani Chandan.

Central Provinces. SIR RICHARD COUCH. *February* 7, 1885.

Second Appeal. Decree of Lower Appellate Court upheld. Claims to villages by two widows, the villages in question having been left by their late husband. Validity of an agreement and of an award of arbitrators arranged for in order to settle matters between the litigants. Alleged disqualification of younger widow (the respondent) to inherit a half share, on the ground that she had been living separate from her husband before his decease, and was therefore only entitled to maintenance. Award made to this effect. Judicial Committee, reversing decree of Judicial Commissioner, but affirming that of the Lower Appellate Court, held that award was binding and could not be disturbed. Respondent to pay costs.

[*L. R.* 12 *Ind. App.* 67; *I. L. R.* 11 *Calc.* 386.]

The Russian ss. "Yourri" *v.*
The British ss. "Spearman."

Constantinople. LORD BLACKBURN. *February* 10, 1885.

Collision. Neglect of 34, cap. 2, of the Danube Commissioners' Rules for the navigation of that river. The Court below held both steamships to blame. The rule being that vessels going down the river Danube should keep to the right bank, the "Yourri" was to blame in going down by the left bank instead of hugging the shore on the right in the mist which prevailed. The "Spearman" was held to blame for having an absence of lights coming up the river, and that decision had not been appealed against. Judgment below affirmed, with costs. [10 *App. Cas.* 276.]

Harris *v.*
Davies.

New South Wales. Sir Barnes Peacock. *February* 10, 1885.

Action for slanderous words. One farthing damages. Certificate for costs. Refusal of Prothonotary to tax. Can plaintiff be awarded a larger sum for costs than he has recovered as damages? Statute 21 James I. c. 16, s. 6. Was this statute impliedly repealed by Colonial Statute, 11 Vict. No. 13, s. 1? The statute of James, if in force, would debar a successful plaintiff in whose favour the jury had found a verdict with damages less than 40*s.* from recovering any further sum for costs. The question was whether this statute was still in force in New South Wales? Had Colonial Legislature power to repeal the English Act? Their Lordships are of opinion that the Colonial Legislature had the power to repeal the statute of James if they thought fit, and they are also of opinion that, looking at the first section of 11 Vict. No. 13, it was the intention of the Legislature to place an action for words spoken upon the same footing as regards costs and other matters as an action for written slander. Under these circumstances, their Lordships think that the statute of James, as regards an action for words, was impliedly repealed by the act of the Colonial Legislature. Judgment of the Supreme Court upheld, with costs.

[10 *App. Cas.* 279; 54 *L. J. P. C.* 15.]

Powell *v.*
The Apollo Candle Company.

N. S. Wales. Sir Robert Collier. *February* 13, 1885.

Is section 133 of the Colonial Customs Act of 1879 (42 Vict. No. 19), *ultra vires* of the Colonial Legislature? Imperial Statute and Constitution Act (18 & 19 Vict.), granting legislative powers to New South Wales. Was the first named Act *ultra vires* of the powers granted by the Constitution Act? Exceptions from the levy of duty. *The Queen* v. *Burah*, 3 L. R. App. Cas. p. 889, and *Hodge* v. *The Queen*, 9 L. R. App. Cas. p. 117, quoted with

respect to the *delegation* of power to, or the circumscribing of power of a local legislature. The action was brought by the respondent company to recover back from the appellant, as collector of customs, a certain sum which the appellant had demanded as duty leviable by law on fifteen casks of stearine imported by the respondent, which sum the respondent thereupon deposited in the hands of the appellant as collector. Is stearine a dutiable commodity? Is it a substitute for candles, which are dutiable? The Judicial Committee, reversing judgment below, held that the duties which were levied under an Order in Council by the authority of the Local Act were properly leviable, and that the section in dispute was not *ultra vires*. Appellant to have costs of demurrers below, and of this appeal.

[10 *App. Cas.* 282; 54 *L. J. P. C.* 7.]

Fanindra Deb Raikat *v.*
Rajeswar Dass alias **Jagadindra Deb Raikat.**

Bengal. Sir Richard Couch. *Feb.* 14, 1885.

Claim to an estate which formed a portion of the Kuch Behar property. Sir William Hunter's account (Hunter's Gazetteer) of the Kuch Behar Dynasty and Territory cited. Alleged title of respondent by adoption and by an Angikar-Patra (agreement) and will. Customs by which the Baikunthpur family are governed, and by which succession to the Raikat is provided for. Family, although Hindus, governed to some extent by customs at variance with Hindu law: *Rajah Bishnath Singh* v. *Ram Churn Majmoodar*, Beng. 6 S. D. A. Rep. 20. Their Lordships find, as against the respondent (defendant), that in sixteen devolutions of the estate there had been no instance of succession by adoption. They also find that the property did not pass by the Angikar-Patra. They reversed decision of the High Court, with costs, holding that the appellant had satisfied them that the custom of adoption was excepted in this particular family, and that this point raised by respondent failing, he could not inherit by means of the will.

[*I. L. R.* 11 *Calc.* 463; *L. R.* 12 *Ind. App.* 72.]

The Exchange Bank of Yarmouth *v.* Blethen.

Nova Scotia. SIR ROBERT COLLIER. *Feb.* 17, 1885.

Deed for the release of debts. Effect of creditor's signature to it. Appeal by the plaintiffs (appellants) from the discharge of a rule for setting aside a verdict for the respondent in an action in which the plaintiffs sued the respondent, as first indorsee, for payment of two promissory notes with interest. Question was whether the appellants having signed a deed made by certain debtors, who were also the makers of the promissory notes, for a general release of their debts, and having added a note to their signature that they executed only in respect of certain claims, could afterwards, *on receipt and acceptance of* a certain sum from the trustee of the assignors, raise a demand against the respondent for the payment of the promissory notes in question? Can a release be executed to be void on a condition? Is it not equitable that a release purporting to be general in its terms should operate as an extinguishment of the whole debt? The circumstances of the claim were these:—The notes were made by Messrs. Dennis & Doane, who were partners, and by Mr. Doane alone, and were payable to the order of the respondent, who indorsed them. The respondent indorsed them to a firm styled Viels & Dennis, who indorsed them to the appellants. The defence to the action was that the plaintiffs (the appellants) had released the makers of the notes, and therefore also the defendant. It was not disputed that if the makers were released so also was the prior indorsee, the respondent. Messrs. Dennis & Doane being unable to pay their creditors in full, prepared a deed of assignment, and all creditors who wished to participate in the benefits of the deed were called upon to sign it within a limited time. The appellants, being creditors, put their seal and signature to the deed, but appended a note or memorandum to the execution of it declaring therein that they signed with reference only to certain claims which they scheduled. These did not include the promissory notes. The Judicial Committee upheld decision below, and declaring that it is not every attempt by a

form of execution to restrain the full operation of the deed which can be treated as a non-execution of it, held that the appellants were bound by their signature. The appellants had signed the deed—this was a condition precedent to receiving benefit under it; they had moreover received a sum of money from the distribution, and having received that sum by virtue of their execution could not now be heard to repudiate it and deny their execution: *Teele* v. *Johnson*, 11 Exch. 845. Affirmed, with costs. [10 *App. Cas.* 293; 54 *L. J. P. C.* 27.]

Sir Rajah Row Venkata Mahipati Gangadhara Bahadur (Rajah of Pittapur) *v.*
Sri Raja Venkata Mahipati Surya and Another.

Madras. SIR BARNES PEACOCK. *Feb.* 25, 1885.

Claim to personalty. Concurrent findings. *Onus* of proof. Was this suit barred because of a previous suit for possession of an estate? Their Lordships, in recommending the decision below to be affirmed, declare that the claim in respect to the personalty is founded on a cause of action distinct from that which was the foundation of the former suit, and therefore is not barred. In this case the plaintiffs (the respondents) had first instituted a suit for recovery of immoveable property, and subsequently sued for moveable property. The appellant fruitlessly contended that the foundation of the cause of action was the same in both suits. *Vaughan* v. *Weldon*, L. R. 10 C. P. 47; *Narayan Babaji* v. *Pandurang Ramchandra*, 12 Bom. H. C. 148. See also 14 Moo. Ind. App. 197, and 3 Mad. H. C. 384—414. True interpretation of sect. 7, Act VIII. of 1859. Affirmed, with costs. [*I. L. R.* 8 *Mad.* 520; *L. R.* 12 *Ind. App.* 116.]

Abdul Wahid Khan *v.*
Musummat Nuran Bibi and Others.

Oudh. SIR RICHARD COUCH. *March* 4, 1885.

Suit for a declaration of proprietary right to Talukas. Construction of an instrument of compromise. Creation of life

estate by an arrangement between a widow and the sons of her deceased husband, is not one which, according to Mahommedan law or usage, could operate *inter vivos*. So far as it was operative, it could only be so if the sons survived the widow. It could not create a vested interest in the sons which passed to their heirs on their death in the lifetime of the widow. *Humeeda and Others* v. *Budlun*, *vide* judgment of the Privy Council, March 26, 1872 (17 W. R. 525). The Court of the Judicial Commissioner decided that, though the sons died before the widow, the estate fell to the heirs of the sons, and that a gift of the estate made by the widow after their death to her daughter, whose husband is the appellant, was invalid. Reversed. Appeal from the District Judge dismissed. Respondents to pay costs in the Appellate Court and here.

[*I. L. R.* 11 *Calc.* 759; *L. R.* 12 *Ind. App.* 91.]

Sookhmoy Chunder Dasi and Another *v.* Srimati Monohurri Dasi.

Bengal. Sir Richard Couch. *March* 6, 1885.

Claim to a share of an estate. Validity of a will. If invalid, the respondent, the widow of one of the testator's sons by his third wife, was entitled to the share she claimed, which ought, she contended, to come to her (she being her husband's heir-at-law) as her husband's share. The appellants were the testator's son by his second wife, and his third wife, the mother-in-law of the respondent. The questions at issue resolved themselves into one, and that was, what was the intention of the testator? It appeared clear that the intention was that the estate itself should not be disposed of, but that the will intended simply to make a gift of the profits. The will was invalid, therefore, by Hindu law; nevertheless, judging by the intention, the respondent was entitled to her husband's share of the accumulation, on accounts being gone into. The Judicial Committee recommended that the judgments of the

Courts below in this view should be affirmed, and dismissed the appeal, with costs.

[*I. L. R.* 11 *Calc.* 684; *L. R.* 12 *Ind. App.* 103.]

Rai Raghu Nath Bali *v.*
Rai Maharaj Bali.

Oudh. SIR ROBERT COLLIER. *March* 12, 1885.

Claim to share in family property. Limitation Act XV. of 1877, art. 127, sched. II. Both Courts below held that plaintiff (the appellant) had been excluded from possession of joint family property for more than twelve years, and that therefore his suit was barred. Affirmed.

[*I. L. R.* 11 *Calc.* 777; *L. R.* 12 *Ind. App.* 112.]

Viziaramarazu Virabahu Narandra Row Bahadoor *v.*
The Secretary of State for India in Council.

Madras. LORD BLACKBURN. *March* 13, 1885.

Claim to the Zemindary of Palcondah. High treason by the person installed as heir by the Court of Wards. Sentence of death and forfeiture under Reg. 7 of 1808, to the Crown. Present claim by a brother. Interpretation of sect. 10, Act XV. of 1877 (Statute of Limitations). The claimant, who came of age in 1837, did not assert his claim within a period far longer than that allowed by the law of limitation. If the Government held the property in trust for a specific purpose, no period of time would be a bar, but their Lordships, affirming decree below, with costs, held that there was no such trust for a specific purpose. Appeal therefore fails. [*I. L. R.* 8 *Mad.* 525.]

Prince Mirza Jehan Kudr *v.*
Nawab Badshah Sahiba.

Oudh. SIR ARTHUR HOBHOUSE. *March* 17, 1885.

The Queen of Oudh's (Mulka Kishwar's) landed property. [The lady was the mother of the king deposed in 1856.] Con-

fiscation and redistribution after annexation of Oudh. Rival claims between a grandson and a daughter of the queen. The appellant (the plaintiff) was the son of the second son of the queen, and therefore her grandson. The respondent was the queen's daughter. Gift to the daughter. Mahommedan law does not require any deed. Reasons for the gift. Concurrent judgments, but on different grounds. Results of previous litigation assist decision in this appeal. *Vide* L. R. 6 Ind. App. pp. 80, 86, 87. Possession by the daughter since 1863. *Limitation.* At the hearing of the previous appeal there was a remand on issues to try whether the respondent could prove either the gift she alleged, or possession prior to the *confiscation*. If she could prove either, the appellant's claim must fail. Their Lordships now uphold the gift, and consider upon the evidence that it was a gift by deed, and not a merely verbal one. [For Canning's Proclamation on the confiscation of Oudh, see L. R. 4 Ind. App. 74.] For difference between a Zemindar and a Talookdar, and for particulars as to the nature of the settlements with regard to them, see *Thakrain Sookraj's Case*, 14 Moo. Ind. App. 127, and *The Widow of Shunker Sahai's Case*, L. R. 4 Ind. App. 198. Appeal dismissed, with costs.

[*L. R.* 12 *Ind. App.* 124; *I. L. R.* 12 *Calc.* 1.]

The Commissioners of French Hoek *v.* Hugo.

Cape of Good Hope. Lord Blackburn. *March* 17, 1885.

Law of waters in Crown lands in the Cape of Good Hope. Prescription. Vested rights of respondent's predecessor, and therefore of himself, to certain springs, and power in the latter to divert into a private stream flowing through his farm. The rights had been granted so long ago as 1820. Effect of grants of the Landdrost and Heemraden. The Commissioners (appellants) brought the action for a declaration of their rights to certain springs, and claimed damages for the entry of the respondent on lands and destruction of the watercourses, and for an interdict to restrain him from interfering with the said water

in future. Agreeing with the Supreme Court, the Judicial Committee held that a right of prescription in the respondent's predecessor and respondent himself was established. Case of much importance, by reason of points arising as to rights in watercourses and natural springs, and especially ownership of sources, under Roman-Dutch law. It would appear that rights even under such law are subject to user by prescription. Appeal dismissed, with costs. [10 *App. Cas.* 336; 54 *L. J. P. C.* 17.]

Marshall and Another *v.*
McClure and Another.

Victoria. SIR ROBERT COLLIER. *March* 17, 1885.

Construction of a memorandum of agreement with respect to a mortgage entered into by respondents to secure a payment of 10,000*l.* Sequestration of respondent's firm and re-purchase by them of the assets. The suit is brought by respondents to obtain a decree directing a proper discharge of their mortgage to the appellants and others to be executed to them by the appellants so far as their share went in terms of the agreement. The question at issue was whether Marshall, who was a partner with the second appellant, when joining in the agreement with respondents bound his firm or himself only, to surrender that share in the mortgage in which either Marshall alone (or his firm) was interested. Marshall contended that under the agreement he was not called on to surrender more than his own beneficial interest as distinguished from that of his firm. Judicial Committee agreed with Supreme Court that the firm was bound. Decree of the Supreme Court directing the execution of a proper memorandum of discharge is affirmed. Appeal dismissed, with costs. [10 *App. Cas.* 325.]

Louis E. Escallier and Another *v.*
John Eubert Escallier and Others.

Trinidad. SIR ARTHUR HOBHOUSE. *March* 25, 1885.

Escallier Case. Inheritance. Spanish law in force in Trinidad before 1845 gave a like inheritance to children born before as to

children born after marriage. Effect, as to this, of Trinidad Ordinance, No. 24 of 1845. Effect also of Ordinance No. 7 of 1858, in assimilating the law of Trinidad to the law of England. What effect, if any, these Ordinances had on persons anticipating inheritance. In this case, the *ante nati* had been duly legitimated by a subsequent marriage, and therefore it is not questioned that the Supreme Court rightly held that on the death of the mother intestate (the father having predeceased her and left a will) one-seventh of the estate of the mother went to each of the seven children. The Judicial Committee upheld the view that the Ordinance of 1845, which prevented marriages after March, 1846, from legitimating *ante nati* children, contained nothing conveying that the rights of children legitimated before that date had been taken away. The decree as to seventh shares was therefore right. The main question in the appeal, however, related to the disposal of the shares of two brothers who had died. There were also questions whether one of the brothers, living still, who had acted as executor, could be charged interest on the accounts of his trusteeship; and again, whether certain of the children who were of age had a right to elect to take any interests they may be entitled to against the will of their father the testator. On these latter points decree below was varied. The Judicial Committee held that on the deaths of the two brothers (ob. 1862—1872), their two "seventh" shares did not go as the Supreme Court decided to the eldest *post nati son*, but became divisible in fifths of such two-sevenths among the five survivors indiscriminately; that the children of age have elected to take such interests as they are entitled to, against the will of their father, the testator; that no ground was shown to tax the executor with interest; and, further, that two infants, the daughters of one of the seven heirs who had died in 1871, had become entitled to their deceased mother's fifth share in moieties. The accounts are directed to be varied so far as is necessary for giving effect to the declarations made. In other respects, decree below is affirmed. No costs.

[10 *App. Cas.* 312; 54 *L. J. P. C.* 1.]

Mac Dougall *v.* Prentice.

Lower Canada. SIR ARTHUR HOBHOUSE. *March* 25, 1885.

Partnership transactions. The action was brought by the appellant for an account and for recovery of certain shares in a projected company, entitled the Canada Lands Purchase Company. Upon the partnership accounts, apart from the shares in question, the plaintiff (appellant) has been found indebted to the defendant, and there is now no controversy upon that point. The appeal relates only to the rights of the parties with regard to the particular shares, which are now represented by shares in the Silver Mining Company of Silver Islet and the Ontario Mineral Lands Company. Construction of an agreement. *Partage, i.e.*, the proportion of shares or their value due on the settlement of all accounts to each partner. The appellant in appealing declared that the decree of the Court of Queen's Bench ascribed to him under the agreement too small a number of shares, and that it has put them at too low a value. Other points raised were, what was the effect of a decree gained by a third party as against the unsold shares, and what date should properly be fixed upon as the date for the valuation of the remaining shares. Their Lordships, upon the whole, were of opinion that the decree of the Queen's Bench ought not to be disturbed. The appeal would therefore be dismissed, with costs. [*P. C. Ar.*]

Bhubaneswari Debi *v.* Nilkomul Lahiri.

Bengal. SIR BARNES PEACOCK. *June* 9, 1885.

Heirship. "Adoption after the death of a collateral (in this case the deceased estate-holder's widow), does not entitle the adopted person to come in as heir to the collateral." The appellant was the mother and guardian of her infant adopted son. Through fraud on the part of the respondent (nephew

of the estate-holder, whose property was subject of claim), the adoption of this son by the widow of the estate-holder's brother did not take place until after the death of the collateral (viz., the estate-holder's widow). In default of adoption before that event the respondent, as next of kin, inherited. The adopted boy, however, never could have in law inherited, as he was not even born until after the death of the collateral. Decree below affirmed, but costs not allowed to respondent.

[*L. R.* 12 *Ind. App.* 137; *I. L. R.* 12 *Calc.* 18.]

Toolshi Pershad Singh and Others *v.*
Rajah Ram Narain Singh.

Bengal. Sir Richard Couch. *June* 13, 1885.

Construction of an istimrari mokurruri pottah (lease) granted by respondent's grandfather to his daughter. The appellants are children of that daughter. Was the grant therein hereditary or for life? Meaning of the words "istimrari mokurruri" when they stand alone or with additions. Do they themselves constitute an estate of inheritance? Previous decisions on the point, and particularly *Mussummat Lakhu Kowar* v. *Hari Krishna Singh*, 3 B. L. R. 226; *Rajah Leelanund Singh* v. *Thakoor Munoorunjun Singh*, L. R. Ind. App. Sup. Vol. 181; and *vide* also L. R. 9 Ind. App. 33. The Judicial Committee affirm decision below and dismiss the appeal, with costs. After the review of the decisions their Lordships think it is established that the words *istimrari mokurruri* in a pottah do not *per se* convey an estate of inheritance, but they do not accept the decisions as establishing that such an estate cannot be created without the addition of the other words that are mentioned, viz., "bafurzundan," including children or descendants, or "nazlan bad nazlan," from generation to generation, as the judges do not seem to have had in their minds that the *other terms of the instrument*, the *circumstances under which it was made*, or the *subsequent conduct of the parties* might show the intention with sufficient certainty to enable the Courts to pronounce that the grant was

perpetual. Their Lordships decide that the words do not convey an estate of inheritance in this case.

[*L. R.* 12 *Ind. App.* 205; *I. L. R.* 12 *Calc.* 117.]

Petition In re "R."

Malta. LORD WATSON. *June* 16, 1885.

Petition for leave to appeal against a decree in a criminal case. Jurisdiction under the criminal laws of the Island of Malta. Petition dismissed. *Queen* v. *Bertrand*, 4 Moore's Privy Council Cases, N. S. p. 474, cited. Dictum. "*There are a series of decisions by this Board which establish that the Crown, by virtue of its prerogative, can admit an appeal in criminal as well as in civil cases, unless the right is taken away by statute; but these cases also establish that the power of reviewing the judgments of criminal courts ought not to be exercised save in certain rare and exceptional cases.*" [*P. C. Ar.*]

Sri Kishen and Others *v.* The Secretary of State for India in Council. (And Cross Appeal.)

Oudh. SIR ARTHUR HOBHOUSE. *June* 18, 1885.

Government and its officers in the Lucknow Treasury. Basis of the suit is an agreement or guarantee against loss made between the Sudder Treasurer and the Government. Misappropriation and forgery of stamps. Against the Sudder Treasurer himself there was no charge, but the principal question was whether he was liable for misappropriation by subordinates. There was also a question whether the chief defaulting subordinate was the agent of the Sudder Treasurer or of the Government. Their Lordships affirmed the decree below and dismissed the appeal with costs, and also the cross-appeal, which

latter was as to costs only. They held that there was no charge whatever against the Sudder Treasurer. The question of the forgery had been adjudicated upon in other proceedings, and no liability attached to him under them. Still, under the terms of the agreement, he was to be held accountable for the misappropriation by his subordinates.

[*L. R.* 12 *Ind. App.* 142; *I. L. R.* 12 *Calc.* 143.]

Mitchell *v.*
Mathura Dass and Others.

[*Ex parte.*]

N. W. P. Bengal. Sir Barnes Peacock. *June* 19, 1885.

Liability of property to be disposed of by sale in execution of a decree. Title in the property. Plaintiffs (respondents) brought the action and sought a decree to the effect that certain buildings were the property of William Mitchell (the appellant) and were liable to be attached by them in execution. The appellant set up the defence that the buildings in question were not his property but his father's. The first Court, and now their Lordships, confirm this view; and the Judicial Committee reverse the decision of the High Court, which held the buildings to be owned by the son, and not the father. The evidence showed that in 1873 the father became the owner, but the deed of conveyance was not registered, and was therefore in accordance with the terms of the Registration Act (Act III. of 1877), sect. 49, not admissible in evidence. It transpired, however, that in 1878 a deed confirming the first deed, and in fact including it, was executed and registered. Furthermore, it was shown that the consideration for the conveyance was paid by the father, and not by the son. Certain erroneous opinions of the judges of the High Court upon the character of the Registration Act are commented on by the Committee. Reversed, and suit dismissed with costs in the High Court. Respondents also to pay costs of appeal. [*L. R.* 12 *Ind. App.* 150; *I. L. R.* 8 *All.* 6.]

Moulvie Muhammad Abdul Majid *v.* Mussumat Fatima Bibi.

N. W. P. Bengal. SIR RICHARD COUCH. *June* 24, 1885.

Settlement of property by will, or rather by a document, which was not exactly a will, for the testator had reserved some benefit to himself under it during his lifetime. The whole question rested upon the construction of the document. The respondent was the daughter by his first wife of the testator. He had a son by a second wife, and the appellant was the son of that son. By the terms of the will of the testator the son and the daughter by the different wives were appointed his legal heirs. The son was to be the manager of the estates, and after him the management was to go to his "descendants." The Courts below and the Judicial Committee hold the view that the word "descendants" here means the testator's descendants, the principal of whom left is the respondent, and did not mean an extension to his son's descendants (on his son's death), the principal of whom was the appellant, and there were others besides him. If it was meant that the succession might go first to the heirs of the son, there were several persons to come in, and not the appellant alone. The words "always and for ever," according to several decisions of this Board, do not *per se* extend the interest beyond the life of the person who is named. Appeal dismissed, with costs.

[*L. R.* 12 *Ind. App.* 159; *I. L. R.* 8 *All.* 39.]

Srimati Kamini Soondari Chowdhrani *v.* Kali Prosunno Ghose and Another.

(Consolidated Appeals.)

Bengal. SIR ROBERT COLLIER. *June* 27, 1885.

Mortgages of mouzahs by a Purda-Nashin lady, a widow. Suit to foreclose in the Court of the 24 Pergunnahs, and action on a covenant in a mortgage deed. *Ultra vires* proceeding of the High Court in changing two separate suits (one of

which has been dismissed on appeal) in Courts of different districts into one contribution suit. The character of this suit totally different from either of the other two. Act VIII. of 1859, s. 12, does not give this power under the circumstances of this case. Decrees of High Court, one interlocutory and the other final, are recommended to be reversed in favour of the widow (the appellant), and the judgments of the District Courts, dismissing both suits, are upheld. Their Lordships think it right to say that the ruling laid down in *Benyon* v. *Cook* (L. R. 10 Ch. 391) as to the doctrine of equity on the question whether the rate of interest was not a "hard and unconscionable bargain," such as a Court of Equity will give relief against, appears to have a strong application to the facts of this case, "where we have the borrower, a Purda-Nashin lady; the lender, her own mooktar, under the cloak of a benamidar; the security an ample one, as abundantly appears; the interest on both mortgages, especially the compound interest on the latter, exorbitant and unconscionable; and a purchaser with full notice of these circumstances." Reversed, appellant to have all costs, below and here.

[*L. R.* 12 *Ind. App.* 215; *I. L. R.* 12 *Calc.* 225.]

The Official Trustee of Bengal and Trustee for the Creditors of the late N. P. Pogose *v.* **Krishna Chunder Mozoomdar** and Others.

Bengal. Sir Richard Couch. *June* 27, 1885.

Suit by appellant for registration as entitled to zemindari rights. The appellant brought the suit in the Court of the subordinate judge of Pubna against the defendants (respondents), alleging that the whole of fifteen mouzahs named in the schedule to the plaint was the zemindary right of the late N. P. Pogose, and that, having obtained possession with the aid of the High Court, the appellant, as the official trustee appointed under the orders of the High Court, was entitled to, and possessed of, the same. Certain decrees of the lower Courts had declared the appellant entitled to be registered as proprietor of the mouzahs,

in lieu of the respondents, who unsuccessfully claimed to be zemindars. The High Court, however, declared that the respondents were putnidars of the estates, and against this decision the appellant now appealed to the Queen in Council. The High Court founded this declaration on certain statements in the documentary evidence which had been put in by the trustee. The issues which had been framed in the first Court did not bring into question a claim to be putnidars, and their Lordships, reversing this part of the High Court judgment, found that the High Court could not properly make any such declaration. (Act X. of 1877, sect. 566), which enables the appellate Court in some cases to determine a question of fact upon the evidence then upon the record, cannot apply where the case has not been set up in the lower Court. Decree of High Court that respondents were putnidars reversed, with costs below and here. [*L. R.* 12 *Ind. App.* 166 ; *I. L. R.* 12 *Calc.* 239.]

Thakur Sangram Singh *v.*

Mussumat Rajan Bai and Another.

Central Provinces of India. SIR ROBERT COLLIER. *July* 2, 1885.

Claim by appellant to a Mouzah through descent. What are the proofs of pedigree? Admissibility of evidence under sect. 32, Act I. of 1872 (the Indian Evidence Act), *vide* also Act XXIII. of 1872, s. 50. The principal evidence tendered was that of a deceased Mooktar. Appellant contended such evidence was admissible. Value of evidence of deceased persons. It would appear that the Mooktar had no special means of knowledge, and therefore that he did not come within the description of persons mentioned in the section. It nowhere appeared that he had any other knowledge than as Mooktar. Their Lordships report that the plaintiff has not made out his case. They uphold the decision of the Judicial Commissioner, who decided that the evidence of the Mooktar was not admissible, and who refused to send the case back for evidence to be taken as to his special knowledge. Appeal dismissed, with costs.

[*L. R.* 12 *Ind. App.* 183 ; *I. L. R.* 12 *Calc.* 219.]

The United Insurance Company *v.* Cotton.

South Australia. LORD WATSON. *July* 3, 1885.

Agent to represent a company in a Colony. Power of attorney (with limits) to accept maritime risks on goods, &c. Did the agent (respondent) exceed the authority given to him? Import of letters between the parties. Effect of instructions as to the jurisdiction of the agents of the company in particular Colonies. It is not disputed that if the authority of the respondent rested on the power of attorney and relative instructions he exceeded his authority, but the pith of the defence is that by their letters and their conduct the plaintiffs (appellants) induced him to believe that he was at liberty to take the particular risk in dispute, and induced him to act on that belief, and he contended that the plaintiffs are estopped from asserting in the action that the defendant went beyond authority. The jury returned a verdict for the defendant, but the Judge refused to enter up judgment on that verdict, because at the time he thought there was no evidence to sustain it. On appeal, the Supreme Court (including the aforesaid Judge, who, upon deliberate consideration of a certain letter, altered his original opinion) decided that the jury might reasonably put upon the correspondence the construction which they indicated by their verdict. It does not appear possible to the Judicial Committee to overturn the verdict on the only ground on which they could set it aside, namely, that no honest jury could reasonably come to the conclusion which is affirmed by the verdict. Judgment of the Supreme Court upheld with costs. [*P. C. Ar.*]

Carter *v.*
Molson
And Cross Appeal (No. 431), and
Holmes and Another *v.*
Carter (Nos. 432, 433).
(Four Appeals Consolidated.)

Lower Canada. LORD WATSON. *July* 4, 1885.

Attachments by Carter of rents, and of dividends on shares, in order to obtain satisfaction of a mortgage debt. Under the circumstances of the debtor's inheritance under his father's will, were these rents and dividends subject to a writ of *saisie-arrêt*, or in other words, are they seizable? Procedure Code of Canada. In the Superior Court, Mr. Justice Papineau, upon the 30th June, 1881, rejected the contestation of the judgment debtor, with costs, and sustained the right of the arresting creditor, both as to rents and dividends; and, at the same time, in both applications for intervention the learned Judge decided, with costs, against the petitioners. The Court of Queen's Bench, upon the appeal of Alexander Molson, by their judgment rendered on the 24th March, 1883, in substance affirmed the decision of Mr. Justice Papineau, so far as concerned the dividends, which they declared to have been validly arrested in the hands of the bank; but reversed his decision, in so far as it related to the rents of the St. James Street property, and quashed the attachment. The debtor was condemned to pay to the arresting creditor the costs of the contestation with regard to the bank dividends in the Court below; whilst the creditor was condemned to pay to his debtor the costs of the contestation in the Court below with regard to rents, as well as the costs of the appeal. By a separate judgment of the 24th March, 1883, the Court of Queen's Bench, in the appeals taken by the intervening petitioners, rejected their contestation, and confirmed the decisions of Mr. Justice Papineau, with costs. Against these judgments four separate appeals have been presented to her Majesty in Council. Mr. Carter complains of the

decision of the Queen's Bench, in so far as it reverses the judgment of the Superior Court and quashes his arrestment of the rents of the St. James Street property; Alexander Molson complains of decisions of the Courts below sustaining the writ of saisie-arrêt as regards dividends arising upon the 148 bank shares; and the intervening petitioners complain of the decision by which their respective contestations have been rejected. These appeals have been consolidated, and heard as one cause, but must now be separately disposed of, inasmuch as they do not depend upon the same considerations either of fact or law. Their Lordships upheld all the judgments of the Court of Queen's Bench. As to the rents, their Lordships are of opinion that Carter was affected by the knowledge of the agent to whom he confided the duty of attending to his interests, and must therefore be treated as having full knowledge that the property was vested in his debtor, subject to all conditions and limitations (alimentary provisions—Grevé de Substitutions in favour of the mortgagor's wife and family included) imposed by the debtor's father's will. The rents were, under the effects of the will, not seizable. On the other hand, the dividends were seizable, as one portion of them never belonged to Molson's father's estate, and the balance was not proved to have been bought with proceeds of certain bank shares left by the father's trustees to Molson. In the appeal of interveners, the judgment below was also upheld. These parties had not the right to intervene. Sect. 154 of the Procedure Code, which gives the right of intervention, lays it down that the parties must be "interested in the event of a pending suit." The parties here wanted to come in simply in apprehension that something might be decided in the litigation between the arresting creditor and Molson which might prejudice their rights at some future time. "To admit the plea would involve the admission of a right to intervene on the part of every person who had an interest in preventing a decision being given *inter alios*, which might be cited as an authority against him in some other suit." There would be no order as to costs in any of the appeals.

[10 *App. Cas.* 664.]

Akhoy Chunder Bagchi and Others *v.*
Kalapahar Haji and Another.

Bengal. SIR RICHARD COUCH. *July* 8, 1885.

Suit to recover rent. The case depends on the validity of a simultaneous adoption of two sons by two widows. Is such simultaneous adoption recognized by Hindu law? The appellants claiming the rent from a tenant (such claim being the basis of the suit) represent the interest of one of the adopted sons. The Judicial Committee, affirming decree below, consider, after full consideration of the texts of pundits, that no text can be produced to show that the Hindu law sanctions simultaneous adoptions. See note in book published by Shama Charan Sarkar, the author of the Vyavastha Darpana—the book is called the Vyavastha Chandrika—vol. II. p. 118 of the Precedents. See also Mr. Macnaghten's note, Hindu Law, vol. II., p. 201. The Judicial Committee on the whole decide that an adoption of this description is invalid. They are therefore of opinion that the appellants have failed to make out title to recover any portion of the rent sued for. Affirmed, with costs.

[*L. R.* 12 *Ind. App.* 198; *I. L. R.* 12 *Calc.* 406.]

Nilakant Banerji *v.*
Suresh Chunder Mullick and Others.

[*Ex parte.*]

Bengal. LORD HOBHOUSE. *July* 9, 1885.

Mortgage for an advance of money. Mortgagee institutes suit for foreclosure. Sale of a portion of the mortgaged property. Who holds the equity of redemption? Are the purchaser's rights superior to that of the mortgagee? Decree of the High Court reversed, their Lordships holding that a purchaser at the sale of a fragment of the property, who in 1867 was a party in the suit to foreclose, and who then himself declared that he

could not (though a purchaser) be put to redeem, could not now claim that privilege as against the mortgagee. *Res judicata. Dictum:* "It would be a new thing to hold that a purchaser of a single fragment of the equity of redemption should come without bringing the other purchasers before the Court, and have an account as between himself and the mortgagee alone, so that the mortgage may be paid off piecemeal. Such a law would result in great injustice to the mortgagee." Decision of the Subordinate Judge restored. Respondents to pay costs. Remarks made on bulk of record, and the Registrar is directed to disallow costs incurred for perusal of irrelevant matter.

[*L. R.* 12 *Ind. App.* 171; *I. L. R.* 12 *Calc.* 414.]

Tekait Ram Chunder Singh *v.*
Srimati Madho Kumari and Others.

Bengal. Lord Monkswell. *July* 11, 1885.

Ghatwali tenure. Appellant successfully raises plea of *res judicata.* (Act X. of 1877, sect. 13.) Respondents plead limitation (Act XV. of 1877, art. 144), and adverse possession. Suit brought by the Ghatwal, the appellant, to resume at will a portion of the Ghatwali lands in the possession of the respondents. These latter are the widows of the last holder, and are under the protection of the Court of Wards. The respondents say they cannot be dispossessed from the tenure on payment of a fixed rent; they deny the question to be *res judicata* in a previous suit, as alleged by appellant; and set up the plea of limitation. The Judicial Committee reverse the decision below to the effect that the Ghatwal was barred by limitation. In their Lordships' opinion, no adverse possession within the meaning of the statute is proved to have existed until the institution of the suit in 1873, when the claims of both parties were adverse, and the statute begins to run only from that time. That being so, the appellant (plaintiff) is not barred by limitation. Decree reversed, and judgment to be given for appellant. Respondent to pay costs. [*L. R.* 12 *Ind. App.* 188; *I. L. R.* 12 *Calc.* 484.]

Prévost *v.*

La Compagnie de Fives-Lille and The Attorney-General for the Dominion of Canada.

Lower Canada. LORD WATSON. *July* 18, 1885.

Sale of *immeuble* property (beet sugar factory) under a judgment debt. Lien of the Crown for unpaid duties on the import of machinery (Dominion Customs Act, 40 Vict. c. 10). Notification to the sheriff. Seizure by the Crown after the sale. Petition of the purchaser (the appellant) to be relieved of the obligation to pay the purchase-money on the ground that the purchase was made wholly and solely on the condition that the property was to be delivered free of all charges. The respondent company were the judgment creditors, and they opposed the appellant's application for cancelment of the sale. The Judicial Committee reversed the judgments below, and granted the prayer of the appellant's petition, freeing him from all obligation to pay the purchase-money or any costs. Procedure Code of Canada, sect. 712. Respondents to pay all costs below and here. [10 *App. Cas.* 643; 54 *L. J. P. C.* 35.]

McGibbon *v.*

Abbott and Another.

Lower Canada. SIR BARNES PEACOCK. *July* 18, 1885.

Construction of a will. Intention of testator. The question raised was whether, according to the law of Lower Canada, the gift in the will by the words "and secondly, upon the death of the said John Octavius Macrae (the testator's son and heir), then the capital thereof to his children in such proportion *as my son shall decide* by his last will and testament," contained an exclusive or non-exclusive power. The testator's son John married twice. By his first marriage he had four children, one of whom is now a principal respondent. In their favour he made a will on the 5th April, 1880. By his second marriage he had a son Hum-

phrey (now appellant as represented by his *tutor aux biens*). This son was born in January, 1881, *i. e.*, after the date of the said will. His father died in May, 1881. This son now sued to participate in the benefits of his father's will. The Superior Court held that he was not excluded, but the Court of Queen's Bench held, and now the Judicial Committee hold, that he was. The Courts of Lower Canada are not bound by a current of English decisions, especially as those decisions were now in consequence of the Act 37 & 38 Vict. c. 37, found not wholly sustainable. A similar Act has not been found necessary in Lower Canada. The doctrine of the English Courts of equity as to illusory or unsubstantial appointments under a power is not and never was any part of the old French law or of the law of Lower Canada, nor is it included in any of the articles of chap. IV. of the Civil Code of Canada. The question whether John could exclude any one of his children from a share must, in their Lordships' opinion, be decided according to the law of Lower Canada, and not according to the English Law. *Martin* v. *Lee*, 14 Moo. P. C. 142. In the present case, the terms of the grandfather's will charged the son with the fiduciary substitution, and he was the judge of the distribution. It was contended at the bar that John could not properly decide with reference to the plaintiff (appellant) without considering his case, and that, as his will was executed before the plaintiff was born, he must have decided without considering. This is not so. He had the power and the time to revoke or alter his will, or he could have made a codicil in plaintiff's favour. Affirmed, with costs.

[10 *App. Cas.* 653; 54 *L. J. P. C.* 39.]

Coomari Rodeshwar *v.*
Manroop Koer and Another.

Bengal. Lord Watson. *July* 18, 1885.

Genuineness of an Ikrarnama or deed. Previous judgment of the Privy Council (*vide* judgment 25 March, 1875 (P. C. Ar.)),

cited as showing the ownership of the property in suit at that period. The Judicial Committee, after considerable analysis of the evidence and want of evidence set up by the respondents (the plaintiffs), come to the conclusion that the Ikrarnama was not genuine, and reverse the decree of the High Court, and restore that of the Subordinate Judge. Fabricated documents having also been used by the original appellant, she is held disentitled to costs. [*L. R.* 13 *Ind. App.* 20.]

Petition of Louis Riel for special leave to Appeal.

Manitoba (*Court of Queen's Bench*). LORD HALSBURY (The Lord Chancellor). *Oct.* 22, 1885.

Petition against sentence of death for rebellion. Respite for petition to be heard granted twice. Practice of Committee not to admit an appeal in criminal cases except under most exceptional circumstances, such as some clear departure from the requirements of justice adverted to. Contention that an Act passed by the Dominion Parliament (43 Vict. c. 25) for the peace, order, and good government of Manitoba, was *ultra vires.* Dominion derived its power to pass this Act from an Imperial Statute, 34 & 35 Vict. c. 28 (British North America Act), which enacted that the Dominion Parliament might make laws for the good order of any territory not within any province. Other points raised were that high treason was not conveyed in the words of the Act (43 Vict. c. 25), "any other crimes," and also that taking notes of a case in shorthand by a reporter was not a compliance with the statute. The Judicial Committee held that the Act 43 Vict. c. 25 was *intra vires.* *Dictum* as to shorthand notes: The terms of the Act prescribing full notes to be taken (sect. 76, sub-sect. 7) are complied with if taken in shorthand instead of in writing as the petitioners contended they ought to be. Leave to appeal refused. (Riel was executed some weeks afterwards.)
[10 *App. Cas.* 675; 55 *L. J. P. C.* 28.]

Parker *v.*

Kenny and Others.

Nova Scotia. LORD FITZGERALD. *Nov.* 20, 1885.

Insolvency Case. Suit by an assignee (appellant) of an insolvent's (Morrison's) estate—Cap. 95, Revised Statutes of Nova Scotia, Fourth Series, sect. 12. Cause of action—alleged preference by Morrison of certain creditors (respondents), the allegation being that the preference was shown at the time when Morrison and the respondents dissolved partnership. *Dicta:* "If a contract or dealing has been entered into with a view to defraud creditors generally—not to injure a particular creditor, but to defraud creditors generally—the assignee, in his character as such, may institute a proceeding to annul that fraudulent contract or transaction." "Fraudulent preference means some transaction by which a debtor, in contemplation of impending insolvency, voluntarily gives to a creditor money, goods, or security, with intent to prefer him to the other creditors. The mere statement of the proposition alone shows its inapplicability to the case before their Lordships." As to withdrawal of partners, *Anderson* v. *Maltby*, 2 Ves. Jun. 244, distinguished. In this case the evidence showed that the dissolution of partnership was carried out in 1873 by effluxion of time, and that the proceedings complained of, which took place then at a date long previous to the insolvency, were fair and *bonâ fide.* The result of these transactions was (at Morrison's solicitation) to vest in him all the property, the stock in trade, goodwill, &c., so as to enable him to take his chance by a continuance of business to make that, which had been a paying concern, still a paying and profitable concern for his benefit, and his benefit alone. The Judicial Committee come to the conclusion, agreeing in the decision of both Courts below, that the supposed conspiracy between Morrison and the defendants, and the most material allegations of subsequent fraudulent acts in pursuance of such conspiracy, have not only not been proved but have been disproved, and the case of the plaintiff wholly fails. Appellants to pay costs. [*P. C. Ar.*]

McElhone and Others *v.*
Browne and Others.

New South Wales. SIR BARNES PEACOCK. *December* 8, 1885.

Validity of the will of John Browne, deceased. Appeal against order refusing new trial. Case tried by a jury of twelve. The judge in his charge told the jury "that while it was not necessary that the testator should be able to view his will with the eye of a lawyer and comprehend its provisions in their legal form, the plaintiffs must satisfy them that at the time he executed it he knew all, understood all, and approved of all, its contents; and further, that he was then of sound mind, memory, and understanding, which was to say that he had sufficient intelligence to remember and understand the nature of his property, what it consisted of, who the persons were to whom he was leaving it, and also whom he was leaving out; in fact, all those who, by personal relationship or otherwise, might have claims upon him, and would be, in the natural course of things, objects of his bounty. All these matters of law were before the jury, and their verdict shows that they considered the plaintiffs had established all necessary facts." The Judicial Committee affirmed decision of the Supreme Court, holding that the verdict of a jury in such a case ought to be established, unless there are sound and sufficient grounds for showing that they came to an erroneous conclusion, or were misdirected by the judge. Affirmed, with costs. [*P. C. Ar.*]

The Colonial Bank *v.*
The Exchange Bank of Yarmouth, Nova Scotia.

Nova Scotia. LORD HOBHOUSE. *December* 10, 1885.

Mistake in the transmission of money. The respondent bank finds itself in possession of a draft for money which was not intended for its own use, which draft was in fact transmitted erroneously by the appellants, plaintiffs' agents, to the wrong bank. Duty of the receiving bank to repair the error, albeit that

one Rogers, in whom the ownership of the money lay, was their debtor. Privity. In their Lordships' opinion, the respondents (defendants), when they were told, as they were almost immediately, that a mistake had been made, had an equity fastened upon them until the mistake could be repaired. The original equity subsists still. They think the verdict below, and the maintenance of that verdict by the Supreme Court sitting as a Division Court, was perfectly right, and that, when the matter came before the Supreme Court on review, they ought to have dismissed the defendants' application. The decision of the Supreme Court in review was as follows:—That "although the defendants have received the money through a mistake, and although it may be against conscience and against justice that they should retain it, if, indeed, they are allowed to retain it, the plaintiffs are not the parties to recover." This decision is now reversed, and the appeal of the Colonial Bank is allowed with costs. Respondents to pay costs.

[11 *App. Cas.* 84; 55 *L. J. P. C.* 14.]

David Sassoon, Sons, & Company *v.* Wang-Gan-Ying.

China and Japan. LORD MONKSWELL. *December* 12, 1885.

Compradore's case. Compradores are native Chinese carrying on (concurrently with a business of their own) business on behalf of English firms, whose names they are permitted to use (over their shops and warehouses). Weight to be attached to certain forms and receipts. Whole question in suit was whether gold supplied by a certain native dealer (plaintiff, respondent) to the compradore, who was employed by Sassoons & Co., as well as by another firm, was supplied to the compradore on his own behalf, or on behalf of the Messrs. Sassoon. Importance of evidence of the compradore (who has had to make a composition with his creditors since the transaction) to the effect that he gave distinct notice to the plaintiff that this dealing was with him alone. Effect also of the

plaintiff having accepted a composition from the compradore. The Judicial Committee reverse the judgment of the Supreme Court, with costs below and here, and declare the firm of Sassoons not liable. It appeared to their Lordships that the evidence had not been satisfactorily dealt with, either in the Consular Court at Tientsin or in the Supreme Court. [*P. C. Ar.*]

Nanomi Babuasin and Others *v.* Modun Mohun and Others.

Bengal. LORD HOBHOUSE. *December* 18, 1885.

Liability of sons for father's debts. Mithila and Mitacshara law. Can family ancestral estate become liable to answer the debts of the head of the family? Sale in execution for a debt. Did anything but a coparcenary interest pass with the sale, or did the estate pass in entirety? Contention that nothing passed by the sale, except such as would have passed on partition. The suit was begun by Nanomi, on behalf of her minor sons and herself, against the purchaser of an 8 annas and $11\frac{1}{4}$ gundahs share of a mouzah, in which a father and the minor sons had a joint interest. The sales took place in accordance with a decree, and in satisfaction of the debts of the father. The first Court held, believing itself bound by *Deen Dyal's Case* (L. R. 4 Ind. App. 247), that a coparcenary interest only passed, and the purchaser was entitled simply to the share of the father, and that that share was one half of the whole, under Mithila law. Held, further, that the mother, being otherwise provided for, was entitled to no share, and accordingly the minor sons would receive the other half-share. The Court, however, held also that the purchaser thought that he was buying the entirety. The High Court, on appeal and cross-appeal, declared that the entirety interest of the father and sons passed by the sale, and that it could lawfully be sold. The Judicial Committee now confirm the accuracy of the High Court decree in this case. See also *Muddum Mohun's Case*, L. R. 1 Ind. App. 321; and *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, L. R. 6

Ind. App. 85. Apparent discrepancy of this decision with that in *Deen Dyal's Case* commented on.

If the debt was a joint family debt, the sale cannot be impeached. *Dicta:* "Sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debts, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability." "Decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality." In this case the Judicial Committee, believing that the purchaser and all parties concerned believed the entire estate was offered for sale, the suit failed on its merits. Appeal dismissed. Appellants to pay costs. [*L. R.* 13 *Ind. App.* 1; *I. L. R.* 13 *Calc.* 21.]

1886.

The Bank of New South Wales *v.* Campbell.

N. S. Wales. LORD BLACKBURN. *Feb.* 5, 1886.

Mortgage by the respondent to the bank. Foreclosure under the Real Property Act, 26 Vict. No. 9. Statutory powers of banks with regard to foreclosure. The respondent contended that by the terms of the Acts incorporating the bank, the bank was entitled to hold land for reimbursement only, and not for profit. Consequently lands mortgaged to it are redeemable by the mortgagor at any time, so long as they remain vested in the bank, notwithstanding any order of foreclosure obtained by it. The Judicial Committee reverse the decision of the Supreme Court, and affirm that of the primary judge in favour of the bank. The power to foreclose was expressly attached by statute to the mortgage, and under the Bank Act of 1864 the mortgage which involved foreclosure was legally and properly taken by the bank, and there was nothing whatever in proof that the power of foreclosing should be taken away. Respondent to pay costs. [11 *App. Cas.* 192; 55 *L. J. P. C.* 14.]

Maharajah Mirza Sri Ananda Sultan Bahadoor of Vizianagram Samastanam *v.* Pidaparti Surianarayana Sastri and Others.

Madras. SIR RICHARD COUCH. *Feb.* 6, 1886.

Eviction suit. Character of a grant of a village. Creation of Inams. Was tenancy in perpetuity, or could it be deter-

mined by a notice to quit? Madras Regulation XXV. of 1802, sect. 3. Effect of re-grant. Did it entail a power of resumption by the grantor, or was the so-called re-grant merely a confirmation of the old grant? The Subordinate Judge decided in favour of the Maharajah (appellant), holding that the inamdars were not in possession in virtue of their inam right from 1853 to 1863, that in 1863 a new grant was made to them, and that in view of their pleadings in a mortgage suit they are not entitled to deny that it was a new grant. He also held that the new grant was resumable at pleasure. The High Court held that by the various grants a title in perpetuity (save with the alteration of quit-rent) was intended to be maintained, and reversed the Subordinate Judge's decree, and dismissed the suit. Effect of the assumption of British authority over the territory in question, and history of the grants gone into at length. In the result the Judicial Committee affirmed the decree of the High Court, dismissing the suit.

[*L. R.* 13 *Ind. App.* 32; *I. L. R.* 9 *Mad.* 307.]

White *v.*
Neaylon.

South Australia. Lord Hobhouse. *Feb.* 9, 1886.

Title to grants of Crown land. Rival claims. Equity enforceable even against the Registration Act (5 Vict. No. 8, sect. 3). The respondent, John Neaylon, instituted the suit against White (the appellant) and the respondent's brother Thomas. John claimed that Thomas might specifically perform an agreement made between the two brothers in 1878, by which, in settlement of outstanding differences, the lease of a block of land called Natterannie was to become the property of John. The respondent also claimed that if an assignment by sale had subsequently been made by Thomas to the appellant it was void, and that Thomas Neaylon and the appellant should be ordered to assign him the lease in priority with damages. The appellant in reply stated that the agreement between Thomas and John

was verbal and unregistered, whereas the assignment by Thomas to the appellant on the latter's purchase was registered in the General Registry Office of South Australia. The evidence showed that John and Thomas Neaylon had carried on a partnership. Their business was to get grants of lands from the Crown, and then to sell the lands to advantage. The claims John had on Netterannie were not his right as a partner, but a separate right in consequence of disputes between the partners, and which were settled by an agreement that John should take the lease of Netterannie in lieu of other claims. John took possession and executed works and improvements upon the land in faith of his right. On the assignment being made by Thomas the appellant's title was registered, and the question now was whether the registered title of the appellant or the prior unregistered and equitable title of John should prevail. The first objection of the appellant was founded upon the Statute of Frauds, and it is admitted that there was no *written* contract between Thomas and John to satisfy that statute. As to this the Judicial Committee, agreeing with the Supreme Court, held that it could not be maintained that the works done by John on the land were not sufficient to take the case out of the Statute of Frauds. John, therefore, had an equity enforceable, notwithstanding the Statute of Frauds, against Thomas. The second objection was whether, notwithstanding the equity, the Registration Act (5 Vict. No. 8) excluded John from his rights. The material section said that "all contracts *in writing* . . . . may be registered, and every such contract, &c., unless registered shall be void." "It is quite clear," their Lordships say, "under this enactment that a prior *document* of a registrable nature, unregistered, cannot convey a good title against a subsequent document of a registrable nature and registered; but there is nothing in the wording of the Act to exclude a claim upon an *unwritten equity* of which the subsequent registered purchaser has notice." Their Lordships, considering that a claim might be enforceable notwithstanding the Statute of Frauds, and construing the Registration Act literally as it stands, come to the conclusion that the judgment of the

Supreme Court should be affirmed, and that there was nothing to exclude the equity acquired by John Neaylon in this case. Appeal dismissed, with costs.

[11 *App. Cas.* 171; 55 *L. J. P. C.* 25.]

Muhammad Ismail Khan *v.*
Mussumats Fidayat-ul-Nissa and Others.

N. W. P. Bengal. SIR RICHARD COUCH. *Feb.* 10, 1886.

Claim to shares of an estate. Mahomedan Law, alleged "family custom" not proved. Affirmed. [*I. L. R.* 8 *All.* 516.]

Rae Sarabjit Singh *v.*
Chapman.

Oudh. LORD BLACKBURN. *Feb.* 10, 1886.

Validity of a lease entered into by the Court of Wards acting in the management of a lunatic's estate. Was it valid? Court of Wards Act, 35 of 1858 (which now applies to Oudh). The Judicial Committee affirm decrees below that the lease is valid, and dismiss the appeal. In this case the Civil Court had, probably for an *ex majore cautelâ* reason, and as it had power to do, appointed the same manager as the Court of Wards had appointed to administer the estate. Their Lordships asked what objection there was to the lease. No attempt is made to show that it was a lease improper in its terms, or that there was anything that amounted to an imposition, or that it was obtained by fraud, or obtained improperly; but the one point relied on against the lease is that it could not be granted for more than five years; and that objection, *whatever might be its importance if the lease had been granted by one acting only under the authority of an appointment as manager by the Civil Court, does not seem to apply to a lease granted by the Court of Wards.* Appellant to pay costs.

[*L. R.* 13 *Ind. App.* 44; *I. L. R.* 13 *Calc.* 81.]

Nan Karay Phaw and Others *v.*
Ko Htaw Ah and
Ko Htaw Ah *v.*
Nan Karay Phaw and Others (by Cross Appeal)
and also the Appeal of
Kho Htaw Ah and Another *v.*
Nan Karay Phaw.

Rangoon. Lord Monkswell. *Feb.* 16, 1886.

Timber trade in Burmah. Litigation arising out of transactions between Burmese timber merchants and the semi-barbarous tribe called the "Karens Tribe," who hewed timber in the immense forests of the Salween river. Phaladah was a Karen, and it was alleged contracted to send, and did send, timber to the merchant Ko Htaw Ah for sale. Principal and agent. Validity of the alleged contracts. Demand for an account of sales made by the merchant. Ko Htaw Ah in his written statement denied having entered into the agreements, and claimed that the timber sent down to Moulmein was his own; further, that Phaladah was really his agent for cutting timber as directed and paid for by Ko Htaw Ah. Mutual indebtedness. Set-off. Evidence. Value of marks on timber, as constituting title to ownership, and also title of the Government to be paid revenue upon it. Weight to be given to a supposed verbal contract alleged to have been made twelve years before the trial. Detention of elephants not justified. In the timber case, the Judicial Committee, upholding the decree of the special Court, held that the contracts were not proved, and consider the probability to be in favour of Ko Htaw Ah. As to the cross appeal by Ko Htaw Ah, the Committee doubted whether a set-off could be pleaded to a claim such as was put forward in the suits. Act X. of 1877, sects. 111—216. This cross appeal, like the principal appeal, would be dismissed. The second appeal was for the detention of elephants which belonged to Phaladah. Both Courts below had decided that these elephants should be restored to his widow. As a question of fact the decision should be in favour

of Phaladah's widow, and that decree would stand. The result is that the principal appeal is dismissed with costs. The cross appeal is dismissed without costs, save only those which were incurred by the widow in opposing petition to lodge cross appeal. The second appeal as to the elephants is dismissed with costs.
[*L. R.* 13 *Ind. App.* 48; *I. L. R.* 13 *Calc.* 124.]

Kuar Balwant Singh *v.*
Kuar Doulut Singh.

N. W. P. Bengal. LORD HOBHOUSE. *Feb.* 17, 1886.

Security for costs. Non-service of a notice on appellant. Was tender of security under the orders made too late? Civil Procedure Code, 1877. Appeal struck off file. Their Lordships were of opinion that the case had not been fully considered by the High Court, and recommend that it be directed to the Court that it is to be at liberty to receive appellant's security and to restore his appeal to the file. No costs.
[*L. R.* 13 *Ind. App.* 57; *I. L. R.* 8 *Mad.* 315.]

The Exchange Bank of Canada and Others *v.*
The Queen.

Lower Canada. LORD HOBHOUSE. *Feb.* 18, 1886.

Is the Crown, as an ordinary creditor of a bank in liquidation, entitled to priority of payment over ordinary creditors. French law (which was the law in Quebec before the Codes) is extensively discussed as to Regal priorities. Proper construction of certain articles in the Civil Code and in the Procedure Code of Lower Canada. History of the two Codes traced. Dictionaries cited as to meaning of "*Comptables.*" L'Académie Française, Laveaux, Littré, Bouillet, Contanseau, and Spiers. Held that the Crown can claim no priority except what is allowed by the Codes. The Judicial Committee consider that the priority contended for by the Crown did not exist in French law. On the further point raised as to the definition of comptables (in Art.

1994, Civil Code of Lower Canada), *i.e.*, "officers who receive and are accountable for the King's revenue," the Judicial Committee declare that they have not been referred to, and they have not found any passage where these words (*ses* comptables) are used to denote generally a debtor or person under liability. . . . As between a banker and his customers, he, by English law, is an ordinary debtor, and the amount which he owes them is not "their" money, nor is he "accountable" for it in any but a popular sense. With reference to the wording of Art. 611 of the Procedure Code under which, when read with Art. 1994 of the Civil Code, the Crown (it was argued by the respondent) is by express enactment entitled to the right claimed, their Lordships came to a contrary conclusion. It could be no part of the Procedure Code to contravene the principles of the Civil Code. . . . When the Procedure Code is found to overlap the Civil Code, and so it becomes necessary to modify the one or the other, the fact that the function of the Procedure Code is in this part of it a subordinate one favours the conclusion that it is the one to be modified. Their Lordships are of opinion that full effect should be given to Art. 1994 of the Civil Code, and Art. 611 of the Procedure Code should be modified so as to read in harmony with the other. "There is difficulty about it, as there always is in these cases of inconsistency. Following the rule laid down for their guidance in such cases by sect. 12 of the Civil Code, their Lordships hold that the meaning of the Legislature must have been to speak to the following effect: 'Subject to the special privileges provided for in the Codes, the Crown has such preference over chirographic creditors as is provided in Art. 1994'; or, adhering as closely as possible to its rather inaccurate language, 'in the absence of any special privilege, the Crown has a preference over unprivileged chirographic creditors for sums due to it by the defendant, being a person accountable for its money.'" The result is that, in the opinion of the Judicial Committee, the Court of Queen's Bench ought to have dismissed with costs the appeal to it from the superior Court, which had decided that the claim to priority failed. Decree of the Court of Queen's Bench reversed, seeing

as has been said, that it ought to have dismissed the appeal from the Superior Court. The respondents, by whom the Crown is represented, will pay the costs of the appeals, which were consolidated. [11 *App. Cas.* 157; 55 *L. J. P. C.* 5.]

Ince *v.*
Thorburn.

China and Japan. LORD BLACKBURN. *Feb.* 24, 1886.

Public uses of beach grounds at Shanghai. Rights of renters thereon under the Municipal Regulations Act, 1854, *vide* Art. 5. Construction of the said Act. Validity of Sir John Bowring's (as Superintendent of Trade in China) Regulations for the Peace, Order, and good Government of British Subjects in that country. The appellant was a beach renter of a certain lot of land, and as such had filled up and, at an expense of Tls. 2,892, improved a certain portion of it. He then gave notice to the respondent, who is the secretary of the Council for the Foreign Community of Shanghai, that he intended to build upon it, whereupon the respondent sued for an injunction to restrain the appellant from so building without first obtaining the consent of the proper majority of land renters and others entitled to vote in public meeting. The questions were whether the land was beach land within the meaning of the regulations, and whether the appellant by his acquisition of it did not take it subject to public uses. The Supreme Court held, that on the Council repaying to the appellant the sum of Tls. 2,892 expended by him, with interest thereon at 8 per cent., the injunction should issue against the appellant. The Judicial Committee affirmed the judgment of the Supreme Court. The validity of the regulations was decided so long ago as 1865 in the case of *Keswick* v. *Wills*, and again in 1869 in the case of *The Municipal Council* v. *Gibbs, Livingstone & Co.* These cases were heard in the Supreme Court of China and Japan, and, though not reported, are cited authoritatively in the judgments below in the present appeal. The reasonable and sensible construction of certain words in the 5th Article was that every renter who takes beach land takes it with the condition, expressed or implied, that as soon as he acquires the land it

shall be subject to public uses. The land in question was beach land, and the appellant's ownership of it must not be inconsistent with the public use over the thing which has been granted to him. The extent to which those public uses go appears to have been assumed throughout below as prohibitory of building, and that is all in the nature of a right that was prohibited by the injunction. There was a subsidiary question as to whether certain proceedings in 1880 did not preclude the respondent from going on with this suit, but their Lordships considered that weight was not to be attached to the argument. Affirmed, with costs. [11 *App. Cas.* 180; 55 *L. J. P. C.* 19.]

Kirkpatrick and Others *v.*
The South Australian Insurance Company, Limited.

South Australia. Lord Hobhouse. *Feb.* 24, 1886.

Premiums on insurance policies. Validity of payment for renewal. Question at issue, whether at a certain date, the 2nd February, 1883, the goods of the appellants were covered by policies of insurance against fire. Had the policies lapsed or were they renewed? The plaintiffs (appellants) were acting in the capacity of agents for the respondents (insurance company), and they remitted (on the 25th January, 1883) to the respondents 100*l.* "for premiums," and the question was whether any part of that sum was intended to provide for the renewal of two policies, and whether, although there was no specific appropriation of the payment by the insurance office for the purpose of there being a renewal, the policies in question should not be held to be so renewed and not lapsed at the date in question. Examination of correspondence and telegrams. The 100*l.* was proved to be in excess of the money owed by appellants in their agency business for other premiums; but there apparently being no information at the moment at hand showing the real fact that a portion of the sum was intended for the renewal of the lapsing policies, the appropriation to this purpose was not registered by the company. Their Lordships, after a careful perusal of the communications which had passed between the company and the agents, came to the conclusion that

a contract for renewal did exist, and that the insurance of the appellants was valid. The judgment of the Full Bench of the Supreme Court was reversed, and the judgment of the Chief Justice, who decided in favour of the plaintiffs, the appellants, is restored. The judgment of the Supreme Court should have been to dismiss the appeal, with costs. Respondents to pay costs of appeal. [11 *App. Cas.* 177.]

De Jager and Another *v.*
De Jager.

Cape of Good Hope. SIR RICHARD COUCH. *Feb.* 25, 1886.

Construction of a codicil to the will of a man and woman married in community of property. The testator and testatrix had two sons, and to these certain real estate was willed. The words of the codicil were to the effect that the properties were given to the sons, who may not sell, or exchange, or dispose of the same. The properties "shall remain in the first place for both of them, and secondly, the eldest son among our grandchildren shall always have the same right thereto, and after the decease of their parents remain in possession thereof, with this understanding, however, that *the other heirs who may still be born* shall enjoy equal share and right thereto. Wishing and desiring we, the testators, this only to be our object, not to let the before-mentioned bequest fall into other hands, but to be for the convenience and benefit of our two children and grandchildren, so that always the eldest son of the grandchildren has the privilege. And since the place is provided with a strong stream of water, and with sufficient serviceable soil, the grandchildren can, in our opinion, if God grants his blessing, earn their living thereon." No other children beyond the two sons were born to the testator and testatrix. The elder son entered on their deaths into the possession of one-half, and the younger into the possession of the other, and the younger brother being now dead the question in dispute relates to his half share. This younger brother left ten children, the respondent being the eldest of them. The appellants are two of the remaining children. The other children were not parties to the suit.

The Judicial Committee agreed with both Courts below in deciding that the whole of this half share went to the respondent as the eldest grandchild, and was not, as contended by the appellants, to be divided for their benefit into tenths. Their Lordships considered the words "other heirs" referred only to the possibility of the testator and testatrix having other children than the two sons born to them. They also considered that the words "so that always the eldest son of the grandchildren has the privilege" point to the construction that it was the eldest son of the grandchildren who, in the prior passages of the will, was contemplated as the sole taker. Appeal dismissed, with costs. [11 *App. Cas.* 411; 55 *L. J. P. C.* 22.]

Bickford *v.*
Cameron.

Ontario. The Lord Chancellor (LORD HERSCHELL).
March 2, 1886.

Business claim by the respondent for an account of the profits in certain enterprises in which the appellant and respondent had joined. The whole question was as to whether the claims of Cameron had or had not been settled by a payment made to him in 1878. The Primary Judge held that such a settlement had taken place. This decision, however, was reversed by the Court of appeal which held that Cameron was entitled to an account. The Judicial Committee, after careful review of all the evidence in the case, came to the conclusion that the Court of Appeal had come to an erroneous decision, and that the alleged settlement upon the whole was supported. Decision of the Primary Judge is upheld, and that of the Court of appeal reversed with costs. [*P. C. Ar.*]

The Grand Trunk Railway Company of Canada *v.*
Peart.

Ontario. LORD BLACKBURN. *March* 3, 1886.

Appeal by a railway company in an action brought against them for damages for the loss of a man's life at a crossing. Was there negligence of the company in not giving all the

statutable signals as a train was approaching? Was there contributory negligence on the part of the deceased? And was the verdict against the weight of evidence? The respondent's counsel are not called upon. In dismissing the appeal their Lordships say, as to the allegation of original negligence, "The evidence, in the opinion of their Lordships, was very strong that the signals were not given. There was no doubt evidence, and strong evidence, the other way, but that made a question for the jury; it was left to them, and the jury have found for the plaintiff (respondent). The judge who summed up the case is satisfied; and of all the judges in Canada who heard the appeal in the Court below, there is not one who differed on that point. Their Lordships do not say that the evidence was conclusive at all to show that the deceased was not guilty of contributory negligence, but it shows that it was a fair and proper case for the jury to consider whether or no he was guilty of contributory negligence, and the jury have found that he was not; and the learned judge who heard the case not being dissatisfied, and the great majority of the judges in the Court of appeal having thought the verdict was right, it certainly seems to their Lordships that it would not be right to reverse it." Affirmed, with costs. [*P. C. Ar.*]

Corporation of the City of Adelaide *v.* White.

South Australia. Lord Monkswell. *March* 4, 1886.

Riparian proprietor. Right to the flow of a river. Interference by a corporation. Unsatisfactory finding of jury on the evidence. Appeal against order for a new trial dismissed. Affirmed, with costs. [*P. C. Ar.*]

Davis and Sons *v.* Shepstone.

Natal. The Lord Chancellor (Lord Herschell). *March* 5, 1886.

Damages for libels in a newspaper. Libels directed against Resident Commissioner in Zululand, and impugning his conduct

towards native chiefs. At the trial it was proved that the allegations against the commissioner were absolutely without foundation. Damages 500*l.* Motion to the Supreme Court for a new trial refused. Appeal against this ruling dismissed. The appellants rested their appeal on two grounds, first, that the learned judge misdirected the jury in leaving to them the question of privilege, and in not telling them that the occasion was a privileged one; the second, that the damages were excessive. It was clear to their Lordships that the circumstances of this case revealed that the statements made were not privileged. They also held that the assessment of damages in a libel action is peculiarly the province of a jury. Affirmed, with costs. [11 *App. Cas.* 187; 55 *L. J. P. C.* 51.]

Barton *v.*
Taylor.

New South Wales. THE EARL OF SELBORNE. *March* 6, 1886.

Powers of New South Wales Legislative Assembly to suspend a member of that assembly. Applicability of rules of British House of Commons to colonial Legislative Assemblies, to protect themselves against obstruction, interruption, or disturbance by their members. *Doyle* v. *Falconer*, L. R. 1 P. C. 328, approved. The action was one of trespass brought by the respondent, who was a member of the Legislative Assembly. The assembly, while sitting in a committee of the whole House, had passed the following resolution :—" That Mr. Adolphus George Taylor, having been named by the chairman as having persistently and wilfully obstructed the business of the committee, be suspended from the service of the House." The resolution was reported by the chairman of the committee, and thereupon the assembly passed this resolution, " That Mr. Taylor be suspended from the service of the House." A week elapsed from the passing of this last resolution, and then Mr. Taylor, while the assembly was sitting, entered the chamber, and claimed his right as a member to serve and sit. The appellant as speaker ordered him to withdraw, and on his refusal the sergeant at arms was directed

to remove him. This was the trespass complained of. In answer to the declarations, the appellant filed three pleas, and the appeal came before their Lordships now on the respondent's demurrer (allowed below) to the pleadings. The Judicial Committee agreed with the Supreme Court that a certain standing order of the British House of Commons set forth in the third plea was not, in April, 1884, by adoption or otherwise a rule of procedure applicable to the legislature of New South Wales. Although, by the Constitution Act (18 & 19 Vict. c. 54), the Legislative Assembly had power to adopt rules and orders of the British House of Commons, and in fact did by standing order do so, the particular rule of the Imperial Parliament under which suspension of an unlimited kind might be ordered was not, at the date of the alleged offences, adopted in New South Wales. The resolution in this case, their Lordships add, was that Mr. Taylor be "suspended from the service" of the House. If more was meant than to suspend him for the rest of the then current service or sitting, their Lordships think that it ought to have been distinctly so expressed. Degrees of suspension and rights of constituents. Importance of governor's assent when suspension is to be more than temporary. Validity of the objection on demurrer is upheld, and the order below is affirmed with costs of the appeal. The member who was suspended (the respondent) argued his case in person.

[11 *App. Cas.* 197; 55 *L. J. P. C.* 1.]

Dharani Kant Lahiri Chowdhry *v.*
Kristo Kumari Chowdhrani and Another.

Bengal. Sir Richard Couch. *March* 6, 1886.

Title to land sold in execution challenged. Inquiry into a transaction which took place so far back as 1842. Question one of fact, whether a certain three-gundah share, which had been purchased at a sale in execution by the predecessor of the appellant, had originally been purchased in the name of a wife as her absolute property, or had really been purchased by her husband, but benami in her name. The Subordinate Judge decided that the purchase by the wife was benami for her husband, and the

Judicial Committee upheld this view, and reversed the decree of the High Court, which was to the effect that there was an absolute purchase by the wife with her own funds on her own behalf. Their Lordships think that the reasons given by the High Court for its decision are not satisfactory, and their consideration of the evidence in the case has brought them to the same conclusion as the Subordinate Judge. Respondent to pay costs of appeal. [13 *Ind. App.* 70; *I. L. R.* 13 *Calc.* 181.]

Petition, In re Dillet.

British Honduras. LORD BLACKBURN. *March* 20, 1886.

Petition for special leave to appeal. Conviction and disenrolment of a barrister for alleged perjury. Character of the summing up of the chief justice. Leave to appeal granted. Observations as to right of appeal in criminal cases. *Falkland Islands Co.* v. *The Queen*, 1 Moo. P. C. N. S. 312. In this case leave is granted with the following addendum: "Their Lordships are not prepared to advise her Majesty to make this conviction for perjury an exception to the general rule, if the conviction were not made the sole foundation for the order of disbarment. The petitioner is permitted to show, if he can, that the conviction was obtained in a manner so unsatisfactory that the conviction alone ought not to be conclusive as a ground for striking him off the Rolls." [Subsequently, on the hearing of the appeal (*vide* 12 App. Cas. p. 459), the conviction was quashed by order of her Majesty in Council, and Mr. Dillet was restored to practice at the bar of British Honduras.]

[*P. C. Ar. March* 20, 1886, *and* 12 *App. Cas.* 459; *vide also infra*, p. 367.]

Judoo Lall Mullick *v.*
Gopaul Chunder Mookerjee and Another.

Bengal. LORD HOBHOUSE. *March* 30, 1886.

Right of way through a passage. User. Prescription. Effect of bye-laws of the Municipal Corporation of Calcutta—Act IV. of 1876—in passing the user for sanitary purposes from the respondents (the plaintiffs) to the servants of the corporation,

whose duty it was to remove refuse day by day. Was there thus a breach of user, or was there a greater privilege, or a wrongful one demanded at the burden of the holder of the servient tenement? The objector (*i.e.*, the appellant, who held contiguous premises) complained because the sanitary officers came down the passage daily, instead of three or four times a year, which had been the case when respondents alone were users. The Judicial Committee affirmed the decree below—the prescription was proved even prior to the municipal regulations, and these new regulations did not aggravate the servitude. The respondents, indeed, themselves could, if they had desired it, have also been daily users for a like purpose. Affirmed, with costs.

[*L. R.* 13 *Ind. App.* 77; *I. L. R.* 13 *Calc.* 136.]

Hari Ravji Chiplunkar *v.*
Shapurji Hormusji and Others.

[*Ex parte.*]

Bombay. Sir Richard Couch. *March* 31, 1886.

Mortgage. Right to redeem. Limitation. Both Courts below held, as against the appellant (plaintiff), that a mortgage made in 1806 by his predecessors had merged in a decree which the mortgagee had obtained in 1825, which decree was made for the benefit of both parties, and that the suit now brought was barred by operation of law. The Courts below held also that the proper course, prescribed by Act XXIII. of 1861, sect. 11, had not been pursued, namely, to apply at the time of the 1825 decree to have that decree executed, and to be put into possession on payment of the mortgage money. The Judicial Committee, affirming decision below, held that the appellant could not now on appeal fall back upon the right to redeem which existed after the execution of the mortgage in 1806. *Vide* Act XIV. of 1854. A different case was relied on by the appellant from that stated in his plaint. In it he did not seek to redeem the mortgage of 1806, or allege that there had been an acknowledgment of that mortgage. If he had,

the question whether there had been such an acknowledgment made would have been inquired into in the lower Courts, but he treated the decree of 1825 as the mortgage which he sought to redeem, and therefore claimed the privileges of a new period of limitation. In their Lordships' opinion, the appellant is not at liberty to do that on the present occasion. Such a course would be making a different case from that which he made below. The right of the mortgagors in this suit must be treated as a right to execute the decree (which right was now barred by Act XXIII.), and not as a right to sue for the redemption of a mortgage. Affirmed.

[*L. R.* 13 *Ind. App.* 66; *I. L. R.* 10 *Bomb.* 461.]

Harding *v.*
The Board of Land and Works.

Victoria. Sir Richard Couch. *April* 3, 1886.

Compensation and damages for land taken for the construction of a railway. Victorian Lands Compensation Statute, 1869. Construction of sect. 35. Intention of the Legislature as to this section. Appeal from order refusing to grant appellant a rule *nisi* to set aside verdict in favour of respondents on ground of misdirection, and also against an order discharging a rule *nisi* granted on a former date to enter the verdict for the appellant. [Their Lordships decided that there was no misdirection to the jury.] The real question now was whether there was an enhancement by the making of the railway on land adjoining that taken up of such a kind as to allow set-off in compensation to be pleaded, the claim for compensation being not only for taking particular lands, but for severing these from other lands. The Judicial Committee, reversing decree below, hold that the enhancement of adjoining land to that taken up may not be pleaded against the compensation for the lands actually taken, though it may be pleaded against the damages claimed for *severance.* The Chief Justice below "does not seem to have considered that there would be lands adjacent to the railway which would be

enhanced in value by the making of it, but no part of which might be taken by the Land and Works' Board. The owners of these might be equally benefited with the owners of lands taken, or even more so, and would lose nothing, whilst the latter might lose the whole value of their land that was taken. If this was the intention it might have been clearly expressed." Their Lordships recommend her Majesty to reverse the decision of the Supreme Court, and direct that a verdict be entered for the plaintiff (appellant) for 189*l.* 5*s.* 9*d.*, *i. e.*, the damages claimed, less the set-off for severance. No costs of appeal.

[11 *App. Cas.* 208; 55 *L. J. P. C.* 11.]

Gan Kim Swee and Others *v.*
Ralli and Others.

Bengal. Lord Halsbury. *April* 6, 1886.

Alleged breach of warranty in contracts for cutch. Indian Contract Act IX. of 1872. By the decision of the High Court damages were awarded to the respondents in consequence of the alleged breach on the part of the appellants to deliver good cutch, it being held that the cutch which was shipped at Calcutta was, on arrival at New York, found to be inferior. The High Court had dismissed a claim made for false packing on the ground, that as the duty of the agents of the respondents at Calcutta was to examine strictly the bags of cutch before they took delivery, the true character of the packing and of the contents of certain of the bags, one specimen of which was partly filled with rubbish and should on discovery not have been accepted, must then have become known. An examination did take place at Calcutta, but apparently it was not an adequate one. The Judicial Committee agreed with the High Court as to the disallowance of the packing claim, but also thought the principle of reasoning as to that must also apply to the other claim, that for inferior quality of cutch as cutch, in which damages had been given. On that branch of the case, the decree below must be reversed and, like the packing claim, be

pronounced in favour of the appellant. It was incumbent by very cogent evidence on the part of the respondent to rebut the inference which justly would be drawn from the acceptance in Calcutta after such searching examination that the goods were according to contract. In the absence, therefore, of any evidence of the treatment of the cutch in Calcutta after delivery, of its loading on board, and evidence of the conditions of the voyage as to changes of heat, moisture, or pressure, the respondents must be held to have failed to satisfy the burden which was upon them. If, indeed, the evidence had established that the liquid state of the cutch at Calcutta had prevented examination, and upon its arrival at New York it disclosed that, as originally manufactured, it was defective, a different question might have arisen; but in truth there is hardly any evidence in support of this branch of the proposition. Reversed, and the suit decreed to be dismissed, with costs; the respondents to pay costs of appeal.

[*L. R.* 13 *Ind. App.* 60; *I. L. R.* 13 *Calc.* 237.]

Jagadamba Chowdhrani and Others *v.*
Dakhina Mohun and Others.

(Four Appeals consolidated.)

Bengal. LORD HOBHOUSE. *April* 9, 1886.

Title to properties. The respondents (plaintiffs) claimed possession of certain properties as reversionary heirs of the last holder. They disputed certain adoptions under which the appellants claimed to succeed. The questions raised were whether the suits were brought in time, and also, what was the point of time particularly from which the limitation began to run. The question of limitation was the principal one. Of course, both adoptions could not be valid, though both might be invalid. One of the adopted sons was now dead. The plaintiffs (the respondents) in the suits are the persons who failing adoption were the heirs of the last holder at the death of his surviving widow. It appears that the earliest of the suits was brought eighteen years after the latest adoption, and the latest a little

less than six years after the death of the surviving widow. In their Lordships' opinion, Art. 129, Sched. II. of Act XI. of 1871, on which the cases depended, was, on its proper construction, fatal to the case of the respondents. The condition of the section was that for a suit to establish or set aside an adoption, the period of limitation shall be either the date of the adoption or the date of the death of the adoptive father. While thus deciding, their Lordships observed: "The expression 'suit to set aside an adoption' is not quite precise as applied to any suit." They discussed the several definitions given, and added then these words to their judgment: "It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intrinsic questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession." *Raj Bahadoor Singh* v. *Achumbit Lal*, L. R. 6 Ind. App. 110, explained. The Judicial Committee reversed the decision of the High Court, and agreed with the opinion of the Subordinate Judge, which, "expressed probably with some inaccuracy in the transcript," was to this effect: "The plaintiffs, although they have only sued for the possession of the property as heirs at law of their deceased uncle, Hurro Mohun Chowdhry, but as a fact apparent in itself, they cannot likely succeed unless and until the adoptions of Saroda Mohun and Doorga Mohun be set aside, making the way smooth for the plaintiffs to enter into possession as heirs of Hurro Mohun Chowdhry. The formation of the plaints can render no advantage to the plaintiffs. Whatever terms they might have used in framing the plaints and the consequential relief sought for, they are in effect suits to set aside the adoptions, and should have therefore been brought within the time allowed by law, to be reckoned from the dates of the successive adoptions." Reversed. The respondents must pay the costs of these appeals.

[*L. R.* 13 *Ind. App.* 84; *I. L. R.* 13 *Calc.* 308.]

O'Brien *v.* **Walker.**
Curlewis *v.* **O'Brien** and Another.
(Consolidated Appeals.)

New South Wales. Lord Blackburn. *April* 9, 1886.

Mortgage. Sale. Lien. The respondent, Walker, was purchaser of certain interests in mortgaged lands. These were sold subject to two mortgages, and the main question in the appeals was, what charges Walker was liable for in redeeming one of the mortgages. Their Lordships approve the relief given below to Walker. They guard themselves from pronouncing any opinion as to the other and prior one of the two mortgages, that question not being raised now. Affirmed. Costs of both appeals to be paid by the appellants. [*P. C. Ar.*]

De Carteret *v.*
Baudains and Others.
De Carteret *v.*
Gautier and Another.

Jersey. Lord Blackburn. *April* 9, 1886.

Right of way cases. Both appeals relate to the same question, whether there existed a public right of way over a road and a lane, or whether both were private property of the appellant. Laws of Jersey. Their history gone into. Usage. Prescription. Right of branchage. "Dedication." Doubt as to whether easement or servitude can be created under Jersey law by enjoyment even from time immemorial without proof of title. The Judicial Committee, reversing decrees below, hold that the undoubted ownership of the soil in the situations named rests with the appellant. There was no tangible evidence of a public right of way in either of the cases. As to the road, title deeds of the appellant were in proof for a long series of years, but, on the other hand, no acts, such as repairs or the exercise of a right of branchage, &c., had been done by the parish, such as should

have been done if the road was public property. As to the lane, the same decision was arrived at. In the absence of evidence that the soil belongs to anyone else, the appellant has proved it to be hers. Judgments in both appeals reversed.

[11 *App. Cas.* 214; 55 *L. J. P. C.* 33.]

Sri Raja Rao Venkata Mahipati Surya Rao Bahadur *v.*
The Hon. Sri Raja Rao Venkata Mahipati Gangadhara Rama Rao Bahadur and Another.

Madras. Sir Barnes Peacock. *June* 4, 1886.

Effect of a karanamah or agreement between two Mitacshara brothers in 1845. Did it operate to prevent the son, who was then in existence, of one of these brothers, from adopting a son who would in time be heir to the zemindary of Pittapuram? The parties to the agreement were joint owners of the zemindary, and they agreed that, in case of the failure of aurasa (self-begotten) male issue in either of their lines, the property should not be alienated by making adoption or the like. The first respondent was the son who was in existence at the time of the agreement, and he had adopted a son as his heir. The appellant was the son of the other joint owner who participated in the agreement. He claimed to be next heir of the first respondent on two grounds: first, that there was a custom in the family that no adopted son could succeed; second, that the agreement of their fathers prevented alienation. Both Courts below held that, as a matter of fact, no custom was proved, and the second ground alone was argued in the appeal. Without calling on counsel for the second respondent, the Judicial Committee affirmed the decree of the High Court, to the effect that the agreement could not bind the son then in existence. That would be entirely altering the law of descent, and contrary to the principle laid down in the *Tagore Case*, L. R. Ind. App. Sup. Vol. p. 47. Affirmed, with costs.

[*L. R.* 13 *Ind. App.* 97; *I. L. R.* 9 *Mad.* 499.]

Genda Puri and Another *v.*
Chhatar Puri.

N. W. P. Bengal. SIR RICHARD COUCH. *June* 25, 1886.

Mohunt case. Suit was brought by the first of the appellants for declaration of right in respect of moveable property and for possession of immoveable property of a deceased mohunt of a religious establishment. The respondent was in possession after the death of the mohunt, and the suit was brought by appellant to eject him. The appellant claimed he was first a *chela*, or disciple, and that he had been nominated by the deceased mohunt in presence of witnesses to succeed him as mohunt. There was no instalment of either appellant or respondent by the *Goshains* (the sect to which the mohuntship was attached). Affirming decree below, their Lordships said: "In determining who is entitled to succeed as mohunt in such a case as the present, the only law to be observed is to be found in custom and practice, which must be proved by testimony, and the claimant must show that he is entitled according to the custom to recover the office and the land and property belonging to it. This has been laid down by this Committee in several cases. The infirmity of the title of the defendant, who is in possession, will not help the plaintiff, as the Subordinate Judge seems to have thought." . . . "The evidence points to the necessity of instalment on the Gaddi to make a complete title. It is unnecessary to quote the evidence here. It appears to their Lordships to fail in proving that the mohunt alone had power to appoint his successor. What was done by Kapur Puri (the deceased mohunt) . . . *was not*, according to the custom proved, *sufficient* to entitle Genda Puri to recover the property." Affirmed, with costs.

[*L. R.* 13 *Ind. App.* 100; *I. L. R.* 9 *All.* 1.]

Salmon *v.*
Duncombe and Others.

Natal. LORD HOBHOUSE. *June* 25, 1886.

Claim by a husband (appellant) to the whole of the property in Natal of his deceased wife. Validity of ante-nuptial contract

and of a will. Construction of Natal Ordinance of 1856, sect. 1 of which provided that any natural-born subject of Great Britain, resident in Natal, may exercise all the rights which such subject may exercise according to the laws and customs of England in regard to the disposal by will of real and personal estate situated in the colony, as if such subject resided in England. The lady was twice married—firstly, to Robert Duncombe, and by him she had the children who were now defendants (respondents): the Registrar of Deeds was also joined as a defendant. These children contended that their rights as children of the first marriage, and born before 1856, could not be affected by the Ordinance. The Roman Dutch law *Hac Edictali*, Codex, Lib. v. tit. ix. pl. vi. would give them legitimate portions. The operation of the Ordinance was limited to persons settled and resident in Natal; and if the effect of it was to confer upon the lady the power of disposing of her property as if she was resident in England in respect of the like property in England, she would still have no power to devise real estate in Natal. The facts showed that both husbands and the wife were British born subjects, and also that at the date of the second marriage the wife had no property. What she died possessed of has fallen to her after her second marriage. There were two children of the second marriage, who have disclaimed interest in favour of their father. The Supreme Court based its judgment on certain ambiguities in the sections of the Ordinance and on the effect of the *Hac Edictali* law, and decreed that the appellant as executor to his wife be adjudged to transfer one-fourth of the property to each of the respondent children and to retain one-fourth himself. The Judicial Committee, reversing the decree, pointed out that the preamble of the Ordinance showed that its object was to exempt in future natural-born British subjects from the testamentary laws in force in Natal. In the ante-nuptial contract there were special provisions that the whole of the property left at death by either the husband or wife should go absolutely to the survivor, and also that no distribution or division of that property should be made according to the colonial law. There

was no doubt surplusage or unskilful draughtsmanship in the words of the Ordinance which led to ambiguity being created, as to whether resident meant domiciled, &c., but the main object of the legislature was clear in all that went before such surplusage. The added words, which may add nothing to what has gone before, ought not without necessity to be construed so as to destroy all that has gone before. The broad intention was to provide a substantial measure substituting English law for Natal law in the cases mentioned. Their Lordships therefore construe the word "resident" in its ordinary sense, and cannot discover any reason why the powers conferred should be limited by either domicil or residence. Mrs. Salmon had died in England, but she was resident in Natal when she joined in the contract and made the will, and their Lordships are of opinion that both by the contract and the will she exercised lawfully the powers conferred by the Ordinance while she was in Natal. Further, they were unable to see that when the Ordinance passed the respondent children had any vested interest in the property now in question. Reversed with costs.

[11 *App. Cas.* 627; 55 *L. J. P. C.* 69.]

Taylor and Another *v.*
Bank of New South Wales.

New South Wales. LORD WATSON. *June* 25, 1886.

Liabilities of sureties to a bank. The appellants were sureties to the bank for the mortgage debt of another person, the mortgagor. They alleged in their action that the mortgagor had subsequent to the mortgage sold parts of the mortgaged property, and that through the failure of the purchaser to pay for his purchase they had been deprived of the full benefit of their security, and were therefore not liable as sureties. Proceedings by the borrower and mortgagor. Were all transactions of the borrower and of the bank who lent the money warranted by the terms of the mortgage? The Supreme Court, reversing the decree of the Primary Judge, had held that on the proper terms of the mortgage contract, and seeing that the mortgagor had in the course of his business as a prudent farmer negotiated

for the sale in good faith with the consent of the mortgagee, his acts were not wrongful, and that the liability of the sureties was not affected. The Judicial Committee upheld the decision of the Supreme Court. *Polak* v. *Everett* (1 Q. B. D. 669), *Holme* v. *Brunskill* (3 Q. B. D. 495), and *Pearl* v. *Deacon* (24 Beav. 186; 1 De G. & J. 461) compared. Suit in equity. Account affirmed. Appellants to pay costs.

[11 *App. Cas.* 596; 55 *L. J. P. C.* 47.]

Rewa Mahton *v.*
Ram Kishen Singh.

[*Ex parte.*]

Bengal. SIR BARNES PEACOCK. *July* 9, 1886.

Validity of a sale in execution. *Bonâ fide* purchaser. Misapplication by High Court of sect. 246, Code of Civil Procedure (Act X. of 1877). Nature of the inquiries which are or are not compulsory upon would-be purchasers at a sale in execution. In this case, one Khoob Lal and Mussamat Radheh Koeri, the mother of respondent, whose heir the respondent is, held cross decrees against each other for respective debts. Radheh Koeri, who was owed more by Khoob Lal than he owed her, took out execution against him without mentioning her debt to him. While these proceedings were pending, Khoob Lal applied for execution in respect to his smaller debt, and, obtaining a judgment, had certain property of Radheh Koeri's sold. The first appellant was the purchaser; and the questions now were whether, considering that there were cross judgments, the sale was valid or not; whether there was collusion; and whether appellant was a *bonâ fide* purchaser. The High Court decided the case on their construction of sect. 246, which enacted that "If cross decrees between the same parties and for the payment of money be produced to the Court, execution shall be taken out only by the party who holds the decree for the larger sum, and for so much only as remains after deducting the smaller sum; and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum." A decree for respondent was thereupon pronounced by the

High Court, who declared the sale null and void. It appeared, however, that Khoob Lal had only brought before the Court his own decree when applying for attachment and sale. The two cross decrees for debt were not together before the Court. This being so, the Judicial Committee thought the decree of the Subordinate Judge was right, and upheld the validity of the sale, thus reversing the judgment of the High Court. A purchaser under a sale in execution is not bound to inquire whether the judgment-debtor had a cross judgment of a higher amount, any more than he would be bound in an ordinary case to inquire whether a judgment upon which an execution issues has been satisfied or not. Those are questions to be determined by the Court issuing the execution, assuming always that the Court has jurisdiction. To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchases under executions. Their Lordships, who examined the evidence very closely, have come to the conclusion (upholding the decision of the Subordinate Judge) that there was no fraud; that there was a *bonâ fide* purchase; and that the property was not sold for an inadequate price. Reversed, with costs.

[*L. R.* 13 *Ind. App.* 106; *I. L. R.* 14 *Calc.* 18.]

The Collector of Godavery *v.* Addanki Ramanna Pantulu.

Madras. SIR BARNES PEACOCK. *July* 10, 1886.

Claim to a share of an estate by purchase. Joint family estate. Title. Actual or constructive or adverse possession. Claim by respondent for possession of one fourth share of an estate with profits setting out a title derivable from the husband of a lady who was a member of the joint family in whose possession the property was. The Collector who acted for the widow (a minor) of the last lineal holder of the whole estate denied that the husband above mentioned ever had any possession or enjoyment, and asserted that the transfer of the share by him was invalid. He also contended that possession had been adverse to the respondent (plaintiff), for the whole of the statutory period under Sched. II., Art. 144, of the Limitation

Act XV. of 1877. After a review of the evidence and hearing exhaustive arguments thereon, the Judicial Committee reported in favour of the contentions of the appellant, thus upholding the decree of the Subordinate Court and reversing that of the High Court. Reversed. [*L. R.* 13 *Ind. App.* 147.]

Sayyid Mansur Ali Khan *v.*
Sarju Parshad.

N. W. P. Bengal. SIR RICHARD COUCH. *July* 13, 1886.

Suit by appellant to enforce a right to redeem a mortgage. In the part of India where Bengal Regulation XVII. of 1806 is in force, the right to redeem depends upon the sections of the regulation, and not upon conditions set forth in the mortgage deed. In this case, the appellant had deposited the principal sum and interest for one year, alleging that the interest for other years was according to the conditions of the deed to be recovered by a separate suit, and he then brought a suit for redemption. The Judicial Committee, affirming the High Court decree, with costs, held that the appellant had not done what was necessary, namely, to pay *all* interest due before foreclosure, and therefore was not now entitled to redeem.

[*L. R.* 13 *Ind. App.* 113; *I. L. R.* 9 *All.* 20.]

Dagnino *v.*
Bellotti.

Gibraltar. SIR BARNES PEACOCK. *July* 16, 1886.

Action for goods sold and delivered. Verdict. Leave to appeal applied for and granted in Gibraltar, before any application for a new trial, such as is provided for in the Charter of Justice, 1st September, 1830 (for which, see Clark's Colonial Law, 680), had been made. Their Lordships dismissed the appeal, with costs, holding that the jurisdiction below had not been exhausted: see *Tronson* v. *Dent*, 8 Moo. P. C. 441; see also *The Agra Bank* v. *Le Marchand*, P. C. Ar. 12 February, 1887.

[11 *App. Cas.* 604.]

Petition to re-hear the Appeals of Venkata Narasimha Appa Row *v.* The Court of Wards, and Venkata Ramalakshmi Garu and Others *v.* Gopala Appa Row and Others.

Madras. LORD WATSON. *July* 17, 1886.

Petition to re-hear appeals on the ground that new matter had been discovered which would, if produced at the hearings, have materially affected the decision of the Board. For the decisions on these appeals, *vide* L. R. 7 Ind. App. 38, and P. C. Ar. July 19, 1883. Plea of *res noviter*. Their Lordships, although finding that most of the documents alleged to be new were known to the parties, are yet unwilling to decide the application on that ground alone. Assuming for the purpose of this petition that a relevant case of *res noviter* is set forth in it, they declare that no authority has been cited to them which can warrant them in granting a re-hearing under such circumstances as those presented in this application. The cases in which such an indulgence as a re-hearing might be competently granted are explained by Lord Brougham in the case of *Rajunder Narain Rae* v. *Bijai Govind Singh*, 2 Moo. Ind. App. Cas. 181. There is a salutary maxim which ought to be observed by all courts of last resort. "*Interest reipublicæ ut sit finis litium.*" Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this. *Vide* also *Hebbert* v. *Purchas*, 3 L. R. P. C. 664. Petition dismissed. [*L. R.* 13 *Ind. App.* 155; *I. L. R.* 10 *Mad.* 15.]

Imambandi Begum *v.*
Kumleswari Pershad and Others.
(And Cross-Appeal.)

Bengal. SIR RICHARD COUCH. *July* 21, 1886.

Purchase of a share of a mehal at a sale for arrears of government revenue under sects. 13, 14, and 54 of Act XI. of 1859.

By these sections a share or shares of an estate are to be sold subject to all incumbrances, and this litigation arose out of an alleged incumbrance by virtue of certain mokurruri pottahs. Benami transactions. *Dictum:* "Where there are Benami transactions and the question is who is the real owner, the actual possession or receipt of the rents of the property is most important." Difficulty in tracing the real persons, as distinct from Benamidars, who had title to a certain share, and the validity or invalidity of proceedings by which rights over the property were alleged to have been obtained. The question in the cross-appeal was whether the suit should not be barred by limitation. Act XV. of 1877, Sched. II. Art. 144. Their Lordships varied the judgment of the High Court, and set forth their view of the particular portion of the estate on which an incumbrance was established, and gave the plaintiff (principal appellant) a larger share of the estate, and more favourable conditions, than the High Court did. As regards the cross-appeal they decided that a suit to establish this was not barred by limitation. No order as to costs. Varied.

[*L. R.* 13 *Ind. App.* 160; *I. L. R.* 14 *Calc.* 109.]

Ledgard and Another *v.*
Bull.

(And Cross-Appeal.)

N. W. P. Bengal. Lord Watson. *July* 21, 1886.

Indian patent case. Action by respondent (plaintiff) for damages for alleged infringement of patent rights. The whole controversy between the parties depends upon two pleas maintained by the defendant, the late Mr. Petman. Act XV. of 1859, Indian Patent Act, sect. 34 of which corresponds with sect. 41 of the English Patent Act Amendment Act, 15 & 16 Vict. c. 83. Petman (of whom Ledgard and another, now appellants, are executors) raised firstly the plea of no jurisdiction, inasmuch as the suit was instituted before a court incompetent to entertain it, and that an order of transference to another court was incompetently made. He pleaded also that

the provisions of sect. 34 of the Act had not been complied with, inasmuch as no "particulars of breaches" complained of had been delivered with the plaint. He contended that in the absence of such particulars he could not be called upon to state a defence to the action upon its merits. Cases quoted to show what is "fair notice" of the case a defendant has to meet. In their Lordships' judgment the plea of no jurisdiction is upheld, and their Lordships see no valid reason for thinking, as the respondent contends, that Petman at any time waived his objection to the jurisdiction. On this head, therefore, the decision of the High Court was reversed. The second plea was overruled by the District Court, whereas the High Court considered the objection of Petman founded on sect. 34 good, but allowed the plaintiff (respondent) another chance of a hearing upon the merits, and for that purpose directed that the plaint be amended and presented in the proper Court, viz., the principal Court of original jurisdiction in civil cases at Cawnpore, and that with the plaint the particulars required by sect. 34 be duly delivered. The Judicial Committee reversed this latter finding also. Their Lordships are of opinion that it is impossible, in any view which can be taken of the defendant's pleas, to sustain this part of the decree of the High Court. It sets aside, or at least ignores, the whole previous proceedings, including the plaint in which the suit originated; and it directs a new and amended plaint to be presented to the Court, which is simply equivalent to directing a new suit to be instituted. Assuming that the defendant's pleas were rightly disposed of by the High Court, what the Court ought to have done was to give the plaintiff the alternative of having his suit dismissed, or of withdrawing it with leave to bring a new action. The result, therefore, on the hearing of the appeal and cross-appeal, is that the decision of the High Court is reversed, except in so far as it recalls the decision of the District Judge, and the suit is ordered to be dismissed. The appellants to have the costs in both Courts below, and in this appeal and cross-appeal.

[*L. R.* 13 *Ind. App.* 134; *I. L. R.* 9 *All.* 191.]

O'Shanassy *v.*
Littlewood.

Victoria. LORD WATSON. *July* 21, 1886.

Alleged misrepresentation in sale of Crown lands. Verdict of a jury in favour of plaintiff (appellant) set aside by the Full Bench, and non-suit entered. Appeal by plaintiff. Point of jurisdiction. Was purchase (at the price given) induced by the representation? Was there reasonable belief in title? The Judicial Committee upheld the decision of the Full Bench. The possession by the respondent (defendant) from 1869 down to 1883, coupled with the other facts of the case, were, in their Lordships' view, well calculated to induce belief in the respondent that he actually held the lands in question as licensee, and as part of Crown lands attached to and going with his run. Being of opinion that there is really no evidence upon which an honest jury could reasonably come to the conclusion that Mr. Littlewood or his agent was guilty of any fraud whatever in making the representations they did, their Lordships have to consider whether this is a case in which the procedure indicated in Order XL., sect. 10 of the Rules annexed to the Victorian Judicature Act of 1883 ought to be applied. They are of opinion that it is a case of that kind, and that they ought now to pronounce the order which ought to have been made by the Full Bench, sustaining the defence upon the ground that there has been a failure to prove fraud, and dismissing the action. There has been no suggestion made that the plaintiff will suffer undue prejudice by not having the opportunity of having a new trial and bringing forward other evidence, and there is nothing in the facts of the case to suggest that to allow him such an opportunity would be either expedient or proper.

Their Lordships are not bound to follow the course indicated in Order XL., sect. 10, unless they are of opinion that there ought to be no further trial of the case, but this is in their opinion one of the class of cases to which the rule was meant to apply. The Judicial Committee humbly advised her Majesty to reverse the judgment appealed from, and to declare that in lieu of the order

of the Full Bench it ought to be found that in respect of the plaintiff's failure to adduce evidence tending to establish that the representations complained of in the two counts submitted to the jury were fraudulently made, the defendant ought to have judgment entered in his favour, with costs in both Courts below. The respondent must have the costs of this appeal. [*P. C. Ar.*]

Ramcoomar Ghose and Others *v.*
Kali Krishna.

Bengal. LORD WATSON. *July* 24, 1886.

Chur case. Dispute over arrangements made as to payment of rent in case of accretion. Construction of stipulations in a Kabulyat Howladhari tenure. Effect of respondent having made a measurement of the land before notice was served on the appellants. Claim by the respondent for a new measurement and for Khas possession of the excess land, or for an assessment of the rent of the excess land. The Judicial Committee, reversing part of the decree of the High Court, held that the tenants were not bound by the measurement made by the Kabulyatar in their absence. They decided in favour of the respondent, however, that the cause should be remitted in order that the precise extent of excess land for which rent is payable, and also the precise amount of the increased rent, may be ascertained in the Court below. When that has been done, it will be in the option of the respondent either to realise the rents in terms of law, or to serve a fresh notice in terms of the Kabulyat of 1850. And if the appellants do not come in and make a settlement, and file a new Kabulyat, he (the respondent) will then be entitled to Khas possession of the excess accreted land which has accreted to the original howla, and to the lands for which increased rent was found to be payable in the suit No. 178 of 1865. As the parties maintained pleas far in excess of their respective legal rights, each side is directed to pay its own costs in the Courts below and here.

[*L. R.* 13 *Ind. App.* 116; *I. L. R.* 14 *Calc.* 99.]

Hurro Nath Roy Bahadoor *v.*
Krishna Coomar Bukshi.

[*Ex parte.*]

Bengal. LORD HOBHOUSE. *July* 24, 1886.

Suit by the appellant against his dewan for a specific balance in an account. The Judicial Committee agree with both Courts below in holding that there is no bar to the suit under the Limitation Act (Act IX. of 1871). Time must be counted from the cessation of agency, when the dewan left the plaintiff's service, and therefore, whether three or six years be the limit, there is no bar. They disagree, however, with the finding of the High Court that it is impossible to say what sums remain unaccounted for, and in the dismissal of the suit. It appears to their Lordships that sufficient weight has not been given to the onus thrown upon the defendant by his fiduciary position. Declaration made that the High Court should have remanded the suit to the Subordinate Judge to take a general account of all dealings and transactions between the plaintiff and the defendant in the character of the plaintiff's dewan, only not disturbing any settled account, if such there be; and inasmuch as the defendant has taken the course of denying his accountability *in toto*, he should have been ordered to pay the whole costs of the suit up to and including the appeal to the High Court. He will also pay the costs of the appeal. Reversed.

[*L. R.* 13 *Ind. App.* 123; *I. L. R.* 14 *Calc.* 14.]

Wentworth *v.*
Humphrey.

N. S. Wales. LORD HOBHOUSE. *July* 24, 1886.

Suit by the appellant for specific performance under an agreement to purchase land. Objection raised by the respondent that the title was insufficient. The decision turned on the construction of the colonial statute, "Real Estate of Intestates Distribution Act, 1862," 26 Vict. No. 20, the intention of which was to intro-

duce a new rule of succession to real estate, and to enact that in cases of intestacy it should be administered and should devolve precisely as chattels real did before. The Supreme Court upheld the respondent's objection to the title. This decision the Judicial Committee (affirming the ruling of Faucett, J., sitting for the Primary Judge in Equity) reversed, with costs. The governing question was whether on the death of one Abraham Elias, who was absolutely entitled to the property, and who died intestate and unmarried, the property was to be treated as of the nature of freehold or as a chattel real. If the latter, the appellant has purchased it from the legal personal representative of Abraham Elias, namely, from the curator of Estates, who has handed the proceeds to the deceased's mother, and, subject to any prior interests, the appellant has an indisputable title.

[11 *App. Cas.* 619; 55 *L. J. P. C.* 66.]

Chauvigny de la Chevrotière *v.*

La Cité de Montréal.

Lower Canada. Lord Fitzgerald. *Nov.* 16, 1886.

Suit for declaration of right to resume land, and have the deed granting the land in question to the city of Montreal declared null and void. Conditions of gift. Public right and private servitude. Conversion of the land into a public market. Evidence of long-continued user and dedication or abandonment as a public place. Claim. The grant was made so far back as 1803, and the appellant now claimed, by alleged rights of his predecessors, that by reason of dereliction from the original purposes the deed of gift should now be declared null. Both Courts below found against the appellant, and now their decisions are upheld by the Judicial Committee. It was open to doubt whether the gift was voluntary, but whether or no the right of user for the benefit of the public was now fully established. Act after Act for the municipal government of Quebec had been passed, although in the course of years under these

Acts the original user of the land for a market place was transformed for the public benefit into user of the space for a public square. No formidable objection was raised, even if it could have been raised, to such changes by the representatives of the grantors. In their Lordships' view the absence of any thorough contestation of the right of the public to use this place as a public highway was clear evidence of acquiescence in the public right, or rather abandonment of the claim if any existed. There was long-continued user by the public, and it was now too late to attempt to show title against and in preference to it. The judgments of the Superior Court and of the Court of Queen's Bench are affirmed, with costs. [*P. C. Ar.*]

Allen and husband *v.*
The Quebec Warehouse Company.

Canada. LORD HERSCHELL. *Nov.* 18, 1886.

Action against a warehouse company for damages to a ship, owned by the female appellant, through alleged defects in a mooring berth. Was there want of skill and prudence on the part of those in charge of the ship? Concurrent findings. Vessel not sufficiently moored to the wharf, and should have been made fast to more than one post. "Both the Courts below have taken a view unfavourable to the appellants upon the facts, and no question of law appears to their Lordships really to be in dispute, or to have been dealt with in any way erroneously by the judges below. It has always been the view taken by the Committee, when the question for determination has been whether the concurrent judgments of the judges who have been unanimous below should be supported or reversed, that unless it be shown with *absolute clearness* that some blunder or error is apparent in the way in which the judges below have dealt with the facts, this Committee ought not to advise her Majesty to reverse the judgment. *Vide* 11 Moo. Ind. App. 207, 338. Affirmed, with costs. A preliminary application was made in this case on the part of

appellants that an alleged "*rotten post*" should be ordered to be sent from Quebec for inspection by the Board. It was not granted. [12 *App. Cas.* 101; 56 *L. J. P. C.* 6.]

Beningfield *v.*
Baxter.

Natal. THE EARL OF SELBORNE. *Dec.* 7, 1886.

Important trust case. Action by a widow (the respondent) as legatee under her husband's will against executor (the appellant) of her husband's estate. Widow's interest confined to such ultimate surplus (if any) as might remain of her husband's estate after payment of his debts and realization of credits as a a partner in different firms. What was his financial position in these firms? Right of the widow (not being executrix) to set aside the sale of a property called the Equeefa estate which was included in assets. (*Vide Travis* v. *Milne*, 9 Hare, 150.) The sale of the estate in question appeared to have been made (by auction) by the appellant, and he and one Harry Escombe, both of whom were acting and selling in more than one fiduciary capacity, became the purchasers, and subsequently what was regarded as Escombe's share of the bargain was afterwards transferred by him to the appellant. The main question in this appeal was whether the sale in question was voidable or void in equity. There was also a question whether there was an estoppel caused by delay or acquiescence on the part of the widow. In the Supreme Court many authorities, Roman law and English, were quoted to show that at a public auction an administrator is not prohibited from buying the goods whereof he has the administration. The Supreme Court had decided, however, that the sale of the Equeefa estate to the appellant and another person was invalid as against the respondent to the extent of one third part of such estate, and certain rolling stock therein, and declared the appellant to be trustee for the respondent of such one third part, and the subsequent profits thereof. The Judicial Committee discharged this decree, and held that the suit of the widow was

not barred by laches or acquiescence or by acceptance of money, and reported that in lieu of the order below a declaration should be made for accounts to be taken of the debts (partnership and otherwise) of the deceased husband, of the firms in which the husband was partner, and also for an account of the profits gained on the working of the Equeefa estate. They further declared that the purchase of the Equeefa estate be held voidable in equity, and directed that all such accounts be taken and directions given as to the charges on the estate, partnership debts and liabilities, &c., &c.; that if on taking the said accounts nothing shall be found due to the appellant, the said Equeefa estate is to be re-sold under the direction of the Court at such time, &c., as to the Court shall seem fit; but that if a balance be found due to the appellant, the Equeefa estate is to be put for sale at a reserved price, not less than that balance; and that if it does not realize that amount it is to be left in his possession. In the taking of accounts all credit is to be granted, and all just allowances are to be allowed to the appellant for advances made to the widow. The opinion of their Lordships is entirely without prejudice to any question which may arise, on taking the accounts, out of any new or further evidence which may then be before the Court as to the rights or position of any particular creditor or creditors. They also expressed the view that in matters of this nature the law of Natal is not essentially different from that of England. Costs in Supreme Court to be paid by appellant. Costs of the appeal to be costs in the cause when it is finally disposed of below. *This appeal was twice argued before their Lordships' Board.*

[12 *App. Cas.* 167; 56 *L. J. P. C.* 13.]

Senecal *v.*
Hatton and Another.

Lower Canada. Sir Barnes Peacock. *Dec.* 8, 1886.

Suits for the delivery and account of debentures. There were two actions: one was brought by Hatton against Senecal to re-

cover from him thirty-five debentures of the Montreal, Chambly, and Sorel Railway Company for $1,000 each, with coupons attached, Hatton having received an assignment of those debentures from Hibbard; and the other action was brought by Senecal against Hibbard, calling upon him to intervene in the suit brought by Hatton against Senecal and to render an account of the debentures. The Superior Court in the first action gave judgment for the plaintiff, Hatton, and condemned the defendant to deliver to the plaintiff the thirty-five debentures within fifteen days from the date of the judgment, and in default to pay to the plaintiff $35,000 as the value of the debentures. On appeal, the Queen's Bench reduced the amount and valued the debentures at 25 cents to the dollar. The judgments in the view of the Judicial Committee were right in ordering the debentures to be returned and handed over to Hatton, and that in default of their being handed over the defendant should pay the value of them. Their Lordships held that, as regards this action, there was no error in the judgment of the Queen's Bench. In the second action both Courts found, as they did in the first action, that the facts stated were not made out in evidence. The Superior Court dismissed the suit with costs. The Court of Queen's Bench on affirming the judgment said, "Considering that the said appellant has failed to establish that he was entitled to the conclusion of his declaration against the said Ashley Hibbard, doth confirm the judgment rendered by the Court below, and doth dismiss the said action of the said Louis A. Senecal with costs against him, both in the Court below and on the present appeal." The Queen's Bench, however, added a reservation which their Lordships now said was unnecessary. In the result, their Lordships recommended that the judgment of the Court of Queen's Bench ought to be affirmed with costs.

[*P. C. Ar.*]

The Owners of the "Thomas Allen" *v.*
Gow and Others.

Nova Scotia (*Vice-Admiralty*). SIR JAMES HANNEN.
Dec. 11, 1886.

Measure of compensation for salvage. Appeal on ground that the compensation was assessed too highly by the Court below. Measure of danger. Principles laid down in cited cases for fixing the estimate. Their Lordships held that the salvage amount decreed by the Vice-Admiralty Court ($12,000) was excessive, and in their judgment approved the ruling in the case of *The* "*Glenduror*," L. R. 3 P. C. 589. This was a case of a broken shaft. The actual towing occupied forty-three hours only, and the wind was favourable at all events for a portion of the time, and both vessels were able to carry sail. The time lost by the "Austerlitz" in bringing the "Thomas Allen" into port at Halifax was but slight. The services rendered to the "Thomas Allen" though valuable were simple, unaccompanied by any danger to the helping vessel. Acting on the principles laid down in the case of *The* "*Glenduror*," and in that of *The* "*Scindia*," L. R. 1 P. C. 241, the Judicial Committee thought that $7,500 would be a liberal reward for the services rendered by the "Austerlitz," and of that sum the master and crew would receive $1,880. Judgment below varied. Each party to bear their own costs. [12 *App. Cas.* 118; *P. C. Ar.*]

Price *v.*
Neault.

[*Ex parte.*]

Lower Canada. LORD HOBHOUSE. *Dec.* 11, 1886.

Suit for recovery of a plot of land. Principal and agent. The question was whether transactions which passed between a landowner, the plaintiff (appellant), and his agent, who had charge of the allocation of, and liberty to alienate, plots of land on the one hand, and the defendant and his predecessors in the

holding on the other, were such as to preclude the plaintiff from recovering a certain plot of the land. What is a "*commencement de preuve.*" The appellant was owner of certain plots of land. His local agent prior to 1872 had entered in his book, as an intending purchaser, the name of a person from whom and a subsequent transferee the respondent obtained possession. It appeared that settlers customarily entered freely upon vacant plots and effected improvements without any title except the entry of their names in the agent's book. When one of them was warned by the agent that he must either complete the contract by payment or give up the land, he repaired to the agent's office and settled the transaction one way or the other. On the evidence it was difficult to say if there was any promise or contract in this case as regards the purchase-money. In 1882, the appellant gave respondent notice to quit and claimed damages. After action brought the respondent paid into Court $150 as the purchase-money. The Superior Court gave the appellant a decree for possession, saving to the respondent the right to recover the value of his improvements. The respondent appealed, and the Court of Queen's Bench reversed the previous decision and dismissed the action with costs, reserving to the parties all rights which either could enforce against the other in respect of the said immoveable property. That is the decree now appealed from. The appellant's main contention before the Judicial Committee was that the respondent could not succeed without a contract in writing, or, at all events, without producing a written *commencement de preuve* (Civil Code, Arts. 1605, 1608; Pothier, Obligations, sect. 113, &c.); also that there was no sufficient evidence from which a quasi-contract could be held to be established under Art. 1041, Civil Code. The Judicial Committee held that there was a quasi-contract, and that on the evidence the agent had laid himself under an obligation not to disturb the person in possession on payment of the purchase-money. Although there was difficulty in finding a *commencement de preuve* (which must be "some written evidence which lends probability to that which is sought to be proved by oral evidence") for a complete contract, still such assurances were

given as to induce the intending purchaser to believe he was safe; and they decided that the appellant was bound upon payment of the proper price to confirm the respondent's title. The rate of the price to be paid ought to be estimated as akin to the price paid for other lots at the time when improvements were begun by the respondent's predecessor on the land. Affirmed. [12 *App. Cas.* 110; 56 *L. J. P. C.* 29.]

De Waal *v.*
Adler.

Natal. Sir Richard Couch. *Dec.* 11, 1886.

Contract to purchase shares in a gold mine. Specific performance. Delay in the completion of the bargain. Absolution. Definition of *Mora.* Action was brought by Henry Adler, a sharebroker, against the appellant, a merchant in Durban, on three contracts for the sale and purchase of shares in the Rose Hill Gold Mining Company, and he claimed 925*l.* in exchange for the said shares, or otherwise the difference between 925*l.* and the price for which such shares may be sold. The *contrà* plea was, that on the arrival of a certain mail steamer the shares were to be delivered; that they were not so delivered, and as a matter of fact were not delivered till March, 1884, the first of the contracts for the purchase being more than a year before. The main question was whether there was an unreasonable delay in the delivery of the certificate for the shares, and, if there was, whether the plaintiff (respondent) was to blame for it. Delay caused by the shares having to be sent to England for subdivision, although at the time of sale the buyer thought the shares were deliverable within a short time. Their Lordships considered that there was unreasonable delay in delivery. They were of opinion that there was an unjust omission on the part of the plaintiff (Adler), in the sense in which the word *mora* "is defined to be unjust omission in one rightly required to perform his obligations," and they cannot agree with the Chief Justice that the plaintiff was not blameable for a delay which

was caused by his having parted with the documents of title. They reported that the judgment of the Supreme Court should be reversed, and the appeal to that Court dismissed with costs. Respondent will pay the costs of this appeal.

[12 *App. Cas.* 111; 56 *L. J. P. C.* 55.]

Binney *v.*
Mutrie and Another.

British Honduras. Lord Hobhouse. *Dec.* 11, 1886.

Partnership. Suit by the leading partner (the appellant) for the adjustment of partnership accounts after dissolution. Construction of the partnership articles. Principle of division of surplus assets. Their Lordships, having ascertained that all claims of persons external to the partnership had been satisfied, considered that the principal order of the Supreme Court was not, on a due consideration of all the particulars, correct. The order in question directed exactly the same distribution of the assets among the partners, whether the accounts showed a profit, a loss of capital, or an exact balance. But as, by the partnership articles, profits and losses are not to be shared in the rates of the respective capitals brought in or estimated to have been brought in, it is obvious that the distribution directed by the order cannot be according to the contract, except in the very improbable contingency of an exact balance. So far as appears on the face of the accounts in the record, they are founded on entries of capital, which are estimates only, and it is open to all parties to have them accurately taken. It was clear to their Lordships that the surplus assets should be first applied in paying to each partner his claims in respect of capital. The residue will be profits, and will be divisible as such. If the assets will not satisfy the sums found due for capital, there is a loss, which must be borne or made good by the proportions of the respective liens of each partner set forth by the conditions of the partnership. And the possibility of such a loss may make it necessary to keep under the control of the Court a sufficient

amount of the assets to secure the principal claimant, Binney. The order below was discharged, and their Lordships in lieu thereof made a new declaration setting forth their views as to the principle on which the rights of the different parties could best be provided for or arranged. Their Lordships think there has been error on both sides, and they are not at all sure which party will benefit by the alteration made in the order. Costs to be paid out of the partnership funds.

[12 *App. Cas.* 160.]

Harihar Buksh *v.*
Thakur Uman Parshad.

Oudh. Lord Hobhouse. *Dec.* 14, 1886.

Claim to estate. Construction of a Razinama or compromise. Effect to be given to the words *naslan-bad-naslan*. Did the Razinama give an absolute interest to one Bissessur Buksh? and if it did, what was the character of the inheritance it would convey to his heirs? [The respondent, who was the brother of the father of Bissessur, was by one degree a nearer relative than the plaintiff (appellant).] To take the last question first, the plaintiff alleges that by a certain custom prevalent among the Punwar Rajputs, if a branch of a family has become extinct, the other branches take the estate in equal shares, which means in equal shares as between those branches, without regard to their being more or less remote in kinship to the deceased. That question was tried in the Courts below, and both Courts came to the same conclusion upon it adverse to the plaintiff (the appellant.) Two lines of evidence appear to have been pursued, one consisting of instances of successions in kindred families, and the other of records of rights in Wajib-ul-arzees. Upon the first line of evidence the Judicial Commissioner, who seems to have examined the cases with care, has come to the conclusion that, balancing case against case, there is no certain invariable custom proved on this point. He also finds, and the District Judge also

states, that the Wajib-ul-arzees do not support the custom. In their Lordships' judgment, the Wajib-ul-arzees to which they have been referred point further. One document appearing on the record (at p. 126) is a specimen, and it states that brothers or nephews of the deceased are to succeed, regard being had to the nearness of kinship. That is a statement contrary to the statement in the plaint and to the custom which the plaintiff alleges. Therefore their Lordships have not considered it proper to go through the mass of oral evidence given in this case, because, if the Courts below concur in their conclusion upon such a matter as a family custom, their Lordships are very reluctant to disturb the judgment of those Courts. If there had been any principle of evidence not properly applied; if there had been written documents referred to on which the appellant could show that the Courts below had been led into error, their Lordships might re-examine the case; but in the absence of any such ground they decline to do so.

Then the question comes back to the construction of the Razinama, and that again is to be divided into two branches. The Courts below have found that the Razinama ought to be construed to give an absolute interest, because it has been decided that it should be so construed,—in fact, that the matter is *res judicata.* Upon that point it is unnecessary for their Lordships to pronounce any opinion; but they wish it to be understood that they do not express any agreement with the Court below on this point, and it must be taken that, not having heard the argument on the other side, their minds are completely open upon it.

They rest their opinion upon the terms of the Razinama itself. After providing that the estate shall be divided into the fractions specified in it, the conclusion of the Razinama is that the division shall hold good for ever, and to descend from generation to generation—*naslan-bad-naslan.* Their Lordships have not been furnished with any authority, in fact counsel has fairly said he can find no authority, in which a gift with the words *naslan-bad-naslan* attached has been held to confer anything less than the absolute ownership. On the contrary, in the

various cases in which the expressions *mokurruri, istimrari, istimrari mokurruri,* have been weighed and examined with a view to see whether an absolute interest was conferred or not, it seems to have been taken for certain that, if only the words *naslan-bad-naslan* had been added, there would have been an end to the argument, because an absolute interest would have been clearly conferred. Their Lordships think that the insertion of these words in the Razinama would be conclusive in itself; but, looking at the expressed objects of the Razinama, they would come to the same conclusion even if words of a less peremptory character had been used. It was for the purpose of settling a dispute which had been going on for several years about the proprietary right to the Talook Sarora, and it was agreed that the whole dispute should be set at rest. The dispute was not as to maintenance; it was not as to a temporary interest; but it was as to the proprietary right. That is the dispute to be set at rest by a division of the estate to hold good for ever, and not a word is introduced which of its own force imports less than an absolute ownership; they find it impossible to doubt that the true intention of the parties was to give to all alike the same amount of interest in the shares conceded to them, viz., that absolute ownership which each was claiming for himself in the whole or part of the property. On those grounds, their Lordships agree with the decision of the Courts below, though not for the same reasons, and the result is that the appeal will be dismissed with costs.

[*L. R.* 14 *Ind. App.* 7; *I. L. R.* 14 *Calc.* 296.]

Mussamut Amanat Bibi *v.*
Luchman Pershad and Another.

Oudh. Sir Barnes Peacock. *Dec.* 15, 1886.

Action on a mortgage bond. Construction. Accounts between the parties prior to the mortgage. Special leave to appeal. Both Courts below against the appellant. The original plaintiff was appellant's husband. Main question was whether the plaintiff

had a right to have his mortgage debt rectified (*vide* Act I. of 1877, s. 31). The appellant's contention was that there had been a mistake in the enumeration of the sum for which the mortgage deed was given, and it was claimed that a portion of the money ought to be deducted from the sum named in the deed. Settlement by the mortgage. It appeared to their Lordships that putting a correct construction on the deed, and taking the evidence which was adduced and the findings of the learned Judge (of the District Court, Fyzabad), there is no reason to suppose there was any fraud or deceit on the part of the defendants (respondents), or that there was any mutual mistake of the parties as to the amount which was stated as the sum for which the security was given. In their Lordships' view the decision of the Fyzabad Judge who tried the case in the first instance, and the decree of the Judicial Commissioner who affirmed his finding, must be upheld with costs.

[*L. R.* 14 *Ind. App.* 18; *I. L. R.* 14 *Calc.* 308.]

The Colonial Insurance Company of New Zealand *v.* The Adelaide Marine Insurance Company.

South Australia. SIR BARNES PEACOCK. *Dec.* 18, 1886.

Action on a policy of marine insurance. Terms of the contract. Insurable interest. Cases cited and compared: *Anderson* v. *Morice* (1 Ap. Cas. 713); *Oxendale* v. *Wetherell* (9 Barn. & Cr. 387); *Dunlop* v. *Lambert* (6 Cl. & Finelly, 621); see also Baron Parke's dictum in 2 Exch. Reports, p. 699. The action arose in this way, a firm intituled Morgan, Connor, and Glyde had chartered a vessel called the "Duke of Sutherland" to proceed from Algoa Bay to Timaru in New Zealand, and at the latter port to ship for conveyance to the United Kingdom a cargo of wheat. The wheat had been purchased from the New Zealand Grain Agency, and they were to deliver the same on board the "Duke of Sutherland." The respondents (the plaintiffs), on arrival of the vessel at Timaru, entered into a contract with the purchasers to insure the wheat for a sum not

exceeding 14,000*l*. This transaction completed, the plaintiffs applied to the New Zealand Company, the appellants (defendants), to hold them covered for not exceeding 2,000*l*., being two-fourteenths interest in cargo of wheat per "Duke of Sutherland," "at and from" Timaru to the United Kingdom, rate charged to be that ruling in New Zealand for similar risks. In their letter of acceptance, the appellants (defendants) had stated that in accordance with written request, the respondents were now held provisionally insured to the limit mentioned for cargo to be shipped, &c., and carried "from" Timaru, &c. Before the cargo was all on board, the "Duke of Sutherland" and cargo were lost by the stranding of the vessel during a gale at Timaru. Messrs. Morgan paid the New Zealand Grain Company for the wheat, and the respondents paid Messrs. Morgan & Co. the insurance as per the contract with them. The Adelaide Company then called on the defendants the New Zealand Company to indemnify them on their contract of cover. The defendants denied their liability, and the plaintiffs (respondents) then took the action. Both the Primary Court and the Supreme Court decided in favour of the plaintiffs. The appellants now appealed on three grounds: 1st, there was no contract, the proposal and the acceptance not being *ad idem*, since the acceptance was in different terms from the contract; 2nd, that at the time of the loss the risk had not commenced; and 3rd, that the purchasers had no insurable interest. Their Lordships, having heard counsel for the respondents on the point of insurable interest only, affirmed both decisions below. They held that there was a contract of insurance: although the terms of the acceptance were not quite the same as the terms of the proposal, it was clear the defendants intended to accept it, and were therefore bound. They held also that it was a complete contract "at and from," that the risk commenced when the master of the ship began receiving the wheat from the vendors, that such delivery was equivalent to a delivery to the purchasers, and that there was vested in them from that delivery an insurable interest. The right they had to return the wheat which had been delivered, in the event of the sellers neglecting, with-

out lawful excuse, to complete the supply, did not prevent them from having an insurable interest. Appellants to pay costs of appeal. Their Lordships comment on the absence of judge's reasons from the record, and repeat how desirable it is that Colonial judges should comply with her Majesty's Order in Council of 10th February, 1845, directing these reasons to be transmitted. Affirmed, with costs.

[12 *App. Cas.* 128; 56 *L. J. P. C.* 19.]

Hawksford and Renouf *v.* **Giffard.**

Jersey. Lord Herschell. *Dec.* 18, 1886.

Action against a railway company for debt. Foreign judgment. The Jersey Railways Company Limited were debtors to a person whose attorney the respondent is, for a sum of 1,426*l.* 5*s.* 3*d.* and certain taxed costs. A judgment for this amount was obtained against the company in England. The appellant Hawksford was attorney for the trustees in England of the railway company, and the appellant Renouf was attorney for the railway company *per se* in Jersey. Both Hawksford and Renouf were joined by the plaintiff (respondent) as defendants in an action brought in Jersey to recover the judgment debt. The principal question in this appeal was whether the trustees could lawfully be made parties in the action. The Royal Court decided that both the company and the trustees by their attorneys could be so sued, and condemned them jointly for the debt. This judgment the Judicial Committee now reversed. The action was brought upon an English judgment, which, until a judgment was obtained in Jersey, was in that country no more than evidence of a debt; and they do not think it competent to sue other persons jointly with the real debtor, merely on the allegation that they hold as trustees property of which the debtor is the beneficial owner. [Reversed in favour of appellant No. 1; affirmed with a slight variation as to interest and costs as against the appellant No. 2].

[12 *App. Cas.* 122; 56 *L. J. P. C.* 10.]

Ajudhia Pershad and Another *v.*
Sidh Gopal and Others.

N. W. P. Bengal. Sir Richard Couch. *Dec.* 18, 1886.

Suit by bankers (appellants) to enforce liabilities under a mortgage. Mortgage was executed to meet claims of creditors as a whole, and the intention was that the deed should not take effect unless the creditors as a body were bound by it. Defence was that as certain creditors took actions for their debts against the defendants, the mortgage deed did not take effect and was not binding. Defence upheld in the High Court and by the Privy Council. Affirmed, with costs.

[*L. R.* 14 *Ind. App.* 21; *I. L. R.* 9 *All.* 330.]

1887.

The Maharajah of Burdwan (now by order of revivor The Maharani of Burdwan) *v.*
Krishnakamini Dasi and Others (now by order of revivor Murtunjoy Singh and Others).

[*Ex parte.*]

Bengal. LORD HOBHOUSE. *Feb.* 5, 1887.

Construction of Regulation VIII. of 1819, sect. 8, par. 2. Validity of a sale instituted by the Maharajah under the regulation. Publication of notice. Formalities to be observed. Both Courts agreed that the suit brought to set aside the sale of a putni talook to recoup arrears of rent was decreed on the ground that the notice of sale was not served in accordance with the terms of Regulation VIII. of 1819. Counsel for the appellant contended that, in this case, personal service on one of the defaulters who was joint manager for both, and on the joint servant of both the defaulters, was sufficient to satisfy the Regulation. Construction of the section. Failure to stick up the notice anywhere in the talook that was to be sold or on the lands thereof. It was argued that the terms of the section were satisfied by publication at the defaulters' own kucheree, which was not on the talook but some distance from it. Their Lordships, in construing the Regulation, find a process provided by it, which its framers thought it indispensable to fix, for the observance of which they have declared the Zemindar to be exclusively answerable, and which is calculated

to protect all persons interested in the estate against injury by the working of a very swift and summary remedy given to the Zemindar. Decree of High Court affirmed on the ground that there was *material irregularity in procedure*, and of that irregularity the Putnidar is entitled to avail herself as a sufficient plea within the meaning of the Regulation. Cases discussed and compared: *Looftonissa Begum* v. *Kowur Ram Chunder*, S. D. A. (1849), 371; *Mungazee Chaprassee* v. *Sreemutty Shibo*, 21 W. R. 369; *Gouree Lall* v. *Joodhishter*, 25 W. R. 141; *Soma Beebee* v. *Lall Chand Chowdhry*, 9 W. R. 242; *Maharajah of Burdwan* v. *Srimati Tara Soondari Debia*, L. R. 10 Ind. App. 19. *Dicta:* "Their Lordships think that it is an error to rely on punctuation in construing Acts of the Legislature." "Of course there may be cases in which one, who might otherwise be entitled to avail himself of an irregularity, has so conducted himself as to have waived or forfeited his right." "The formalities which the Zemindar has to observe, and the evidence by which that observance has to be proved, are two totally distinct things." Affirmed. [*L. R.* 14 *Ind. App.* 30; *I. L. R.* 14 *Calc.* 365.]

Babu Sheo Lochun Singh *v.*
Babu Saheb Singh.

Bengal. SIR RICHARD COUCH. *Feb.* 10, 1887.

Husband's estate. Intention of widows in dealing with not only property which descended to them, but also with property purchased by them. Adoption. Deed of gift. Were the properties entire or separate? The suit which is the subject of this appeal was brought by the respondent, who claimed as one of the heirs of Sheodyal, who died in 1827, to recover from the appellant a third share of the property which had been left by Sheodyal at his death, and to which his two widows, Pranpeari and Rekaba, became entitled, and also a third of the properties which had been purchased by the widows with, as he alleged, the income of the property which they inherited. Pranpeari

and Rekaba in the first place held the properties jointly, and Pranpeari died in 1870, leaving Rekaba surviving her, and in possession of the whole of the estate. It appears that on the 19th October, 1875, Rekaba executed a deed of Atanama, by which she professed to give to the appellant, who was the defendant in the suit, the whole of the property, not only that which came to the widows from Sheodyal, but the properties which had been purchased by them; and it was also alleged that the defendant had been adopted by the widows with the permission of Sheodyal as his son. Several issues were settled. The defence set up various matters, including the law of limitation, the adoption of the defendant, and the deed of Atanama. All the issues were found in favour of the plaintiff (the respondent) except that with respect to the question whether the plaintiff was entitled to recover a share of the properties which had been *purchased* by the widows. The lower Court found that the widows were entitled to alienate that property, and consequently that the plaintiff was not entitled to it. The High Court, when the case came before it upon appeal, upon this question said that according to the evidence before them there was not the slightest doubt that the properties in question, namely, the purchased properties, were dealt with by the widows as accretions to their husband's estate, and that they were treated in the deed of gift precisely in the same way as the admitted properties of Sheodyal were treated. Their Lordships have been referred by counsel for the appellant to the different parts of the evidence which he considered bore upon the question whether the properties were purchased by the widows out of the income of the descended property, and whether their intention was to keep those properties distinct. Certainly the evidence is not such as would show that the High Court in coming to the conclusion they did were not quite justified by it. The authority upon this matter is the case of *Isridut Koer and Another* v. *Mussumat Hansbati Koerin and Others*, L. R. 10 Ind. App. 150. At the conclusion of the judgment in that case, their Lordships state what, in their view, is the matter which has to be looked at in deciding whether the property acquired or pur-

chased by the widows is to descend with the husband's estate, or is to be treated as a separate estate. They say:—"Neither with respect to this object"—namely, to change the succession —"nor, apparently, in any other way have the widows made any distinction between the original estate and the after-purchases." They now say:—"Where a widow comes into possession of the property of the husband, and receives the income, and does not spend it, but invests it in the purchase of other property, their Lordships think that, *primâ facie*, it is the intention of the widow to keep the estate of the husband as an entire estate, and that the property purchased would, *primâ facie*, be intended to be accretions to that estate. There may be, no doubt, circumstances which would show that the widow had no such intention, that she intended to appropriate the savings in another way. There are circumstances here which would indicate that it was the intention of the widows to keep the estate entire, and that they did not intend that the husband's estate and the subsequently purchased properties should go in a different line of succession, because their act, in what they did with regard to the defendant, was to make a gift to him of the whole of the property, and professing to do it so as to, what seems to be called, carry out the intentions of Sheodyal and found a Thakoorbari, with which the estate would be connected. The transaction appears to indicate that their intention was not to create separate estates, one to go in one way and another in another, but to keep the whole as one entire property; and applying what is said in the case of *Isridut Koer and Another* v. *Mussumat Hansbati Koerin and Others* to the present case, there do not appear to be circumstances which would show that there was any other intention than that the purchased property should be accretions to the inherited property. The High Court has found that, and their Lordships see no ground for saying that the Court has not come to a proper conclusion from the evidence." Affirmed with costs.

[*L. R.* 14 *Ind. App.* 63; *I. L. R.* 14 *Calc.* 387.]

Krishna Kishori Chowdhrani and Another *v.* Kishori Lal Roy.

Bengal. SIR BARNES PEACOCK. *Feb.* 16, 1887.

Proof of a document in the nature of a will. Loss of the original document not sufficiently proved. Secondary evidence: when is it admissible? Provisions of the Indian Evidence Act (Act I. of 1872), sect. 65, clause C. *Vide* also sects. 74 and 76. Effect of diverse accounts in different proceedings as to the loss of the alleged original *anumati-patra*. The plaintiff (respondent) claims to be entitled to half the estate which belonged to one Goluck Nath. Goluck Nath died leaving only a widow and two daughters. The plaintiff is the only son of one of those daughters, and would be, if there were no will disentitling him to the property, entitled to the half share which he seeks to recover in the action. But the defendant in the action sets up that in a power to adopt alleged to have been set out in an *anumati-patra* which Goluck Nath executed in the year 1840 he devised, in the event of no adoption being made, the half share, which would otherwise go to the plaintiff, to the other daughter and her son. Their Lordships are of opinion that the loss or destruction of the document not having been proved, secondary evidence was not admissible under clause C., sect. 65, of the Indian Evidence Act. There are, however, cases under that Act, in which secondary evidence is admissible even though the original is in existence. One of the cases is under sect. 65, letter *e*, "When the original is a public document within the meaning of sect. 74;" and another under letter *f*, "When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence." But in either of these cases "a certified copy of the document, but no other kind of secondary evidence, is admissible." If then the *anumati-patra* was a public document within the meaning of sect. 74 of the Act, which in their Lordships' opinion it was not, no secondary evidence would have been admissible except a certified copy. Where is the certified copy? The document which is set out at page 118 of the Record is not a certified copy. Their

Lordships therefore are of opinion that there was no sufficient evidence of the loss or destruction of the original, and no sufficient secondary evidence, within the meaning of the Evidence Act. Even if parol evidence were admissible as secondary evidence their Lordships cannot rely upon such evidence as was given in 1881 with reference to the contents of a document which had been executed forty years previously. Looking to all the evidence in the case, their Lordships are of opinion that the High Court, who gave a very carefully considered judgment, and weighed the evidence with great care, came to a right conclusion upon the evidence, that the will was not executed by Goluck Nath, and consequently that the plaintiff (respondent) is entitled to recover his half share, and that the judgment of the High Court ought to be affirmed with costs.

[*L. R.* 14 *Ind. App.* 71; *I. L. R.* 14 *Calc.* 486.]

Anthony Hordern and Another (trading as Anthony Hordern & Sons) *v.*
The Commercial Union Assurance Company.

New South Wales. LORD FITZGERALD. *Feb.* 18, 1887.

Action on an insurance policy. New trial granted on ground material question of fact was not submitted to jury. Appeal against rule for new trial dismissed, and new trial may therefore be had. Affirmed with costs. [For further proceeding in this matter, asking for definite directions as to what point or points the new trial is to be confined, see P. C. Ar., 14th December, 1887.] [56 *L. J. P. C.* 78.]

Pirthi Pal Singh and **Uman Pershad Singh** (sons of Hurdeo Buksh, deceased) *v.*
Jawahir Singh and Others.

(Two Appeals and a Cross-Appeal Consolidated.)

Oudh. SIR RICHARD COUCH. *Feb.* 19, 1887.

Joint family estate. Was it held in trust by Jawahir for other members of the family? Did the Act I. of 1869 (the

Oudh Rent Act) operate so as to change the relative conditions of the parties. Effect of finding of the Privy Council in an earlier suit. (*Vide Hurdeo Bux and Another* v. *Jawahir Singh*, L. R. 4 Ind. App. 178; L. R. 6 Ind. App. 161.) Claim on partition for accounts. Declaration that the appellants are to be co-sharers with Jawahir (the trustee) in the immoveable property on division of the family. *Dictum*:—"Any member of a joint Hindu family may sue for a partition of the estate, unless there is a family usage or a special law which makes it impartible."

The Judicial Committee held that by reason of their decision in 1879 (by which Jawahir Singh was declared trustee of the estates for the benefit of an undivided joint Hindu family), the Courts below were precluded in fresh suits from finding that Jawahir held the estate as an integral impartible one according to primogeniture, or, on the other hand, from finding that the plaintiff (the father of the appellants) was entitled to have his share on petition allotted to him as a sub-proprietor to Jawahir. Their Lordships held, however, that the plaintiff, now represented by his sons, the appellants, was entitled on partition to have accounts rendered by Jawahir to the extent of profits as a co-sharer of a one-third part. The law of limitation does not apply to these proceedings. Two principal appeals reversed, with costs. Cross-appeal affirmed, with costs. One of the suits remanded to India, so that the accounts of the joint estate should be taken. The costs of all the appeals are to be paid by Jawahir. [*L. R.* 14 *Ind. App.* 37; *I. L. R.* 14 *Calc.* 493.]

Attorney-General of Queensland *v.* Gibbon.

[*Ex parte.*]

Queensland. LORD HOBHOUSE. *Feb.* 19, 1887.

Appeal from the Legislative Council of Queensland under Constitution of Queensland Act (31 Vict. No. 38), sects. 23 and 24. Term of absence from duty permitted by the statute to a legislative councillor. Seat declared by the Judicial Com-

mittee to be vacated on the ground that permission to be absent for a year did not cover two successive sessions. Decision below reversed. Costs not asked for.

[*L. R.* 12 *App. Cas.* 442; 56 *L. J. P. C.* 64.]

Simbhu Nath Pandey and Others *v.*
Golab Singh and Another.

[*Ex parte.*]

Bengal. LORD HOBHOUSE. *Feb.* 26, 1887.

Sale in execution. Right and interest of a Hindu father in family property. Mortgage for a loan of money. Did the father intend to convey (or was it possible for him to convey therewith without the assent of other members of the family) the right and interest presently vested in others, namely, his sons? The duty of purchasers of family estate (the appellants) to inquire whether they are purchasing the whole family estate, or only a personal interest of one of its members. Special leave to appeal from a decree of the High Court reversing a decree of the Subordinate Judge of Bhagulpore. The Judicial Committee affirmed with costs the decision of the High Court. The language of the certificate of conveyance (which no doubt may be influenced by that of the Procedure Code) is calculated to express only the personal interest of the father. They do not think that a creditor who might be bargaining for the whole of a family estate would be satisfied with a document purporting to convey only the right and interest of a father. Moreover, the creditors in this case took no steps to bind the other members of the family, and the sum which passed for the purchase appeared to be nearer the value of one-sixth than the whole. See *Suraj Bunsi Koer* v. *Sheo Proshad Singh*, L. R. 6 Ind. App. 88; *Nanomi Babuasin* v. *Modun Mohun*, L. R. 13 Ind. App. 1; *Deen Dyal Lal* v. *Jugdeep Narain Singh*, L. R. 4 Ind. App. 247; *Hurdey Narain Sahu* v. *Rooder Perkash Misser*, L. R. 11 Ind. App. 26; and *Uporoop Tewari* v. *Lalla Bandajee*, I. L. R. 6 Calc. 749. Affirmed.

[*L. R.* 14 *Ind. App.* 77; *I. L. R.* 14 *Calc.* 572.]

Thayammal and Kuttisami Aiyan *v.*
Venkatarama Aiyan.

[*Ex parte.*]

Madras. SIR BARNES PEACOCK. *Feb.* 26, 1887.

Validity of an adoption made by a father's widow. Rights of a father's widow to adopt compared with his own son's widow's rights—to adopt or for other purposes. Suit instituted by the respondent to have it declared that an alleged adoption of the second appellant by the first defendant was invalid. The Judicial Committee affirmed both decrees below, and held that once an estate is vested in the son's widow, the power of a father's widow to adopt is at an end. See *Pudma Coomari Debi* v. *The Court of Wards*, L. R. 8 Ind. App. 229; *Mussummat Bhoobun Moyee Debia* v. *Ram Kishore Chowdhry and Another*, 10 Moo. Ind. App. 279.

[*L. R.* 14 *Ind. App.* 67; *I. L. R.* 10 *Mad.* 205.]

Waghela Rajsanji *v.*
Shekh Masludin and Others.

Bombay. LORD HOBHOUSE. *March* 3, 1887.

Deed of sale. Validity of a covenant as against a guardian's infant ward. Powers of guardian to make infant personally liable not greater under Indian than English law. Construction of Bombay Ahmedabad Talukdari Act (Act VI. of 1862), s. 12. Policy of the Act. Non-liability of ward personally. Non-liability of his estate. The appellant's mother, who was guardian for her son (now a talukdar) during his minority, executed a deed of sale in favour of the father and grandfather (now deceased) of the respondent. The deed was to secure payment of a sum of money. A prior suit was brought by the respondents or their ancestor to enforce the covenant entered into so long ago as 1858. That covenant arose in this way. The plaintiff (meaning the respondent's ancestor) was a creditor of the

appellant's father, and the debt appears to have been one for which the talukdari family estate might be made liable. Under those circumstances, in 1858, an account was stated of the amount due to the plaintiff, which was found to be Rs. 35,001. In lieu of enforcing the debt by decree and execution, the plaintiff took a conveyance from the mother and guardian of a certain extent of the family land. The validity of that transaction was challenged by the appellant after he came of age. It was the subject of the before-mentioned suit, which was brought in 1868, and the result was to establish that the transaction was a valid one, *bonâ fide* entered into by the guardian and within the range of her powers. There is therefore no question in the present suit as to the propriety or expediency of the sale which took place in 1858, but the question now is as follows. To quote from the judgment of the Judicial Committee: "The family claimed to hold the conveyed land rent free, and the guardian conveyed it *as rent free*, and their Lordships must assume that it was valued on that basis. The purchaser was not content with the assertion of the family that in point of fact they paid no rent, though that seems to have been the fact, but he took a covenant from the guardian to indemnify him in case the Government should enforce their claim to receive rent out of the estate, and that covenant is framed so as to bind both the guardian and the infant, who was nominally by his guardian a party to the deed. That the covenant bound the guardian there can be no doubt, but the question is, *whether it could bind the infant talukdar*. Unfortunately neither of the Courts below addressed themselves to this question, because they held that it had been already decided by the decree made in the prior suit." Their Lordships conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward, and they hold that in this case the guardian exceeded her powers so far as she purported to bind her ward, and that so far as this suit is founded on the personal liability of the talukdar it must fail.

The above, however, is "not the whole of the covenant. By way of security for its performance the deed gives a charge upon

the other talukdari estates, some specified wanta lands and giras lands, and the other property generally." Counsel for respondents "reasoned on that in this way. He said the land was valued as rent free; if it had been valued as subject to rent, the creditor would have insisted on having so much more of the land; therefore family land is saved by valuing as rent free the land actually taken, and it was not only reasonable but within the compass of the guardian's power to deal with the remaining family land of which she was manager, so as to make it a security to the creditor against his loss by the Government exacting rent. The argument is one which is worthy of great consideration, but their Lordships do not wish to pronounce any opinion on it, or to subject it to any minute examination, because, assuming it in favour of the respondent to be a sound argument, they are clearly of opinion that so far as regards the talukdari estate—and that is now the only part of the case which they have not dealt with—an answer to it is to be found in the terms of the Ahmedabad Talukdari Act VI. of 1862."

The present claim was to recover Rs.12,000, with interest, to satisfy Government revenue. The Subordinate Judge below held that the appellant was personally liable, but that his estate could not be charged on account of the terms of sect. 12 of the Talukdari Act. The High Court decided that he was liable both personally and as regards the talukdari estate.

The facts showed that the Government had claimed rent, but previous to that had, in accordance with the above-mentioned Act, put the talukdar's estate under management. This was shortly after the talukdar had come of age. The decision now to be given rested wholly on the construction of the Talukdari Act (particularly sects. 9 and 12), which was designed to set up talukdars in an unembarrassed state, and to restore them their land within a period of at most twenty years. It was an Act intended to deal with all notified debts and liabilities which could possibly impose a charge on the talukdar. Their Lordships considered that it was contrary to the policy of the Act that a burden like that claimed by the respondents could now lawfully lie against the estate. The liability did not exist when the management began; Government rent was not

then being demanded. Construing sect. 12 of the Act, the Judicial Committee say, "Then as to sect. 12, the debt must have been incurred at some time, otherwise it could not be recovered. When was it incurred? According to the reasoning of the High Court it never was incurred. There was no debt when the period of management commenced, and no debt was afterwards incurred, because there were proceedings to which the talukdar was no party, which converted the liability into a money claim. Their Lordships think that that is not the *meaning of the word* 'incurred' . . . . 'incur' means to run into, no doubt, but it is constantly used in the sense of meeting with, of being exposed to, of being liable to; and in that sense the talukdar did not incur debt. The liability was inchoate in the year 1858, and it reached its maturity some time between 1871 and 1875." Their Lordships proceed to say that if the claim was not a liability when the management began, it must have been incurred during the management, and that if so, under sect. 9, or, if not that section, under sect. 12, it cannot be now enforceable against the talukdar. They advised her Majesty to discharge the decrees of the Courts below, and dismiss the suit with costs, the respondents to pay the costs of the appeal. [In the judgment the Judicial Committee call the attention of the Courts in India to the irrelevancy of matter in the record.]

[*L. R.* 14 *Ind. App.* 89; *I. L. R.* 11 *Bomb.* 551.]

Petitions of the Trustees of Archbishop Holgate's School at Hemsworth and Others against a Scheme of the Charity Commissioners relating to that Foundation and other Charities.

The Lord Chancellor. *March* 5, 1887.

Endowed Schools Act, 1869. The petitioners objected to the removal of site from Hemsworth to Barnsley, as not being within the scope of the Act. The Judicial Committee hold that such removal is within the powers of the Commissioners. (*Vide* sect. 9; also the preamble of the Act.) Other objections were

raised with respect to conscience clauses and the effect of a Chancery scheme of 1861 upon the foundation, also with reference to the "due regard" clauses. Sect. 11 of the Endowed Schools Act, 1869, and sect. 5 of the Endowed Schools Act of 1873. Construction of Holgate's Statutes. "*Husbandmen or men of occupation*" defined to be *the poor of a parish*. Limitation with regard to elementary schools inserted in scheme meets claims of the poor. Petition by parents of children, but who had no boy at the school at the passing of the Act in 1869. No *locus standi*. Both petitions dismissed. Scheme approved.

[12 *App. Cas.* 444; 56 *L. J. P. C.* 52.]

Somerville *v.*
Paola Schembri (for the firm of Schembri & Navarro) and Another.

Malta. LORD WATSON. *March* 5, 1887.

Malta trade-mark case. "Kaisar-i-hind" cigarettes. No law in Malta for registration of trade-marks. Rights of parties therefore depend on the general principle of commercial law. The appellant in the suit had cited the respondents to show cause why the property of the trade-mark "Kaisar-i-hind" should not be assigned to him to denote his particular class of cigarettes; why the respondents should not be restrained from using the said mark in their trade as tobacco merchants; and claimed damages. Respondents contended that the appellant had not acquired exclusive title, and alleged that they used the name "Kaisar-i-hind" in such a way that it was impossible for a purchaser to suppose that their cigarettes had been manufactured by the appellant's firm. At the trial below in the first Court (the Commercial Court) the respondents produced evidence in proof that the term "Kaisar-i-hind" had, before the date of these proceedings, been extensively used in connection with ships, hats, pickles, &c. That tribunal decided in favour of the appellant, but reserved the question of damages till the finding of that Court became *res judicata*. It affirmed the *absolute right*

of the appellant to use the trade-mark, and restrained the respondents from "using it in their trade, or assuming it *in any other manner.*" The Court of Appeal reversed the decision of the Court of Commerce, and dismissed the action. The Judicial Committee could not concur with the Court of Appeal, and reversed their decree. They also reversed the decree of the Court of Commerce, save as to reservation of damages. In their Lordships' view the decree of the Court of Commerce was couched in terms too wide. The result on this appeal would be that it be declared the appellants had established an exclusive right to the title "Kaisar-i-hind" *for cigarettes*, and the respondents would be restrained from using the label objected to or the trade-mark in question in connection with cigarettes. The respondent P. Schembri, who had taken the leading part in the litigation, would have to pay the costs in both Courts below and of this appeal. Authorities:—*Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 538; *Johnston & Co.* v. *Orr-Ewing & Co.*, 7 App. Cas. 219.

[12 *App. Cas.* 453; 56 *L. J. P. C.* 61.]

Zalim Singh and Others *v.*
Bal Kishan.

N. W. P. Bengal. Lord Fitzgerald. *March* 8, 1887.

Adoption. The question was whether the respondent Bal Kishan was or was not adopted by one Bijai Singh, his granduncle. If he was validly adopted, then he became the heir to Bijai's zemindary, to the exclusion of the appellants (plaintiffs), who were next in succession if there had been no adoption. A compromise had been arrived at by the parties for a division of the property, which might possibly have been supported as an equitable family agreement. The plaintiffs, however, advised by some third party, broke this amicable arrangement. They instituted this suit, and insisted that the boy was never adopted. Their Lordships affirmed the decree of the High Court. They considered that the evidence as to ceremony, &c., and the evidence

generally on behalf of the boy, made it beyond doubt that the adoption was good. Further, they did not shut their eyes to the circumstances that the boy had lived in the house with his grand-uncle, had been made much of by him, and was not only a blood relation, but the nearest actual relation to him. Affirmed with costs. [*P. C. Ar.*]

Pettachi Chettiar and Others *v.* Sangili Veera Pandia Chinnathambiar.

Madras. SIR BARNES PEACOCK. *March* 10, 1887.

Sale in execution. What was the nature of the right, title, and interest acquired under the sale certificate by the purchaser? The appellants, who claimed as transferees of the purchaser, sought to have it found that the zemindary passed to them absolutely by the sale. The son of the debtor, who is respondent, on the other hand declared that what was sold and agreed to be sold was only his father's life interest. Both Courts below found that nothing passed by the sale but a right to recover the rents due and unpaid at the death of the father, the late zemindar. This finding their Lordships wholly agreed with. Affirmed with costs.

[*L. R.* 14 *Ind. App.* 84; *I. L. R.* 10 *Mad.* 241.]

Anangamanjari Chowdhrani and Others *v.* Tripura Soondari Chowdhrani and Others.

Bengal. LORD WATSON. *March* 11, 1887.

Rival claims to re-formed chur land. The re-formation lies between the properties of the disputants. Importance of prior possession. *Second or special appeal.* The question at issue was whether land was upon a particular site at a particular moment. The respondents contended that the fact of possession for a greater or less period by the appellants was not admissible evidence. The first Court held that identity of the land was proved by the

appellants. On appeal the District judge also gave a decision in favour of the appellants, but on the ground not of identity, but of prior possession. The appellants, he declared, had held adverse possession for more than twelve years before ouster by the respondents under a decree in 1873. The High Court judges, on an appeal to them, remanded the case back to the District Court for a finding on the issue of identity. That Court then decreed that the first Court's decision was correct. On the matter coming up again, the High Court pronounced against the appellants. The Judicial Committee in their judgment review the High Court's last decision thus: "The grounds upon which the learned judges of the High Court came to that conclusion are very distinctly expressed in their judgment. They are twofold; and in the opinion of their Lordships, neither of these grounds is sufficient to sustain the judgment which was pronounced. They came, in the first place, to the conclusion that Mr. Peterson (the District judge) who last disposed of the case, had fallen into the same error as his predecessor, and, instead of dealing with the identity of this disputed parcel with one or other of the two shares of the mouzahs in question, had disposed of the case on the footing that the plaintiffs (the appellants) had enjoyed prescriptive possession, which vested them with a good title as against the defendants. The learned judges say, 'The judgment now before us contains a finding by the Court that, prior to the ouster by the appellants (*i.e.*, the respondents), the plaintiffs had a sufficiently long and continuous possession of the chur lands to confer upon them a title to it.' Their Lordships are of opinion that the learned judges erred in supposing that the judgment of Mr. Peterson contains any finding to that effect. Then, having come to the conclusion that Mr. Peterson had erred in the same way as his predecessor, and had not dealt with the proper issue in the case, they (the High Court) proceed to consider whether they ought to remand the cause for the purpose of having that third issue (is the re-formed land on the property of the plaintiffs or the defendants?) tried. They came to the conclusion that it was unnecessary to do so for these reasons: 'As there is no evidence

in the case as to the date or site of the re-formation, and the Court below has no materials upon which it could come to a finding on the third issue, it would be useless to send this case down again to the lower Court.' They came to a conclusion the very reverse of that at which their predecessors, who remanded the case, arrived; they were of opinion that there was evidence bearing upon the subject-matter of the third issue, which ought to be disposed of by the judge in the Court below. The High Court on this last occasion came to the opposite conclusion, that there was no evidence whatever which was fit for the consideration of the Judge, or had any bearing on that issue. It must be borne in mind that the decree appealed from to the High Court on this occasion being a decree after remand, *on a second or special appeal*, the learned judges had not, and accordingly they did not profess to have, jurisdiction to deal with it on its merits. But it was, in the opinion of their Lordships, within their jurisdiction to dismiss the case, if they were satisfied that there was, as an English lawyer would express it, no evidence to go to the jury, because that would not raise a question of fact, such as arises upon the issue itself, but a question of law for the consideration of the judge. Their Lordships are very clearly of opinion that the reasons assigned by the learned judges cannot be sustained. They are of opinion, with the judges who made the remand, not only that there was an issue proper to be tried, but that there was evidence in support of that issue, or bearing upon that issue, which was proper to be considered and disposed of by the District judge. The theory upon which the learned judges who last disposed of the case proceeded, so far as one can gather from their observations, appears to have been this: *that evidence of possession is not receivable as evidence of the identity of a piece of ground; that, in other words, evidence of possession is not material or good evidence in a question of parcel or no parcel.* Perhaps they did not go quite so far as that, but they certainly go the length of indicating their opinion that evidence of subsequent possession is not good evidence upon the question of parcel or no parcel at a previous date. To countenance that proposition would be to introduce

an entirely new rule into the law, and their Lordships do not think that a judgment resting upon such a ground can be upheld. When the state of possession for a long period of years has been satisfactorily proved, in the absence of evidence to the contrary, *præsumitur retro*. In the present case there is evidence to prove possession by the plaintiffs for a considerable period antecedent to February, 1873. Whether it is sufficient to establish the plaintiffs' possession, and whether, if established, that possession is sufficient to warrant the inference of fact derived from it, are questions upon the merits of the case. The evidence has been disposed of by the Judge below as a court of appeal, after careful consideration, and upon the merits his judgment was final in the High Court, which was sitting upon a second appeal, and is final and binding upon this Board." Decree of High Court reversed with costs. Judgment of Mr. Peterson affirmed, and the appeal to the High Court dismissed with costs.

[*L. R.* 14 *Ind. App.* 101; *I. L. R.* 14 *Calc.* 740.]

McGreevy *v.*
Russell.

Canada. Lord Hobhouse. *March* 16, 1887.

Validity of a claim for money alleged to be due. Contract. Was there consideration? The action was instituted by the respondent William Augustus Russell to recover $33,333.33. Both Courts below found in his favour. The Judicial Committee in their judgment say: The facts which raise the question in this case are exceedingly simple. It appears that one Willis Russell had a claim against the North Shore Railway Company for promoter's expenses. Whether the claim was one actually enforceable at law is a point which their Lordships do not think it necessary to go into now. It was a pending claim. The company had not rejected it; and though they had not admitted it at the time when the transaction took place between Willis Russell and the present appellant, Mr. McGreevy, it was still a claim

preferred against them on at least plausible grounds. Under those circumstances, the appellant contemplated taking up the work of the company for a lump sum to be paid by the Government, and taking upon himself the whole of the obligations of the company. That was effected in September, 1875. In March, 1875, he purchased from Willis Russell the claim which is stated at $50,000. Nothing can be more explicit than the description of the subject-matter sold by Willis Russell to the appellant. Willis Russell assigns "all his right, title, interest, claim, and demand whatsoever which he has in and to a certain claim made by him against the North Shore Railway Company," which is then described, "for the sum of $50,000, said claim contained in a printed pamphlet, and in three affidavits then lately filed with the secretary of the said company." That is the subject assigned, and it is stipulated that the assignment shall be without any warranty whatever, even as to the claim being due, or being rejected, or being not paid. The defence to this action is grounded on the suggestion that there is no valuable consideration in this contract. It is not contended at the bar, and is not the case, that there is any difference between the French law and the English law upon this subject. Is there then what the law recognises as a valuable consideration in this contract? Any benefit to the assignee, or any loss to the assignor, is such a consideration. And their Lordships think that, whether it be looked at as a benefit proceeding to the assignee, or as a loss imposed upon the assignor, who parts with his claim, there is clearly a valuable consideration in this assignment, and that is sufficient to support the action. But that is not the whole of the case. The sum of $50,000 which the appellant stipulated to pay, was to be paid in three equal annual payments. When the year came round for the first instalment to be paid, it was not paid, and it was not paid for two years. In April 1877 an agreement was come to between the respondent (William Augustus Russell), who purchased from Willis Russell the benefit of his contract with the appellant, that the respondent should take the payment of the first instalment in two promissory notes payable at a future date, and that in case those promissory

notes were paid at their maturity, he would not insist upon the payment of the balance for a year from the date of the fresh agreement. That appears to their Lordships also to be a valuable consideration, because the respondent has given the appellant time to pay the sum that he had agreed to pay in March, 1875, and the appellant has had the benefit of that time. The result is that their Lordships agree with the Courts below. Appeal dismissed, the appellant to pay the costs. [*P. C. Ar.*]

In re Abraham Mallory Dillet.

British Honduras. LORD WATSON. *March* 19, 1887.

Appeal in a criminal matter. Appeal of a barrister of the Inner Temple against an order striking him off the roll of practitioners in British Honduras and against a conviction for alleged perjury.—1. Disregard of the forms of legal process; 2. Some violation of the principles of natural justice; or 3. Where substantial and grave injustice has been done, are grounds for invoking Her Majesty in Council to traverse the usual rule invariably followed not to review or interfere with the course of *criminal* proceedings. Special leave to appeal granted. When appeal came on to be heard, following questions were dealt with:—Procedure of the trial. Charge of the Chief Justice and directions severely animadverted on. Conviction quashed and appellant ordered to be restored to the roll of advocates. A copy of their Lordships' judgment to be communicated to the Secretary of State for the Colonies. Reversed. [12 *App. Cas.* 459.]

Abdool Hoosein Zenail and Another *v.*
Turner (Official Assignee).

Bombay. SIR BARNES PEACOCK. *March* 30, 1887.

Validity of a payment under a compromise. *Bona fides.* Suit by the official assignee (the respondent) of the estate of

one Aga Mahomed Rahim Shirazee to recover from the appellants, who were the heirs of one Hajee Zenail Abadeen, the sum of one lac and a half of rupees together with interest, which sum it was alleged had been wrongfully paid to Zenail in the course of a settlement by compromise of the pecuniary disputes of two Persian families. The settlement happened in 1875, the disputes, however, had extended back for fifty years and were at one time (1847) the subject of an appeal to Her Majesty in Council. The main questions in the present suit were: 1st, whether Zenail, at the time of the compromise, while admittedly acting as agent for the family of the insolvent Aga Mahomed Shirazee, so acted in any fiduciary capacity in receiving a lac and a half of rupees out of the assets; and 2ndly, whether it was lawful for the Courts below, after one charge of alleged fraud had been heard, to allow a substituted charge not alleged in the plaint to be gone into and become the ground of a judgment. The Judicial Committee reversed the judgment of the High Court. They concurred in that part of the finding of the first Court to the effect that Zenail did not hold any fiduciary position towards the suitor who was official assignee at the time of the compromise. He assisted in the proceedings then going on, but was not guilty of any concealment, nor had he a *locus standi* in the Court. He, no doubt, gave very valuable assistance acting (as he was well known by the then assignee to be acting) throughout on behalf of the heirs and representatives of Aga Mahomed, and possibly of himself as having made advances for conducting the suit, and not on behalf of the creditors. Further, it was not likely that the Court would have inquired whether the decree was likely to be beneficial to the creditors when all the parties to the suit consented to have it dismissed. With reference to the amendment of the plaint by introducing a new and distinct charge (namely, that the said payment was a fraud upon the Court, and that the assignee had no power such as would be binding on his successor to consent to it), after evidence given and the case closed, their Lordships feel bound to say that the allowance of it was contrary to every principle of justice. It was wholly unprecedented. It is a well-known rule that a

charge of fraud must be substantially proved as laid, and that when one kind of fraud fails another cannot be substituted for it (*vide Montesquieu* v. *Sandys*, 18 Ves. jun. 302; see also p. 314). Decree of High Court reversed, with the costs in that Court, and decree of first Court affirmed. Respondent to pay costs of appeal. [*L. R.* 14 *Ind. App.* 111; *I. L. R.* 11 *Bom.* 620.]

Mylapore *v.*
Yeo Kay and Others.

Rangoon. SIR BARNES PEACOCK. *June* 14, 1887.

Title under a will. The right of the appellant to sue as devisee for title to an estate (certain lands and buildings in Rangoon). Is the suit barred by Limitation Act XV. of 1877, Article 140, Second Schedule? Cause of action, whence derivable (*vide Eschenkunder Singh* v. *Shamachurn Bhutto*, 11 Moo. Ind. App. 7). The Judicial Committee agreed with the Court of the Recorder that the suit was barred. Affirmed, with costs. [*L. R.* 14 *Ind. App.* 168; *I. L. R.* 14 *Calc.* 801.]

Meenakshi Naidoo *v.*
Subramaniya Sastri.

Madras. SIR RICHARD BAGGALLAY. *June* 16, 1887.

Election to the committee for the management of a temple. Provisions of the "Pagoda" Act (Act XX. of 1863). Was there jurisdiction in High Court to entertain appeal from District Court on a question which, under the Act, was a matter of pure discretion with the District Judge. Can there be a waiver of a right to complain of a want of jurisdiction where no jurisdiction exists? (*vide Ledgard* v. *Bull*, 13 L. R. Ind. App. 144). The petition of appeal to the High Court instituted by persons who were either intended as candidates, or were in favour of other candidates. The substantial grounds of the

appeal were that the Madura temple was devoted to the worship of Siva, and that the present appellant was a Vishnuite. The High Court, agreeing with the petitioners, discharged the order of the District Judge. The question has now for the first time been raised whether the High Court had jurisdiction to deal by way of appeal with the order of the District Judge. Such a question was not raised until an application for leave to appeal to the Queen in Council. It was, however, then too late for the High Court to entertain the matter. The case was now brought by special leave to appeal before the Judicial Committee. Decision of District Judge confirming the election of the appellant is now affirmed, and the appeal of the respondents to the High Court is dismissed. Upon a review of the Pagoda Act, their Lordships were clear that the High Court had no jurisdiction, nor in a decision of this nature is there an appeal under the general law. Act X. of 1877 and Act XII. of 1879 considered. It was impossible to bring the order of the District Judge under the definition of a "decree." On the second plea of the respondents, namely, whether the appellants by the course they pursued in the High Court had waived the right which they might otherwise have had to raise the question of want of jurisdiction, the Committee declared that no amount of consent under such circumstances could confer jurisdiction where none exists. There was therefore no *waiver*. Reversed with costs. The appeal to the High Court dismissed, without costs. No costs of appeal.

[*L. R.* 14 *Ind. App.* 160; *I. L. R.* 11 *Mad.* 26.]

Babu Bindeshri Parshad *v.*

Mahant Jairam Gir.

N. W. P. Bengal. Sir Richard Couch. *June* 17, 1887.

Claim by appellant for a decree for specific performance of agreement for sale of an estate. Act I. of 1877. Failure of purchaser to pay the purchase-money in full within limited time. What interest was for sale? Did the contract of sale give the

purchaser a right to insist on formal covenants including an absolute warranty of title? Both Courts below refused the decree for specific performance, and the Judicial Committee upheld these decisions. Affirmed with costs.

[*L. R.* 14 *Ind. App.* 173; *I. L. R.* 9 *All.* 705.]

The Commissioners for Railways *v.*
Hyland and Others.

New South Wales. LORD HOBHOUSE. *June* 17, 1887.

Merchandise rates (framed by Government) to be charged for goods conveyed by railway. The action was instituted by the respondents against the appellants to recover overcharge for the carriage of wines, the product of South Australia, by railway from Hay to Sydney. The Supreme Court gave a verdict for 550*l.* to the respondent. A new trial was refused—hence the appeal. The whole question depended upon the meaning to be given to the term "colonial wine." The appellants contended that it meant wine which was the product of New South Wales alone. The respondents, on the other hand, said that the term applied to wine produced in any of the Australian colonies. The term occurred in a table of merchandise rates. When used in Acts of Parliament and legal documents of the colony of New South Wales, and intended to mean only wine produced in that colony, the term is expressly defined in such Acts or documents to mean wine produced in New South Wales alone; when not so defined it had its ordinary and broader meaning. The Judicial Committee affirm the order of the Supreme Court, and dismiss the appeal, with costs.

Their Lordships are led to think that the larger meaning must be attached to the words by three considerations. The first is that the expression "colonial" in the general conditions has, as they think, the larger meaning. It is not quite without difficulty there, but the word "foreign," where it is used of gold or silver coin, clearly means everything that is not gold or silver

coin of the realm, and therefore does not include colonial gold or silver coin. Using "foreign" in the same sense where it occurs in the second passage—the passage "English, colonial, or foreign"—then the word "colonial" must be taken to embrace all the colonies, otherwise the distribution of stamps into "English, colonial, or foreign," would not be an exhaustive distribution, which it is evidently intended to be. That is one reason. Then they think that there is substance in the argument that if the Government intend to impose a charge they should impose it in clear language, and, if the language is found to be ambiguous, it must be construed in favour of those on whom the charge is sought to be imposed. Their third reason is that they find that for some years—it does not appear how long—the wine of South Australia was conveyed at the lower rate of charge which the regulations impose on colonial wine, and they look upon that practice as a sort of contemporaneous exposition of the ambiguous document, which is of value in construing it now. [56 *L. J. P. C.* 76.]

Gera *v.*
Ciantar.

Malta. LORD WATSON. *June* 18, 1887.

Legitimation. Right of succession to real estate in Malta under a *fidei commissum* or entail created by will. Code Rohan. Roman law: Justinian (Nov. 89, cap. 2, and Nov. 89, cap. 15). The chief question in the appeal related to the validity or otherwise of a decree and act of legitimation, whereby the respondent purported to be created the legitimate and natural son of his father, Paolo Antonio Ciantar (himself a legitimated son of one Paolo Ciantar), and as such claimed the properties. The appellants (the plaintiffs), represented by attorney, claimed inheritance as next of kin by blood to Paolo Ciantar, and contended that they had a better right to the properties to the exclusion of the respondent.

In the year 1801, the testator, Paolo Ciantar, who was at

that time a married man, had a son, afterwards named Paolo Antonio, born to him by a single woman. The testator had no lawful issue, and in October, 1810, he presented a petition to the Governor of Malta, praying his Excellency to declare his illegitimate child to be his son, "so that the said Paolo Antonio, *quibuscumque non obstantibus*, to the exclusion of whatsoever person, may succeed to your petitioner *ab intestato*, or by will, and enjoy all the honours and effects of law and grace." After receiving a favourable report from the Civil Judge, to whom the application was remitted for inquiry, his Excellency, on the 7th November, 1810, granted the prayer of the petition. Thereafter, upon the 23rd November, 1810, the testator executed a formal notarial act, by which, after narrating the procedure which had taken place, and the fiat of the governor, he accepted and recognised Paolo Antonio as his legitimate son, "giving and granting to the said Paolo Antonio ample, full, and free power and authority to exercise whatsoever acts of such legitimation, and to succeed to his property and rights, either by will or *ab intestato*, as he *de jure* might or should succeed if he was born his legitimate and natural son and born of lawful marriage."

The wife of Paolo Ciantar died in January, 1812, and on the 30th May of that year he executed the will in question, by which his legitimated son, Paolo Antonio Ciantar, was nominated as his universal heir. The testator, however, directed that Paolo Antonio should be a pure and simple usufructuary heir during his lifetime of the hereditary real estates, without the power of disposal either *inter vivos* or *mortis causâ;* and that after his death these estates should "go to the children and other descendants, legitimate and natural, of his said son and universal heir." In the event of his son dying without leaving children or other descendants, legitimate and natural, these estates were devised, "free from any entail, to the testator's nearest next of kin according to the rules of succession *ab intestato*, and not otherwise."

The testator did not long survive the execution of his will; and on his death, Paolo Antonio entered into possession of the

hereditary real estates, of which he enjoyed the usufruct until his decease in 1877. Paolo Antonio was married in 1815 to Carolina Theij, and they had one child, who died in 1818. In the year 1833, during the subsistence of their marriage, he had a son named Eduardo, the respondent in this appeal, by Teresa Izzo, a single woman. In August, 1839, being then without lawful issue, he presented an application to the Third Hall of the Royal Civil Court of Malta and its dependencies, setting forth his desire of recognizing the respondent, so that he might enjoy all the rights and privileges attributed by the law to legitimate and natural children, and craving the permission of the Court "to enter into an act of legitimation in favour of the said Eduardo, his natural son, for all the effects of law, and in the best manner which the law allows." The Court, after obtaining the necessary information, granted the required permission, and appointed the act of legitimation to be made with the intervention of the Judge. Accordingly, on the 31st August, 1839, Paolo Antonio Ciantar appeared before one of her Majesty's judges, sitting in the Third Hall of the Royal Civil Court, and executed an act of legitimation, by which he declared the respondent to be his legitimate and natural son, and gave and granted him, *inter alia*, full power and liberty "to succeed him, his father, both by will and *ab intestato*, to all and whatsoever his property, ... as if the said Eduardo had from the beginning been born natural and legitimate."

It may be proper to notice here, because they are circumstances relied on by the appellant, that the proceedings in 1839, with a view to the legitimation of the respondent, were conducted *ex parte*, in so far as no one representing the next of kin of the testator Paolo Ciantar was cited as respondent; and also that, neither in the petition to the Third Hall, nor in the written proceedings which followed upon it, was the fact disclosed that, at the time of the respondent's conception and birth, his father Paolo Antonio Ciantar was a married man.

Upon the death of his father, in 1877, the respondent assumed, and he still retains, possession of the real estates settled by the will of Paolo Ciantar.

The plaintiffs, who are represented by the appellant Giovanni Gera, allege themselves to be four of the five nearest next of kin by blood, in equal degrees, to the testator, who were living at the time of his son Paolo Antonio's decease; but the respondent does not admit that their relationship to the testator has been proved. In the libel filed on their behalf in the First Hall of the Civil Court, on 13th October, 1877, they claim from the respondent four fifth shares of the real estates, with a corresponding proportion of mesne profits. The Judge of the First Hall, on 2nd January, 1880, held that they had established their propinquity to the testator; that the legitimation of the respondent in 1839 was, according to Maltese law, invalid; and gave them decree in terms of their libel, restricting their claim for mesne profits to rents accruing after the 5th April, 1878. Upon appeal to the Second Hall, the learned judges of that Court reversed his decree, and gave judgment for the respondent. They were unanimously of opinion that the legitimation of the respondent was valid, and that he was consequently entitled to take, under the will of 1812, as the legitimate and natural child of Paolo Antonio Ciantar. In that view, it became unnecessary to decide whether the appellant's constituents had proved their title as nearest next of kin to the testator.

Their Lordships of the Judicial Committee dwelt at length (and their remarks, slightly abbreviated, are given hereunder) on the history of the process of legitimation in Malta. Legitimation *per rescriptum principis* was first introduced into the written law of Rome by the Emperor Justinian (Nov. 89, cap. 9). After the dissolution of the Roman Empire the principle was adopted by Christian states, but in course of time it became subject in different countries to various modifications. It does not seem to admit of doubt that after the Island of Malta was granted by Charles the Fifth to the knights of St. John, the Grand Master of the Order became imperator in the fullest sense of the word. During the eighteenth century there are instances of his exercising the power of legitimation, and in 1784 the Code Rohan, which still forms the basis of the municipal law of Malta, was enacted by the Grand Master whose

name it bears, with the advice of his council. When Malta, in 1800, became a British possession, His Majesty's Governor administered the law of legitimation, of which the case of Paolo Antonio Ciantar is an example. By an Ordinance, dated the 25th May, 1814, the governor reconstituted the civil and criminal tribunals of the island, and, *inter alia*, declared that the Third Hall of the Civil Court should in future "perform all acts of voluntary jurisdiction hitherto performed by the Civil Judge, or by the government, on a petition from the party and a report from the Civil Judge." It is in virtue of the jurisdiction so conferred upon them that the judges of the Third Hall now exercise the power of sanctioning acts of legitimation.

The argument addressed to their Lordships on behalf of the appellant may be summed up in these propositions: that, according to the civil law, and also according to the municipal law of Malta, the respondent was *natus ex nefario coitu*, so that his legitimation could not be obtained in ordinary course of law, but required a special dispensation from the sovereign authority; that, assuming the legitimation of bastards who were *nefarii* to have been within the competency of the supreme authority in Malta prior to 1814, no such dispensing power was given to the Third Hall of the Civil Court by the ordinance of that year; that assuming the Court to have had the power of granting legitimation to the respondent, he is nevertheless by law incapable of taking the estates settled by the will of Paolo Ciantar, in prejudice of the substitution to the testator's nearest next of kin; and lastly, that the authority of the Court was surreptitiously obtained by Paolo Antonio Ciantar in 1839, and that the decree and notarial act of legitimation are therefore null. All these points were fully and ably argued by counsel before their Lordships. Copious reference was made to treatises on the civil law by Italian, Spanish, French, and Dutch jurists of eminence, and also to the decisions of the Rota Romana. At the conclusion of the argument for the appellant, their Lordships were clearly of opinion that the case depends upon the municipal law of Malta, and that the judgment appealed from is in strict accordance with that law.

Their Lordships in continuation of their judgment say: "That it was the practice of the British governor of Malta, and afterwards of the Third Hall of the Civil Court, to confer the *status* and privileges of legitimacy (so far as allowed by the Code) upon children born, like the appellant, *ex uxoratò et solutâ*, is attested by the cases which have been put in evidence. In point of fact, the governor and the Court have, in such cases, successively exercised the same power of conferring legitimacy which admittedly belonged to the Grand Master. The respondent and his father Paolo Antonio were illegitimates of the same class. Whatever may have been the case in regard to the respondent, it is obvious that the whole circumstances of his father's birth were known to the Civil Judge, to whom the petition of Paolo Ciantar was referred for inquiry. The learned Judge reported in favour of the application, upon the special ground that 'such a benefit is not in these days customarily denied either to spurious, adulterous, or even to incestuous children;' and acting upon that advice the governor granted the prayer of the petition." Their Lordships review many recorded cases of legitimation which are conclusive, they declare, in regard to the practice followed by the Court between 1814 and 1839; but it is a necessary consequence of the appellant's argument that, in every one of them, the Court exceeded its jurisdiction, and usurped the sovereign authority of the state. Their Lordships are unable to come to that conclusion. If the granting of legitimation to children in the position of the respondent had been a matter wholly dependent upon the arbitrary exercise of Imperial power, it might have been plausibly contended that the right was a prerogative of, and could not be severed from, the supreme authority. But this was not the case in Malta. An application for the legitimation of a child, whether born *ex conjugato et solutâ* or of two persons free to marry, was a *quasi*-judicial proceeding, and was disposed of by the head of the State, upon well-recognized considerations, and with the assistance and advice of a judge of the Civil Court. Power or jurisdiction of that kind may, with perfect propriety, and without any violation of constitutional

principles, be delegated to a court of justice. Their Lordships do not doubt that the exercise of such jurisdiction was within the competency of the Governor of Malta, or that he had the power to transfer it to the Civil Court. In their opinion, the terms of the Ordinance of 1814 are so framed as to give jurisdiction to the Court in the case of every petition for legitimate rights, which, according to previous practice, would have been referred to a judge for inquiry and report by the Grand Master or the governor. The practice of remitting to a judge in such cases as that of Anna Maria Dibarro in 1771 (cited in the argument), or that of Paolo Antonio Ciantar in 1810, being sufficiently established, it necessarily follows that, in 1839, the Court had jurisdiction to grant legitimation to the respondent.

Dictum.—" '*Illegitimate*' *is not a term confined to any particular class of bastards*, it includes every child born out of lawful wedlock, irrespective of the character of the connection to which it owes its birth." Dealing with the argument of the appellant that the next of kin ought to have been cited during the proceedings of 1839, their Lordships say, "A petition for the legitimation of a child is not a proceeding *in foro contradictorio.* It is an appeal to the voluntary jurisdiction of the *princeps* or of the Court. No case has been referred to, since the date of the Code Rohan, in which persons whose interests might be affected by the legitimation were cited as parties, or have appeared for their interest." As to the alleged non-disclosure of Paolo Antonio's marriage, their Lordships observe the fact does not appear in the petition or the decree of Court, which, together with the notarial act, form the written record of the proceedings. The decree bears that the Court, before granting the prayer of the petition, had "obtained the necessary information," but what that information was nowhere appears. Presumably, such information comprehended full details as to the position of the father, &c. It is impossible to affirm that the Court was in ignorance of the fact, or even that it was probably ignorant. In these circumstances their Lordships are of opinion that the presumption *omnia rite et solenniter acta* applies. It would be contrary to all principle to set aside a decree affecting *status*,

after the lapse of thirty-eight years, upon such slender and conjectural grounds. Besides, their Lordships are by no means satisfied that, if it were substantively proved that the judge who gave the decree had no knowledge of Paolo Antonio's marriage, the decree ought therefore to be set aside.

Their Lordships advised her Majesty that the judgment appealed from ought to be affirmed, and this appeal dismissed, with costs to be paid by the appellant.

[12 *App. Cas.* 557; 56 *L. J. P. C.* 93.]

Uman Parshad *v.*
Gandharp Singh.

Oudh. Lord Hobhouse. *July* 6, 1887.

Claim by appellant to succeed by heirship to certain villages. Real or benami transactions. Evidence. Wajib-ul-arz papers. Necessity of Government rules under which such documents shall be framed. Danger of fictitious documents getting on these village records pointed out. Their Lordships reverse the decision of the Judicial Commissioner, and direct the appeal to him to be dismissed with costs. On the evidence, they considered that the conveyances were valid and not benamidar, and that the appellant should succeed. Main question was whether two sale deeds, executed by one Gulab (the absolute owner of the villages) in favour of her son-in-law Bissessur Baksh, husband of her only daughter, whose heir the appellant claimed to be, were valid. The respondent declared that the deeds were benami transactions, and never intended to pass title; that on the death of Gulab her daughter succeeded; that this daughter by gift conveyed the villages to her daughter; and that the respondent, as the last-mentioned lady's husband, was the true heir. The respondent also said that with the consent of his wife he was in possession. Respondent to pay costs of appeal.

[*L. R.* 14 *Ind. App.* 127; *I. L. R.* 15 *Calc.* 20.]

The Heirs Hiddingh *v.*
De Villiers, Denyssen, and Others
(Appeal).
Willem Hiddingh *v.*
Denyssen and Others; and
Denyssen *v.*
Hiddingh
(Appeal and Cross-Appeal).

Cape of Good Hope. Lord Hobhouse. *July* 9, 1887.

Executors. Duties. Liabilities. Discretion. Time within which executors should realize investments. Liability of the South African Association for the Administration and Settlement of Estates, in regard to beneficiaries under the will of Petrus Hoptede Hiddingh. Question whether the said Association had acted with due diligence for the benefit of the beneficiaries in the sale of shares entrusted to them. There was a principal appeal and an appeal and cross-appeal, all of which were consolidated, and all of which lay between persons entitled to the estate of Petrus on the one hand, and his executors or administrators on the other. The first or principal appeal, brought by the four of the children heirs of Petrus, raised the question as to the right of the plaintiffs (appellants) to recover damages against the Association for alleged neglect in selling and disposing of the shares with due diligence and within a reasonable time after the death of the testator, also after a demand to do so was served upon them. The appellants also, as a second plea, asked to have certain liquidation accounts framed by the respondents in October, 1883, amended by the striking out of the said accounts certain items charged therein for advertising and calling for tenders for the shares and for interest paid to the purchasers of the said shares; and thirdly, they asked to have the costs of the action paid by the respondents. The Association (the respondents) contended that the estate had been administered with due diligence, and the decision of the Supreme Court was in their favour, that Court holding that the executors did no

more than exercise a discretion vested in them under bye-laws sanctioned by statute.

Their Lordships agree with the Court below that the *onus* lies on the executors of proving that they acted *bonâ fide* and exercised a reasonable discretion. Against their good faith not an insinuation has been made. But, in their Lordships' opinion, they have not proved that they exercised reasonable discretion. The nature of the investments was such as to demand conversion; the executors made no effort to realize between December, 1881, and July, 1883; the state of the market was such as to create alarm, and the length of time was excessive.

On these grounds the executors must be held liable for loss, and then the question is, what loss? The rule in England is, that if the executor fails within a reasonable time to convert investments which require conversion, the end of a year is, in the absence of circumstances pointing to a different date, to be taken as the time for ascertaining the value which he ought to have got. Their Lordships have given their reasons for fixing an earlier date in this case, and they adopt the Chief Justice's term of six months. The proper course will be to order an inquiry, what was the mesne market value of the shares of the four companies which the executors could have realized on the 13th April, 1882, or as near thereto as can be ascertained, and to charge the executors with that value, with lawful interest from that date. The executors should also be disallowed the items of expense incurred after that date in connection with certain shares, mentioned in paragraphs 2 and 5 of the second count of the plaint. On the other hand, the executors should be allowed the amount of dividends accrued since the 13th April, with interest, and also the price of purchase-money actually credited to the estate on sale of shares, with interest; also the shares themselves if any of them remain on the executors' hands.

As regards costs, having regard to the difficulty of the position, and the unimpeached good faith of the executors, their Lordships think that justice will be done by ordering the plaintiffs' costs of suit as between solicitor and client to be paid out of the estate, and by making no order with respect to the

costs of the executors. The costs of the appeal to be dealt with on the same principle applied to the costs of the suit.

The second appeal and cross-appeal was in another action in which the testator's son, Willem Hiddingh, sued the executors. Mr. Denyssen, representing the Association, was sued both as administrating executor and as administrator. The Supreme Court held partially in favour of the plaintiffs, and partially in favour of the Association. The Judicial Committee in their judgment say, "The plaintiff states that the defendants are in default for not enforcing contracts made on or after the 14th July, 1883, for the sale of some of the shares which are the subject of the first action. If it were necessary to decide this issue, the action would fail, because the plaintiff brings no evidence to show that it was expedient, or even possible, to enforce such contracts. But the result of the first action has now removed the ground for this portion of the second action. The plaintiff then seeks relief in respect of 150 shares in the Cape Commercial Bank which the executors have not sold. The bank has failed, and the estate has been charged with the sum of 5,250*l.* for calls, with a prospect of further calls. The defendants plead the decree in the first action as a bar to the second, and the Court has allowed the plea. It appears, however, to their Lordships that the first action was confined entirely to the shares which were sold in or after July, 1883, and in respect of which the sum of 1,138*l.* 17*s.* 6*d.* was claimed as damages. The damage by retention of the Commercial Bank shares is a totally different matter, which was not and could not, as the declaration was framed, have been adjudicated in the first action. There is no evidence in the record that it was practicable to sell these shares, or that the estate would have escaped liability if they had been sold within a reasonable time, and the executors may, for aught that appears, have a complete defence on the merits. But the Court below declined to receive evidence or to go into the merits at all, on the ground that the question had been already decided between the parties. Their Lordships think that the case should be remitted to the Supreme Court for trial of the issue raised with respect to the Cape Commercial Bank shares."

Other questions raised by the appeal and cross-appeal were, whether the Association were bound to invest the fidei-commissary estate in separate securities, and to keep the same distinct from their own funds, or to pay to this appellant any higher interest than 5 per cent. on the amount of his share; whether the sum of 500*l.* bequeathed to, and accepted by, the Association was in full satisfaction of all charges and commission in respect of the administration of the estate (as distinguished from the executorship); also as to whether the bye-laws of Act XVII. of 1875, under which the Association carried on its business, authorized the course adopted by the Association in turning the estate into money, and selling bonds to themselves. The Judicial Committee in their judgment point out that they "have not been referred to any authority to show that an executor must turn all the assets into money. It is laid down that his duty is to liquidate the estate. But an estate is liquidated when it is reduced into possession, cleared of debts and other immediate outgoings, and so left free for enjoyment by the heirs."

Their Lordships considered there could be no distribution of the fidei-commissary inheritance until an absolute and unburthened interest has vested in the heirs or some of them. Their Lordships do not doubt the "perfect stability of this company. It is clearly one that is regarded with great confidence in the colony. For aught they know, to be inscribed in the books of the company as a creditor may there be considered as desirable a mode of investing money as the purchase of Bank of England stock is in England. They are not suggesting that estates may not, in some cases, benefit by such a process. It may be that, even in this case, others of the beneficiaries, or the co-executors if they had exercised any judgment in the matter, or a Court judging on behalf of infants or unborn takers would have approved or may still approve of such a process, either partially or wholly. But, as before said, the Association is practically a sole executor. No one has interposed on behalf of the beneficiaries to correct any bias felt by the sole executor, or to adjust the balance of his judgment. And under such circumstances he cannot claim that a transfer by himself to himself shall stand."

In the conclusion their Lordships make an exhaustive declaration for the taking and reforming of accounts by the Supreme Court, pointing out where allowances are to be made to the complainant, and where to the Association. They hold, also, that commission should not be charged, and also that it was competent to Willem Hiddingh, although the beneficiary for one out of seven shares, and that only as regards a life interest, to sue the Association alone.

"If the corpus of the estate has been dealt with in a manner which cannot be justified in law, it is competent for any one interested to insist on the right principle being applied." (*Vide Beningfield* v. *Baxter*, 12 App. Cas. 167.) Subject to the declaration, the decree in the principal appeal is to be affirmed. As has before been stated, the case would be remitted to the Supreme Court for trial of the issue raised with respect to the Cape Commercial shares. The cross-appeal would be dismissed, and the association would pay the costs of the appeal and cross-appeal.

[In this case there was a preliminary petition to consolidate, by reason of which their Lordships struck out one appeal on the board to allow of its being consolidated with the others. The appeals, though the judgments appealed against were of different dates, related to much the same subject-matter, and therefore it would be convenient to consolidate them.]

[12 *App. Cas.* 107, 624; 56 *L. J. P. C.* 107.]

The Bank of Toronto *v.*
Lambe.
The Merchants Bank of Canada *v.*
Lambe.
The Canadian Bank of Commerce *v.*
Lambe; and
The North British Mercantile Company and Others *v.*
Lambe.

Lower Canada. Lord Hobhouse. *July* 9, 1887.

One of the numerous difficult questions which have come up for judicial decision under the provisions of the British North

America Act, 1867, ss. 91 and 92, which apportion separate legislative powers between the Parliament of the Dominion and the legislatures of the several Provinces. Statute of the Quebec Legislature (45 Vict. c. 22), imposing direct taxes on banks and insurance companies carrying on business in the Province. Liability to assessment on paid-up capital. What is a direct and what an indirect tax? Definitions of John Stuart Mill, Mr. Henry Fawcett, and other economists. Does the taxation in question fall within those matters which the British North America Act left for legislation in the Provinces? Cases cited: *The Attorney-General for Quebec* v. *The Queen Insurance Co.*, 3 App. Cas. 1090; *The Attorney-General of Quebec* v. *Reed*, 10 App. Cas. 141; *The Citizens' Insurance Co.* v. *Parsons*, 7 App. Cas. 96. Their Lordships hold the taxation in question to be "direct" within sect. 92, class 2 of the British North America Act, and therefore a subject not *ultra vires* of the Quebec Legislature. [Their Lordships take Mill's definition of direct and indirect taxes as a fair basis for testing the character of these imposts. It is as follows:—"Taxes are either *direct* or *indirect*. A *direct tax* is one which is demanded from the very persons who *it is intended or desired* should pay it. *Indirect taxes* are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the *excise* or *customs*." "The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."] All four appeals dismissed, with costs.

[12 *App. Cas.* 575; 56 *L. J. P. C.* 87.]

Watson and Company *v.*
Sham Lal Mitter.

Bengal. Sir Richard Couch. *July* 9, 1887.

Guardian and minor. Mokurreri Tenures. Enhancement of rent. Is a mother and guardian's contract binding on her son?

The principal object of the suit was to obtain a declaration that the plaintiff (respondent) was not bound by two decrees for enhancement of rent of certain mouzahs which had been assented to by his mother when he was an infant. The plaintiff also claimed that certain moneys which were paid to the appellants to stop a sale of the mouzahs should be refunded to him. In previous litigation two Courts had found that the mouzahs were liable to an enhanced rate; but the question now in dispute, in this appeal, was whether the plaintiff, who had attained majority, was personally liable. Effect of Kabulyats. The Judicial Committee held that the respondent's liability was clear. The additional words following the signature of the mother's name, "Mother of Sham Lal Mitter," must in their Lordships' opinion be considered as meaning that she was contracting as the mother and guardian of her infant son. It cannot be presumed that she held the estate adversely to her son, and the substance of the case is that the estate being under her management as her son's natural guardian, and the appellants being able to sue for an enhancement of the rent, she came to what appeared to be and what she was advised was a proper arrangement with them. If there were any doubt as to the capacity in which the mother acted, it should be presumed that she did so in her lawful capacity. Decrees below reversed and the suit dismissed with costs in both Courts. The appellants also to have costs of this appeal.

[*L. R.* 14 *Ind. App.* 178; *I. L. R.* 15 *Calc.* 8.]

Girish Chunder Maiti *v.*
Rani Anundmoyi Debi and Another.

Bengal. Sir Richard Couch. *July* 15, 1887.

Law of limitation. Act XV. of 1877, second schedule, sect. 132. Was a trust charged upon *immoveable property?* Terms of a will. The questions in this appeal were (1) whether a a gift in a will of certain immoveable property to pay off particular debts was in the nature of a trust chargeable on such estate; and (2) whether a suit brought by the respondents representing the purchaser of the creditors' claims to realize

payment was barred by limitation. The suit was brought in the first instance against one Goluckchunder (father of the appellant), in whose favour the will was made by the testator, Shib Pershad. Goluckchunder's father had lent 15,000 rupees to Shib Pershad to aid him in legal proceedings to recover the very landed property now at stake, and Shib Pershad by the terms of his will directed that this money should be paid with interest out of the said property which he was successful in recovering. Goluckchunder was also a creditor of his son (the appellant). The husband of the first respondent had, at an auction sale, purchased the residue of Goluckchunder's claim against the appellant, and claimed payment thereof out of the properties of the appellant. The Subordinate Judge was of opinion that the money sued for was not charged upon the immoveable property devised by Shib Pershad, and that by Art. 57 of Act XV. of 1877 a term of three years only was given for bringing the suit, and that time had expired before the suit was brought. When the case came before the High Court, the judges there were of opinion that sect. 10 of the Limitation Act applied on the ground that there was a valid trust for the payment of the money which was claimed in the suit. The Judicial Committee were of opinion that a charge was clearly created by the terms of the will upon the property which had been recovered, but they held that the case came within Art. 132 of the second schedule to the Act, in which case a period of twelve years is given for bringing the suit. As a result they agreed that the suit was not barred. The decree of the High Court ought to be affirmed, with costs.

[*L. R.* 14 *Ind. App.* 137; *I. L. R.* 15 *Calc.* 66.]

Mussammat Rajeswari Kuar *v.*
Rai Bal Krishan (now by Order of Revivor, his his sons and legal representatives, **Rai Ghani Krishan** and Others).

N. W. P. Bengal. LORD HOBHOUSE. *July* 15, 1887.

Action on a bond. Money lent. Effect of recitals in bond. Account books. Is corroborative evidence of accounts always

essential? The plaintiff, whom the respondents represented, instituted the suit to recover 16,444 rupees principal, and 7,733 rupees interest, alleged to be due on a bond mortgaging a talook, which bond was executed by the appellant's deceased husband to the respondents' deceased father. The execution of the bond was admitted, but the appellant contravened liability for a sum of 7,000 rupees which was stated in the mortgage bond to have been borrowed to settle a claim for monthly allowance to one Vilayati Begum. The appellant contended that as this sum was not applied to this purpose the respondents were bound to prove that it had been expended for other purposes by the appellant's husband, and that they had not done so. The Subordinate Court had struck out certain of the items of the claim, but gave plaintiff a decree for the rest. The High Court on the other hand thought the reasons for disallowing any items were insufficient, and had no doubt whatever that the borrower had received the full sum of 7,000 rupees. The plaintiff's books were produced, and contained particulars of all the items. Moreover, there were the recitals in the bond of the amount required by the borrower. Both borrower and lender were men of character and respectability and great friends. The Judicial Committee upheld the decree of the High Court with costs. Their Lordships considered that the Subordinate Judge acted on an entirely wrong principle. What he did was to look whether the items of discharge in the plaintiff's books were corroborated or not. Where they were corroborated he allowed the discharge, and where they were not corroborated he disallowed them. In doing that the Subordinate Judge acted on a principle which would have been correct if the plaintiff had relied on his own books as proving his debt; but that was not the case. The plaintiff relied upon the bond which was executed by his debtor, and unless that bond is displaced there is no answer to the action. It is the defendant who seeks her defence in the books of the plaintiff. She calls for the books and extracts her defence out of them, and it would be a monstrous thing if the party sued were allowed to call for the accounts of the plaintiff, and extract from them just such

items as proved matters of defence on her part, and were not to allow those items which make in favour of the plaintiff. The High Court held that the books must be admitted *in toto*. Their Lordships think the High Court were entirely right, and that the decree cannot be complained of on that ground.

[*L. R.* 14 *Ind. App.* 142; *I. L. R.* 9 *All.* 713.]

Doulut Ram *v.*
Mehr Chand and Others.

Punjaub. SIR BARNES PEACOCK. *July* 19, 1887.

Declaratory suit. What property was acquired at a sale in execution? Contention that a share only of the ancestral property passed. Appellant (plaintiff) being mortgagee, execution creditor, and also decree holder under the mortgage debt, had purchased certain houses and shops at a sale in execution, and he contended that the property purchased included the shares of the respondents, and that his title was secured for the whole of the property. His claim was that he had acquired in his purchase not only a ten-annas share, but also the other six-annas shares which the respondents dispute. The appellant, in answer to the allegation that the respondents were not personally parties to the mortgage and proceedings arising upon it, contended that they were parties through their managers, who were legally authorized to bind them. The respondents, who were members of a joint and undivided family belonging to the sect of Jains, but subject to the Mitacshara law, said they were not liable to hand over the houses and shops in suit, and rested their defence on the ground that the mortgage was entered into when they were minors by their uncle and brother, who were managers of the ancestral estate. They also contended that only the interest of the mortgagor or judgment debtor passed by the sale, and that the co-sharers in the estate were not parties to the suit. If the mortgagee sought to enforce the mortgage against them they should have been made parties and been given an oppor-

tunity to redeem. The appellant, in answer to the allegation that the respondents were not personally liable to the mortgage and subsequent proceedings arising out of it, argued that the respondents were parties through their managers, who were legally authorized to bind them. The Judicial Committee came to the conclusion that none of the decrees ought to stand. In their opinion it was necessary that the decree be made, which the Chief Court ought to have made, and their Lordships would therefore advise her Majesty that the decrees of all the Courts below be reversed, and that it be decreed that the plaintiff (appellant) is entitled to the six-annas share for which he sues, and that he is entitled to recover possession thereof, and further that the respondents do pay the costs in all the lower Courts and also of this appeal. The defendants had the opportunity of trying whether the mortgage was a valid mortgage which bound the ancestral property. The plaintiff proposed to prove all the facts that were necessary to make the mortgage valid and binding upon them. The defendants had the opportunity of trying that question, but they did not wish to try it. They made their stand upon the ground that they had not been made parties to the suit, and that the two mortgagors alone had been sued. But that ground falls from under them. Then when they stood upon that ground, and objected to have the evidence gone into at the proper time for going into it, can they now ask their Lordships to remit the case? Their Lordships at first had some little doubt as to whether the case ought not to be remanded; but considering the evidence of Jiwan Mal, and that the plaintiffs offered to go into the whole evidence, and to prove that a portion of the purchase-money was paid over and received by the defendants, and that the defendants refused to meet the case upon that ground, their Lordships have come to the conclusion that the case ought not to be remanded: *Mussumat Nanomi Babuasin and Others* v. *Modun Mohun and Others*, L. R. 13 Ind. App. 1. Reversed with costs.

[*L. R.* 14 *Ind. App.* 187; *I. L. R.* 15 *Calc.* 70.]

Rani Janki Kunwar *v.*
Raja Ajit Singh.

Oudh. Sir Richard Couch. *July* 20, 1887.

Suit to set aside a deed of sale. Mental capacity of a husband in executing a deed. Law of limitation applied to the suit. Act XV. of 1877, Article 91, Second Schedule. The suit was originally brought by the appellant and her husband for cancellation of a deed of sale entered into by the husband, who, in return for an advance of 125,000 rupees by the respondent, had conveyed to the latter a number of villages, and it was sought now by the appellant to recover this property. The husband is now dead. The appellant alleged that in August, 1882, she had come to know of frauds alleged to have been practised on her husband, in obtaining the deed which is the subject of this suit. The husband died in 1884. The deed was executed in 1872, but in 1871, enquiries into the state of his mind resulted in his being found in that year not incapable of managing his affairs. This was shortly before the deed was executed, which is important, especially when it is remembered that in subsequent suits the husband was found to be of weak intellect; the natural inference is that when the particular deed was executed, in 1872, he was considered by the proper authorities to be capable of managing his affairs. The crucial question in this suit was as to whether it was barred by limitation. The suit was instituted in February, 1884. Bijai, the husband, joined, as was said above, in the suit, and it would appear that much more than three years (the statutable period of limitation) had elapsed after the facts which are alleged in the plaint to have constituted an unconscionable bargain were known to Bijai. It was to be assumed that the husband knew of these facts since the date of the deed in 1872. It should be mentioned that shortly before certain other suits were brought Bijai had made a deed of gift, dated the 1st of November, 1879 to his wife, the present appellant, and it is a matter of remark that she relies upon that deed, and has relied upon it all through the proceedings, at the same

time setting up that her husband was a man incapable of entering into the other transaction, and of executing the deed of sale of the 29th July, 1872. These suits went through a considerable course of litigation, and were finally determined in favour of Bijai and the appellant on the 24th of June, 1884, by the judgment of this Committee. *Vide* L. R. 11 Ind. App. 211. The Judicial Committee, while agreeing in the result with the Judicial Commissioner, consider that there has been, on the part of the lower Courts, a misapprehension of the law of limitation in this case. They are clearly of opinion that the suit falls within Art. 91, and is therefore barred.

Upon the main question in the suit, whether upon the facts which have been proved there was a case entitling the appellant to have the deed of sale set aside, their Lordships consider that they have not had any matter laid before them which would lead them to the conclusion that the decision of the Judicial Commissioner that the deed ought not to be set aside should not be allowed to stand. They see no ground for thinking that on that matter he came to a wrong conclusion.

The result therefore is that their Lordships will advise her Majesty to dismiss the appeal, and to affirm the judgment of the Judicial Commissioner, with costs of this appeal. Affirmed with costs. [*L. R.* 14 *Ind. App.* 148; *I. L. R.* 15 *Calc.* 58.]

In re **Southekul Krishna Row** (a Pleader).

Court of the Judicial Commissioner of Coorg, India. SIR JAMES HANNEN. *July* 21, 1887.

Appeal upon special leave to appeal. Pleader struck off roll. Irregularity of procedure in striking the pleader off the roll, without giving him an opportunity of being heard in his defence. *Vide* sect. 40 of the Legal Practitioners Act XVIII. of 1879. Order appealed from set aside by the Judicial Committee, and the petitioner is to be restored to the roll.

[*L. R.* 14 *Ind. App.* 154; *I. L. R.* 15 *Calc.* 152.]

Farnell *v.*
Bowman.

N. S. Wales. Sir Barnes Peacock. *July* 23, 1887.

Action against the Government represented by the Secretary of Lands who held office under Act 39 Vict. No. 8. Is the Government of New South Wales liable to be sued in an action of tort alleged to have been committed by its servants? Construction of the colonial statute. Mr. Farnell, the Secretary for Lands and appellant, was sued as nominal defendant on behalf of the Crown. The declaration contained two counts. The former charged that the Government by their servant broke and entered the lands of the plaintiff situate in the colony, and lit fires thereon, and thereby burned down and destroyed the grass, trees, and fences of the plaintiff on the said lands. The second alleged that the Government by their servants so negligently and wrongfully lighted and maintained certain fires on the plaintiff's said lands in the first count mentioned, and upon lands adjoining thereto, and conducted themselves so negligently and wrongfully in and about the care of the said fires, and the taking of precautions against the spreading of the same, that by reason thereof the said fires spread over the lands of the plaintiff and burned down and destroyed large quantities of grass and fencing thereon. The count also charged special damage.

The defendant pleaded not guilty, and also demurred upon the ground that the declaration was bad in substance, and stated, among other grounds for demurrer, first, that the Government were not liable to be sued in an action of tort. The majority of the judges held that, upon the construction of the Act, and bearing in mind previous colonial legislation, such an action would lie, the learned Chief Justice dissenting. The demurrer was therefore overruled, and it was ordered that judgment be entered for the plaintiff on the defendant's demurrer. From that order the present appeal has been preferred. Their Lordships are of opinion that the order is right, and ought to be affirmed.

The design of several of the colonial statutes bearing on the subject at issue, and which were cited during the arguments, showed that the object was to open a larger range of remedies to the subject in New South Wales than the ordinary remedy by petition of right, which was of limited operation. It could not have been intended to limit the operation of the principle of the legislation in the colony to cases in which the subject had a remedy by petition of right. Justice requires that the subject should have relief against the colonial governments for torts as well as in cases of breach of contract or the detention of property wrongfully seized into the hands of the Crown. And when it is found that the Act uses words sufficient to embrace new remedies, it is hard to see why full effect should be denied to them. *Hettihewage Appu* v. *The Queen's Advocate*, 9 App. Cas. 571, distinguished as being a decision which was given solely with reference to the law of Ceylon. Decision alike with Court below in the affirmative. Affirmed with costs.

[12 *App. Cas.* 643; 56 *L. J. P. C.* 72.]

La Banque Jaques-Cartier *v.*
La Banque de la Cité et du District de Montréal.

Canada. Lord Fitzgerald. *Nov.* 4, 1887.

Transactions between two banks. Loan by one bank to the cashier of the other. Had the cashier authority to pledge the credit of his bank, or was the loan personal to himself? Doctrine of acquiescence or ratification. The banks had large dealings together, mainly without security. The advance to the appellant bank's officer was made upon security of certain shares in their bank, which, in negative words, by law they were prohibited from trafficking in. This particular loan was made in September, 1873. In June, 1875, the appellants stopped payment. The question arose then, Were the appellants liable for the particular loan entered into by their cashier, or was it personal to himself? Their Lordships considered that

contemporaneous written evidences (and where there is a conflict of verbal testimony, their Lordships would generally give weight to written records) all reached the same point, viz., that the loan was beyond all doubt a loan to the cashier personally and on his personal security. The form of the loan, the promissory note of the cashier that accompanied it, the collateral security and the payment of the amount to the cashier, on cheques payable to him personally, and the entries then made in the books of the respondents, all tend to the same point.

It was urged that the borrower took up this money for the Banque Jacques-Cartier, which, it was alleged, was requiring aid to meet engagements, and that the appellants got the benefit of it, but this allegation their Lordships considered was unfounded. The cashier had not, and does not pretend that he had, any authority to negotiate this loan on behalf of the plaintiffs (appellants), and the proceeds were received by him and immediately applied to liquidate his own debt to his own bank. They were obliged to assume that, in law, the plaintiffs could not be, and in fact were not, the owners of the shares given as collateral pledge.

An important point raised was as to whether those representing the Banque Jacques-Cartier had by their behaviour acquiesced in or ratified indebtedness and liability. The Court of appeal (Queen's Bench) arrived at a decision opposed to that of the Superior Court, and pronounced against the appellants on the ground, it would appear, that such acquiescence existed. In the view of the Judicial Committee, "acquiescence and ratification must be founded on a full knowledge of the facts, and further it must be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction. But this is not the character of the present case." The Judicial Committee recommended her Majesty to pronounce in favour of the non-liability of the appellant bank, to reverse the decree of the Court of Queen's Bench, and to reinstate the judgment of the Superior Court.

Their Lordships think that the appellants should have the

costs of this appeal; but on the taxation of the costs here, they desire that their officer should have regard to the fact that the record has been cumbered with over 200 pages of accounts of no use whatever on the appeal, and but one or two items of which have been read. If this most unnecessary expense was occasioned by the default of the appellants, they ought not to have the costs thus occasioned.

[13 *App. Cas.* 111; 56 *L. J. P. C.* 1.]

Cossman *v.*
West; and

Cossman *v.*
The British America Assurance Company.

(Consolidated Appeals.)

Nova Scotia. Sir Barnes Peacock. *Nov.* 15, 1887.

Actions on two policies of insurance, one a time policy on a barque called the "L. E. Cann," and the other a voyage policy on freight of the same ship. The time policy was issued by the Ocean Marine Assurance Association, and was underwritten by the respondent West, who was a member of the association. The voyage policy was issued by the other respondents the British America Assurance Company. Barratry of the master. Actual owner innocent of any collusion. The question was whether there was a *total* or *a constructive total loss* of the vessel. Points also raised were whether "abandonment" or notice thereof to the insurers was necessary; whether there was preliminary proof of loss. Ship was pierced with holes and was deserted by crew when rapidly filling with vater. A steamer belonging to a salvage company picked up the vessel and towed her to harbour, where she and her cargo were sold to meet some of the salvage services. Vessel subsequently repaired and put into good condition. Both actions were tried before the Chief

Justice of the Supreme Court, who decided that there was a total loss of both ship and cargo, and verdicts were given in favour of Cossman the owner.

A motion was made to the Full Court to set aside the verdicts and judgments. After argument, the learned judges were divided in opinion, the majority holding that, as no notice of abandonment had been given, there was only a partial loss, and in each case the finding and judgment of the Chief Justice was set aside and reversed, and judgment entered for the defendants with costs, including the costs of the trial and the costs of the appeal. The Chief Justice adhered to his original opinion, and held that there was an actual total loss both of the ship and of the freight.

The Judicial Committee were of opinion that the judgments and orders of the Full Bench of the Supreme Court ought to be reversed and the original judgments be reinstated. Their Lordships considered that after the sale there was a total loss to the original owners. "*To constitute a total loss within the meaning of a policy of marine insurance, it is not necessary that a ship should be actually annihilated. If a ship is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a Court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated.*" The Judicial Committee endorse several authorities in declaring abandonment is not necessary when a total loss by peril is the object to recover. They also concur with the Chief Justice that the defendants cannot rely upon want of preliminary proof of loss. Cases cited: *Mullett* v. *Sheddon*, 13 East, 304; and (on writ of error) L. R. 5 Q. B. 599; *Stringer* v. *English and Scottish Marine Insurance Co., Limited*, L. R. 4 Q. B. 676; L. R. 5 Q. B. 607; *Holdsworth* v. *Wise*, 7 B. & C. 794; *Parry* v. *Aberdein*, 9 B. & C. 411; *Roux* v. *Salvador*, 3 Bing. (N. C.) 267; *Mellish* v. *Andrews*, 15 East, 13; *Green* v. *Royal Exchange Assurance Co.*, 6 Taunt. 68; *Idle* v. *Royal Exchange Assurance Co.*, 8 Taunt. 755; *Robertson* v. *Clarke*, 1 Bing. 445; *Cambridge* v. *Anderton*, 1 Ry. & Mood. 60; *S. C.*, 2 B. & C. 691; *Farnworth* v. *Hyde*, 18 C. B. N. S.

835; L. R. 2 C. P. 204; L. R. 2 C. P. 226; *Cory* v. *Burr*, 8 App. Cas. 393. Reversed with costs.

[13 *App. Cas.* 160; 57 *L. J. P. C.* 17.]

Porteous and Others *v.*
Reynar.

[*Ex parte.*]

Lower Canada. LORD FITZGERALD. *Nov.* 15, 1887.

Right of trustees to sue in their own names to recover "balance due to the trust estate." Objection that they were only suing the debtor as agents or *mandataires.* Art 19, Code of Civil Procedure for Lower Canada. The estate of an insolvent firm vested by the provisions of the Insolvency Acts in an official assignee. This officer subsequently transferred the estate, with the sanction of the creditors, to the appellants, who by deed agreed to manage and realize it, and generally hold it upon trust for the benefit of the creditors. The appellants were given such full powers that they were to be at liberty to sell or convey the estate or parts of it as validly as if every creditor signed the conveyances. The appellants did sell a portion of the estate by an act of sale to the respondent, and later on, finding that he failed to pay the balance of the purchase-money, took an action against him for recovery of the unpaid instalments. The defence of the respondent, while not disputing the title of the appellants to the lands in question, or their right to sell, or the respondent's liability to pay for them, denied the right of the appellants to bring an action for the recovery of the price *in their own names.* The whole case of the respondent rested on the contention that the appellants were agents of the creditors, and as such were not entitled to bring an action for the price of the land sold to him in their own names. The Superior Court pronounced its decision on the 8th November, 1884, holding that the plaintiffs (appellants) had proved their allegations and were entitled under the act of sale to recover from the defendant the balance

of the purchase-money. There is no allusion in that judgment to the 19th Article of the Code of Civil Procedure, or to the exception now founded on it, and therefore it would seem not to have been brought under the notice of that tribunal. The exact words of this 19th Article are "*No person can use the nqme of another to plead*, except the Crown, through its recognised officers. The Court of Queen's Bench reversed the decision of the Superior Court, considering that two recent decisions of the Supreme Court at Ottawa, viz., *Browne* v. *Pinsoncault*, 3 Sup. Ct. Can. Rep. 102, and *Burland* v. *Moffat*, 11 Sup. Ct. Can. Rep. 76, were binding on the present suit. The Judicial Committee, overruling these decisions, now held that Article 19 of the Code was applicable to mere agents or mandatories, but was not applicable to trustees in whom estate moveable and immoveable has been vested in possession and in property under a mandate to manage it for the benefit of third persons, and who have duties to perform in the realization of the trust estate.

Their Lordships considered that the act of sale in the present case was regular and lawful. This was not a case of a mere voluntary cession to a trustee for the benefit of creditors, but of an assignment under the Insolvent Acts to the official assignee for the purpose of realization. *That officer could sue and must sue in his own name, though he has no beneficial interest.* The present plaintiffs derive their title from him with the assent of all the creditors, and they are the assignees of all his rights so far as he could transfer those rights. Judgment of Court of Queen's Bench reversed, with costs; appeal to that tribunal dismissed, with costs; and judgment of the Superior Court reinstated.

[13 *App. Cas.* 120; 57 *L. J. P. C.* 28.]

Bishen Chand Basawut *v.*
Syed Nadir Hossein.

Bengal. SIR BARNES PEACOCK. *Nov.* 25, 1887.

Will or deed of a Mahomedan lady. Bequest in trust for the performance of religious duties. The principal question at issue

related to the validity of an order for attachment and sale in execution of the corpus of certain trust estate to meet a personal debt of a former trustee. There was a second question on the liability to attachment of surplus profits. The property in dispute had been the subject of a decree in execution obtained by the appellant against one Mahomed Ali, who was the first trustee of the Mahomedan lady's bequest and the predecessor in the trust of the respondent. The suit was brought by the respondent to set aside the above-named decree on the ground that the property was held by Mahomed Ali and afterwards by himself in trust for religious purposes, and he contended that it could not be seized for the personal debts of Mahomed Ali. By the terms of the wasiatnamah executed by the lady a power was given to Mahomed Ali to receive whatever margin of profits remained in his hands after the religious rites, dues, &c., had been performed and paid. There was a second question, whether these profits were attachable. In 1868 Mahomed Ali executed a second wasiatnamah in favour of the respondent, and the latter thereupon entered upon his duties as trustee.

The appellant claimed by reason of his purchase of the decree made against Mahomed Ali, and as such obtained an order in execution for the attachment of the property, which he alleged to be the assets of Mahomed Ali. The Subordinate Judge considered that the wasiatnamah was not a deed converting the property into a religious endowment, but a will burthening the property in the hands of the heirs with certain charges for religious objects. The result of his findings was that the larger part of the estate was declared to be the private property of Mahomed Ali, and after his death became assets in the hands of his heirs for the payment of his debts. The High Court held that the corpus of the estate was not liable to be sold, and in the course of the judgment these words are used:—"Nor is it essential to decide whether the property became what is known technically as *Wakf*, and whether Mahomed Ali became Mutwali, because the Subordinate Judge finds, and we think rightly, that the deed created a trust for certain specific purposes. This implies that the trustee for the time being is entitled to hold

the property subject to the performance of the duties charged upon it. There may have been in Mahomed Ali's time a margin of profit, and that margin might possibly have been attached in execution of a personal decree against the trustee; but that is not the question now. The question is, whether Mahomed Ali's creditor is entitled to attach the property itself in the hands of the plaintiff."

The Judicial Committee were of opinion that the decree of the High Court ought to be affirmed. "If the whole property is to be sold, it must be taken out of the hands of the trustee altogether, and put into the hands of a purchaser. That purchaser might be a Christian, he might be a Hindu, or he might be of any other religion. It surely cannot be contended that property, devised by a Mahomedan lady to a Mahomedan trustee with the object of providing for certain Mahomedan religious duties, could be taken out of the hands of that trustee and sold to a person of any other religion, and that the purchaser should become the trustee for the purpose of performing or seeing to the performance of those religious duties. If property is to be sold and alienated from the trustee whom this lady appointed, or the trustee who was subsequently appointed by him to succeed him as trustee, the purchaser, of whatever religion he might be, would have to see to the execution of the trusts. Is it possible that the law can be such that a Hindu might become the purchaser of the property for the purpose of seeing to the performance of certain religious duties under the Mahomedan law; for example, that a Hindu might be substituted for a Mahomedan trustee for the purpose of providing funds for the Mohurrum, and taking care that it should be duly and properly performed, when it is well known what disputes and bitter feeling frequently exist between Hindoos and Mahomedans at the time of the Mohurrum? The High Court says: 'If there was a margin of profit, that margin of profit might possibly have been attached.' Their Lordships cannot in this suit, in which all parties interested are not before it, decide as to the extent of the religious trusts, or whether any surplus profit after the performance of those trusts would belong to Mahomed Ali

or the trustee substituted by him. The corpus of the estate cannot be sold, nor can any specific portion of the corpus of the estate be taken out of the hands of the trustee because there may be a margin of profit coming to him after the performance of all the religious duties." Civil Procedure Code, Act X. of 1877, ss. 266, 280, and 381 referred to. Affirmed with costs.

[*L. R.* 15 *Ind. App.* 1; *I. L. R.* 15 *Calc.* 329.]

The Grand Junction and the Midland Railways of Canada *v.* The Corporation of Peterborough.

Ontario. LORD HOBHOUSE. *Dec.* 3, 1887.

Claim by the railways (plaintiffs-appellants) (the Grand Junction being now amalgamated with the Midland) to a bonus or debentures under a bye-law of the respondents. Condition precedent for performance before money becomes payable. Absence of an engineer's certificate. Effect of Grand Junction Railway Acts of 1871 (34 Vict. c. 48) and 1874 (37 Vict. c. 43) (Ontario statutes) in incorporating the Grand Junction Railway Company and in giving the Grand Junction Railway the benefit of the Corporation of Peterborough's bye-law. Is the claim *res judicata* by reason of proceedings by the appellants upon a rule for a mandamus? The Judicial Committee held that there was no *res judicata*, because the jurisdiction exercised in the first suit in refusing a prerogative writ of mandamus for delivery of debentures by the respondents was discretionary, and moreover if it had been granted it would not have bound the other side to anything except to make return of it. They further found that the railway works, although not completed at the time of the mandamus, were for the purposes of this suit completed in time in accordance with the conditions of the byelaw. An engineer's certificate stipulated for by the bye-law as a condition precedent had not, however, been produced, and on that ground the appeal must fail. Their Lordships in regard to the demand for delivery of the bonus or debentures to

trustees said that the substantial objection to the appellants' request was that the trusts are spent. The time for acting through trustees is past, as was clearly pointed out by Mr. Justice Gwynne in the Supreme Court in 1883, and as was clearly seen by those who framed this claim. Trustees were for the time when the debentures or their proceeds were to be held in suspense, not for the present time, when the plaintiffs, if right in other respects, can claim the payment directly to themselves. If the trustees were to take the debentures either on the trusts of the Acts or on those of the bye-law, they would have no duty except to hand them over to the plaintiffs upon the engineer's certificate. Their Lordships are asked to use a purely illusory machinery for no purpose whatever except to relieve the plaintiffs from the observance of a condition precedent, which, either by extraordinary neglect or from some unexplained difficulty in substance, they have left unperformed. They cannot do that. They will humbly advise her Majesty that this appeal should be dismissed. And the costs must follow the event.

[13 *App. Cas.* 136.]

Nawab Zein-al-abdin Khan *v.*
Mahammad Asghar Ali Khan and Others.

N. W. Provinces. Sir Barnes Peacock. *Dec.* 3, 1887.

Claim by appellant to have certain auction sales of property formerly in the possession of the appellant declared invalid, and for the recovery of estate. There were three sales, and the appellant asked that they should all be set aside, not only against some of the respondents who were decree holders and had purchased under their own decree, but also as against a *bonâ fide* purchaser, one Asghar Ali, who was a stranger to the decree. The main questions were (1) whether a modification of the decree (following a remand on a judgment of the Judicial Committee, *vide Sahibzada Zein-al-abdin Khan* v. *Sahibzada Ahmed Raza Khan and others*, L. R. 5 Ind. App. 233), which modification was made after the sales had been completed, invalidated them. (2) Whether the appellant's suit is barred by limitation.

It appears to their Lordships that there is a great distinction between the decree holders who came in and purchased under their own decree, which was afterwards modified, and the *bonâ fide* purchasers who came in and bought at a sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order.

In Bacon's Abridgment, title "Error," it is laid down, citing old authorities, that "If a man recovers damages, and hath execution by *fieri facias*, and upon the *fieri facias* the sheriff sells to a stranger a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself, because the sheriff had sold it by the command of the writ of *fieri facias*." There are decisions to a similar effect in the High Court at Calcutta. They are collected, *vide* Broughton's book on the Code of Civil Procedure, 4th edition, note to sect. 246, Act VIII. of 1859. So in this case, those *bonâ fide* purchasers who were no parties to the decree, which was then valid and in force, had nothing to do further than to look to the decree and to the order of sale.

The Subordinate Judge held that the defendants were bound to restore the property; not only the decree holders who had purchased, but the defendants who had purchased *bonâ fide* not being parties to the decree. He also held that the suit was not barred. The defendant Asghar Ali and the three added defendants, none of whom was a party to the decree in execution of which the sales were effected, appealed to the High Court. The High Court reversed the decree of the Subordinate Judge, and held that the suit was barred, either by Art. 14 of Act IX. of 1871, or Art. 12 of Act XV. of 1877. They passed two decrees, one as regards the three persons who were added as parties and the other as against Asghar Ali; but they were both in similar words. They said:—"Both appeals must be decreed with costs, and, the decision of the Subordinate Judge being reversed, the plaintiff's claim will stand dismissed." According to the strict grammatical construction of the decrees the plaintiff's claim was dismissed, not only as regards the defendants

who had appealed but as regards the others who had not appealed. The decrees must, however, be construed as applicable only to the defendants who had appealed and whose appeals were decreed, and not to the defendants who had not appealed, and who were not before the Court, and had not objected to the decision of the Subordinate Judge.

Their Lordships humbly advised her Majesty that the decrees of the High Court ought to be treated as decrees against the plaintiff only so far as his suit related to the defendants who had appealed to the Court; and that being so treated, they ought to be affirmed, and that the decree of the Subordinate Judge should be reversed, so far only as it related to the plaintiff's claim against those defendants. Their Lordships order that the appellant is to pay the costs of the respondents in this appeal. Their Lordships wish it to be distinctly understood that in affirming the decrees they treat them merely as decrees in favour of the defendants, who were appellants to the High Court.

[*L. R.* 15 *Ind. App.* 12; *I. L. R.* 10 *All.* 166.]

Tekait Kali Pershad and Another *v.*
Anund Roy and Others.

Bengal. LORD FITZGERALD. *Dec.* 7, 1887.

Validity of a sale in execution of a ghatwali tenure. Alienability of such ghatwali tenures in Kharagpore, subject to approval of the zemindar. Distinction between the ghatwals of Birbhoom who are appointed by the Government and who hold their tenures under statutory provision, viz., Regulation XXIX. of 1814, and those of Kharagpore appointed by the zemindar. The father of the first appellant, one Tekait Meghraj, had been ghatwal, and became a judgment debtor liable to the ancestor of respondents. The decree in execution was made against him. The son, the first appellant, and his family in the present suit contended that the mehal in dispute—mehal "Kharna"—was

inalienable, and that only the right, title, and interest of the debtor which were limited to proprietary possession for life only could pass by the sale; further, that on the death of the debtor the interest of the purchasers ceased. The plaint, *inter alia*, alleged that the family of the plaintiff was governed by the Mitacshara law, but subject to a family custom that the eldest son became the malik without dividing with the other brothers, who are entitled to maintenance only; that the Tekait Meghraj was in possession, and that plaintiff No. 1, his eldest son, was born in Aughran, 1241, and thereupon acquired a right with his father in the mehal; that Tekait Meghraj, without the consent of the plaintiff No. 1, who had then attained his majority, under a bond borrowed the sum of Rs. 1,300 from Alam Roy, ancestor of the defendants Nos. 1, 2, and 3; that the aforesaid Alam Roy, on the basis of that bond, obtained a money decree against Meghraj without making the plaintiff No. 1 a defendant on the 18th July, 1862; that on the sale in execution of that decree, he got only the right and share of the said Tekait in the ghatwali mehal of mouzah Kharna sold by auction; that Tekait Meghraj died in the month of Bhadon, 1278 Fusli (that is, August, 1871); that the plaintiff, agreeably to the usage of the family, governed by the Mitacshara law, acquired the right of direct possession in respect of the whole of mehal Kharna aforesaid, since the death of the said Tekait. The defendants in their written statement, denying most of the allegations of the plaint, specially contended that the plaintiff had not any joint estate with his father, who was the sole proprietor; that the restrictions on the Mitacshara law did not affect the estate or the sale in question, and that the particular nature of the ghatwali tenure which was based on actual service is contrary to the joint right of the sons according to the Mitacshara law.

The decision of the Subordinate Judge was in favour of the plaintiffs (appellants) to the extent of a two-thirds share, but not the whole of the mehal; his decision was mainly rested on the contention that the rules of the Mitacshara law were applicable. This finding was reversed by the judges of the High Court, after argument in appeals from both sides brought before them. They

held that the sale was not invalid by reason of the inalienability of the tenure; further, that the appellants could have no claim to possession unless by establishing that they were ghatwals duly appointed by the zemindar, whereas they nowhere said that they had been appointed ghatwals. "Their case was that plaintiff No. 1 had a vested interest by his birth in the ghatwali; but this we have shown to be untenable. The result is, that we decree the appeal of the defendants, and dismiss the plaintiff's suit with costs of both Courts." The Judicial Committee affirmed the decree of the High Court. Their Lordships were of opinion that the doctrines of the Mitacshara, which govern in some districts the Hindu law of inheritance, are not to their full extent applicable to a ghatwali tenure. By the general Hindu law of inheritance where the Mitacshara does not prevail, the heirs are generally selected because of their capability to exercise certain religious rites for the benefit of the deceased. Where, however, the Mitacshara governs, each son immediately on his birth takes a share equal to his father in the ancestral immoveable estate. Having regard to the origin and nature of ghatwali tenures, and their purposes and incidents as established by decided cases, it is admitted that such a tenure is in some particulars distinct from and cannot be governed by either the general objects of Hindu inheritance as above stated, or by the before-quoted rule of the Mitacshara. Their Lordships proceed to observe: "It is admitted that a ghatwali estate is impartible, that is to say, not subject to partition; that the eldest son succeeds to the whole to the exclusion of his brothers. These are propositions that seem to exclude the application of the Mitacshara rule, that the sons on birth each take an equal estate with the father, and are entitled to partition. The allegation, too, that the estate is not in the whole or in part alienable, or, if alienable, is only so for the life of the alienor, must largely depend on local and family custom, and such custom, if proved to exist, may supersede the general law, though in other respects the general law may govern the relations of parties outside that custom. Thus the rules of the Mitacshara yield to a well-established custom, though only to the extent of that custom.

"The question then which their Lordships have to consider and decide is whether the sale and transfer of a zemindari ghatwali in Kharagpore under a decree is invalid by reason of the tenure being in its nature inalienable.

"The evidence establishes a number of instances in which there have been unquestioned transfers and sales applicable to mehals in Kharagpore, and some to portions of the same estate which the plaintiff describes as part of his ancestral, inalienable, ghatwali right. This custom of alienation has been proved in fact by oral and documentary evidence to the satisfaction of the Subordinate Judge and of the High Court, and their Lordships see no reason to doubt the correctness of the conclusion in that respect of the two Courts. It seems to their Lordships that the true view to take is that such a tenure in Kharagpore is not inalienable, and may be transferred by the ghatwal or sold in execution of a decree against him if such transfer or sale is assented to by the zemindar.

"The plaintiff was of full age at the time of the sale. He does not appear to have made any objection to the sale or transfer, or to have taken any action during the period of twelve years that intervened between the sale and the institution of this suit, or during the period of ten years that elapsed between the death of Meghraj in 1871, and the 12th April, 1881, when the suit was instituted . . . .

"Their Lordships are of opinion that the Subordinate Court was justified in assuming under the circumstances the acquiescence of the zemindar in the sale and transfer under the decree, and that conclusion in fact has been approved and adopted by the High Court. Their Lordships do not deem it to be necessary to criticise the various decisions which have been brought so fully under their notice, and are of opinion that the High Court was correct in its conclusion that a Kharagpore ghatwali is transferable if the zemindar assents and accepts the transference.

"There remains only to be noticed the argument that though the ghatwal might alien, it could only be for the life of the alienor. It seems to their Lordships that there is no foundation for this argument. When once it is established that the ghatwal had the power of alienation as before stated, that power forms an

integral portion of his right and interest in the ghatwali, and there is no evidence whatever to limit it to an alienation for his own life and no longer." Appellants to pay costs of appeal.

[*L. R.* 15 *Ind. App.* 18; *L. R.* 15 *Calc.* 471.]

The Commissioners for Railways *v.* **Brown.**

New South Wales. LORD FITZGERALD. *Dec.* 10, 1887.

Accident with a steam motor. Allegation of contributory negligence. The finding of the jury was that there had been contributory negligence on the part of the respondent, who had sustained injuries through his cart in which he was driving coming into collision with a tram engine. The Supreme Court had granted a rule absolute for a new trial on the ground that the verdict was against the weight of evidence. The Judicial Committee discharged this rule and directed the verdict for the appellant to stand. The case was fairly and properly, in their opinion, submitted to a jury, and their Lordships were of opinion that the verdict, not unreasonable or unfair, and which was warranted by the evidence, once found ought to be permitted to stand. The verdict that there was contributory negligence ought to be suffered to remain as it was, and the order setting aside the verdict should be discharged. Reversed with costs.

[13 *App. Cas.* 133; 57 *L. J. P. C.* 72.]

Musammat Thakro and Others *v.* **Ganga Parshad.**

N. W. P. Bengal. SIR BARNES PEACOCK. *Dec.* 14, 1887.

Validity of a deed of conveyance by a mother to her daughters. The question was whether the property conveyed was held by the mother *benami* for her husband, or whether it was her own to give away. The first appellant, Musammat Thakro, by deed of gift in 1878 transferred to her daughters, the other

appellants, a particular mouzah. Possession followed the deed, which was made some half-a-dozen years after the death of Thakro's husband, by name Ganesh Singh. The respondent was the son of Thakro and Ganesh Singh, and he brought the suit to have the conveyance declared void, and to obtain possession. His contention was that (although so far back as 1862 his father had applied for a mutation of names for certain property which in 1847 he had made over to his wife Thakro), this property was only to be held *benami* for her husband. The real facts, however, appeared to be that, in 1847, Ganesh Singh, being about to marry a second wife, made Musammat Thakro a present of a portion of the property now in dispute, and that the rest of it, forming the village, was acquired out of her savings. The Subordinate Judge found that the property was owned personally by Thakro, and was not the estate left by Ganesh for his male heirs, and that the deed of gift was valid. The High Court came to a different conclusion. They decided that the property was held *benami* for the husband, and considered that there was no actual proof of a present having been made. This decision the Judicial Committee reverse, with costs in the High Court and here, and uphold the finding of the Subordinate Judge.

In the Mitakshara, sect. 11, clause 1, speaking of the nature of *stridhan*, it is thus stated: "What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other separate acquisition, is denominated a woman's property." It is not unusual, their Lordships say, for a husband, upon his being about to marry a second wife, to make a present to his first wife, and if he does so, the property so presented becomes her *stridhan* according to the doctrine above laid down. The representations made by the respondent himself from time to time showed that the object of the father in procuring mutation of names was not to put the property into the hands of the mother to hold it *benami* for him. Further, the circumstance that the father had a son, Dip Chand, by his second wife, had an important bearing in the matter.

"Looking at the conduct of the plaintiff and at the representations which he made, their Lordships have come to the conclusion that the case of the plaintiff is not made out, viz., that the property was put into the hands of the mother *benami* for the father. . . . They think that the High Court came to an erroneous conclusion in reversing the judgment of the Subordinate Judge upon the fourth issue, in which he found, upon the evidence and upon the statements of the plaintiff, that the property was the property of Thakro, and not the property of the plaintiff. The plaintiff even in his plaint does not state that the property was that of himself and Dip Chand, but claimed it as his own property. Dip Chand was no party to the suit, as he ought to have been if the property was that of the father." [*L. R.* 15 *Ind. App.* 29; *I. L. R.* 10 *All.* 197.]

Dibbs *v.*
The Bank of New South Wales; and
The Bank of New South Wales *v.*
Dibbs.

N. S. Wales. LORD FITZGERALD. *Dec.* 17, 1887.

Construction of a contract between the colonial Government and the Bank of New South Wales. Reservation that Government might negotiate with Bank of England. Provision for revision of the contract. Did demand for revision of the contract prevent the contract being still in full force?

The plaintiffs were the bank who had been by the agreement constituted bankers for the colonial Government, and this agreement set forth in different articles the duties and conditions under which the bank were to carry on the banking business of the Government, both at Sydney and in London. The contract was for two years certain from January, 1881, and it was terminable afterwards by six months' notice from either side.

By one of the articles, the Government was to be at liberty to make arrangements for loans with the Bank of England.

Upon such arrangements being completed, any right acquired under the contract by the bank conducting the Government business for commission or other charge for services of this nature was to cease, and other provisions of the contract would then become subject to revision, should the contracting bank desire it.

The two years certain expired in January, 1883, and for eighteen months afterwards, the parties had been working under a contract terminable by six months' notice from either side, but not containing any provision for its termination otherwise than by such notice. In 1881, an Act was passed enabling the colonial Legislature to raise a large sum of money for public works, and it was thereafter decided, by a colonial Order in Council to raise 5,000,000*l.* in the English money market. The Order in Council made it an essential part of the issue of the loan that it was to be "inscribed" by the Bank of England.

Acting under this authority, and in conjunction with the Agent-General, the New South Wales Bank, in December, 1883, floated a loan for three millions (part of the five millions) inscribed by the Bank of England. They charged and were allowed their commission on that loan. On the 18th June, 1884, the Colonial Secretary received from the Agent-General in London a telegram that the Bank of England objected to inscribe any further loan unless they also issued it. That telegram with the subsequent correspondence on the subject was immediately communicated to the Bank of New South Wales. The Government appears finally to have come to the conclusion that the public interests of the colony required that the two millions, residue of the five millions, should be raised by the Bank of England, and inscribed by that institution, and they gave immediate intimation of their resolve to the Bank of New South Wales.

As a result, the bank (and they claimed title to do so) decided to require a revision of all parts of the contract under the 6th Article of the document, but they did not allege that anything had occurred which put an end to the contract, or that they desired to end it. On the contrary, they seem, as the Judicial

Committee say in their judgment, to adhere to the contract, and desire only that it be reviewed, and with the object probably of seeking for some equivalent in profit to compensate for the deprivation of the floating of the two million loan, by which they might have realized 2,500*l.* less expenses.

It was alleged on the part of the plaintiffs in the Supreme Court that when the Government, acting under their undoubted right, reserved by Article 6, placed the negotiation of the two million loan in the hands of the Bank of England, the other terms of the contract became subject to revision at the option of the New South Wales Bank, and that when that bank required such revision the contract was at an end.

The chief question in these appeals was whether the decision of the Supreme Court, as expressed by the Chief Justice, was right, namely, that at the moment the power of negotiating loans was taken out of the hands of the bank, and the bank gave notice to the Government that they desired a revision of the terms of the contract, the contract ceased, and the bank had a right to regard the terms as no longer binding upon them. The Judicial Committee declared they could find nothing expressed in the contract to warrant them in accepting the conclusion of the Chief Justice. Their Lordships' decision on this point largely affects, if it does not govern, the remaining contentions of the plaintiffs, which related to the right to raise the rate of interest to 8 per cent. on an excess of overdraft, the argument of the bank being that the rate of interest could not remain at 5 per cent. unless as the basis of a revised contract. The Judicial Committee, after considering the whole contract, giving particular attention to the terms of it in relation to overdrafts, and also to this matter, viz., the effect of the bank declining, in October, 1884, to transfer 1,200,000*l.* from the London Branch to the public account of the Government (the bank believing that, pending a settlement of the revision asked for, the Government could not desire them to take action), agreed to make the following report to Her Majesty, viz.: Order that the appeal of the defendant (Dibbs) be allowed, that the judgment of the Supreme Court, so far as complained of by this appeal, be

reversed, and declare that the plaintiffs (the bank) are only entitled to charge 5 per cent. interest on the advances; that they are not entitled to commission on the two millions of loan negotiated by the Bank of England; that the defendant is entitled to one-eighth per cent. in respect of the 1,200,000*l.* which ought to have been transferred; further to remit the case to the Supreme Court that they may do what is right, having regard to the above declarations; dismiss the appeal of the plaintiffs with costs, and order the costs of the defendant's appeal to be paid by the plaintiffs to the defendant.

[*P. C. Ar.*]

Thakur Shankar Baksh *v.* Dya Shankar and Others.

Oudh. SIR RICHARD COUCH. *Dec.* 17, 1887.

Suit by appellant for redemption of mortgage. New suit with the same cause of action though relief prayed for on a different grade of right. *Res judicata.* Act VIII. of 1859, sect. 114. After the opening of the case the hearing of this appeal was adjourned to allow one counsel on each side to argue whether the first suit had been dismissed under sect. 114 of Act VIII. of 1859, and whether the conditions of that section applied to the case. The section provides for cases where the defendant appears and the plaintiff does not appear, and then "the Court shall pass judgment against the plaintiff by default unless the defendant admits the claim," and it says that when judgment is passed against a plaintiff by default he shall be precluded from bringing a fresh suit in respect of the same cause of action. The facts of the case were as follows:—In 1853 the grandfather of the appellant mortgaged the property in dispute to the first respondent (the other respondents had since become co-sharers in the villages). Portions of the mortgage money were paid, but subsequently, as alleged by the appellant, the mortgagee, on the settlement of Oudh, had a

sanad granted to him in which the disputed villages were entered, and thereafter he refused to allow the mortgagor to redeem by payment of the balance. In 1864 the mortgagor instituted a suit in the Settlement Court which then had jurisdiction claiming an under-proprietary right by redemption of mortgage. On the day for hearing the plaintiff applied for an adjournment to a particular day, and, the defendant's agent present in Court acquiescing in the application, it was granted. On the day fixed the plaintiff did not appear. The defendant, however, did appear, and the suit was accordingly dismissed for default. The decision in the present suit mainly rested on the question whether the case was disposed of under sect. 110 by which reinstatement was provided for, or under sect. 114.

In the present suit, instituted by the appellant, grandson of the mortgagor, he alleged that, acting under a mistaken view that the sanad barred his right to redeem the superior proprietary right, the mortgagor brought his suit to redeem an under-proprietary right. The appellant now sued for the superior proprietary right, declared he was willing to pay the balance of the mortgage debt, and contended that the Oudh Estates Act, Act I. of 1869, s. 6, conferred a fresh cause of action. The Judicial Committee agreed with the finding of the Judicial Commissioner that the suit was barred under sect. 114 of Act VIII. of 1859, and dismissed the appeal with costs. After reviewing the character of the proceedings in the Settlement Court, their Lordships say that the objection that the first decree of dismissal was made under sect. 110 did not seem to have been taken in the lower Courts in any of the various efforts made for a rehearing, nor in the District Court in the present suit.

"No objection has been taken in the lower Courts that the suit in 1864 was not in proper form, or that it was then necessary to deposit the money. That has been made necessary by a subsequent Act. That in the former suit the plaintiff asked for sub-proprietary right, and in the latter for the superior proprietary right, does not make any difference as regards the cause of action. It is not, as the District Judge thought, part of the cause of action. It is the manner in which the redemption

of the mortgage was to be given. Various questions have been raised, and very fully argued, before their Lordships in order to show that the cause of action in the two suits is not the same, and that the present suit is for a new cause of action. Their Lordships have fully considered those arguments, and they are unable to come to the conclusion that the causes of action are not the same, and that the judgment of the additional Judicial Commissioner, who held that the suit was barred under the provisions of sect. 114, is wrong. Affirmed, with costs.

[*L. R.* 15 *Ind. App.* 66; *I. L. R.* 15 *Calc.* 422.]

Raikishori Dasi and Another *v.*
Debendra Nath Sircar and Others.

Bengal. SIR BARNES PEACOCK. *Dec.* 22, 1887.

Construction and genuineness of a will, or rather of three documents in the nature of wills. Claim by respondents to a share of their father's (the testator's) property under the will. The appellants (the first appellant being the widow of an adopted son of the testator, and the second appellant a transferee of a share by deed from the first appellant) claim that the will is void and illegal. The first appellant, in consequence, claimed to be entitled to the property in dispute as her share coming to her as Gobind's widow, and the other appellant said he was entitled to a transfer of the portion made by the widow. Point of practice in regard to documents filed in Court.—The respondents were the plaintiffs in the suit: they were the four sons of the testator, Biswanath Sircar. The plaintiffs by their plaint prayed that after putting a true construction on the will of the late Biswanath Sircar, the Court would be pleased to pass a decree declaring that defendant No. 1, that is to say, the widow of Gobind Nath, the adopted son, had no right to the property stated in the schedule marked (*ka*), and to declare the plaintiffs' right to the said property in accordance with the said will. They also prayed that after declaration of the plaintiffs' right, the Court

would be pleased to pass a decree declaring that defendant No. 1 had no right to take possession of, or to transfer any property stated in the said will, and that the registered kobala executed by defendant No. 1, dated 9th Falgoun, 1285, was void. The will was contained in three documents, which together formed the last will of Biswanath. The first of these documents was dated January, 1856; the second, May, 1862; and the third, August, 1870. The Subordinate Judge held that the will was void, and consequently that the widow succeeded to her husband's share. The High Court upon appeal reversed that decision, and held that the plaintiffs were entitled to it. The will contained many provisions which could not legally be carried into effect, and which appeared to create a perpetuity, and consequently to render the will invalid. The more important passages in the High Court judgment were these. "The conclusion then at which we arrive upon the construction of these three testamentary instruments is, that there was a good gift to the six sons of the testator's property in equal shares; and that in the second and third wills, the testator has endeavoured to impose restrictions upon the proprietary interest conferred by the first will, which restrictions are opposed to law, and must therefore be regarded as invalid and inoperative." "We are . . . . of opinion that we ought to give effect to the clear intention of the testator as to the share of a son dying going over to the other sons who survive him. We think, then, that according to the true construction of the will, upon the death of Gobind Nath Sircar (who was specifically mentioned in will No. 1), the one-sixth share which he originally received under the provisions of the will, together with the share of Jagadindra Nath Sircar (a son who died before Gobind), went over under the provisions of paragraph 5 of the third will to the four sons who are plaintiffs in this case, and that Raikishori Dasi, the widow, was not entitled to take anything by inheritance from her deceased husband, Gobind Nath Sircar." The Judicial Committee, affirming the decree of the High Court, use the following language in their judgment:—"At the close of the arguments their Lordships reserved judgment, in order that they might

carefully consider all the provisions of the three documents read together. They have now done so, and although they cannot, after full consideration, say that the case is free from doubt, they are not prepared to hold that the High Court came to an erroneous conclusion, or to advise her Majesty to reverse the judgment. *Their Lordships observe that the High Court has declared the deed of conveyance to be void, and that it be cancelled and retained in Court. It is not because a man conveys property to which he is not entitled that the conveyance is absolutely void or ought to be cancelled or retained by the Court. It was unnecessary to do more after declaring the plaintiff's right than to declare that defendant No. 1 had no right to take possession of, or to transfer any part of the property mentioned in the will, and that the deed passed no right in any part of such property to the defendant No. 2.* Their Lordships will humbly advise her Majesty to affirm the decree, so far as it declares that the defendant No. 1, Raikishori Dasi, had no right or interest in the property mentioned in the schedule '*ka*' attached to the plaint, and that the plaintiffs are entitled to the same, but that *instead of declaring that the conveyance executed by Raikishori Dasi in favour of Defendant No.* 2, *Syed Abdul Sobhan, is void, and that the said conveyance be cancelled and retained in Court, it be declared that the said conveyance transferred no interest in the property to the defendant No.* 2, and that in all other respects the decree of the High Court be affirmed. This modification of the decree of the High Court does not affect the merits of the case as regards the parties to this appeal, and accordingly the appellants must pay the costs of the appeal."

[*L. R.* 15 *Ind. App.* 37; *I. L. R.* 15 *Calc.* 409.]

De Montmort (née Letterstedt) *v.* Broers.

Cape of Good Hope. Sir Richard Couch. *Dec.* 22, 1887.

Further litigation concerning the estate of the late Jacob Letterstedt (*vide Letterstedt* v. *Broers*, 9 App. Cas. 371). Claims by infant children of the testator's daughters against the exe-

cutors. *Res judicata.* Position of executors under Roman Dutch law. *Fidei commissum.* Are the children on whose behalf this action was brought bound by a compromise effected by their mother with the executors in 1874? Cape law of inheritance. The Judicial Committee agree with the Supreme Court in declaring that the minors are bound by the compromise, and that the mother's interest at the time the compromise was entered into bound the children now. Affirmed with costs.

[13 *App. Cas.* 149; 57 *L. J. P. C.* 47.]

1888.

Rani Sartaj Kuari and Another *v.*
Rani Deoraj Kuari.

N. W. P. Bengal. SIR RICHARD COUCH. *Jan.* 21, 1888.

Validity of a deed of gift of villages by a Raja to his younger Rani during his life-time. The suit was brought by the respondent (the elder Rani) as mother and guardian of her infant son, against the Raja and the younger Rani. The plaintiff contended that the Raja had no power according to Hindu law and usage to alienate any portion of the raj. The plaint stated that the estate of Mahauli (one of the properties of the raj) had been in the plaintiff's family for a very long time, and, according to the custom of the country and its neighbourhood, and the provisions of Hindu law, the eldest son of the Raja succeeds to the estate; that since the establishment of the raj up to the time of bringing the suit, according to the provisions of Hindu law and the prescriptive and recognized usage, the successor of the Raja and occupant of the gaddi had had no other right under any circumstances except to enjoy possession of the estate during his lifetime, and use its income in maintaining his own respectability and dignity of the estate and in support of the members of the family, leaving the whole estate at the time of his death to his successor. The written statements of the defendants alleged that Bhawani Ghulam Pal was proprietor of the estate and authorized to make any transfer, and it would be proved on inquiry that, on account of the separation of the family and other reasons, transfers of every

description had been made in the family from of old, without any objection or obstruction being offered.

The estates of the raj, which are considerable, and are situated both in Oudh and the North West Provinces, are in the family 300 years.

The Subordinate Judge decided that the deed of gift was invalid, and made a decree for the plaintiff. He appears to have held that the estate being impartible it must also be inalienable, unless it was proved that the custom of making transfers had been prevalent in the family, and that the defendant had failed to prove this.

The defendants appealed to the High Court. That Court held that, in the absence of any custom to the contrary, the plaintiff and his father being Hindus, and members of a joint Hindu family, and as such subject to the law of the Mitacshara, the estate pertaining to the raj of Mahauli must be regarded as joint family property in which he had an immediate present interest and a right of succession as eldest son. And they said that "they were not prepared to admit, at any rate so far as the law governing these (the North-West Provinces) is concerned, except where it is clearly overridden by well recognized family custom, an absolute disposing power in one member of a joint family over an estate which has some of the incidents at least of joint family property," and that the defendant Raja and the minor plaintiff being members of a joint Hindu family, and the estate of the raj being joint ancestral property, and the law of the Mitacshara being applicable, the gift not having been made for necessary purposes was void, and must be set aside. Accordingly the appeal was dismissed, with costs.

The Judicial Committee reported to her Majesty that these decisions ought to be reversed. Their Lordships discussed at length the doctrines of the Dáya-Bhaga (ch. 1, sect. 1, v. 27), and the Mitacshara (ch. 1, sect. 1, v. 30), with regard to heritage and also the following authorities: *The Tipperah Case*, 12 Moo. Ind. App. 542; *The Shivagunga Case*, 9 Moo. Ind. App. 592; *Periasami* v. *Periasami*, L. R. 5 Ind. App. 61; *Raja Venkayamah* v. *Raja Vanhondora*, 13 Moo. Ind. App. 333; *The Hansapore Case*, 12 Moo. Ind. App. 1; *Raja Udaya Aditya Deb* v. *Jadub Lal Aditya*

Deb, L. R. 8 Ind. App. 248. It was admitted that the raj in the present case was impartible, and that there was a custom of succession by primogeniture, but the questions how far the general law of the Mitacshara was superseded by custom, and whether the right of the son to control the father was beyond the custom, made it necessary for the Judicial Committee to dilate upon the character respectively of the above-cited cases. In conclusion their Lordships say:—"If, as their Lordships are of opinion, the eldest son, where the Mitacshara law prevails and there is the custom of primogeniture, does *not become a co-sharer with his father* in the estate, the inalienability of the estate depends upon custom, which must be proved, or, it may be in some cases, upon the nature of the tenure. The Subordinate Judge and the High Court thought that the onus was upon the defendants (the appellants) to prove that by custom the estate was alienable, and they have found that the custom was not proved. Their Lordships have not to consider whether these concurrent findings should be questioned. They have to see whether it is proved that there is a custom of inalienability. The fact that there is no evidence of a sale of any portion of the estate is in the plaintiff's favour, but this is not sufficient. The absence of evidence of an alienation without any evidence of facts which would make it probable that an alienation would have been made cannot be accepted as proof of a custom of inalienability. For the foregoing reasons, their Lordships are of opinion that the plaintiff has failed to show that the gift ought to be declared to be invalid, and they will humbly advise her Majesty to reverse the decrees of the lower Courts, and to decree that the suit be dismissed with costs in both these Courts. The respondent will pay the costs of this appeal.

[*I. L. R.* 10 *All.* 272; *L. R.* 15 *Ind. App.* 51.]

Tearle *v.*
Edols.

New South Wales. LORD FITZGERALD. *Jan.* 21, 1888.

Construction of the Crown Lands Act, 1884, particularly sect. 4. Tried on a special case. The plaintiff (respondent) Edols had a leasehold area—some fifty square miles—called the

Burrawang Run. The whole action depended on the construction of the 1884 Act. It was brought by Edols to recover damages for trespass. The facts were as follows. Originally the plaintiff (respondent) was a leaseholder of the Burrawang Run. On 9th February, 1882, one John Stewart, under the land laws then in force, conditionally purchased 640 acres. On the passing of the 1884 Act, Edols applied under the terms of the Act for a "pastoral" lease of his "leasehold area." In November, 1885, Stewart's conditional purchase was forfeited, and as a consequence thereof the portion he had conditionally purchased was under the 1884 Act resumed by the Crown. Meanwhile Edols had secured a pastoral lease, under which runholders who were holders of pastoral leases were allowed to hold their lands under a more certain and continuous tenure than mere leaseholders. The chief matter to be considered was, what amount of land previous leaseholders could claim to be brought into the "pastoral" holding. The Act of 1884 came into force in January, 1885. In December of that year the appellant Tearle applied to conditionally purchase 160 acres, part of the said forfeited portion, and for a conditional lease of 480 acres, the residue of the said portion. What he sought for was granted and confirmed by the Land Board. The conditional purchase by Stewart took place when the prior Colonial Act of 1875 (39 Vict. No. 13) was in force, but that statute was referred to only for the purpose of pointing out that if the forfeiture had taken place under it, or under the Crown Lands Alienation Act of 1861, the lands would have returned to the plaintiff as lessee of the run.

The Crown Lands Act of 1884, an Act to regulate the alienation, occupation, and management of Crown lands, came into force, as has been said, on the 1st January, 1885, and it is to be borne in mind that the conditional alienation of the 640 acres to Stewart was then in full force and vested in Stewart, who was, their Lordships assume, also in possession. It represented but a small portion of the run.

The plaintiff contended that the true view to take of the forfeiture of a conditional purchase was that the land reverted to its former condition as if the conditional purchase had never

been entered on or made, and that consequently, the 640 acres being locally within the ambit of the leasehold area, it reverted and became part of the leasehold. Their Lordships cannot adopt this view. There are many and formidable arguments against it, but it is sufficient to say that their Lordships can find no language in the Act to warrant them in coming to the conclusion that it reverted to or was brought within the pastoral holding, in the sense of forming part of it. For the plaintiff it was contended that sect. 21 on its exemption of lands comprised within leasehold areas should receive a different interpretation from that given to leasehold area in the fourth or definition section, and should be taken to exclude all land within the external boundaries of the local area, though not being a portion of a pastoral holding for which a pastoral lease might be granted—that in effect "area" should be there interpreted as area physically of the pastoral holding, and that all lands within its continuous external boundaries were exempted.

The defendant on the other hand contended that "within the leasehold area" was to be read under the definition of sect. 4, as that which was within it as forming part of it, and of which as such a pastoral lease might be granted.

The Judicial Committee are of opinion that the latter is the correct view, and that there is nothing in the context of sect. 21 so far which would require a different meaning to be put on "leasehold area" in sect. 21, sub-sect. 3, from that given in the interpretation section.

"Leasehold area" and "resumed area" are put in contrast, and each apply to some division of the Crown lands in the pastoral holdings. The first is applicable to that portion of the pastoral holding which *may* be, and the latter to that which *may not* be the subject of a pastoral lease under the Act: but it was asked, is the forfeited land part of the resumed area? The answer ought to be in the affirmative. The run holding, so far as it consisted of Crown lands, was, in all its parts, liable to resumption for the purposes of absolute or conditional sales—and clearly when a forfeiture took place and the forfeited land reverted to the Crown it became in the hands of the Crown resumed land and part of the resumed area.

Their Lordships have arrived at certain conclusions which govern the decision of the case and render it unnecessary to notice many other points of difficulty of construction presented in the course of the argument. They "are of opinion that Stewart's 640 acres, though within the continuous external boundary of the leasehold area as notified by the minister, yet did not belong to it, and was not a portion of the pastoral holding of which the minister might make a pastoral lease, and that on the subsequent forfeiture of Stewart's title the land reverted to the Crown, and became "Crown land" within the definition of that expression in sect. 4, and part of the resumed area, and was not exempted from conditional sale within the third sub-section of sect. 21. Their Lordships in effect adopt the reasons of the late Chief Justice as on the whole the most reasonable, and they are of opinion that the question contained in Article 10 of the special case stated—viz., Whether the defendant's (appellant's) said applications, or either of them, were valid under the circumstances hereinbefore set out?—should be answered in the affirmative as to both, and that the judgment of the Supreme Court of New South Wales should be reversed, and a verdict entered for the appellant in terms of Article 12 of the said special case. Their Lordships will so humbly advise her Majesty. The respondent is to pay to the appellant the costs of this appeal." [Article 12 of the special case ran thus:— "If this honourable Court shall be of opinion that both the said applications were valid, then a verdict is to be entered for the defendant, with costs of suit."]

[13 *App. Cas.* 183; 57 *L. J. P. C.* 58.]

The Victorian Railway Commissioners *v.* James Coultas and Wife.

Victoria. Sir Richard Couch. *Feb.* 4, 1888.

Alleged injury by fright. The respondents brought the action to recover damages alleged to have been caused by negligence of a railway porter, in the appellants' employment, in opening a gate to allow the buggy in which the respondents were seated to pass over a level crossing just as a train was approaching. The train passed the vehicle without impact, but

it was stated that the lady respondent had suffered seriously in health from the nervous shock. The jury below had awarded 342*l.* damages to the male respondent, and 400*l.* to the lady, subject to the discussion by the Supreme Court of certain points reserved. The chief of these was whether the damages were too remote. On this point the majority of the judges agreed that they were not and, further, that proof of impact was not necessary. The Judicial Committee now reversed this finding. They held, without saying that impact was necessary, that in this case the damages were too remote. Were they to decide otherwise, in every case of nervous shock there might be a claim for damages, and a wide field would be opened for imaginary claims. Appeal allowed, and judgment would be entered for the Railway Commissioners.

[13 *App. Cas.* 222; 57 *L. J. P. C.* 69.]

Osborne and Others *v.*
Morgan and Others.

(Consolidated Appeals.)

Queensland. Lord Watson. *Feb.* 4, 1888.

Miners' "rights" in the Queensland Gold Fields. The principal question to be determined on the appeal was whether the appellants were in a position to challenge and set aside "leases" granted to others. The appellants contended that the leases were invalid, and were (contrary to the regulations) granted within two years of the proclamation of the gold field, and that the respondents in making application for the said leases did not comply with the regulations. *Demurrer.* Gold Fields Act, 1874 (Queensland, 38 Vict. No. 11, sect. 11). The respondents contended that the appellants were licensees only of the Crown for mining purposes, and had no title to any of the land in question; that the lands were not unoccupied Crown lands within the meaning of certain statutes; that the irregularities (if any) in the proceedings under which the leases were granted did not render them void.

Their Lordships hold that the holders of miners' rights have

no title to impeach possession held under a mining lease granted by the Crown. Sect. 9 of the Act. Orders appealed from affirmed, and appeals dismissed with costs.

[13 *App. Cas.* 227; 57 *L. J. P. C.* 52.]

Williams *v.*
Morgan and Others.

Queensland. LORD WATSON. *Feb.* 4, 1888.

Miners' "rights" in the Queensland Gold Fields. Action by the holder of a miner's right against a lessee. *Vide* (*ante*) decision in *Osborne and Others* v. *Morgan and Others.* Appeal dismissed, with costs. [13 *App. Cas.* 238; 57 *L. J. P. C.* 52.]

Attorney-General of the Straits Settlements *v.*
Wemyss.

Straits Settlements (*Settlement of Penang*). LORD HOBHOUSE. *Feb.* 4, 1888.

Crown Suits Ordinance of 1876 (Straits Settlements, sect. 18, sub-sect. 2). Petition of right. Land acquired by grants from the Crown. Damages done to tenement by the execution of works upon the foreshore. Free communication between the land in question and the sea cut off. Appellant argued that respondent's lessors had title under Crown grants; that these were for certain defined areas; further, that by agreement the lessors had, in effect, given up their rights. The respondent answered that his covenant dated many years back; that it gave him power to renew, and that his rights were paramount to any the Crown obtained when the reclamation was entered on in 1882. Can the Crown be sued in tort? *Farnell* v. *Bowman*, 12 App. Cas. 643.

The Judicial Committee affirmed the decision below. The Crown could be sued in tort, and the petitioner was in the same position as is a riparian owner with regard to access to a tidal river. *Lyons* v. *Fishmongers' Co.*, 1 App. Cas. 662.

[13 *App. Cas.* 192; 57 *L. J. P. C.* 62.]

The Government of Newfoundland *v.* The Newfoundland Railway Company.

Newfoundland. LORD HOBHOUSE. *Feb.* 7, 1888.

Claim by a railway company, and by trustees for bondholders of the company and assignees of a portion of the line, against the Government for recovery of lands and arrears of a subsidy for a completed part of the railway. Construction of the contract between the Government and the company (as embodied in consolidated statutes of Newfoundland, tit. 4, c. 29). The Government deny liability, on the ground that the subsidy was for an entire sum, and that the condition precedent to payment was the complete fulfilment of the contract. If the liability does exist, then the Government sets up counter-claim. The main question was whether there had been a forfeit of the subsidy because the whole of the line engaged to be constructed by the company was not completed. Feeling as they do the impossibility of reconciling all parts of the contract, the Judicial Committee give it the best construction they can. Their Lordships in the result recommend that the decree below be varied, but they make a declaration approving of the claims of the company and of the assignees for so much of the line as is completed, and laying down that as each part of the railway was finished there became due a proportion of the subsidy and of the lands, though subject to the condition of continuous efficient operation. Their Lordships also decided that counter-claims and set-off (for unliquidated damages for the company's breach of contract in not completing the line) were to be sanctioned in favour of the Government, such set-off also to be available against the assignees. An inquiry is directed to be held in the colony to ascertain the extent of the Government claims. *Young* v. *Kitchin*, 3 Ex. Div. 127. *Dictum:* "The Colonial Legislature has adopted the convenient and just rule introduced into England by the Judicature Act, so that damages unliquidated at the time of the action may be made the subject of counter-claim."

[13 *App. Cas.* 199; 57 *L. J. P. C.* 35.]

The Bank of Africa *v.*
The Colonial Government.

Cape of Good Hope. Sir Richard Couch. *Feb.* 7, 1888.

Liability for payment of duty on the issue of bank notes. Special case. Construction of Act No. VI. of 1864, s. 9. Effect also of Act XIX. of 1865. Distinction between notes "outstanding" and "in circulation," and those which were neither outstanding nor in circulation, but were in the possession of the branches of the bank.

The special case stated that the Bank of Africa is a joint stock bank carrying on business in the colony as bankers, and issuing bank notes; that the bank has its head office at Port Elizabeth, and has several branch offices; of these offices only the head office at Port Elizabeth and the offices at Cape Town and Kimberley issue or have at any time issued their own notes, Kimberley having ceased to issue its own notes since the 30th of June, 1886: since the month of June, 1880, the head office and the Cape Town and Kimberley branches have each made separate returns of their note circulation for the purposes of the Colonial Act, No. VI. of 1864; in making such returns the head office and the two branches have treated all notes of the bank, *in the possession of any of its offices* upon the last day of any given month as not being in circulation or outstanding on that day, and have excluded all such notes from the returns: that on comparing the amounts published by each branch bank, under the provisions of Act XIX. of 1865, of the notes of such bank in circulation on any particular day with the returns made by such branch bank under the provisions of Act VI. of 1864 to the Treasury, it is found that the amounts do not agree, and that the amounts of the notes in circulation according to the statements made under Act XIX. of 1865 are considerably in excess of the amounts of the notes in circulation according to the returns made under Act VI. of 1864; that the Kimberley branch has been in the habit of re-issuing to the public notes of the said bank other than notes originally issued by itself: that

the plaintiff contended that each of the three offices issuing notes—the head office, the Cape Town office, and the Kimberley office—should have included in its returns (*a*) all notes issued by it and in possession of either of the other two of the said three offices, (*b*) all notes issued by it and in the possession of any other office of the bank in the colony upon the last day of each month for which any such return was made, and that duty should have been paid upon all such notes accordingly, in terms of the Act VI. of 1864; that the defendant disputed this contention, and said that all the returns had been duly made in manner provided by the Act.

The Supreme Court pronounced a decision in favour of the plaintiff (respondent). The Judicial Committee, on the other hand, considered that, by the true construction of Act VI. of 1864 (and in their Lordships' view, Act XIX. of 1865 was passed for a particular purpose, and cannot be used to show the meaning of the 1864 Act), the findings should be given for the defendant bank. Their Lordships, in reversing the decision of the Supreme Court of the Cape, held that a bank note in circulation means a note which is passing from hand to hand as a negotiable instrument representing a certain value, and is quite different from a note returned to a bank or any of its branches, when it ceases to be either in circulation or outstanding within the meaning of the Act. In the opinion of the Committee, the 1864 Act merely directed that monthly returns for taxation should be made on bank notes in circulation or outstanding. Once notes came back from these channels to the bank or its branches, there was no longer any person entitled to require payment on them. Moreover, the policy of the Act was not to enlarge the basis of returns, nor treat every branch, for the purpose of the Act, as a separate and independent bank.

Their Lordships are of opinion that the defendants' contention ought to have been declared to be correct, and judgment recorded for the Bank of Africa, and that the plaintiff should pay the costs of the suit. They will so humbly advise her Majesty, and that the judgment of the Supreme Court be reversed. The respondent will pay the costs of this appeal.

The following cases were cited (during the arguments) with reference to the position of branch banks relatively to the parent bank:—*Prince* v. *Oriental Bank Corporation*, 3 App. Cas. 325; *Oriental Bank Corporation* v. *Wright*, 5 App. Cas. 856.

[13 *App. Cas.* 215; 57 *L. J. P. C.* 66.]

Raja Madho Singh *v.*
Ajudhia Singh and Others.

[*Ex parte.*]

Oudh. SIR BARNES PEACOCK. *Feb.* 7, 1888.

Suit under the Oudh Rent Act, XIX. of 1868, s. 83, cl. 4, by a talookdar to have a lease cancelled and lessees ejected from occupancy of land on account of outstanding arrears of rent and alleged violation of the conditions of an agreement. The lessees (the respondents) were "persons with an under-proprietary right in land." Three Courts below had pronounced against the appellant on the grounds that the lease was held under the terms of a settlement decree, and that these were not modified by a later agreement; further, that to eject the respondents under the Rent Act would be in violation of the settlement; further, that sect. 158 of Act XVII. of 1876, Oudh Land Revenue Act, did provide an effective remedy if the plaintiff had brought the suit under that Act instead of the Rent Act. The Judicial Committee agreed with the unanimous decrees below. No *locus standi* existed under the settlement decree (consented to by way of compromise) for a suit to cancel the lease in the Rent Courts. The only procedure open to the appellant would have been to sue in the Civil Court. [*L. R.* 15 *Ind. App.* 77; *I. L. R.* 15 *Calc.* 515.]

Gunga Narain Gupta *v.*
Tiluckram Chowdhry and Others.

Bengal. LORD WATSON. *Feb.* 7, 1888.

Action by appellant to set aside a judicial sale. Allegations of fraud not supported in plaint. No cause of action. Civil

Procedure Code, Act XIV. of 1882, s. 53. Important observations as to proper procedure when judge finds plaint defective. There were two sets of defendants, viz., judgment creditors and auction purchasers. The High Court affirmed the decision of the Subordinate Judge. The Judicial Committee in their judgment say:—"The 50th section of the Civil Procedure Code (Act XIV. of 1882) provides that every plaint must contain a plain and concise statement of the circumstances constituting the cause of action and when and where it arose. By sect. 53, sub-sect. (d), the judge before whom the plaint depends is authorized, if it does not disclose a sufficient cause of action, to adopt one or other of two courses: he may at or before the first hearing either reject the plaint, or allow an amendment, to be made upon the spot or within a limited time, upon such conditions as to payment of costs as he may think proper. When fraud is charged against the defendants it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges. Lord Selborne said, in *Wallingford* v. *The Mutual Society* (5 App. Cas. 697):—'With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court ought to take notice.' There can be no objection to the use of such general words as 'fraud,' or 'collusion,' but they are quite ineffectual to give a fraudulent colour to the particular statements of fact in the plaint, unless these statements, taken by themselves, are such as to imply that a fraud has actually been committed.

"In the present case it is unnecessary to criticise the plaint minutely. Strike out the words 'fraud,' 'deceit,' 'illegal and fraudulent acts,' 'machinations,' and so forth, of which there is great superfluity, and what remains? Nothing, except an allegation of certain facts which might be unattended with any fraudulent or illegal purpose or character. In these circumstances, the Subordinate Judge, being of opinion that no cause of action was stated in the plaint, allowed an examination of the pleader for the plaintiff. He did so, not with the view of

taking evidence, or of ascertaining what was to be the evidence in the case, but with the very proper object of ascertaining whether the pleader was in a position to make, on behalf of the plaintiff, an amendment of the plaint which would introduce a specific and relevant cause of action. Counsel for the plaintiff—who is appellant here—admitted that the effect of the declaration of the pleader was to make matters worse instead of better; and in that observation by the learned counsel their Lordships are quite ready to concur.

"Their Lordships are accordingly of opinion that the judgment of the High Court is well founded, and must be affirmed. They are, however, of opinion that in disposing of this case upon the defects of the plaint as not setting forth a good cause of action, the Subordinate Judge ought not to have taken the course of dismissing the suit. If he did not allow an amendment as authorized by sect. 53 of the Procedure Code, he ought, in terms of the same section, to have rejected the plaint. That, according to sect. 56 of the Code, would have enabled the plaintiff to present a fresh plaint in respect of the same cause of action if he found himself in a position at any future time to make averments which would give relevancy to his action. However, no objection seems to have been taken in the Court below to the form of the judgment, which was the same in both Courts, dismissing the action. No objection was stated in the appellant's case, or raised by his counsel; and in these circumstances, and seeing that the time limited for bringing an action to set aside the judgment has already elapsed, their Lordships are of opinion that the ends of justice will be served by permitting the judgment of the Court below to stand in its present form." [*L. R.* 15 *Ind. App.* 119; *I. L. R.* 15 *Calc.* 533.]

Jugal Kishore and Others *v.*
Girdhar Lal and **William Martin.**

N. W. P. Bengal. Sir Richard Couch. *Feb.* 8, 1888.

Dispute between firms trading in indigo. Action to recover a balance of account in respect of losses alleged to have been

incurred on purchases. Failure of evidence. Appeal dismissed. The Judicial Committee gave a judgment, of which the following were the principal expressions:—The plaintiffs (appellants) claimed to recover from the two defendants "a balance of an account which they say there was between their firm and the defendants as commission agents in respect of certain transactions of trading in indigo, grain, &c., between January, 1878, and March, 1879. The defendants separated in their defence, that of Girdhar Lal being that, excepting in a contract for indigo seed, he was not a partner at all with the other defendant, and there was no other claim against him; and that as regards the transaction of the indigo seed the balance was in favour of the two defendants, and nothing was due to the plaintiffs as agents in respect of that transaction. The Subordinate Judge found that this defence was true, and that Girdhar Lal was not liable to the plaintiffs upon the account, the balance as far as regarded that transaction being in his favour. Upon appeal by the plaintiff to the High Court that finding was affirmed. The consequence was that the counsel for the appellants admitted that he could not contest the propriety of that decision. As regards Girdhar Lal, therefore, the appeal must be dismissed, and the decision of the High Court affirmed, Girdhar Lal having the costs of this appeal.

"There then remains the question with regard to the other defendant, Martin. His defence was that, as regards the transactions which followed the contract for indigo seed, they were not entered into by the plaintiffs as commission agents for him, but that Ram Parshad, a member of the plaintiffs' firm, had entered into a contract for the supply of 100,000 maunds of seeds, and that there was an agreement between him and Martin, that Martin should purchase 40,000 maunds for the purpose of carrying out that contract. Upon the case of the plaintiffs it would be necessary for them to show that a balance was due to them, which they claim in respect of damages which they had sustained as commission agents; but the evidence which Ram Parshad gives, so far from showing that, rather shows that the contention of Martin is correct, and that the damages which are

claimed were really damages sustained in consequence of the transactions with regard to the 40,000 maunds. There is nothing to show that the case of the plaintiffs, which they were bound to prove, has been made out. . . . . . The case has entirely failed, and there is no ground for considering that the decision of the High Court, by which they reversed the decree of the Subordinate Judge, is not perfectly correct.

"The appeal as regards Martin should also be dismissed. The appellants will pay to Girdhar Lal (who alone appeared) the costs of this appeal." [*P. C. Ar.*]

Sardhari Lal *v.*
Ambika Pershad and Others.

[*Ex parte.*]

Bengal. Lord Hobhouse. *Feb.* 8, 1888.

Law of limitation. 11th article of Act XV. of 1877. Suit by appellant under Act X. of 1877, sect. 283. The whole question in the suit was whether it was brought in time to satisfy the exigencies of the law of limitation. The suit was instituted to set aside an order releasing from attachment and sale property which had been seized on behalf of the appellant in execution of his decree for money due under a mortgage. After the decree for attachment and sale was obtained, near relatives of one of the judgment debtors objected to its being put in force, on the ground that the debt was a personal one of the judgment debtor's, and that therefore the ancestral property of the objectors could not be made liable. Under the order in question the property was released. The present suit was brought in 1882, and prayed for (*inter alia*) a decision that the mortgage, which purported to be executed by the manager of the family, was binding on the defendants (respondents). Both Courts below dismissed the suit, as barred by limitation. The Judicial Committee agreed

with that decision, and in the course of their judgment made the following observations:—

"The plaintiff's case is, that he was aggrieved by an order passed on the 31st of July, 1880, and he now seeks to get rid of it in this suit. The order was passed in execution proceedings under the provisions of sect. 280 of the Code of 1877, and the effect of it was to allow certain objections that had been lodged to an attachment obtained by the plaintiff in another suit in which he was plaintiff and decree-holder, and to release from attachment the property which at his instance had been attached and put up to sale. The plaintiff was entitled, under sect. 283 of the Code, notwithstanding the order in question, to institute a suit to establish the right which he claims to the property then attached and put up to sale. But then it is provided by the 11th article of the Limitation Act, Act XV. of 1877, that a suit by a person against whom an order is passed under sect. 280 of the Code of Civil Procedure to establish his right to the property comprised in the order must be brought within one year from the date of the order. Now this suit was not brought until the 20th May, 1882, that is to say, about twenty-two months after the date of the order. It is clearly therefore out of time unless it can be shown that for some reason or other the case does not fall within the article of the limitation law."

Two reasons were suggested why the Judicial Committee should hold that the case did not fall within the article, but their Lordships saw no force in them. The law of limitation says that the plaintiff must be prompt in bringing his suit. The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution sales, and for that reason a year is fixed as the time within which the suit must be brought.

Their Lordships are clearly of opinion that this case falls within the scope of the 11th article in question, and that the suit must fail upon that ground.

[*L. R.* 15 *Ind. App.* 123; *I. L. R.* 15 *Calc.* 521.]

Redfield and Others *v.*
The Corporation of Wickham.

Lower Canada. Lord Watson. *Feb.* 15, 1888.

Right of the Wickham Corporation to execute a *distraint* and *sale* of the property of the South Eastern Railway of Canada (which had been incorporated as a separate corporation by the amalgamation of the South Eastern Counties Junction Railway with the Richelieu, Drummond, and Arthabasca Counties Railway Company) in satisfaction of a judgment obtained under a writ of *fi. fa. de bonis et terris* by the respondents against that railway. The appellants are trustees of the bondholders of the amalgamated concerns, and they have of late maintained, worked, and managed the railway. This power was reserved to the trustees in case of default by the railway itself, by an Act passed by the Quebec Legislature (43 & 44 Vict. c. 49), sect. 5 of which enabled them, when and as often as default should be made, "to take possession of and run, operate, maintain, manage, and control the said railway and other property conveyed to them as fully and effectually as the company might do the same." Construction of this statute and of the conveyance to the trustees (the present appellants) under it. Action arose out of alleged breach of covenant to run the railway through Wickham by means of a branch line. Cause of action created before assent was given to 43 & 44 Vict. c. 49. Contention of the appellants that the railway and its property could not lawfully be seized at the suit of an ordinary judgment creditor, inasmuch as previous to the seizure the railway and its property had been legally conveyed to the trustees for valuable consideration: that these trustees had priority over other creditors, and that the railway could not be seized until the entirety of the bonds in principal and interest had been paid. The appellants at the conclusion of their opposition *afin de distraire*, prayed that the railway might be declared to be their property, and released from seizure, otherwise that the judgment creditor should be held to give security that the property should realize

at the sale the amount due on the bonds. Both Courts below dismissed the opposition on the ground that the trustees were not the absolute owners of the railway, but had only a charge thereon, and further that the respondents were protected by sect. 11. The Judicial Committee affirmed the decrees below, and in their judgment dwelt upon the effect of a Dominion Statute (46 Vict. c. 24), by which this railway in question has become a Dominion railway, and was therefore liable to be attached and sold.

The appellants relied upon the authority of *Gardner* v. *London, Chatham, and Dover Railway Company* (2 Ch. App. 201), and *In re Bishop's Waltham Railway Company* (2 Ch. App. 382). These cases, which were decided by Earl Cairns (then Lord Justice) and Lord Justice Turner, establish conclusively that in England the undertaking of a railway company, duly sanctioned by the legislature, is a going concern, which cannot be broken up or annihilated by the mortgagees or other creditors of the company.

Their Lordships point out that the legislation of Lower Canada differs materially from legislation upon the same matters in this country. The Dominion Act mentioned contained specific clauses arranging for and rendering lawful in certain cases the sale of a railway. The judgment of the Committee ends thus: "Their Lordships have come to the conclusion that their judgment must be for the respondents. They are not affected by the Act of 1880, and must, therefore, be placed in no worse, and at the same time in no better position than they would have occupied if the Act had never passed. On the one hand, the railway taken in execution by the respondents must, for all the purposes of these proceedings, be deemed to be still the property and in the possession of the South Eastern Railway Company; and, on the other hand, the appellants, as representing the present holders of mortgage bonds, must be taken as standing in the shoes of the bondholders whose debts were unpaid at the passing of the Act. The appellants will be entitled in the present proceedings to the benefit of all rights and preferences which were attached to these mortgage debts during their subsistence."

"Their Lordships will accordingly humbly advise her Majesty to affirm the orders appealed from, and to dismiss the appeal. The costs of this appeal must be borne by the appellants."

[13 *App. Cas.* 467; 57 *L. J. P. C.* 94.]

Bhagbut Pershad Singh and Others *v.*
Mussumat Girja Koer and Others.

Bengal. Sir Barnes Peacock. *Feb.* 15, 1888.

Ancestral estate under Mitacshara law. Suit by widows to recover (on behalf of themselves and their children) estates which had been sold in execution to meet debts contracted by the fathers of the children. The plaintiffs (respondents) were the three wives and the children of three Hindu brothers. The appellants were the purchaser (first defendant) and the three Hindu brothers. The allegation of the plaintiffs was that the debts had been contracted for immoral purposes. The answer of the defendants (appellants) was that the sales had been ordered and obtained on bonds validly executed by the brothers. The Subordinate Court gave a decree in favour of the plaintiffs for the shares to which it considered the claimants would be entitled if a partition of the joint ancestral estate had been made; the claim of five of the plaintiffs not born when the bonds were executed was however dismissed. The High Court also decreed in favour of the plaintiffs (the respondents), and referred in their reasons to a judgment they had given in another suit. In effect the judges decided against the appellants on this ground, viz., that in their opinion the lenders did not make proper inquiry, such as a prudent lender would make, to satisfy themselves as to the necessity, for the benefit of the family estate, of the loans, or, on the other hand, to satisfy themselves that the loans had been entered into for improper or immoral purposes. The Judicial Committee reported that the judgment of the High Court was erroneous, and that that judgment, and the judgment of the Subordinate Court in so far

as it was adverse to the appellants, ought to be reversed, with costs of the appeal. Furthermore, the suit ought to be dismissed, with costs in both the lower Courts. Principle of liability of children to pay their fathers' debts out of a joint estate unless the debts were proved to have been contracted for immoral purposes, is upheld. Their Lordships in their judgment said: "The question arises whether, under the execution of the decree under which the property was ordered to be attached, it was for the purchaser to show that there was a necessity for the loan, or *whether it was not necessary for those who claimed on behalf of the children* to show that the debt was contracted for an immoral or illegal purpose." Their Lordships held that the *onus probandi* in a cause like this was on the children or those claiming for them. *Suraj Bunsi Koer* v. *Sheo Proshad Sing*, L. R. 6 Ind. App. 104; Colebrook's Digest, Book I. Cap. I., par. 167; *Girdhari Lal* v. *Kantoo Lal*, L. R. 1 Ind. App. 321; *Nanomi Babuasin* v. *Modun Mohun and Others*, L. R. 13 Ind. App. 1.

[*L. R.* 15 *Ind. App.* 99; *I. L. R.* 15 *Calc.* 717.]

Mahomed Buksh Khan and Others *v.*
Hosseini Bibi and Others.

Bengal. LORD MACNAGHTEN. *Feb.* 15, 1888.

Suit to recover property which was alleged to have been conveyed as a gift in a *hibbanama* to the donor's grandchildren, the children of a favourite daughter. The donor, one Shahzadi Bibi, a Purda Nashin lady (now dead), brought the suit alleging that the *hibbanama* purporting to be in her name was a forged document. The Subordinate Court found all the issues in favour of the appellants, who were the husband and children of the donee, the latter, therefore, being the grandchildren of the donor. The High Court, on the other hand, gave a decree for the respondents representing the deceased donor, the judges not being satisfied that the deed was ever executed, or, even if it was, that the donor, the Purda Nashin lady, understood the contents of the deed of gift issued in her name. The appeal came up on

special leave. The respondents' counsel now contended that the judgment of the High Court was correct; that the onus lay on the appellants of supporting the deed; that the donor was out of possession when the alleged gift was made, and that therefore it was invalid; and further, that the properties said to have been given were jointly owned by the donor and others, and the transaction was therefore void by the *Mahomedan doctrine of Mooshâá*. The Judicial Committee decided that justice had been done by the Subordinate Judge, and that the decree of the High Court ought to be reversed. The evidence, which their Lordships analysed at length, all pointed to the reasonableness and genuineness of the gift to the infant children of the favourite daughter, herself now deceased. "There remains the question whether the gift was good by Mahomedan law. On that two points were made. In the first place it was said to be open to objection on the Mahomedan doctrine of Mooshâá, which appears to be this: that a gift of an undivided share in a subject capable of division is not good because it would lead to confusion. But it appears to be settled by Mahomedan law that if there are two sharers of property, one may give his share to the other before division. That seems to be established by a passage in Macnaghten's Precedents, Case xiii., which was adopted in the case . . . . of *Ameena Bibee* v. *Zeifa Bibee*, 3 Suth. W. R. 37. Now, if one of two sharers may give his share to the other, supposing there are three sharers, what is to prevent one of the three giving his share to either of the other two? . . . . The other point was that the gift was invalid because possession was not given. That subject was considered in a case which came before this Board in 1884, *Kali Das Mullick* v. *Kanhya Lal Pundit*, L. R. 11 Ind. App. 218. There it is stated that the principle on which the rule rests has nothing to do with feudal rules, and that the European analogy is rather to be found in the cases relating to voluntary contracts or transfers, where, if the donor has not done all he could to perfect his contemplated gift, he cannot be compelled to do more. In this case, it appears to their Lordships that the lady did all she could to perfect the contemplated gift, and that

nothing more was required from her. The gift was attended with the utmost publicity, the *hibbanama* itself authorizes the donees to take possession, and it appears that in fact they did take possession. Their Lordships hold, under these circumstances, that there can be no objection to the gift on the ground that Shahzadi (the donor) had not possession, and that she herself did not give possession at the time. That view seems to be supported by a passage in Macnaghten's Precedents, Case x., where the question was, If property left by two brothers devolve on the widows, 'are the widows entitled to dispose of their late husbands' property by gift? and if they have a right to do so, is the deed of gift executed by them in favour of one of the husbands' heirs available in law?' Then it is stated that, 'Although the widows at the time of the execution of the deed of gift were not seised of the property, yet, if agreeably to their desire, the donee, in pursuance of a judicial decree, became subsequently seised thereof, the fact of the donors having been out of possession at the time of making the gift is not sufficient to invalidate it.'" Decree of High Court reversed, and that of the Subordinate Judge restored. Respondents to pay the costs in the High Court and of this appeal.

[*L. R.* 15 *Ind. App.* 81; *I. L. R.* 15 *Calc.* 684.]

Tennant, Sons & Co. *v.*
Howatson (Trustee of the estate of Agostini and Ambard).

Trinidad. Lord Hobhouse. *March* 3, 1888.

Trinidad bill of sale case. Validity of an assignment of growing crops to the appellants. The agreement or letter of assignment was made in 1885 between the appellant and a firm styled Ambard & Son, in which the two persons now represented by the trustee were partners. It was entered into for the purposes of repaying sums advanced to Ambard & Son, but was never registered. The two partners mentioned subsequently

became bankrupt, and the question now was as to the liability of their estate. The claim was made against the trustee of the bankrupt estate. Construction of Trinidad Ordinance, No. XV. of 1884. The Judicial Committee, on the construction of the Ordinance, and particularly on the construction of sect. 10 and the two preceding sections, agreed to report to her Majesty that the decree below ought to be affirmed, the assignment in question to the appellants being void for want of registration. Their Lordships also held that the letter was a bill of sale.

[13 *App. Cas.* 489; 57 *L. J. P. C.* 110.]

Rai Sham Kishen Das and Others *v.*
Raja Run Bahadoor Singh.

Bengal. SIR BARNES PEACOCK. *March* 6, 1888.

The appeal is as to the right of the appellants, who were the heirs of one Rai Bal Kishen Das, to execute, for the full amount, a decree (founded on a compromise) which Rai Bal Kishen Das's father, the grandfather of the appellants, had obtained against the respondent. Interpretation and effect of previous decision of the Privy Council. *Vide Rai Bal Kishen Das* v. *Raja Run Bahadoor Singh*, L. R. 10 Ind. App. 162. Contingency on which the decree holder was entitled to execute his decree has not happened. The Subordinate Judge ordered that execution should issue against this respondent for the full amount which was found to be due upon the decree according to an account taken in the office of that Court. This decree the High Court set aside, and dismissed the petition for execution, holding "that the defaults on which, according to the terms of the compromise, the decree holder would be entitled to execute the decree in full, had not been made." The Judicial Committee are of opinion "that the High Court was correct in the view which it took that execution could not be issued. The plaintiff under the decree received the yearly instalments of Rs. 30,000, and according to the stipulation in the original arrangement they are to be applied

in the first instance to the payment of interest, and the balance in reduction of the principal. He might have issued execution if the last instalment had not been paid; still, when it was paid, it was to be applied according to the stipulation, in the first place in discharge of the interest. As to the opinion which the High Court expressed with reference to the payment made on the 31st August, 1875, there is not sufficient on the record to enable them to say whether that opinion was correct or not. It is merely an opinion of the High Court not having reference to the decree, and therefore the parties ought not hereafter to be bound by it. The matter will be open for consideration on any future occasion." Affirmed with costs. [*P. C. Ar.*]

The Maharani Indar Kunwar and Udit Narayan (the first appellant's son by adoption) *v.* **Maharani Jaipal Kunwar.**

(Three Appeals and a Cross-Appeal, consolidated.)

Oudh. LORD MACNAGHTEN. *March* 10, 1888.

Construction of the will of the Maharajah Sir Digbijai Singh, K.C.S.I. (the wealthy Maharajah of Bulrampur).

The parties are the Maharajah's two widows (elder and junior) and an adopted son of the senior widow. The junior widow, original plaintiff, claimed (as against the senior widow and the adopted son), a half share of the moveable property, and joint possession of the immoveable property of the deceased Maharajah, and challenged the validity of the adoption.

The two crucial questions in the suits arose out of—1st, the construction of the will of the Maharajah, and 2nd, what, if any, was the effect produced by non-registration of the will. As to the construction of the will, the greatest importance was attached to the true meaning of certain words therein, viz., "Maharani Sahiba." Their Lordships of the Judicial Committee felt bound to consider thoroughly, studying every line of the will, what were the reasonable and probable intentions of the Maharajah. The plaintiff, the junior widow, founded her

claim on the contention that the expression "Maharani Sahiba" was used in the will as a *collective* term, comprehending both widows. The senior widow, on the other hand, maintained that the term or expression applied to her *alone*. The Courts below differed, the first Court holding that the junior widow had no right to anything more than a handsome maintenance given her by the will, while the Judicial Commissioner held that her right to the beneficial enjoyment of her husband's estate was equal to that of the senior widow. The effect of their Lordships' judgment, which on the main points discharged the decrees and orders below, is to leave the management of the estates for the adopted heir in the hands of the senior widow assisted by certain administrative officers. The junior widow is declared to be entitled to maintenance only. That maintenance should be paid from the time of the Maharajah's death, and out of the whole taluqdari as well as non-taluqdari property of the estate.

The following were the principal expressions in the judgment of the Judicial Committee. "His name (Sir Digbijai Singh's) was entered in lists Nos. II. and V. mentioned in sect. 8 of the Act (Act I. of 1869). List No. II. is 'A list of the Taluqdars whose estates according to the custom of the family on and before the 13th day of February, 1856, ordinarily devolved upon a single heir.' List No. V. is 'A list of grantees to whom sanads or grants may have been or may be given or made by the British Government up to the date fixed for the closing of such list, declaring that the succession to the estates comprised therein shall thereafter be regulated by the rule of primogeniture.'

"There seems (in the will) to be the most anxious desire on the part of the testator that the principle of succession which had prevailed in his family for generations, and which was recognized in the taluqdari lists, the rule of single heirship—one owner at one time—should be maintained unimpaired.

"We find . . . that in connection with the three purposes—of succession to the estate, selection and adoption of an heir, and representation on an administrative council during the

heir's minority,—in each of which a great noble in the testator's position might be expected to have in view one person, and one person only, the testator uses the expression *Maharani Sahiba* without qualification and without addition. In the two passages in which he must have had both his wives in view, in connection with the possibility of issue, and in connection with the usual provision for widowhood, he qualifies the words Maharani Sahiba by other words which leave no doubt as to his meaning.

"Their Lordships have . . . . expressed their view as to the right of the junior widow to maintenance from the testator's death. They think that the maintenance is payable out of the whole estate, taluqdari as well as non-taluqdari, notwithstanding the non-registration of the will": Act I. of 1869, sect. 13, sub-sect. 1; *Abbott* v. *Middleton*, 7 H. L. C. 89.

[After the admission of the appeals by the Court below and the arrival of the records in England, Indar Kunwar, the senior widow (*vide* Order in Council, 26th November, 1886) applied to her Majesty in Council for further leave to appeal from an order of the Judicial Commissioner dated 22nd June, 1886. She also prayed, *inter alia*, that the plaintiff (the junior widow) should not, pending the appeals, be put into possession of the large sums in dispute, and that she should not receive more than the annuity of Rs. 25,000, which was decreed to her by the first Court. The Judicial Committee granted leave to appeal, and expressed the opinion that the application for the security of the sums in dispute, involving several lakhs of rupees, was reasonable. With this intimation of advice their Lordships recommended, "that the petitioner be at liberty to apply to the proper Court in India for the due security of all money paid into the Treasury in obedience to the decree of the Judicial Commissioner."

[*This interlocutory opinion, and a similar one expressed in the case of Jariut Ool Butool* v. *Hosseinee Begum* (10 Moo. Ind. App. 196), *offer precedents in practice. It is the rule of the Judicial Committee to refuse to stay execution in cases where the Court below has granted leave to appeal without ordering a stay. If, however, leave to appeal is granted by the Privy Council, their Lordships have not felt the same reluctance, and in several cases have directed*

execution to be stayed. Stace v. *Griffith*, 6 Moo. N.S. 18; *Montaignac* v. *Shitta*, 15 App. Cas. 357; *The Secretary of State for India in Council* v. *Nellacutti*, 10 Aug. 1888 (P. C. Ar.).]

[*L. R.* 15 *Ind. App.* 127; *I. L. R.* 15 *Calc.* 725.]

The Mayor and Councillors of Pietermaritzburg *v.* The Natal Land and Colonization Company, Limited.

(And Cross-Appeal.)

Natal. LORD MACNAGHTEN. *March* 10, 1888.

Appeal and cross-appeal between the Corporation of Pietermaritzburg and a land company arising out of certain alleged encroachments or projections made over the face line of a public street in the town by the land company. The corporation under their municipal powers declared that the projections should be removed. The land company took exceptions to the appellant's pleas mainly on the ground that whilst the plaintiffs (the corporation) were empowered by a private law of the Legislative Council in 1866 to make a re-survey of the town, and deal with encroachments of building on the streets or public ways of the city, yet now sought to enforce the removal of the defendants' buildings under a more recent statute—the Municipal Corporation Law, No. XIX. of 1872, ss. 60 and 64—without complying with the provisions of the first-named private law. One of the terms of the private Act was, that resort was not to be made to ordinary courts of law in any dispute resulting from the re-survey, which could only be referred to a Court of Arbitration established thereby, and another embodied an arrangement for compensation. The principal appeal (on special leave) was from a decree of the Supreme Court, so far as it declared the land company entitled to compensation, and also for referring the matter on the question of amount to the Court of Assessors under the 1866 Act. They also appealed against subsequent orders, one of which dismissed the application to confirm the award of the Court of Assessors. The cross-appeal

of the land company, also on special leave, was directed against the affirmance of certain interlocutory orders of the Supreme Court, and particularly against the Supreme Court's order which declared the buildings and erections to be encroachments, and liable to removal. The counsel for the corporation now argued that the company was not entitled to compensation. If it was, the Court should have assessed the amount, or, if it chose to refer the dispute to the Board of Assessors, it ought to have confirmed their award, and the order refusing to do so was erroneous and ought to be discharged. They further contended that the Municipal Corporations Act, 1872, was practically identical with an Act of 1862 (No. 21 of 1862, sect. 58), which was not affected in point of jurisdiction by the Act of 1866. The exceptions of the land company were that the action did not lie, at all events not till the corporation had complied with the private Act of 1866. By that Act the corporation were restricted to seek their remedy by the proceedings enjoined by that private Act, namely, reference to a Court of Arbitration without the assistance of the ordinary courts. Furthermore, they alleged that the encroachments existed long prior to 1866 without interruption, and with the acquiescence of the appellants' predecessors in office. Their Lordships consider that the manifest intention of the law of 1866, by necessary implication, excludes the right of resort to the ordinary courts of justice in the colony, and hold that the exceptions of the company should be allowed, and the action of the corporation dismissed. The corporation are directed to pay the costs of these appeals, except in so far as they may have been increased by their supplemental case. [13 *App. Cas.* 478; 57 *L. J. P. C.* 82.]

Radhamadhub Holdar and Another *v.* Monohur Mookerjee.

Bengal. LORD HOBHOUSE. *March* 15, 1888.

Right to redeem certain mortgaged lands and recover possession of a share of a zemindari upon which a charge had been

made by the mortgage bond. This was a question of *res judicata* purely. The point in dispute raised by the appellants (the original plaintiff and another), was whether their right to redeem a mortgage executed by one Srimati Matangini Debi in favour of Raj Krishna Mookerji, the father of the respondent, and to recover portions of a zemindary, the subject of the mortgage, was barred as *res judicata.* Effect of *lis pendens.* The decree of the High Court had reversed that of the Subordinate Judge, which was in favour of the original plaintiff. The judgment of the Judicial Committee, in accordance with which the appeal from the High Court was dismissed, was as follows:—

"Their Lordships think that this case is a very clear and simple one when once the numerous proceedings and dates are ascertained."

"The material circumstances are these. Matangini was the proprietor of the estate in question, and she granted the estate in putni to one Mookerji, the father of the present defendant (respondent). No difference is made by the change of title; and it may be considered that the putnidar has remained one and the same person. After that, Matangini mortgaged her proprietary interest to Mookerji. Mookerji's position, therefore, was this: that he was putnidar of the estate with a charge upon what we should call the reversion of the proprietary interest. Under those circumstances, a creditor of Matangini sues for his debt, gets a decree, attaches the property, and sells it in the month of April, 1872; and under that sale the plaintiff Radhamadhub became the purchaser. What did he get by his purchase? He got Matangini's proprietary right, subject to the putni, and subject to the charge. But in the meantime Mookerji had been enforcing his charge against Matangini, and he got a decree, and in the month of May, 1872, about a month after the sale to the plaintiff, a sale took place under his decree, and he himself purchased at that sale. Now if Matangini herself had remained the owner of the proprietary interest she would be clearly excluded by that sale from all interest in the property. It is equally clear that the plaintiff must be excluded, he having purchased only the right, title,

and interest of Matangini, unless he can show that after the purchase in April, 1872, he was not bound by the proceedings in Mookerji's suit. That very question has been raised and decided between the parties. After the two sales Radhamadhub, as claiming to be proprietor, sued Mookerji as *putnidar* for the rent due upon the putni, and his claim was that he stood in the shoes of Matangini. On the other hand, Mookerji defended himself by saying, 'It is not you, but I, who stand in the shoes of Matangini, and therefore you have no claim against me;' and the decision was that, inasmuch as Mookerji's suit to enforce his charge was pending at the time of the sale to Radhamadhub, Radhamadhub was bound by the proceedings against Matangini. On that ground the rent suit was decided against Radhamadhub. Radamadhub now comes to redeem; but the right to redeem rests on precisely the same ground as the right to rent was rested. In each case the question is equally, Who is the true representative of Matangini? Therefore their Lordships conceive that the matter was expressly decided by the High Court in the rent suit; but they desire to add that even if it had not been so decided they see no reason to believe that any amount of argument would induce them to come to a different conclusion than that to which the High Court came."

"Their Lordships are therefore of opinion that the appeal must be dismissed, and that the appellants must pay the costs; and they will humbly advise her Majesty to that effect."

[*L. R.* 15 *Ind. App.* 97; *I. L. R.* 15 *Calc.* 756.]

Amanat Bibi and Others *v.*
Imdad Husain.

Oudh. LORD MACNAGHTEN. *March* 16, 1888.

Right to redeem under a mortgage. Is the claim barred by a determination in a former suit? Limitation Acts of 1877 and 1879 (Act X. of 1877, s. 13, and Act XII. of 1879, s. 6). Proceedings under "Hard Case Circular" (Book Circular 4 of

1867), not judicial proceedings. Procedure. Their Lordships, affirming the decrees of the District Judge of Fyzabad, and also of the Judicial Commissioner, held that the claimant (the respondent) was not bound to bring forward his present claim in the former suit, and that it was not barred as *res judicata.* Effect of sect. 7, Act VIII. of 1859. It appeared to their Lordships "that the fair result of the evidence is that at the date of the former suit (which sought to have effect given to an alleged right to sub-proprietary settlement), the respondent was not aware of the right on which he is now insisting (viz., a right to redeem under a mortgage). A right which a litigant possesses, without knowing or ever having known that he possesses it, can hardly be regarded as a 'portion of his claim' within the meaning of the section in question." *Rajah of Pittapur* v. *Sri Rajah Venkata Mahipati Surya,* 12 L. R. Ind. App. 116, 119, upheld. [*L. R.* 15 *Ind. App.* 106; *I. L. R.* 15 *Calc.* 800.]

Abd-ul-Messih *v.*
Chukri Farra and Another.

Constantinople. Lord Watson. *March* 17, 1888.

Estate of a member of the Chaldean Catholic Community. Will. Law of personal status. The appellant (plaintiff) instituted the proceedings as executrix and residuary legatee under her husband's will, for probate thereof in accordance with English statute law. The respondents were nephew and sister of the deceased, and pleaded that, the deceased being an Ottoman subject, the will was not amenable to English but to Ottoman law. They contended that the law applicable to the testator was the Ottoman law, and his enjoyment of British protection had never purported to alter it; nor would it be altered, even if the testator had become, under the Treaties and Ottoman law, a British subject in the full sense of the term. The testator was born at Bagdad, and died at Cairo, but was a "British-protected subject." The chief question was whether

the law of England or the law of Turkey was to be followed in considering the power of testacy in the deceased, and in distributing the deceased's effects. There was another question, whether the Consular Court had jurisdiction to decide the point.

Importance of "Domicile of Origin:" *Enohin* v. *Wylie*, 10 H. L. C. 19; *Bell* v. *Kennedy*, 1 H. L. Sc. 320; *Udny* v. *Udny*, 1 H. L. Sc. 458; *In re Tootal's Trusts*, 23 Ch. D. 532.

The Board agree with the Court below that the testator was domiciled in the dominions of the Porte, and their Lordships *inter alia* observed: "It is a settled rule of English law that civil status, with its attendant rights and disabilities, depends, not upon nationality, but upon domicile alone; and, consequently, that the law of the testator's domicile must govern in all questions arising as to his testacy or intestacy, or as to the rights of persons who claim his succession *ab intestato*. . . . . It is clear that the deceased was not, in the sense of English law, a subject of her Majesty. Neither did he possess that status, within the meaning of the Order (Order in Council for Ottoman Porte, 12 Dec. 1873), which expressly enacts that it must be attained either by birth or naturalization." Their Lordships proceed to say that there are two sufficient answers to the plea of the appellant, that the deceased's residence in Cairo gave him an Egyptian, as distinguished from a Turkish, domicile. "The appellant has not shown that a domicile in Egypt, so far as regards its civil consequences, differs in any respect from a domicile in other parts of the Ottoman dominions;" and the other answer was, "That residence in a foreign state, as a privileged member of an ex-territorial community, although it may be effectual to destroy a residential domicile acquired elsewhere, is ineffectual to create a new domicile of choice."

Their Lordships, affirming the judgment of the Consular Court, held that (1) the said Consular Court had jurisdiction to declare whether Turkish or English law was applicable; and that (2) the law of Turkey must be followed in distributing the deceased's effects. Appellant to pay costs of the appeal, but

their Lordships think that the costs of all parties in the Court below ought to come out of the estate.

[13 *App. Cas.* 431; 57 *L. J. P. C.* 88.]

Godfrey *v.*
Poole.

New South Wales. Sir Barnes Peacock. *March* 17, 1888.

Validity of a deed of conveyance of land. Is it void as against a purchaser for value at a subsequent sale? Statutes of Elizabeth (Act against fraudulent alienations) 13 Eliz. c. 5, and 27 Eliz. c. 4 (Act against covinous covenants). Their Lordships held that the deed of conveyance of September, 1864, was *boná fide* and not fraudulent, and that it could not be revoked or defeated by the sale held and executed under the District Courts Act. The history of the case was this:—A debtor, one Mooney, who had obtained three lots of land in the colony by grants from the Crown, mortgaged them in 1863 to a person named Young, to secure the sum of 350*l.* with interest. By the terms of the mortgage the mortgagee had an absolute power of sale in case of default. In the year 1864, Mooney, being largely indebted to his master, Mr. Lithgow, was induced under pressure of a Mr. Billyard, Lithgow's solicitor, to execute a deed dated 30th September of that year, by which he conveyed to Billyard, and one William McMillan, all his real estate upon trust to sell the same, and to pay off his mortgage and other debts, and as to the ultimate surplus of the said trust moneys and premises, after satisfaction of the said mortgage and other debts, in trust to pay over the same unto trustees to be named by Ellen Mooney, the wife of the said Francis Mooney, to be held by them in trust for the sole, separate, and unalienable use of the said Ellen Mooney for life, free from the debts, control, interference, or engagements of the said Francis Mooney, and after her decease in trust for the children of the said Francis Mooney and Ellen, his wife, in equal shares and proportions, as tenants in common. This deed was duly registered.

Very shortly after the execution of the deed, the trustees, Billyard and McMillan, paid off Young's mortgage, and an acknowledgment bearing date the 20th of October, 1864, was endorsed by Young on the mortgage deed. So far as appears by the evidence in the suit, all Mooney's creditors were paid, except Mr. George Chisholm and Henry Rolfe, whose claims were, it seems, not known to the trustees at the time when they were dealing with Mooney's assets. In point of fact, the debt due to Rolfe was not wholly due at the time of the execution of the deed of trust, that debt, amounting to the sum of only 18*l.* 0*s.* 3*d.*, having accrued between the 14th of March and the 7th of October, 1864. These two creditors each sued Mooney in the District Court, and recovered judgments against him—the one for 51*l.* 6*s.* 3*d.*, and the other for 18*l.* 0*s.* 3*d.* Chisholm's judgment was obtained on the 6th and Rolfe's on the 7th March, 1865. Execution was issued on Rolfe's judgment for debt, and costs, 28*l.* 6*s.* 2*d.*, and, on the 1st of April, 1865, the Registrar of the District Court sold Mooney's interest in the said three pieces of land to Godfrey, the plaintiff (now appellant), for 18*l.* 10*s.*—a sum less than the amount of the execution. On the 25th April, 1865, the Registrar executed a conveyance of Mooney's interest in the three plots of land to the plaintiff, who, on the 19th of September, 1865, obtained, in consideration of the sum of 2*l.* 10*s.*, an assignment of Rolfe's judgment debt to himself.

On the 2nd October, 1882 (seventeen years after his purchase), the plaintiff filed his statement of claim, in which he alleged that Mooney was on the date of the indenture of 30th September, 1864, indebted to various creditors, and particularly to Rolfe and Chisholm, and that the said indenture was without valuable consideration and a fraud upon creditors, and was also void against the plaintiff as a subsequent purchaser for value. He charged that the legal estate did not pass by this indenture to Billyard and McMillan; and further, that, on the registration of the conveyance to him from the Registrar of the District Court, the indenture of the 30th September, 1864, became, by virtue of the Act 27 Eliz. c. 4, and by virtue of the operations

of the 78th and 79th sections of the District Courts (New South Wales) Act of 1858, as against him, the plaintiff, void and of no effect, and that the legal and equitable estate in the land passed to him as a *bonâ fide* purchaser for value. He further charged that that indenture was, by virtue of the Act 13 Eliz. c. 5, void as against him as assignee of Rolfe's judgment, and also as against Mooney's creditors. He asked for a declaration to the effect that the defendants should be declared trustees for him, that they should be directed to convey to him, and that they should be restrained from interfering with the lands comprised in the said indenture.

It is unnecessary for the purpose of this case to state the manner in which the defendants derived their title. It is fully set out in the reasons given for the judgment of the Supreme Court, by which it is shown, as stated by the Chief Justice, that they derived their title under the trust deed through a conveyance dated 17th of May, 1872, executed by the trustees and by Mooney and his wife to Jacob Marks. His Honour the acting Primary Judge dismissed the plaintiff's claim with costs, and on appeal the Full Court sustained that decision, and dismissed the appeal with costs. The question now is whether the sale of Mooney's interest in the land under the execution on Rolfe's judgment, the conveyance executed by the Registrar on the 25th April, 1865, and the assignment of Rolfe's judgment to the plaintiff, vested in him any title to the land or the right, either as a creditor of Rolfe or as a purchaser for value, to treat the trust deed of the 30th September, 1864, as fraudulent and void. The Judicial Committee reported to her Majesty that the decisions both of the Primary Judge in Equity and of the Supreme Court ought to be affirmed. In their Lordships' judgment the following passages were the more important:—"It was found by both the lower Courts that the deed was not fraudulent in fact, and their Lordships are not prepared to hold that that finding was erroneous, or that the trust for the wife and children was merely colourable and collusive. Indeed, after the concurrent findings of the lower Courts, the objection that the deed was fraudulent in fact was not insisted upon at the bar. Still it

was contended that, the deed being voluntary so far as it related to the trust in favour of the wife and children, it was fraudulent in law and void as against creditors, under the 13 Eliz. c. 5. It is unnecessary to refer to the numerous cases to which their Lordships' attention was called by the learned counsel in his argument for the appellants. It may, however, be stated, as regards the statute 13 Eliz. c. 5, that the rule was correctly laid down by the late Vice-Chancellor Kindersley in the case of *Thompson* v. *Webster* (4 Drew. 632), in which he says:—'The principle now established is this:—The language of the Act being, that any conveyance of property is void against creditors if it is made with intent to defeat, hinder, or delay creditors, the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the intention of the settlor, in making the settlement, was to defeat, hinder, or delay his creditors.' The only remaining question is whether the deed was void under the 27 Eliz. c. 4, as against the plaintiff as a purchaser for value. This depends upon the proper construction of that Act coupled with the District Courts (New South Wales) Act, 1858, ss. 78 and 79. . . . . Assuming that, as regards the trust for the wife and children, the conveyance was voluntary in the sense of its having been made without any valuable consideration, it is clear that Mooney after he had executed the deed, which he could not revoke, was not seised or entitled to the lands comprised in the deed within the meaning of sect. 78. . . . . It was contended that if Mooney had sold the land to a purchaser for value the deed of the 30th of September, 1864, being voluntary, the trust for the wife and children would have been void as against such purchaser by reason of the 27 Eliz. c. 4. There being no fraud in fact, the trust deed when executed, though voluntary, was not of itself fraudulent in law. A subsequent sale to a purchaser for valuable consideration by the settlor would have raised a legal presumption of fraud in regard to the prior voluntary trust deed, which could not have been rebutted. (*Clark* v. *Wright*, 6 H. & N. 875.) The same presumption, however, would not arise from a subsequent sale to a purchaser for value by any other person than the settlor.

The principle is clearly explained in *Doe* d. *Newman*, 17 Q. B. Rep. 724. It is there laid down that 'the principle on which voluntary conveyances have been held uniformly to be fraudulent and void as against subsequent purchasers appears to be, that, by selling the property for a valuable consideration, the seller so entirely repudiates the former voluntary conveyance, and shows his intention to sell, as that it shall be taken conclusively, against him and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser. Such deeds have been held fraudulent and void as against such purchasers, even when they have had notice of them. (*Doe* d. *Offley* v. *Manning*, 9 East, 59.) Where the same person executes the voluntary conveyance and afterwards sells and conveys the property, the application of the principle is obvious and easy. But where the seller is a different person from him who executed the voluntary conveyance, it is otherwise, for the acts of one man cannot show the mind and intention of another.' Where there is no fraud in fact, two acts by the same person are necessary to render a voluntary conveyance fraudulent under the 27 Eliz. c. 4, viz., a voluntary conveyance by the grantor and a subsequent sale by him to a purchaser for valuable consideration. It was laid down in the House of Lords in *Dolphin* v. *Aylward* (4 L. R. Eng. & Ir. Ap. 500), that a creditor cannot seize under an execution any interest in an estate which is vested in another person by a voluntary conveyance executed by his judgment debtor, merely upon the ground that the settlement was voluntary. In this case, Mooney reserved no interest to himself by the trust deed; he consequently had no interest which could be seized under the execution against him, and if there was nothing that could be seized there was nothing which the Registrar could convey. Mooney might possibly have had the power, by committing a dishonest act and selling to a purchaser for value, to raise a legal unrebuttable presumption that the voluntary conveyance in favour of his wife and children was fraudulent as against the purchaser, but no one else had the power of raising such a presumption, nor was it an estate, right, title, or interest within the meaning of sect. 78 of the District

Courts Act, or one which the registrar could sell or convey under sect. 79 of the Act." Their Lordships are of opinion that the plaintiff's claim was properly dismissed by the Primary Judge in Equity, and would advise her Majesty to dismiss the appeal and to affirm the decree of the Supreme Court with costs of the appeal. [13 *App. Cas.* 497; 57 *L. J. P. C.* 78.]

Trilokinath Singh *v.*
Pertab Narain Singh.

Oudh. SIR BARNES PEACOCK. *March* 20, 1888.

Claim to be put into the possession of Sir Maun Singh's estate in Oudh. Revocation of will. *Res judicata.* The claim on behalf of the appellant has been the subject of previous appeals in the Privy Council. (*Vide* L. R. 4 Ind. App. 228; L. R. 11 Ind. App. 197, 210.) The appeal fails, their Lordships holding that the appellant was bound by their decision in 11 Ind. App. (*vide* also *ante*, pp. 54 and 260). Appellant to pay costs.
[*L. R.* 15 *Ind. App.* 113; *I. L. R.* 15 *Calc.* 808.]

Owners of the British Steamship "Glamorganshire" *v.*
The Master and Owners of the American Sailing Ship "Clarissa B. Carver"; and
The Owners of the "Glamorganshire" *v.*
Warren & Co.

(Consolidated Appeals.)

China and Japan. LORD HOBHOUSE. *March* 22, 1888.

Collision. One action for damages to ship (the "Clarissa B. Carver"), and second action for damages to cargo. Which vessel to blame. Evidence. The owners of the "Glamorganshire" (the appellants—defendants in both actions) endeavoured

to show either that she was not in fault or that the "Clarissa B. Carver" contributed to the collision. Concurrent findings in favour of the sailing-ship and the owners of the cargo are upheld. The appellants had alleged *inter alia* that the light on the sailing vessel was so fixed that the foresail, or some portion of the foresail, would interfere so as to prevent the lamp showing a uniform and unbroken light over an arc of the horizon of ten points of the compass. The fixing in the rigging, it was contended, was improper. In their Lordships' view, the answer to that was plain. "The regulation does not say it shall not be fixed in the rigging; and not only is it not contrary to the regulation; it is a common practice; and in American ships appears to be a very common practice—it would seem almost to be *the* common practice. The naval officers who have assisted their Lordships in this case concur with the evidence given on this point." Case of *The "Fanny M. Carvill"* cited (*vide* note, 13 App. Cas. 455) in support of the principle that "Where there was a breach (of the maritime regulations), the presumption of culpability on the part of the vessel committing it can only be met by proof that the disaster could not by any possibility be attributed to the breach." Appeals fail, and are both dismissed, with costs. [13 *App. Cas.* 454.]

Slattery *v.*

Naylor (for and on behalf of the borough of Petersham).

New South Wales. LORD HOBHOUSE. *March* 24, 1888.

Validity of a bye-law regulating interments of the dead. Alleged *ultra vires*. The sole question in this case is whether a bye-law under which the appellant has been convicted and fined is valid or invalid. The bye-law was passed by the Municipal Council of the Borough of Petersham on the 2nd of December, 1884, under the provisions of the Municipalities Act, 1867. The respondent (the plaintiff) is the inspector of nuisances for

the borough. The appellant appealed to the Supreme Court, and the convicting magistrate stated a case, which contains the facts on which the decision of that Court was passed. It affirmed the decision of the magistrate, and their Lordships are now asked to decide that the affirmance was wrong.

The material portion of the bye-law is in the following terms:—

"No corpse shall be interred in any existing cemetery now open for burials within the distance of one hundred yards from any public building, place of worship, schoolroom, dwelling-house, public pathway, street, road, or place whatsoever within the borough."

The proceedings were instituted because the appellant, on the 27th June, 1885, interred his wife's remains in his own family burial place in the Roman Catholic cemetery at Petersham. The burial place was on ground purchased for the purpose years before by the appellant. The appellant took three objections to the validity of the bye-law: first, that it is *ultra vires* because it destroys private property; secondly, that it is *ultra vires* because the Council have only power of regulating interments, whereas in the cemetery in question they have wholly prohibited them; and thirdly, that it is unreasonable. Their Lordships considered the objections, judging them by reference to the provisions of the Municipalities Act. In the result they advised her Majesty to affirm the decree below (which in reality followed two prior decisions as to the law on the points raised), and which were to the effect that the bye-law was valid and not *ultra vires*. The following reasons found place in the judgment:—

"In support of the first objection, their Lordships have been referred to cases in which Acts of the Legislature would, according to their full literal meaning, operate to take away private property without compensation; and in which Courts of Justice have, on account of the extreme improbability that the Legislature should have intended such a thing, sought for some secondary meaning to satisfy its expressions; such as was the case of *The Western Counties Railway Co.* v. *Windsor and Annapolis Railway Company* before this Board. (7 App. Cas. 178.) But a

statute cannot be so construed if it shows an intention to override the private rights in question. The object of the present statute is to establish regulations for the common advantage of persons who have come to live in the same community, in a great number of matters affecting their daily life, and that cannot be done except by interference with many actions and many modes of enjoying property, which, but for such regulations, would be lawful and innocent. . . . It may well be that a plot of ground, having been originally far from habitations, and suitably used as the burying place of a family or a religious society, has been reached by the growing town, and has so become unsuitable for the purpose. In such a case a power to regulate would be nugatory unless it involved a power to stop the burials altogether. Their Lordships hold that the bye-law in question is not *ultra vires* because in certain circumstances it may have, as in Mr. Slattery's case it unfortunately has, the effect of taking away an enjoyment of property for which alone that property was acquired and has been used.

"The considerations applicable to the second objection have, to a great extent, been anticipated by the answer to the first. It is true that, in regulating the interment of the dead, the bye-law makes the cemetery useless for its former purpose. This, it is argued, is not regulation, but prohibition, and it is pointed out that, with regard to several objects of the bye-laws, prevention and suppression are expressly allowed by the Act, whereas in the case of interment only regulation is allowed. One illustration of regulation proper, as distinct from prohibition, was found in another bye-law laying down rules as to the number of corpses in a grave and their depth below the surface. Now if, at the passing of the bye-law, a grave was already so full that it could not, consistently with the bye-law, receive another corpse, the bye-law would amount to a complete prohibition of burial, although the owner of the grave may have contemplated that in death he should be laid by those whom he loved best in life. To regulate the place of burial is certainly one of the most important points in regulating burials for the health of a community, perhaps the most important of all. It is indeed a serious thing

to prevent people from indulging their affections in a matter which they justly consider so sacred as the disposal of their dead. Such prohibitions should be well considered before they are passed. But they are undoubtedly necessary in large and growing communities. And their Lordships cannot hold that a bye-law is *ultra vires* because, in laying down a general regulation for the borough of Petersham, it has the effect of closing a particular cemetery. . . .

"It is contended that the bye-law is unreasonable. . . . Every precaution has been taken by the Legislature to ensure, first, that the Council shall represent the feelings and interests of the community for which it makes laws; secondly, that, if it is mistaken, its composition may promptly be altered; thirdly, that its bye-laws shall be under the control of the supreme executive authority; and fourthly, that ample opportunity shall be given to criticize them in either House of Parliament. Their Lordships feel strong reluctance to question the reasonable character of bye-laws made under such circumstances, and doubt whether they ought to be set aside as unreasonable by a Court of law, unless it be in some very extreme case, such as has been indicated. In the present case, so far from there being ground for thinking the bye-law to be capricious or oppressive, there is good evidence that the communities of New South Wales consider that bye-laws of this nature are reasonable and suitable to their circumstances." Cases cited *Ex parte Flack*, 1 N. S. W. L. R. 27; *Brooks* v. *Selwyn*, 3 N. S. W. L. R. 256. Appellant to pay costs. [13 *App. Cas.* 446; 57 *L. J. P. C.* 53.]

Sri Ammi Devi Garu *v.*

Sri Vikrama Devi Garu (a minor represented by the Collector and Agent to the Court of Wards).

Madras. Lord Macnaghten. *April* 21, 1888.

Suit by the junior widow of the Zemindar of Madgole to set aside the adoption of the minor respondent made by the senior

widow. Allegation of authority given by husband by an alleged will. *The Fish Signature case.* Weakness of the evidence as to authenticity. The suit was instituted by the mother of the appellant (the plaintiff), who was the junior Rani of Madgole, against the senior Rani, and the minor respondent, who was her adopted son, and the collector of Vizagapatam and agent to the Court of Wards. The plaint sought to set aside the adoption on the ground of no authority, and on other grounds it pleaded its invalidity. The Subordinate Judge held that no authority had been given by the husband to adopt, and that the will was invalid, and accordingly set aside the adoption. The High Court reversed this finding and dismissed the suit. Their Lordships, upon a full examination of the evidence, came to the conclusion that the proof of the genuineness of the will was not sufficient, and allowed the appeal. In their Lordships' opinion the irresistible inference on the whole seems to be that the alleged will was not prepared by the instructions of the Zemindar, although the Zemindari seal, and the signature usually adopted by the Zemindar—a fish—by which it purports to be authenticated, were upon it. They were of opinion that it would not be safe to rely on the oral evidence as proof that the document propounded by the respondent contained the last will and testament of the deceased. The burden of proof rested with the propounder of the will, and, in their Lordships' opinion, the respondent had not discharged the burden. In the result they agree with the findings of the Subordinate Judge, though much of his reasoning appears to be ill founded. They would advise her Majesty that the appeal ought to be allowed, and that the respondent ought to pay the costs in the High Court and in the Court of the Subordinate Judge, whose judgment will be restored, except as to payment of costs. The respondent must pay the costs of the appeal. [*L. R.* 15 *Ind. App.* 176; *I. L. R.* 11 *Mad.* 486.]

Hari Saran Moitra *v.*
Bhubaneswari Debi (for self and as guardian of her minor son Jotindra Mohun Lahiri) and **Nilcomul Lahiri.**

(Two Appeals, Consolidated.)

Bengal. SIR RICHARD COUCH. *April* 21, 1888.

Shares in family property. Suits for execution of a decree and for mesne profits. Is a minor who was adopted during the litigation bound by the decree against his adoptive mother? *Dhurm Das Pandey* v. *Shama Soondri Dibiah*, 3 Moo. Ind. App. 229; *Suresh Chunder Wum Chowdhry* v. *Jagut Chunder Deb*, I. L. R. 14 Calc. 204, approved. Consolidated appeals (the appellant in both cases being Hari Saran Moitra). The first was in a suit instituted by Hari Saran Moitra (decree holder) for the execution of a decree which he had obtained from the High Court in 1874, and which was affirmed by the Privy Council on the 12th of November, 1880. (P. C. Ar.) In this suit possession was claimed (against Bhubaneswari and Nilcomul Lahiri, judgment debtors) upon title of a one-fifth share of certain lands which had formed the joint family estate of all the parties concerned. The second decree appealed from was given in a suit brought by Hari (against the said judgment debtors) after he had obtained the decree for possession, viz., in 1881, for the recovery of mesne profits of the share to which his title had been established. The appellants to the High Court were Bhubaneswari and Nilcomul, and also the minor adopted son of the first named. The minor Jotindra appealed to the High Court in the execution case by his next friend Rudra Chunder Roy. This person had presented a petition of objection, as next friend of the minor, to the Court of the Subordinate Judge. He was not shown to have obtained any authority to act as next friend of the minor, and is said to have been a servant of Bhubaneswari. Bhubaneswari likewise appealed, taking the same objections as regards the minor as were taken by the assumed next friend. Nilcomul also appealed, and

Hari Saran Moitra the present appellant filed objections by way of cross-appeal. In the suit for mesne profits both Bhubaneswari and Nilcomul separately appealed. With reference to the mesne profits suit, Bhubaneswari and Nilcomul appealed because the Subordinate Judge had decreed that the liability of the judgment debtors should be assessed separately. As regards the minor's appeal the High Court decided in his favour, holding that, as he had not been brought on the record by Hari in his execution suit, the decree could not be executed against him. The decree made by the High Court was that the order of the first Court should be varied by granting to the decree holder possession jointly as against the two judgment debtors of an undivided share of three annas and four gundas in every plot of land in dispute. As to the mesne profits suit the High Court gave their opinion in favour of Bhubaneswari, and dismissed the suit against her both in her personal capacity and as guardian of her minor adopted son, on the ground that no decree had been made against her in her personal capacity, and that none could be made against her as guardian, as she had not been made a guardian *ad litem* and the minor had not been a party. Nilcomul's appeal was successful in part, viz., he obtained a reduction of his liability for mesne profits to the extent in which he appeared to have held a share of the estate in excess of which he was entitled.

The Judicial Committee considered the circumstances of the devolution of the estate from her husband to Bhubaneswari; the adoption of a son, and the consequences thereof as regards that adopted son's status; and came to the conclusion that the decrees of the lower Courts were erroneous in not holding the minor bound to liability, not only in the execution suit, but also in the mesne profits suit. In the original suit the widow *per se* represented her husband's estate; then she adopted Jotindra, and in the subsequent suits Jotindra was not formally made a party. Nevertheless their Lordships held that as liability under the decree made when the widow fully represented the estate devolved upon the minor on his adoption, the widow's estate being also thereupon devested, it would be right for her to con-

tinue to defend, but only as guardian of the minor; also that it having been for the minor's benefit that the widow as guardian should appeal from a decree which had already diminished his estate, the minor was bound, although he had not been made formally a party. Their Lordships also held on like hypotheses that the minor by his adoptive mother as his guardian was liable in a suit for mesne profits brought after the decree upon title, it being made clear that the suit for mesne profits was substantially brought against the minor. Their Lordships are of opinion that the minor is bound by the decree in the title suit, and that the High Court was in error in allowing his appeal in the execution case. The decree of the High Court in the appeal by Bhubaneswari (mesne profits suit) should be reversed, and the appeal dismissed with costs, and in lieu thereof, and of the decree of the Subordinate Judge, it should be decreed that Hari Saran Moitra do recover from Bhubaneswari as guardian on behalf of the minor, Jotindra Mohun, the sum of Rs. 5,217. 7. 2, with interest at 6 per cent. per annum from the 10th January, 1882, and costs of the suit in the first Court in proportion to the whole of the claim allowed. The decree of the High Court respecting payment by Nilcomul Lahiri and as to costs, will be affirmed. Their Lordships will humbly advise her Majesty accordingly.

With regard to the costs of these appeals, their Lordships think that the proper course will be to order the appellant Hari to pay the costs of the respondent Nilcomul, and that the appellant's costs, but not including what he is ordered to pay to Nilcomul, be paid by Bhubaneswari as guardian on behalf of the minor.

[*L. R.* 15 *Ind. App.* 195; *I. L. R.* 16 *Calc.* 40.]

Chundi Churn Barua and Others *v.*
Rani Sidheswari Debi.

Bengal. Lord Watson. *April* 26, 1888.

Claim to four villages alleged to have been granted by the Rajas of Vijni, in addition to other maintenance, in return for

services of the Barua family. Construction of the deed. A conditional grant to persons yet unborn void and ineffectual. The respondent's husband was the Raja of Vijni, an ancient and considerable raj. The appellants (plaintiffs) were members of the Barua family of the Kayest or Soodra caste, which through generations have been employed in the service of the Rajas. Before 1776, the family were in possession, under grants from the Rajas, of three villages. In this suit they claimed possession of four further villages under an alleged deed or grant dated December, 1778. The Raja, whose widow the respondent was, parted with the services of the first plaintiff in 1876, a hundred years after the alleged grant, and did not provide the other plaintiffs with service. In 1880 they instituted the suit. The defendant (respondent) in her defence contended that the instrument was not genuine, or, if genuine, that it was not binding on her. Without calling on the respondent, their Lordships affirmed the decree of the High Court, which had pronounced against the claim, on the ground that the appellants, who it was not disputed were the living descendants of two of the grantees named in the deed, were still in possession of the first lot of three villages; that these yielded 4,000*l.* sterling annually; and that, according to the just construction of the deed, they had no right to the four extra villages so long as they are sufficiently maintained from any source whatever provided by the grantor or his successors. In the course of the judgment of the Judicial Committee their Lordships say:—"Their Lordships have not found it necessary to consider the evidence bearing upon the question whether the deed of 1778 is or is not a genuine document. On the assumption that it is, they agree with the construction which the learned judges of the High Court have put upon the words, 'If ever in the time of my descendants you are not provided with the means of maintenance.' It attributes to these words their primary and natural meaning; and there is nothing in the context which suggests that the condition which they express must be qualified by the previous narrative of the means by which the four Baruas had actually been supported. There is an antecedent

promise that these Baruas and their descendants shall in future be 'supported in various ways.' It may be plausibly argued that the condition was intended to compel the fulfilment of that promise; but support 'in various ways' simply signifies support 'in some way or other'; and if the words were imported into the condition, they would not alter its meaning.

"These considerations are sufficient to dispose of this appeal; but their Lordships desire to rest their judgment upon broader grounds. They are of opinion that the conditional grant of the four mouzahs to persons yet unborn, who may happen to be the living descendants of the grantees named, at some future and indefinite period, upon the occurrence of an event, which may possibly never occur, is altogether void and ineffectual.

"The manifest purpose of the deed was to fasten upon the grantor, and his successors in the raj, a perpetual duty of giving, in some way or other, the means of maintenance to all the descendants of four persons who were in life at its date. It does not directly impose an obligation of that singular and unprecedented description; but on the failure of the then Raja, at any future time, to maintain these descendants, however numerous, the latter are to have immediate right to four of his villages, which thenceforth are not to 'appertain to his kingdom.'

"Apart from the condition upon which it is made dependent, the grant of these four villages is expressed in language which, according to Hindu law, imports a present assignment to the grantees. It appears to their Lordships that two alternative views may be taken of its real character. It may be regarded as a present assignment to persons not yet in existence, subject to a suspensive condition, which may prevent its taking effect at all, or (as in the present case) for generations to come, or it may be regarded as a contract, not a mere personal contract, but a covenant running with the raj estate, and binding its possessor to give the villages to those persons in the event specified. It was hardly contended that a present grant to persons unborn, and who may never come into existence, is effectual; and a covenant of that nature in favour of non-existing cove-

nantees is open to the same objections. It is immaterial in what way an interest such as the appellants' claim is created. If it prevents the owner from alienating his estate, discharged of such future interest, before the emergence of the condition, and that event may possibly never occur, it imposes a restraint upon alienation which is contrary to the principles of Hindu law." Affirmed with costs.

[*L. R.* 15 *Ind. App.* 149; *I. L. R.* 16 *Calc.* 71.]

Muhammad Yusuf *v.*
Muhammad Husain.

Oudh. LORD HOBHOUSE. *April* 26, 1888.

Authenticity of agreements. The respondent Husain, one of two co-sharers by ancestral title in the under-proprietorship of certain villages, in 1871 obtained decrees against the Talookdar for sub-settlement, and, getting possession, had his name entered in the khewat. The appellant Yusuf, the other co-sharer, and cousin of Husain, brought the suit, alleging that, previous to the decrees, he had, by two agreements, contracted with the respondent that, although both had claims against the Talookdar, he (Husain) alone should sue him, Yusuf to pay half the costs and not appear in the proceedings. By the terms of the agreements, Husain, if successful, was to give Yusuf half of whatever he might recover, with the exception of rent-paying and rent-free *sir* lands and groves which were already held by the parties, each holding his own portion. The respondent succeeded in the proceedings, and the appellant stated that after possession, and down to December, 1879, the respondent acted according to the agreements, and accounted to the plaintiff for his share of the profits; that after that date, however, the defendant refused to give the plaintiff his share, and this constituted the cause of action. In his defence the respondent denied the truth of these allegations, and pleaded that under sect. 43 of the Code of Civil Procedure (*i.e.*, as to the splitting of claims), the present suit

was barred by two other suits which the plaintiff had brought, and in which decrees were made in 1871. The District Judge found that the agreements were valid; also that accounts had been rendered; also that there had been no splitting of claims, the two other suits not relating to the same subject-matter as in this claim. He, however, thought that by reason of the plaintiff's conduct he should not obtain his costs in that Court.

The Judicial Commissioner decided the other way—that the agreements had not been proved—and rejected the accounts which the District Judge had accepted, on the ground that the alleged writer, one Hublal, examined by the plaintiff, denied his writing. He further thought that appellant's allegation of continuing possession till 1879 was discredited by a statement found in a petition of the appellant's in another suit in 1876.

The Judicial Committee recommended her Majesty to reverse the order of the Judicial Commissioner, holding that he laid too much stress on certain omissions and acts of the plaintiff, which were more or less explained; that the defendant did not come forward himself to say one single word about the accounts, although he produced witnesses to try and disprove Hublal's handwriting; also that, although Hublal said the handwriting was not his, yet he did not deny the correctness of the accounts. In the result their Lordships held that the District Judge was right in giving the plaintiff a decree, and that the Judicial Commissioner was in error in disturbing that decree. He should have dismissed the defendant's appeal with costs, and their Lordships will now advise her Majesty to make a decree to that effect. The respondent must pay the costs of this appeal. [*I. L. R.* 16 *Calc.* 749.]

Mussummat Chand Kour and Another *v.*
Partab Singh and Others.

Punjaub. LORD WATSON. *May* 2, 1888.

"Cause of action." Is a suit barred by previous litigation? Cause of action not the same. Sects. 102 and 103 Civil Procedure Code, Act X. of 1877. Their Lordships gave judgment

against the appellants. The following formed the main portion of their Lordships' judgment:—

"In this case the defendants in the original suit, who bring this appeal, are (1) Mussummat Chand Kour, widow of the late Kahan Singh, and (2) Perak Singh, to whom the first appellant in 1879 made over by deed of gift the fee of her deceased husband's estate. The plaintiffs and respondents are the four nearest agnates of Kahan Singh, and the present suit was instituted by them for the purpose, *inter alia*, of obtaining a declaration that the widow's gift is inoperative and cannot affect their reversionary rights. It is admitted that Chand Kour has merely a widow's right in the estate; and it is also admitted that Perak Singh, in whose favour she executed the deed of gift, is a stranger to the succession. The only point which has been argued on behalf of the appellants is, that the suit is barred by certain proceedings in a suit which was begun and concluded, in the Court of the Judicial Assistant Commissioner, before the date of the deed of gift. That action was instituted by two of the respondents, Partap Singh and Gopal Singh, and their plaint prayed for a declaratory decree, and for an injunction forbidding alienation of the moveable and immoveable property of the deceased. . . . The plea in bar can only affect these two respondents, and cannot exclude the other respondents from obtaining a declaratory decree in this suit which will have the effect of protecting the reversionary interests of themselves and of their lineal descendants.

"The proceedings which followed upon the plaint in the suit referred to were these:—A defence was lodged for the widow, and on the 7th October, 1878, the Judicial Assistant Commissioner pronounced this order, which has become final: 'As the plaintiff has not appeared, though waited for up to the rising of the Court, and as the defendant, who is represented by her agent, denies the plaintiff's claim, it is ordered, That the case be struck off under sect. 102, Civil Procedure Code.'

"The provisions of sects. 102 and 103 of Act X. of 1877 require, therefore, to be considered. The dismissal of a suit in terms of sect. 102 was plainly not intended to operate in

favour of the defendant as *res judicata.* It imposes, however, when read along with sect. 103, a certain disability upon the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action. Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

"The Judge of First Instance, the Assistant Commissioner, held that the cause of action set forth in the present plaint is not the same with that disclosed in the plaint of 1878. The Commissioner differed from that view, but it was upheld by two judges of the Chief Court of the Punjaub upon appeal. Their Lordships are of opinion that the decision of the Assistant Commissioner and of the Chief Court is in accordance with the statute. The ground of action in the plaint of 1878 is an alleged intention on the part of the widow to affect the estate to which the plaintiffs had a reversionary right by selling it, in whole or in part, or by affecting it with mortgages. The cause of action set forth in the present plaint is not mere matter of intention, and it does not refer to either sale or mortgage. It consists in an allegation that the first defendant has in point of fact made a *de præsenti* gift of their whole interest to a third party, who is the second defendant. That of itself is a good cause of action if the appellants' right is what they allege. It is a cause of action which did not arise, and could not arise, until the deed of gift was executed, and its execution followed the conclusion of the proceedings of 1878.

"It appears to their Lordships that the two grounds of action even if they had both existed at the time, are different. . . . It is impossible to say that a cause of action, which did not exist at the time when the previous action was dismissed, can be regarded as other than a new cause of action subsequently arising." Affirmed, and appeal dismissed.

[*L. R.* 15 *Ind. App.* 156; *I. L. R.* 16 *Calc.* 98.]

Srimati Kamini Debi *v.*
Asutosh Mookerji and Others.

(And Cross-Appeal.)

Bengal. Lord Hobhouse. *May* 3, 1888.

Validity of a will. *Res judicata.* Act X. of 1877, sect. 13. Preferential Shebaitship. The questions raised by the appellant (plaintiff), who was daughter and heir-at-law of one Ramkomul Mookerji, were, first, whether Ramkomul's will was, if not totally, then partially invalid; secondly, whether, under a sentence in the will, she could claim to be shebait of a family idol. There was a cross-appeal, on the ground that the High Court, which had given the appellant some relief (viz., by declaring that, on the construction of the will, the surplus profits of the funds given to the idol should be divided equally in fifths among the four brothers of the testator and this daughter), ought to have dismissed the suit as being *res judicata.* The Judicial Committee accepted the view set forth in the cross-appeal, and which also was the basis of the decision arrived at in the Subordinate Court, and held that the case was "governed by sect. 13 of the Act X. of 1877, and the question is whether the point now raised is a point heard and decided by the Court in 1863, in a suit in which the present plaintiff was defendant, and the present defendants were plaintiffs." Their Lordships were of opinion that the question of the invalidity of the will was a point decided in that suit; that it was decided that the will was wholly valid, and passed the entire estate to the idol; and that the members of the family take only maintenance made to the idol, and that it is a legal and valid gift to the idol in every respect. On the question as to whether the appellant has a preferential title to be shebait, their Lordships said, "That (question) depends upon one sentence in the will, which was written in Bengali, and their Lordships have only the English translation. The English translation is by no means easy to interpret. It seems there is some difficulty also in the Bengali original, but the Subordinate Judge was able to criticise the

Bengali grammar, and he delivered it as his opinion that the effect of the will was to constitute as SHEBAIT the senior in age of the heirs of the original SHEBAITS. The actual senior has disclaimed. The defendant Asutosh is the next senior in age, and therefore the Subordinate Judge held that Asutosh is the proper SHEBAIT. The High Court, without discussing the matter, have agreed with him, and their Lordships, being unable to appreciate the exact sense of the Bengali sentence, can only say that no reason has been assigned to them why they should differ from the opinion of both the Courts below.

"The result is that the appeal of the plaintiff wholly fails, and the cross-appeal wholly succeeds. The High Court, in their Lordships' opinion, ought to have dismissed the appeal to them with costs. . . . The appellant Kamini must pay the costs of the appeal and the cross-appeal."

[*L. R.* 15 *Ind. App.* 159; *I. L. R.* 16 *Calc.* 103.]

Rolland *v.*
Cassidy.

(Consolidated Actions.)

Lower Canada. EARL OF SELBORNE. *May* 19, 1888.

Award in an arbitration over the accounts of a partnership constituted for the purpose of speculations in lumber, of which either the whole or a considerable part had been previously bought by the co-partners. Conduct and *bona fides* of the arbitrators. "*Amiables Compositeurs.*" Code of Procedure, Art. 1346. Responsibility of a co-partner who is also an agent for the firm. The appellant in the first action sought to set aside the award, and for an account. The respondent in his action sought to have the award enforced, and claimed the amount awarded. The Courts below upheld the award, and the actions now come here as one appeal. Construction of the articles of partnership. The facts showed that under the articles the appellant was not only one of the three partners in the partnership,

but also was appointed sole *gérant* or agent, and active administrator of the whole concern, and by the articles also the expenses of the agency and the commission of the appellant were to be left to the decision of the co-partners. The partnership, which by the death of one member was entirely carried on by the appellant and respondent only, existed for some years, and resulted in disputes over the accounts and the question of liability of the appellant to the partnership, and of the partnership to the appellant. A crisis was reached by the disputes being referred to the arbitration of three gentlemen, who, by the terms of their appointment, were to act as *amiables compositeurs*, which expression, according to the construction of the Code, meant arbitrators who were not bound to proceed with strict form and regularity in everything, though they were bound to proceed according to the substantial rules of justice. They, in the view of the Judicial Committee, while not disregarding the law, dispense with the strict observance of those rules of law, the non-observance of which, as applied to awards, results in no more than irregularity. The arbitrators, as the outcome of their inquiries, found that a certain sum was due in the account from the appellant to the firm. The real question now was whether that award should be set aside because one of the arbitrators had taken legal advice, which, it may be remarked, was considered good advice, upon points supposed to lie upon the threshold of the case. Their Lordships, affirming the decisions below, held that everything in connection with this taking of advice was above board, and that the appellant was aware of the opinion given. "They are satisfied, not that there was a case of acquiescence, but that there was knowledge, and that nobody was misled. It was not a consultation by the arbitrators which was at all irregular; it was an opinion which Cassidy, as a party, brought before the arbitrators to the appellant's knowledge. The subsequent communications of the arbitrators with the legal gentlemen may not have been known to him; their Lordships do not proceed upon the supposition that they were, or that any objection founded upon them was waived; but their Lordships are of opinion that there was nothing substantially

wrong in those communications, though there may have been an error in judgment in holding them to any extent whatever in Mr. Cassidy's presence when the appellant was not present." Appeal dismissed, with costs.

[13 *App. Cas.* 770; 57 *L. J. P. C.* 99.]

Moulvi Abu Abdool Kader and Others *v.* **Srimati Amtal Karim** and Another.

(Consolidated Appeals.)

Bengal. Sir Richard Couch. *June* 23, 1888.

Dispute over shares in property. Validity of a solehnamah or deed of amicable settlement entered into by the mother of the respondents, whereby it was contended by the respondents that their mother conveyed away their share in their father's estate. Did it bar certain present claims made by them? Acquiescence by lapse of time. Validity also of a mokhtarnama or agreement for a *daemi miras ijara pottah* (perpetual lease) alleged to have been entered into for the adjustment of disagreements between the respondents themselves and the appellants. These are consolidated appeals in two suits brought by the respondents (each of them making the other party a defendant) respectively against the appellants, in which one judgment was given by the lower Courts and a similar decree made in each suit. The respondents (the plaintiffs) are the daughters of Moulvi Mahomed Idris, who died in December, 1845, by his second wife, Khadija, who survived him. The appellants, Abdool Kader and Abdool Rahman, are his sons by his first wife, Biju, who died before him. By her he had also two daughters, Amtulla and Amtal Rahman, who survived him. At the time of their father's decease the respondents were living with him at Dacca, and almost immediately afterwards they left Dacca with their mother, Khadija, and went to live in the house of their maternal grandfather, and continued to live there until Khadija married again. From there, soon after her second marriage, the respon-

dents were removed by their brothers, and were taken to the house of the brothers in Sylhet, where they lived until 1864. At that time, they being about twenty-two or twenty-three and twenty or twenty-one years of age respectively, arrangements were made by their brothers for their marriages, and they were taken to Dacca, and, fifteen or twenty days after their arrival there, were married to their present husbands. From the death of Mahomed Idris the property left by him was managed by the elder brother, the first appellant, and apparently by the younger, the second appellant, also after he came of age, and the brothers received the rents and profits of the property.

In each of the suits the plaintiff claimed possession of a share of the immoveable properties mentioned in the schedules to the plaint, and to have an account taken and payment of the balance found due. The first schedule contained the properties left by Mahomed Idris, and the second contained properties alleged to have been acquired after his death from the profits of the properties left by him.

There were two grounds of defence by the appellants, the first being founded on the execution in 1847 of a solehnamah or amicable settlement between Abdool Kader, for himself and as guardian of his minor brother and his minor sisters, and Khadija, for herself and as guardian of her minor daughters, the present respondents. This solehnamah provided for transfer of lands and houses in lieu of a certain sum of money on account of the dower of the deceased mother of Abdool Kader and his minor brother and sisters, which was due to them from their father, by Khadija on her own account and as guardian of her daughters; other lands given to Khadija by Abdool Kader were divided between the parties in the process of settlement.

The Subordinate Judge *inter alia* found that the appellants failed to prove that the solehnamah was beneficial to the plaintiffs. He held, however, that the plaintiffs having allowed twenty years to elapse, even after attaining their majority, without taking any steps to set it aside, it was too late for them to question the validity of the transaction on the ground of its having been prejudicial to their interest. The High Court, on

appeal from the decrees which he made, held that the transaction was not binding on the plaintiffs, especially in the absence of evidence to show that it was the best arrangement which could under the circumstances be made in their interest.

In the opinion of the Judicial Committee, the High Court, in deciding that the solehnamah did not bar the right of the plaintiffs, did not give proper effect to the lapse of time between 1847 and the bringing the suit in 1882, and the inference which should be drawn from the evidence in the suit that possession was had in accordance with it. That Khadija took possession was proved by her having subsequently made an alienation of part of the property assigned to her. "On this part of the case, their Lordships considered that the decrees of the Subordinate Judge were correct." Assuming that Khadija had no power to transfer the plaintiffs' shares, or that they might have had the solehnamah set aside, their making no objection to it for so many years after they attained majority is sufficient evidence that they ratified and adopted it. "The second ground of defence was that the plaintiffs having been married and settled to live permanently at Dacca, they made a proposal to the brothers to give them a *daemi miras ijara* for ever, at a permanently fixed jumma, of their shares of the properties left by their father, and the brothers (the appellants) agreed to take it on the condition of paying Rs. 100 a month, Rs. 50 being paid to each of the plaintiffs. There was no doubt that the miras pottah was executed by the plaintiffs' mohktar, but the question was whether the mohktarnamah for that pottah was agreed to by them. The High Court, differing from the Subordinate Judge, said they were not satisfied that the defendants had succeeded in proving the execution of the mohktarnamah, and the evidence does not satisfy their Lordships that it was executed. The Subordinate Judge found that certain properties mentioned in one of the schedules to the plaint did not appear to be covered by the miras pottah, and he gave the plaintiffs a decree for those properties, and dismissed the suits as regards the remainder of their claims." The High Court reversed the dismissal, and held the plaintiffs entitled to the

relief prayed for by them. The Judicial Committee considered that certain accounts decreed by the High Court to be taken from the year 1845 should only be taken from 1881, up to which date they had been receiving an annual income. The result is that, in their opinion, "the decree of the High Court should be varied by omitting therefrom the talooks Nos. 3 and 4, which were included in the solehnamah, and ordering the accounts to be taken from November, 1881, instead of December, 1845." . . . . They think the partial success of the appellants does not entitle them to the costs, and they order that the parties bear their own costs. [*L. R.* 15 *Ind. App.* 220.]

Kali Krishna Tagore *v.*

The Secretary of State for India in Council and Moazzam Hossein.

Bengal. Sir Richard Couch. *June* 23, 1888.

Reformation of land re-formed near contiguous estates. Suit by appellant to obtain possession, and to nullify proceedings taken to attach the land for diara revenue and settle it temporarily with the other contiguous landowner. Evidence on the maps as to old boundaries. Was the subject-matter *res judicata?* Law as to estoppel where the issue appears to be substantially the same as in a former suit and has been heard and finally decided. Important that the judgment rather than the decree in that former suit should be carefully studied in deciding the matter now. The law as to estoppel by a judgment is stated in sect. 6 of Act XII. of 1879, and sect. 13 of Act XIV. of 1882. The High Court held that the decree of the Subordinate Court of Backergunge (of 23rd February, 1882) in a former suit by the appellant, instituted in 1881 against Moazzam Hossein, operated as an estoppel. The Subordinate Court in question in that earlier suit had declared that under the circumstances the appellant was not *then* entitled to recover the lands in dispute. There was therefore no final decision that

such lands could not be recovered. In this new suit the Secretary of State in Council contended that the matter was *res judicata.* The Judicial Committee having in their judgment analysed the evidence relating to the land in dispute, and going back in the history of proprietary title and reformation to 1842, decided that the suit was not barred by *res judicata.* "In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at. The decree, according to the Code of Procedure, is only to state the relief granted, or other determination of the suit. The determination may be on various grounds, but the decree does not show on what ground, and does not afford any information as to the matters which were in issue or have been decided. Even if the judgment is not to be looked at, the High Court have given to the decree a greater effect than it is entitled to. The decree is only that in that suit the plaintiff is not entitled to the relief prayed for. It does not follow, as the learned judges of the High Court think, that he can never have any claim against the defendant in respect of the property. Upon the question whether the plaintiff was entitled to any relief as against the Secretary of State, the High Court having thus decided as to the estoppel considered it was not a case in which, in the exercise of their discretion, a declaratory decree should be made. Whether they were right in this or not is not now material, the appellant being, in their Lordships' opinion, entitled to more than a declaratory decree. The appeal of the present appellant to the High Court was dismissed, and that of Moazzam Hossein in this suit was allowed, the result being that the suit was entirely dismissed. Their Lordships have given their reasons for their opinion that a decree should have been made in favour of the plaintiff, and they will humbly advise her Majesty to reverse the decrees of the lower Courts, and to make a decree awarding possession to the plaintiff of the lands mentioned in the 12th paragraph of the plaint, with mesne profits for three years previous to the institution of the suit, and from that until the delivery of possession, or until the expiration of three years from the date of the decree, whichever first occurs.

"As to the costs of the suit, their Lordships observe that the Subordinate Judge says he declined to award to the plaintiff the costs incurred by him in recovering the land, inasmuch as he could have obtained this relief in the suit of 1881 if he had not committed an error in his plaint in that suit, and full costs were given to him in that suit. This, they think, is a sufficient reason for the costs of this suit in the Subordinate Court not being now awarded to the plaintiff, but he ought to have his costs of the appeals to the High Court, Nos. 25 and 26 of 1884, in which, according to their Lordships' opinion, the judgment should have been given in his favour. Their Lordships will humbly advise her Majesty to make an order accordingly. The costs of this appeal will be paid by the Secretary of State."

[*L. R.* 15 *Ind. App.* 186; *I. L. R.* 16 *Calc.* 173.]

Appasami Odayar and Others *v.*
Subramanya Odayar and Others.

Madras. Sir Richard Couch. *June* 23, 1888.

Joint ancestral Hindu estate. Right to partition. Was there abandonment of community of interest? Law of limitation. Act XIV. of 1859, s. 1, cl. 13, and later Limitation Acts. The appellants were plaintiffs, and sought by their suit to have partition made of the joint family property, and a one-fourth share (moveable and immoveable) decreed to them. The respondents alleged that there had been a partition by the ancestors of the parties and that the properties now claimed were their own acquisitions, and that since 1837 the two branches of the family had no community of interest. The Judicial Committee in giving judgment pointed out that by *sect.* 1, *cl.* 13, *of Act XIV. of* 1859, *a suit for a share of the family property not brought within twelve years of the last participation in the profits of it would be barred.* The suit would not be affected by the subsequent Act IX. of 1871 and other Limitation Acts, for it could not be revived under them. There was conflicting evidence as to

whether the respondents had not from time to time paid marriage expenses of members of the plaintiffs' family, also as to whether it was true that the plaintiffs had occasionally resided in the family house within recent times. Looking at all the evidence, however, their Lordships felt bound to hold that the High Court, which had reversed the finding of the Subordinate Judge, and dismissed the suit on the ground that it was barred by the law of limitation, was right. Affirmed with costs.

[*L. R.* 15 *Ind. App.* 167; *I. L. R.* 12 *Mad.* 26.]

The Greek brig "**Ilias**" (Sclias mate) *v.*
The steamship "**J. M. Smith**" (Eggleton master).

(Action and Cross Action.)

Constantinople (*Supreme Consular Court*). SIR JAMES HANNEN.
June 23, 1888.

Collision in the Sea of Marmora. Both vessels condemned for culpability. The following are the more important portions of the judgment of the Judicial Committee.

"The case for the 'Ilias,' as pleaded, was that she was on a voyage from Constantinople to Zante, that she was being navigated with all sail set between Heraclea and the island of Marmora, with a favourable wind from the north, when a steamer's masthead light was reported at a considerable distance; later on, when the steamer (the 'J. M. Smith') was about four miles distant, her red light was reported. The 'Ilias' continued her course, keeping the red light in view and watching it. The steamer also kept her course till she arrived at about half a mile distant from the 'Ilias,' when she was seen to change her course, shutting out her red light, and, immediately after, showing her green light and crossing the bows of the 'Ilias' at a very short distance. Seeing a collision imminent, and at the last extremity, the helm of the 'Ilias,' to ease the blow, was ported a little, but the steamer, at full speed, struck the

'Ilias' at the aft rigging on her port side, and caused her to sink in a few minutes. . . .

"For the 'J. M. Smith' it was pleaded that, as she was proceeding up the Marmora, towards Constantinople, the 'Ilias' was observed under sail at about five or six ships' lengths off about one point on the starboard bow of the 'J. M. Smith'; immediately after, a faint glimmer of a green light was observed on the same bearing: that the order was immediately given to starboard, at once followed by the order 'hard-a-starboard,' and both these orders were obeyed: simultaneously with these orders the telegraph was rung to warn the engineer to stand by: that the 'J. M. Smith' obeyed her helm and went to port, so as to avoid the 'Ilias,' but the green light of the 'Ilias' was observed to disappear, and in a few seconds the red light appeared close under the bows of the 'J. M. Smith': before seeing the red light, orders were immediately given to stop and reverse: that, notwithstanding the engines were going full speed astern for about one minute and a half before the collision, the 'J. M. Smith' struck the 'Ilias' abaft her mainmast on the port side, the bows of the steamer being considerably damaged. The respective courses of these vessels are not given in the pleadings, but it appears from the evidence that the 'Ilias' was sailing W. by S., and the 'J. M. Smith' E. $\frac{3}{4}$ N. These courses cross one another, though at a slight angle, and as the speed of the steamer was but little greater than that of the brig, there was risk of their meeting near the point of intersection. The first question which arises is, with what lights open to one another did the vessels approach one another? The statement in the pleadings of the 'Ilias,' that the red light of the steamer was seen at a distance of four miles, is no doubt exaggerated, but the evidence of the mate of the 'Ilias' shows that the red light of the steamer was seen at a considerable distance. He states that upon seeing the red light . . . . he ordered 'to go to the right, for as to show well our red light,' and that he went a quarter of a point to the right. If this evidence is correct, and if the course thus altered was continued, the vessels would be approaching on parallel lines,

and they would have passed red to red, and in that case the steamer must have starboarded her helm when near the 'Ilias,' and attempted to cross her bows. On the other hand, the evidence for the 'J. M. Smith' is clear and consistent, that, while still on her original course, the green light of the 'Ilias' was seen on the steamer's starboard bow, from half a point to a point. To determine between these conflicting statements, their Lordships are compelled to look to the probabilities of the case. It appears in the highest degree unlikely that the steamer should have starboarded to cross the bows of the 'Ilias' when they were closely approaching one another red to red. It is not stated by the witnesses for the 'Ilias' that, after her helm was ported the fourth of a point, she was steadied on that course; and, if the helmsman fell back the fourth of a point to her original course, the 'Ilias' may have passed the point of intersection of the two courses just before the steamer reached it, and have brought her green light into sight on the starboard bow of the steamer. This was the view taken by the learned judge below and his assessors, and their Lordships see no reason to think that this view of the facts is erroneous. But even on this supposition their Lordships are advised that the steamer ought to have stopped and reversed when the green light of the 'Ilias' was seen. However this may be, the question remains whether those navigating the 'J. M. Smith' can be excused for not having seen the 'Ilias' sooner than they did. It is stated by Hall, the look-out man, that he did not see the 'Ilias' till she was about six ship's lengths off, the length of the ship being 285 feet. He says he reported it, but his report was not heard by the mate. The mate, however, says that he saw the green light at a distance of two or three cable's lengths, and that he immediately ordered 'starboard,' and 'hard-a-starboard' in a few seconds, and 'stand by,' to the engineer. It is evident from these orders that he considered himself in a position of dangerous proximity to the other vessel, and he had been placed in this position through the 'Ilias' not having been seen sooner. Three causes for this are suggested,—'defective lights, or lights placed in such a position that they could not be seen,

or to lights having been put up at the last moment.' With regard to the first, it was admitted by the mate of the 'J. M. Smith' that the green light he saw was a good light, and no fault was found with the red light. As to the second complaint, that the position of the lights prevented their being seen, this seems intended to suggest that they were obscured by the sails. This, however, is not only not proved, but no questions were put to the witnesses of either vessel for the purpose of raising this objection to the lights of the 'Ilias.' There are, therefore, no materials upon which their Lordships can base any opinion adverse to the 'Ilias' on this point. The same remarks apply to the charge that the lights were put out at the last moment.

"Their Lordships are thus led to the conclusion that there was a defective look-out on the 'J. M. Smith,' and that through this she was brought into such a position with regard to the 'Ilias' that a risk of collision arose.

"*A steamer ought not to be navigated, with reference to a sailing vessel, on the assumption that the movements of the latter can be counted on with mathematical certainty. Allowances must be made, not merely for contingencies that can be foreseen, but also for possible errors on the part of the sailing vessel, to which a sufficiently wide berth should be given to prevent those in charge being frightened into a wrong manœuvre.*

"But while holding the 'J. M. Smith' to blame, their Lordships cannot acquit the 'Ilias.' It is admitted that her helm was ported, and after the green light of the steamer was seen. It is said that it was only a little, and in the last extremity, but it was sufficient, and soon enough to bring the 'Ilias' across the bows of the 'J. M. Smith,' for the blow was received by the 'Ilias' on her port side aft.

"Their Lordships are, therefore, of opinion that the 'Ilias' was to blame in not keeping her course. On the whole case their Lordships will humbly advise her Majesty that the judgment of the Court below be varied, and that both vessels be condemned, and that each party do bear his own costs, both on the appeal and on the proceedings in the Court below."

[*P. C. Ar.*]

T. R. Arunachellam Chetti v.
V. R. Arunachellam Chetti and Another, by their guardians.

Madras. SIR RICHARD COUCH. *June* 27, 1888.

Alleged irregularity in a sale under a decree. Was there insufficiency of description in the proclamation of sale? When ought objections to be taken? The respondents (judgment debtors) allowed a sale of a village called Kattanoor, their property, to the appellant without making any objections as to whether part or whole was to be sold. Can the sale afterwards be set aside? (Sect. 311 of Act XIV. of 1882, Civil Procedure Code.) Effect of not putting forward evidence of substantial injury resulting from the sale. The High Court reversed the proceedings of the Subordinate Court in execution of a decree against the respondents, which proceedings resulted in the order for a sale being confirmed. The High Court set the sale aside upon the grounds stated thus:—"It is clear that the description of the properties advertised for sale was most imperfect. The judgment debtors enjoyed not only proprietary rights in some portion of the property, but rights as mortgagees of very considerable value in other portions of the property; and there was nothing to indicate the possession by the judgment debtors of any rights as mortgagees in the villages. The purpose of the law would be entirely defeated if a more complete description were not enforced than was given in this case. . . . . It cannot be doubted that the inadequate description led to sale of property valued at upwards of Rs. 40,000, together with mortgage claim for Rs. 40,000, for Rs. 20,000." Then the judges say they must set aside the order confirming the sale, and also another order made upon another petition by which an application to set aside the sale was refused.

The Judicial Committee report to her Majesty that the decree of the High Court ought to be reversed, and in the course of their judgment made these observations:—

"As regards the objection that the description was insufficient,

which is relied upon, as their Lordships understand, as vitiating this sale—for that appeared to be the contention of the counsel for the respondents—the objection was not taken until the sale had been completed. The judgment debtors, knowing, as they must have known, what the description was in the proclamation, allow the whole matter to proceed until the sale is completed, and then ask to have it set aside on account of this, as they say, misdescription. It appears to come within what was laid down by this Board in *Olpherts* v. *Mahabir Pershad Singh*, L. R. 10 Ind. App. 25, that if there was really a ground of complaint, and if the judgment debtors would have been injured by these proceedings in attaching and selling the whole of the property whilst the interest was such as it was, they ought to have come and complained. *It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment debtor could lie by, and afterwards take advantage of any misdescription of the property attached, and about to be sold, which he knew well, but of which the execution creditor or decree holder might be perfectly ignorant—that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated.* That, in their Lordships' opinion, cannot be allowed, and on that ground the High Court ought not to have given effect to this objection."

"There is another objection to this decree of the High Court. The law provides, by sect. 311 of Act XIV. of 1882, that an objection may be taken by the judgment debtor to an irregularity in the sale, but then it says that no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity. The Subordinate Judge finding, as he says, that no complaint had been made of this irregularity, did not receive evidence that there was any injury occasioned by it. If he was wrong in the opinion of the High Court in doing that, they ought to have sent back the case to him to take that evidence. Instead of doing this, when the case comes before them, and they give judgment, they assume that there was a substantial injury, and that the property, in consequence of

this misdescription, had sold for less value than it would otherwise have fetched. There seems to be no ground for an assumption of that kind by the High Court, and therefore, both as to the objection to the non-description, or not mentioning the mortgage in the attachment proceedings, and that there was no proof that any special injury was occasioned, their Lordships think that the judgment of the High Court was wrong, and that it must be reversed. . . .

"The orders of the High Court should be reversed, the appeals to the High Court dismissed with costs, the orders of the Subordinate Court which were appealed against affirmed, and the costs in the Subordinate Court ordered to be paid by the respondents. The respondents will pay the costs of this appeal." [*L. R.* 15 *Ind. App.* 171; *I. L. R.* 12 *Mad.* 19.]

Mussammat Basso and Others *v.*
Dhum Singh.

N. W. P. Bengal. Lord Hobhouse. *July* 7, 1888.

Suit for recovery of debt. Article 97 of the Limitation Act (XV. of 1877); Indian Contract Act (IX. of 1870), s. 65. Starting point of the limitation. Fresh obligation under Indian Contract Act. In 1879 the respondent, Dhum Singh, owed to one Barumal, the person who is now represented by the appellants, the sum of Rs. 33,359 3a. 6p. Negotiations were entered into to liquidate the debt. These resulted in certain landed property being sold under an agreement to the then plaintiff Barumal, the purchase amount being fixed at Rs. 55,000. The plaintiff by the agreement was to give credit for the debt and pay to the respondent the balance in cash. Disputes over the actual terms of the bargain subsequently arose, and litigation ensued. Dhum Singh, in 1880, brought a suit for specific performance of the contract, praying that Barumal might be ordered to pay the balance of the Rs. 55,000 with interest after setting off the debt of Rs. 33,359 3a. 6p. The Subordinate Judge gave Dhum Singh a decree in accordance with his prayer.

Barumal appealed to the High Court, and, by its decree (14th March, 1884), it reversed the finding of the Subordinate Judge. In the opinion of the High Court, Dhum Singh did not make out that the sale deed ever became a contract binding on Barumal and enforceable against him in law. Dhum Singh's suit was thereupon dismissed. The present suit was instituted by Barumal and his wife Basso in September, 1884. The plaint alleged that steps taken during the preparation of the sale deed rendered it nugatory and of no effect, and the old debt with interest was claimed as if no valid contract had been created. Dhum Singh's defence was that as the High Court in March, 1884, had held there was no contract, the present claim was barred by limitation. The Subordinate Court decided in favour of the appellants. In its view, the disputed amount of the debt reverted to its original condition when the High Court dismissed Dhum Singh's claim for specific performance of a revoked contract. The plea of limitation was wrong. The appellants, in the view of the Subordinate Court, were under sect. 12 of the Code of Civil Procedure (Act XIV. of 1882) not competent to seek determination of the debt by means of a separate suit during the pending of the specific performance suit. Therefore, for the period in which the appellants were taking proper steps against the setting off of the amount in question, an allowance should be made to the appellants in computing the term of the suit, and the benefit of exclusion of time provided in sect. 15, Act XV. of 1877, should by reason of bar under sect. 12, Civil Procedure Code, be given to the appellants. On appeal, the High Court considered that Dhum Singh's plea of limitation was sound in law, and the decree of the Subordinate Judge was reversed. This finding the Judicial Committee now reversed, and the decree of the Subordinate Court was upheld. In the course of the judgment of the Board, their Lordships made the following observations:—"It would be a lamentable state of the law if it were found that a debtor, who for years had been insisting that his creditor shall take payment in a particular mode, can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time has relieved him from paying at all. In their Lordships' view,

the decree of the High Court in 1884 brought about a new state of things, and imposed a new obligation on Dhum Singh. He was now no longer in the position of being able to allege that his debt to Barumal had been wiped out by the contract, and that instead thereof Barumal was entitled to the villages. He became bound to pay that which he had retained in payment for his land. And the matter may be viewed in either of two ways, according to the terms of the Contract Act, IX. of 1870, or according to the terms of the Limitation Act, XV. of 1877. By the 65th section of the Contract Act, 'when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.' In this case there most certainly was an agreement, which, as written, was in the terms alleged by Dhum Singh. But it was held not to be enforceable by him, because there were other unwritten terms which he would not admit; and the other party did not seek to enforce the agreement according to his version of it, but threw it up altogether. The agreement became wholly ineffectual, and was discovered to be so when the High Court decreed it to be so. The advantage received by Dhum Singh under it was the retention of his debt. Therefore, by the terms of the statute, he became bound to pay his debt on the 14th March, 1884. Trying the case by the terms of the Limitation Act, their Lordships think that it falls within Article 97. An action for money paid upon an existing consideration which afterwards fails, is not barred till three years after date of the failure. A debt retained in part payment of the purchase-money is in effect, and as between vendor and purchaser, a payment of that part; and if that were doubtful on the first retention, while there was yet an undecided dispute, it could no longer be so when a decree of a Court of justice authorized the retention, and, in effect, substituted the land for the debt. Dhum Singh retained the money, and Barumal lost the use of it, in consideration of the villages which formed the subject of the sale-deed. That consideration failed when the decree of 1884 was made. . . . . The result is that in

their Lordships' opinion, the High Court ought to have sustained the Subordinate Judge's decree and to have dismissed the appeal with costs, and they will now humbly advise her Majesty to reverse the decree of the High Court and to make an order to that effect. The respondent must pay the costs of the appeal."
[*L. R.* 15 *Ind. App.* 211; *I. L. R.* 11 *All.* 47.]

Petition in re Baudains *v.* the Liquidators of the Jersey Banking Company and Another.

Jersey. LORD HOBHOUSE. *July* 7, 1888.

Petition for the transmission of judge's notes. Law and practice of Jersey as regards procedure in the Royal Court. Importance of every possible information being disclosed in an application for special leave to appeal, and particularly the reasons why leave to appeal is refused below. In this case special leave to appeal to her Majesty in Council had been granted. [*P. C. Ar.* 3 Dec. 1887.]

Subsequently, this petition was lodged. It asked for an order that the Royal Court or the Greffier thereof should be directed by the Lords of the Council to transmit the notes of evidence taken (on the hearing of the petitioner's appeal from the Inferior Number) by the Bailiff or for further relief. This petition was of an important character, as bearing upon a question of judicial procedure in Jersey. The respondents put in an appearance as opponents of the petition. Lord Hobhouse delivered the judgment of the Board, and the full text thereof is now given.

"This is an application that the Royal Court of Jersey, or the Bailiff or Greffier thereof, may be directed to transmit to the Registrar of the Privy Council without delay the notes of evidence taken by the Bailiff of the said Court on the hearing of the appeal in this case. Those notes are the notes of the judge; and in cases where it is the judge's duty to take notes it may be most proper to have the judge's notes before the Privy

Council—in fact, it is a matter of common practice in jury trials; but by the law and practice of Jersey it is not the judge's duty to take notes; on the contrary, the judge appears to be forbidden to take notes which shall form part of the record. In that case, the judge's notes are mere private memoranda for the assistance of his own memory; and he may only take down such points as he desires to direct his own attention to in the conduct of the case. Such notes might be misleading to the last degree. There might be an important point taken down for one party, and the counter point for the other party, which would qualify it, not taken down; and though such notes might suit the purpose of the judge very well, it would be very improper to have them before the Court of Appeal. The prayer of the petition, therefore, cannot be granted.

"But the petitioner goes on to pray further relief; and though he does not in his petition point to the taking of further evidence in Jersey under the order of her Majesty in Council, he now asks at the bar that such further evidence shall be taken. Their Lordships agree that it is quite competent to them to take such further evidence in a proper case; but in this case they are not disposed to give any assistance to the petitioner. The ground on which the Royal Court of Jersey refused leave to appeal was that there were no formal notes in writing taken during the trial. The rule of practice is laid down in an article passed in the year 1885, which, rendering it in English, is as follows: 'It shall not be permissible to either party after the evidence in the case has begun to demand that the depositions shall be reduced into writing except in a case susceptible of appeal to her Majesty in Council;' and then: 'The reduction into writing shall be demanded when the evidence is entered on.' In this case there was no such demand, and there is no reduction into writing; and on that ground the Royal Court thought that they ought to refuse the leave to appeal. Their Lordships do not desire to pronounce any opinion in this case whether the omission to demand the formal reduction into writing should be an absolute peremptory ground for refusal of appeal in every case; but applying themselves to the case before

them, they find that it was in fact the ground on which the leave to appeal was refused in the present case. When the petitioner applied for special leave to appeal from that order, he did not disclose the ground on which leave had been refused by the Court. If he had disclosed it, the matter which is now debated on this petition would have been debated when the leave to appeal was applied for, and it is a matter which might well have influenced their Lordships' decision. Now until the filing of the affidavit of the Greffier of the Royal Court in this case, it did not appear what was the ground for refusing the leave to appeal. M. Baudains, the petitioner, who is himself a lawyer, has answered that affidavit, and he says in his affidavit in answer that he is not aware of any law under which the want of such formal reduction into writing is a ground for refusing leave to appeal. But he does not state that he could not have found out what the real ground for refusing the leave to appeal was, so as to let this Committee know it when they were asked to grant special leave to appeal. He does not even state that he does not know that ground, or that he did not know it when he presented his petition. The result is that their Lordships have been induced to make an order upon imperfect materials, and in the absence of materials which might have influenced their judgment when they made that order. It is a matter of extreme importance that a party should bring before their Lordships all that is material to guide their judgment; otherwise, orders may be made here, and are made sometimes, in the absence of knowledge of what ought to be known; and an amount of trouble, disturbance and expense is caused to the parties, which is of great public mischief. The least that a petitioner can do who has—speaking in no invidious sense, not imputing any intention to M. Baudains—but who has in fact misled their Lordships by presenting a petition not stating the true nature of the question raised in the Court below—would be to come forward at the earliest moment to say that he did not know, that he could not by ordinary inquiry have known, what the grounds of the judgment were, and therefore to excuse himself for not having brought the proper materials before this

Committee. M. Baudains has not done that. He has had his attention drawn to the fact by the affidavit of the Greffier; he has answered the affidavit of the Greffier on a matter of law; and he has not answered the affidavit of the Greffier on the much more important matter of fact.

"The case, therefore, is one in which their Lordships are not disposed to lend any assistance to the petitioner; and in the exercise of their discretion they will humbly advise her Majesty to dismiss this petition with costs." [Subsequently a petition was lodged, asking for permission to withdraw the appeal, and the appeal was consequently dismissed for *non-pros.*]

[13 *App. Cas.* 832.]

Dunn and Others *v.*
Lareau.

Lower Canada. Lord Watson. *July* 14, 1888.

Land in lots. Acquisition by respective purchasers of certain lots. Dispute as to the location of one of them. The appellants, who represented the late William McGinnis, were plaintiffs. Question, whether the particular lot is "No. 103," or "No. 104." The Judicial Committee agree with the Courts below in holding that the respondent's right of possession is secured by title and prescription. (Civil Code of Canada, sect. 2251.)

"The fact that . . . . William McGinnis for twenty years and upwards treated the disputed land as outside his lots, and for at least nineteen years permitted the respondent to possess it as No. 104, lays a very heavy onus on the appellants. The Judge of First Instance, and one of the judges of the Court of Appeal, were of opinion that the disputed land has been shown to be lot 103, but four of the judges of the Appeal Court came to the opposite conclusion. Their Lordships would have hesitated to differ from the majority of the Court below upon a pure question of fact; but in the view which they take of the case it is

unnecessary to decide the point. The whole case of the appellants rests upon the assumption that the respondent's deed of sale conveys to him nothing more than a right to lot 104, if and wheresoever it can be found. That assumption appears to their Lordships to be erroneous. The subject sold to him is not merely described as lot No. 104, but as an area of land which had been seen and examined, lying between the property of McGinnis and that of Daigneault. That is a specific description, not with reference to numbers, but with reference to the actual and visible state of possession of the adjoining lands; and having regard to the admitted state of possession in 1857, at the time when the respondent's deed of sale was granted, their Lordships have no hesitation in holding, with the Court of Appeal, that the description of the subject sold completely identifies it with the land in dispute. The respondent's possession, which was in perfect good faith, was in conformity with, and must be ascribed to his title; and the lapse of ten years' possession has therefore perfected his right in competition with the appellants." Appeal dismissed, with costs. [57 *L. J. P. C.* 108.]

Holm *v.*
Adams and
Cross-action consolidated SS. "**Norden**" and H.M.S. "**Espoir.**"

(Vice-Admiralty.)

Hong Kong. SIR JAMES HANNEN. *July* 21, 1888.

Collision between a Danish steamship and an English gunboat. Both vessels held to blame. Regulations for preventing collisions at sea not always absolute. Officers in command of steamers and especially of her Majesty's ships ought not to take upon themselves alone the duty of looking out. *Damages to be assessed in the English Admiralty Registry.* The facts of the case are set forth in the judgment of the Judicial Committee:—"The

Danish steamship 'Norden' was, on the 3rd November, 1886, on a voyage down the Canton river. It is alleged, on her behalf, that at about 6 p.m. she was seven or eight miles above Tiger Island well over on her starboard side of the channel, going about $9\frac{1}{2}$ knots an hour, steering S.S.E. $\frac{3}{4}$ E. by compass. At about 6.30 the masthead light of a steamer, which turned out to be the 'Espoir,' was sighted nearly right ahead about a quarter or half a point on the port bow about three miles distant. A few minutes later, the red light of the 'Espoir' came in sight about $1\frac{1}{2}$ points on the port bow. On this red light being seen the course of the 'Norden' was altered about $1\frac{1}{2}$ points to starboard to give the 'Espoir' a wider berth, and the 'Norden' was shortly after steadied on her former course. When the vessels had approached to about 500 yards, the 'Espoir' being broad on the 'Norden's' bow, the 'Espoir' suddenly starboarded her helm and bore down as if to cross the 'Norden's' bows. A collision then being inevitable, the helm of the 'Norden' was put hard-a-port to lessen the shock. The 'Espoir' came on apparently without slackening speed, and struck the port bow of the 'Norden.' The collision took place about 400 yards S.E. of Bute Rock, to the N.E. of the fort on Tiger Island. For the 'Espoir,' a gunboat in her Majesty's service of 460 tons, it is alleged that she was steaming up the Canton river at the rate of $7\frac{1}{2}$ to 8 knots an hour on a course N. by W. $\frac{1}{2}$ W. by compass (N. by W. $\frac{3}{4}$ W. true). When a little to the N.E. of Tiger Island, at about 6.20, a white light, and subsequently a green light, were seen about half a point on the starboard bow of the 'Espoir' about four miles off. As the steamer, which proved to be the 'Norden,' continued to show her green light, the 'Espoir' was kept steadily on her course. When the 'Norden' bore about two points on the starboard bow of the 'Espoir,' and was apparently 500 yards off, the helm of the latter was starboarded to give the 'Norden' a wider berth, when she suddenly shut in her green and showed her red. A collision being then inevitable, the engines of the 'Espoir' were immediately reversed full speed and her helm put hard-a-port. The 'Norden' did not appear to slacken her speed, and the 'Espoir' struck the

'Norden' on her port bow. The collision took place about $1\frac{1}{2}$ miles N. by W. $\frac{1}{2}$ W. of the fort on Tiger Island.

"The first question which arises upon these remarkably conflicting statements is as to the place of collision. Captain Adams, in command of the 'Espoir,' states that at 6 he was off the Tiger's Claw, the south-easternmost point of Tiger Island, and that he skirted along Tiger Island in order to get a good departure, and that he passed close to the Fort. The navigating officer then showed him, with a lantern, a chart with their course marked on it, N.W. by W. $\frac{1}{2}$ W. by compass. The navigating officer then went aft from the forecastle, where the chart was examined, and while he was away Captain Adams saw a white light a long way off, a little on the starboard bow, about five miles off. A short time after he saw the green light under the white. He continued to watch the light to see if the approaching vessel altered her course; when about two miles off he gave directions to keep a sharp look-out for her red light, because he said, 'If I see it I shall have to port;' when at half a mile he felt certain they would pass safely green to green. The 'Espoir' was at the spot where the witnesses for the 'Norden' place the collision at the time when Captain Adams first sighted the 'Norden,' and he estimates the time between that and the collision at 10 to 15 minutes.

"He is confirmed in these statements by the navigating officer Mr. Clive, by the Gunner Barstow, and the Lance Sergeant Henderson. If this evidence is correct it makes it impossible that the collision could have been where it is placed by the witnesses for the 'Norden,' and if the 'Espoir' proceeded on a course N. by W. $\frac{1}{2}$ W. after the 'Norden' was seen this would bring the 'Espoir' over towards Towling Island, in the direction of the spot where the collision is fixed by the witnesses for the 'Espoir.' As against this very specific evidence, the evidence for the 'Norden' is, in their Lordships' opinion, justly subject to the observations made on it by the Judge in the Court below, that the witnesses for the 'Norden' had no landmark to go by like the witnesses for the 'Espoir.' Their only landmark was Tiger Island, which they had not reached at the time of the

collision, and the pilot, who was well acquainted with the river, said that they had not reached the Bute Rock at the time of the collision. The Bute Rock lies considerably to the north of the place of collision, stated by the master of the 'Norden.' Add to this that the course laid down by the master of the 'Norden' as that taken down the river is admittedly incorrect and is an impossible one, having regard to the bearings of the land on her starboard side. Their Lordships are therefore of opinion that the evidence for the 'Espoir' is more to be relied on than that for the 'Norden,' and that the place of collision more nearly corresponds with that given by the 'Espoir' than that given by the 'Norden.' It results from this that the 'Espoir' would, when off Tiger Island, as stated by her witnesses, have the white and green lights of the 'Norden' on her starboard bow.

"But it was contended on behalf of the 'Norden' that the 'Espoir' was in the wrong by being on the port side of the channel when she first sighted the 'Norden,' and that she thus infringed the 21st Regulation for preventing collisions at sea. It is to be observed, however, that the rule is not absolute, it is only to be followed when 'safe and practicable'; and we are advised by our assessors that at night, with shallow water on the starboard side of the channel, without other guide than that afforded by Tiger Island, it was prudent and proper navigation for the 'Espoir' to make for that island to take a departure. Concurring, therefore, with the Judge in the Court below in the opinion that the vessels were approaching one another green to green, their Lordships consider that the 'Norden' brought about the collision by improperly porting when in this position; but their Lordships think that the 'Espoir' was also to blame for not having stopped earlier than she did. Captain Adams states that when the vessels were two miles apart he said, 'Keep a good look-out for her red light, because if I see it I shall have to port.' This shows that he was aware of the probability of a vessel coming down the river porting to come on to her starboard side of the river. He kept watching the lights of the 'Norden,' and thinking the vessels were on parallel courses, he naturally expected the lights of the approaching steamer to

broaden, but when 500 yards off he observed that they did not broaden, and upon this he starboarded. We are advised by our assessors that the fact of the lights not broadening ought to have informed him that the other vessel was under a port helm. Thus, the starboarding of the helm of the 'Espoir' while the 'Norden' was porting tended to bring the vessels together; had the 'Espoir' stopped instead of starboarding when the red light came in view, the manœuvre she afterwards unsuccessfully had recourse to of porting would, probably, have saved her from collision.

"Their Lordships think it right to add that, in their judgment, the officer in command of a vessel, especially one of her Majesty's ships, with a numerous crew, ought not to take upon himself alone the duty of looking out, as was done by Captain Adams in this case. A man should always be posted exclusively to discharge this function. The captain's attention may be distracted by other calls upon it, as is illustrated by the incident already referred to, of the navigating officer showing the captain, by the light of a lantern, the course marked on the chart.

"On the whole case their Lordships will humbly advise her Majesty that the decree of the Court below be varied, and that both vessels be condemned. Each party to bear his own costs in this Court and the Court below. The damages to be assessed according to the Admiralty rule in the Admiralty Registry here." [*P. C. Ar.*]

Petition *for order to revive the appeal of* Shaikh Haidar Ali and Another *v.* Tassaduk Rasul and Others.

Oudh. Lord Hobhouse. *July* 21, 1888.

This application, which was made for the purpose of having an abated appeal revived, was of importance for the reason that the Judicial Committee saw fit to lay down afresh, but with perhaps greater stringency, the rules to be observed in bringing petitions for revivor before them. The materials produced at the appli-

cation with a view to alter the parties being insufficient, their Lordships said that they had not got the facts before them, and it was very inconvenient that those facts should be tried here. There ought to be some finding of the Court below. The usual course is as laid down in Mr. Macpherson's Book (Practice of the Privy Council, 1873). He says (p. 241):—"Of course in such cases the proper evidence must be given of the representative character of the persons by or against whom the revivor is sought. The title is more generally established upon petition to the Court below, which thereupon makes any inquiries which it may deem necessary, and orders the petition and proofs to be transmitted to England for such order as the Judicial Committee of the Privy Council may think fit to make."

The Court below gives its own opinion as to who are the parties proper to be substituted upon the record. It has been the practice, so far as their Lordships can recollect, for a great number of years; and they now must request the Judicial Commissioner to follow that which is the ordinary practice, and to make a certificate or statement on which their Lordships can act. [*L. R.* 15 *Ind. App.* 209.]

Allan and Others *v.*
Pratt.

[*Ex parte.*]

Lower Canada. The Earl of Selborne. *July* 26, 1888.

This appeal was of importance on the question of competency. Proper mode of arriving at appealable value. The respondent Pratt had been awarded $1,100 as damages in an action alleged to have been caused by the negligence of the appellants' employés. He had claimed $5,000 under Articles 1053, 1054 of the Civil Code of Lower Canada. The question of the validity of the orders of the Court below admitting the appeal was first argued by desire of their Lordships (*Sauvageau* v. *Gautier*, L. R. 5 P. C. 494; and *Macfarlane* v. *Leclaire*, 15 Moo. P. C. 181, cited). In

discharging the order and dismissing the appeal, their Lordships said: "The proper measure of value for determining the question of the right of appeal is, in their (Lordships') judgment, the amount which has been recovered by the plaintiff in the action and against which the appeal could be brought. Their Lordships, even if they were not bound by it, would agree in principle with the rule laid down in the judgment of this tribunal delivered by Lord Chelmsford in the case of *Macfarlane* v. *Leclaire*, that is, that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal. If there is to be a limit of value at all, that seems evidently the right principle on which to measure it. The person against whom the judgment is passed has either lost what he demanded as plaintiff or has been adjudged to pay something or to do something as defendant. It may be that the value to the defendant of an adverse judgment is greater than the value laid by the plaintiff in his claim. If so, which was the case in *Macfarlane* v. *Leclaire*, it would be very unjust that he should be bound, not by the value to himself, but by the value originally assigned to the subject-matter of the action by his opponent. The present is the converse case. A man makes a claim for much larger damages than he is likely to recover. The injury to the defendant, if he is wrongly adjudged to pay damages, is measured by the amount of damages which he is adjudged to pay. That is not in the least enhanced to him by the fact that some greater sum had been claimed on the other side.

"Therefore in principle their Lordships think the case is governed by *Macfarlane* v. *Leclaire* upon the question of value, and they do not think it is at all affected by the circumstance that the Court below did not give effect to that objection, but gave leave to appeal. It has been decided in former cases that leave so given does not make the thing right, if it ought not to have been done.

"Then it is submitted by the learned counsel that their Lordships ought to give an opportunity for an application to be made for special leave to appeal, on the ground that not only questions

of fact but also, as bearing on those facts, questions of law, and particularly a question of law which may be important, upon Article 1054 of the Civil Code, are involved in the case. Of course their Lordships will not at present go into the merits of the case at all, and they will assume that there may be such a question and that it may be important; but the present question is, whether, this appeal being incompetent, they ought to give, under the circumstances of the case, an opportunity of asking for special leave to appeal. *No doubt there may be cases in which the importance of the general question of law involved may induce their Lordships to give leave to appeal, though the value of the matter in dispute is not sufficient;* but their Lordships must be governed in the exercise of that discretion by a consideration of all the circumstances of each particular case. In this case they see from the manner in which it comes before them that this general question of law, if allowed to be argued on appeal, would be argued at the expense, if he did appear and go to any expense, of a man evidently too poor to undertake it. And, secondly, they see that there would be no probability whatever, if they permitted such an appeal, of their Lordships having the assistance which they must necessarily desire, whenever an important question as to the construction of an article of the Civil Code, having so large a bearing as this is suggested to have, may require to be considered and determined by them. If in any future case a similar question should arise, and should be competently brought before their Lordships, no doubt it will be decided upon its merits, and not held to be finally concluded by the judgment given in this particular action. Their Lordships do not think it would be at all a satisfactory thing to allow an appeal not otherwise competent for the sake of raising in those circumstances and in that manner a question of the importance which this question is said to have. Therefore the appeal will be dismissed, but, as nobody has appeared to oppose it, there will be no costs." [13 *App. Cas.* 780.]

Lewin *v.*
Killey and Others.

High Court of Justice, Isle of Man. Lord Hobhouse. *July* 27, 1888.

Title to property. Construction of proviso in a will. Interpretation of words "shall die without leaving lawful issue." Construction of other directions in the will, and effect thereof in elucidating the purpose of the testator. The testator, James Lewin, gave one of his houses, No. 4, Marina Terrace, Douglas, to trustees upon trust to permit his wife to receive half of the rent and profits for her life and his daughter Grace the other half. Upon the decease of the wife, the trustees were directed to transfer and *convey the house to Grace, her heirs and assigns, for ever.* Then follows this direction: "And it is my will and desire, that if any of my said children shall die without leaving lawful issue them surviving, that the property hereby devised and bequeathed to each of my said children shall be equally divided amongst my surviving children." The events that have happened are, that the wife has died, Grace survived the wife many years, and she has died without leaving lawful issue her surviving. The question is whether the property goes to her heir, or is governed by the proviso that has been stated, and is carried over to the surviving children. The appellant, David Duncan Lewin, is the only surviving child. He contends that Grace having died without leaving lawful issue, the proviso must be read according to the most general and literal effect of its terms, and that the property is carried over to him. The principal respondent, who is the *heir of Grace*, contends that the event of dying without leaving lawful issue surviving is confined to death before the time at which the testator contemplated that the absolute interest was to take effect. Both Courts below decided in favour of the respondent, and the Judicial Committee now agree with their findings. Their Lordships were of opinion that in this case the scheme of the will did not permit of any reasonable doubt. "The testator had a number of houses, and

as to one he made an immediate absolute gift to one of his sons. The others he gave to trustees, and he contemplated that the trustees should for a period pay the rents to, or permit the rents to be received by, some person—some of his children, or his widow, child, or grandchild, as the case may be, for life; and when that period came to an end, then the trustees were to transfer and convey the house in question to the person for whom it was designed. They were to divest themselves completely of their trust and vest the property completely in the persons for whom the house was designed. When the period arrived at which they were to transfer and convey, they might find themselves in the presence of a change of circumstances. If the person for whom the house was designed was then dead without leaving lawful issue, they were to convey the property among the surviving children. But if the person for whom the house was designed was living, or had issue, then the conveyance would be to that person, *or the heirs and assigns of that person.* Their Lordships think that that is the whole scheme of the will, and that this testator did not design that the property should be absolutely conveyed by the trustees to any one of his children, and yet at that child's death, if he happened to die without leaving issue, there should be a defeasance of that conveyance, so that the property should pass to the surviving children. . . . . The principle is that the time of dying without leaving lawful issue is confined to the time during which the absolute interest has not been conferred, but when that is once conferred the trust and the period of suspense is closed, and the possession is not to be disturbed." Appeal dismissed, with costs.

[13 *App. Cas.* 783.]

Singleton, Dunn & Co. *v.*

A. F. A. Knight and Cook Brothers.

Lower Canada. Sir Barnes Peacock. *July* 31, 1888.

Partnership. Did it exist between A. F. A. Knight and Cook Brothers, or was there only a trading arrangement in

consideration of a loan to Knight? Singleton, Dunn & Co. were plaintiffs, and they sought to recover from the respondents certain sums of money which they alleged the respondents as partners owed to them. The liability of the respondents depended wholly on the question whether a partnership with Knight had been constituted. Civil Code of Canada, Arts. 1831, 1855. Their Lordships agreed with both Courts below in holding that no partnership existed, and that one of the firm of partners (Cook Brothers), who was alleged to have entered into an agreement with Knight, had no authority from his co-partners to enter into partnership with another person (*i. e.* Knight) in another business. Appeal dismissed, with costs.

[13 *App. Cas.* 788; 57 *L. J. P. C.* 106.]

The Trustees, Executors, &c. Company and Another *v.*
Short.

New South Wales. LORD MACNAGHTEN. *Aug.* 1, 1888.

Action of ejectment by appellants to recover land under a title derived from a Crown grant in 1810. Statute of Limitations, New South Wales (No. III. of 1837). Non-occupation by rightful owner for twenty years before action. *Per contra*, what title has claimant in possession, although he (the claimant) may not have been in possession for whole twenty years? Court below held that when the rightful owner was dispossessed and the statute began to run against him he could not recover against any one in possession at the end of twenty years, although there may have been an interval in the twenty years during which no one was in possession. The Judicial Committee did not concur in this decision. They held that when a person entered on the land of another and held possession for a time, and then abandoned possession, the rightful owner was in the same position as if no intrusion had taken place. "No new departure is necessary." "There must be both absence of possession by the

person who has the right, and actual possession by another (whether adverse or not) to be protected, to bring the case within the statute." *Smith* v. *Lloyd*, 9 Exch. (Welsby, H. & Gow) 562. Substantial miscarriage in the trial. Judgment refusing a rule for a new trial reversed, and a new trial directed. The costs in the former trial, and of the application for the rule, ought to be costs in the cause. Respondent to pay costs of appeal. [13 *App. Cas.* 793; 58 *L. J. P. C.* 4.]

Read and Others *v.*
The Archbishop of Canterbury.

Court of the Archbishop of Canterbury. THE LORD CHANCELLOR (Lord Halsbury). *Aug.* 3, 1888.

Petition in an "appealable ecclesiastical matter." The Archbishop of Canterbury refused to cite the Bishop of Lincoln before him to answer certain charges preferred against him for alleged illegal procedure in ceremonial and worship, on the ground that he conceived he had not jurisdiction. Petition by the promoters of the suit against the Bishop for inquiry as to whether or not the Archbishop had jurisdiction to issue a citation. *Vide* 25 Hen. VIII. c. 19, s. 4; also *Pelling* v. *Whiston*, 1 Comyn's Rep. 199.

Their Lordships were of opinion that the Archbishop has jurisdiction. They are also of opinion that the abstaining, by the Archbishop, from entertaining the suit is matter of appeal to her Majesty; they expressed no opinion whatever whether the Archbishop has or has not a discretion whether he will issue a citation, and they humbly advise her Majesty to remit the case to the Archbishop to be dealt with according to law.

[*P. C. Ar.*]

Sceberras D'Amico *v.*
Sceberras Trigona; and
Sceberras Trigona *v.*
Sceberras D'Amico.

(Two Appeals.)

Malta. THE EARL OF SELBORNE. *Aug.* 4, 1888.

Right of succession to an estate in Malta. *Primogenitura* or perpetual entail of lands. Construction of a marriage settlement of 1695. Validity of a will. Was the *primogenitura* according to the law of Malta a masculine one, *i.e.*, a succession in which males descending through males from the heir of the founder take in preference to any females descending from such heir, so that the brother of the last possessor takes to the exclusion of the daughter of the last possessor. Further question was whether, according to the true construction of the said marriage settlement, the last possessor could by his will call his daughter to the succession. Their Lordships uphold opinion of two Courts below that the inheritance must fall to the male descendant, and that until all the male lines descended through males from the first male heirs of the founder, or through males from a female ancestress were exhausted no female could succeed. *Cardinal Luca*, "*De Linea Legali*," lib. 2, art. 76, num. 5.

Second Appeal.

Right to the Barony and title of Castel Cicciano held by the above mentioned last possessor. Barony established under the Frank princes in Naples and Sicily. History of devolution of Barony. Question whether a deed uniting the feud or Barony with the *primogenitura* was valid or invalid. Was royal assent necessary or is it to be presumed? Pragmatics of Philip IV., King of Naples. Pragmatic No. 34. *Sorge*, tom. 5, p. 50, &c.; Lindenbrog, *Cod Legum Antiquarum;* Constitutionum Neapolitanarum sive Sicularum, lib. 3, tit. 24, § 2. Case remitted to the Court below for further consideration, meantime discharging the judgment of that Court as to the Barony without prejudice

to any question. The costs of the Primogenitura appeal are to be paid by the appellant. Those of the second appeal, as to the Barony, must follow the result.

[13 *App. Cas.* 806; 58 *L. J. P. C.* 20.]

The Grand Trunk Railway Company of Canada *v.* Jennings.

[*Ex parte.*]

Ontario. LORD WATSON. *Aug.* 4, 1888.

A widow's (the respondent's) claim against a railway company for loss by death of husband. Action founded on Revised Statutes of Ontario, cap. 128, sects. 2 and 3. Verdict of jury for $6,000. Appeal by appellants on ground that judges' ruling, which was in accordance with another decision (*Beckett* v. *The Grand Trunk Railway Company*, 13 Upper Canada App. Cas. (Court of Appeal) Rep. 174), was unsatisfactory. Question whether, in the assessment of damages, $2,000 insurance money payable to a widow after her husband's death is to be deducted, or be taken into consideration. Money provisions made by a husband for the maintenance of his widow in whatever form are matters proper to be considered by a jury in estimating her loss. This case is different from others, the pecuniary benefit accruing to the respondent from his early death consisted in the accelerated receipt of a sum of money, the consideration for which had already been paid by him out of his earnings. Cases:—*Pym* v. *The Great Northern Railway*, 2 B. & S. 759; *S. C.*, 4 B. & S. 396; *Hicks* v. *Newport, &c. Railway Company*, 4 B. & S. 403, n., commented on. Appeal dismissed.

[13 *App. Cas.* 800; 58 *L. J. P. C.* 1.]

Meenakshi Naidu *v.* Immudi Kanaka.

[*Ex parte.*]

Madras. LORD FITZGERALD. *Nov.* 1, 1888.

Sale of a zemindary in execution of a money decree. Did the whole right, title, and interest pass by the sale, or only a

father's (the debtor's) interest. Liability of sons to pay father's debts, unless contracted for immoral purposes: *Hurdey Narain* v. *Rooder Perkash*, L. R. 11 Ind. App. 28, 29, distinguished. The appellant was the decree creditor. A note for Rs. 2,000 was not originally passed to him, but he became the *bonâ fide* holder of it, and, as such, obtained a decree against the Zemindar of Velliyakundam, the father of the respondent. The appellant having taken the ordinary proceedings to have the zemindary attached and sold, the respondent intervened, and in his first petition he sought to have his interest excluded from the sale. It does not appear what order was made on that petition. Proceedings for the sale then proceeded, and the respondent subsequently brought the present suit impeaching the decree, and contended that the sale of the zemindary to the appellant was invalid, and that it should not be registered. The Subordinate Court dismissed the suit. This decision the High Court varied, declaring that the sale only affected the father's interests, and not those of the son (the plaintiff-respondent). The Judicial Committee discharged this High Court decree, and reported that the finding of the first Court was the right one and ought to stand. The more material passages of their Lordships' judgment were as follows: "Notwithstanding that petition (the first petition of the plaintiff), proceedings towards a sale went on, and upon the documents before their Lordships they must come to the conclusion that the thing professed and intended to be sold, and actually sold, was not the father's share, but the whole interest in the zemindary itself. Throughout this case the son does not appear to have ever contended that no more than his father's interest was sold. His case was that the whole zemindary was sold out and out; he impeached the debt which led to the sale, and asserted that the decree founded on it could not bind his interests. That impeachment of the debt has failed. . . . . The Subordinate Judge, who examined the evidence with the greatest care, correctly came to the conclusion that there was no satisfactory evidence that the debt was contracted for illegal or immoral purposes, and there is no doubt in the case that the original creditor advanced the Rs. 2,000 *bonâ fide*,

and that it was a debt contracted by the father and coming within the ordinary rule of Hindu law with reference to an estate such as is now before their Lordships, that the son would be liable for the debt contracted by the father to the extent of the assets coming to him by descent from the father, and that his interest in the zemindary was liable, and might be sold for the satisfaction of that debt. The son, having failed to get the protection which he sought by his petition, instituted this suit, impeaching the debt, and seeking to be absolutely relieved from it. He has failed entirely in that, and their Lordships quite agree with the judgment of the Subordinate Court that, failing in that, his whole suit failed. . . . That being the case, there might have been a sale of this estate under this decree, including the whole interest, or of so much as was necessary. Upon the documents their Lordships have arrived at the conclusion that the Court intended to sell, and that the Court did sell, the whole estate, and not any partial interest in it.

"Their Lordships do not intend in any way to depart from principles which they have acted upon in prior cases. The High Court, in dealing with the case, entirely agrees with the Subordinate Judge in the view which he took of the evidence, and would so far confirm his ruling; but it says, 'but in view of the recent ruling of the Privy Council that a sale in execution of a money decree of the right, title, and interest of a Hindu father, will affect only the interests of the father, the plaintiff is entitled to a declaration that the sale in execution of the decree of 1879 has affected the interests of the first defendant only, and not those of the plaintiff.'

"The 'recent ruling' referred to is probably that to be found in *Hurdey Narain* v. *Rooder Perkash*, 11 Ind. App. 28, 29. The High Court seems to have acted on the rule so laid down as a rigid rule of law, apparently applicable to this particular case. But the distinction is obvious. In *Hurdey Narain's case* all the documents showed that the Court intended to sell and that it did sell nothing but the father's share—the share and interest that he would take on partition, and nothing beyond it—and this tribunal in that case puts it entirely upon

the ground that everything showed that the thing sold was 'whatever rights and interests the said judgment debtor had in the property,' and nothing else.

"Their Lordships are of opinion that the decision of the Subordinate Judge was entirely right, and that the decision of the High Court was wrong in holding that less than the entirety of the estate was sold." Reversed with costs.

[*L. R.* 16 *Ind. App.* 1; *I. L. R.* 10 *Mad.* 142.]

The Secretary of State for India in Council *v.* Maharajah Luchmeswar Singh of Darbhanga.

Bengal. LORD HOBHOUSE. *Nov.* 2, 1888.

Claim by Government to establish the inference that they are perpetual and not ordinary tenants of certain lands formerly used for the purposes of Government studs. Construction of grant of tenure. Misconception of the tenure. *Onus probandi.* Right of reversion in the landlord. Is *he* or the Government to have the benefit of enhanced value of land. The respondent was plaintiff in the suit and he claimed possession of the mouza (village) of Malinuggur, a portion of the Darbhanga Zemindary, or alternatively for enhancement of rent. The Secretary of State for India in Council has held the land since 1798, subject to an annual payment of Rs. 972, which has never varied. The Maharajah, who sought to recover this village, was successful in both Courts below, and the Judicial Committee did not disturb those decisions. The Government counsel argued that since 1798 they had possession of the village in question, and that the tenure was terminable at their pleasure so long as the fixed yearly rent was paid. The Government said the onus lay on the respondent to show that the position was changed. Counsel also contended that it was not open to the respondent to demand enhancement of rent. *Per contra*, the respondent by his counsel said that the *onus probandi* was on the Secretary of State to prove either an actual agreement for a perpetual tenancy, or

that such was to be inferred from the dealings of the parties. The main question was, whether perpetuity of tenure was to be inferred from any circumstance occurring in all the years since 1798. The manner in which the East India Company became possessed of the village in question for stud purposes is fully gone into by the Judicial Committee, and the considerations which led the Government, who were in possession in 1798, to examine into the arrangement of a decennial settlement and ultimately enter into a permanent settlement are exhaustively dealt with in the judgment. Their Lordships find that from 1798 forwards up to 1872, matters were conducted as they were in 1798 between the Government and the holders of the Raj. The Government continued in possession of the village; they continued to use the lands for the purpose of the stud; and they continued to be charged at the same rate as in 1798 or 1799. To quote their Lordships' judgment:

"In 1872 the Government came to the conclusion that they had better give up the stud, and it was accordingly given up, and the village has been used for ordinary agricultural purposes since that time. At that time the present Maharajah of Darbhanga was an infant, and some three or four years after he attained his majority he demanded possession. The mode in which that demand was made, and the time at which it was made, have been observed on by the counsel for the Government; but in their Lordships' opinion, nothing whatever turns upon the correspondence which took place in the years 1881 and 1883; but whatever were the rights of the parties in 1872, when the stud was given up, precisely the same rights exist now.

"Under these circumstances their Lordships think there is no substantial doubt that the Courts below, who have both decided that the Government cannot establish the inference that they are perpetual tenants, are right. The Government undoubtedly are tenants of the Darbhanga Raj. It is for them to show why the landlord may not recover his property, and they can only do that by proving that there is some agreement between them and their landlord that they shall have something more than the ordinary tenancy at will or from year to year.

All they offer is some conjecture of such an agreement founded simply on their long possession at a uniform rate of payment. If we could not find out the origin of these things there would be strength in that argument, but as the origin of them is known the argument loses its force. In fact the possession is not difficult to explain in other ways. It is not the business of the plaintiff (the Maharajah of Darbhanga) to explain the possession; it is the business of the defendants to show that it leads to the inference of a perpetual tenancy. But even if the *onus probandi* did not lie so clearly on the defendants, their Lordships think that the reasonable explanation has been given by the Courts below, and that there probably was some understanding, which might have amounted to an agreement, that the Government should have this land for the purposes of a stud, not that they should have it for ordinary agricultural or commercial purposes to make what money they could of it. Thus the moment it ceased to be occupied for the purposes of a stud the rights of the landlord would revert, and it was he and not the Government who would have the benefit of the increased value of the land. That hypothesis seems more probable than the alternative one, and it is of course always more satisfactory when we can arrive at a reasonable explanation of the facts instead of merely resting the case upon the failure of one party to make out his case against the other.

"The result is that their Lordships think the Courts below were quite right, and that this appeal must be dismissed with costs, and they will humbly advise her Majesty to that effect."

[*L. R.* 16 *Ind. App.* 6; *I. L. R.* 16 *Calc.* 223.]

Hari Ram and Another *v.*
Sheodial Mal and Another.

N. W. P. Bengal. Sir Richard Couch. *Nov.* 3, 1888.

Suit to recover money. Mortgage. Validity of registration. Act VIII. of 1871. Sale. Accounts. Proof of money being really due, and of its being subject to the mortgage. Wrongful

order to cancel deed of sale. Decree of High Court reversed with costs. Construction of Registration Act (VIII. of 1871), s. 28. Question, whether a deed mortgaging certain lands was invalid for want of proper registration. Registration had taken place, and the Act ordained that it was requisite to have the registration made within the district where the whole or some of the property to which the deed related was situate. In this case, the registration was executed in the locality where a small piece of land was situate, but not in that where the bulk of the property lay. The High Court, reversing the decree of the District Judge of Gorakhpur, held that the deed was invalid for want of proper registration. The intention of the Act, the High Court thought, was that the registration should take place where a man's property is well known to be situated, and not in an outlying district where only a minor piece of the mortgaged land was located. The suit was brought by the appellants (plaintiffs), who were bankers, against the respondents and one, Mr. Brooke. They sought to recover Rs. 79,655 as principal and interest, which they alleged to be due in respect of a mortgage executed by Brooke in May, 1873, the plaintiffs alleging that at that date Brooke adjusted his account and executed a mortgage for securing Rs. 349,504—4. There was no question that the mortgage was executed by Brooke. The deed stated that there had been an adjustment of accounts between Brooke and the plaintiffs, and it was given to secure the money which was then due on the account, together with a sum of Rs. 90,000 to be advanced by the plaintiffs to Brooke for defraying necessary expenses of an indigo plantation from May, 1873, to October of the same year. The defence of the present respondents, with whom alone the Judicial Committee had to deal, was twofold. Having become the purchasers of part of the mortgaged property, another part of it having been previously sold, they objected that this mortgage of May, 1873, was not duly registered; and they also objected that the whole of the sum of Rs. 90,000 was not advanced before the 1st of October, 1873, but a portion only was advanced, leaving a sum of about Rs. 30,000 which they say was subsequently advanced, and is therefore not covered by the

mortgage. The Judicial Committee, reversing the decree of the High Court, held upon the first point—due registration—that the words of sect. 28 of the Registration Act did not show an intention that there should be any inquiry as to whether the place where the document was registered was the place where what may be called some substantial portion of the property was situate; and an inquiry of that kind might very frequently lead to considerable difficulty. The intention of the Act was evident from the subsequent provisions, and especially sects. 64—66; and these showed that it should be sufficient that the registration might be made in the place where some portion of the property, not a substantial portion, but where any portion of the property, was situate, leaving it to the registration officer to make any inquiry, and satisfy himself where other portions of the mortgaged property lay. On the second point, in respect to the amount of money subject to the mortgage, the Judicial Committee held that the appellants (plaintiffs) were entitled to recover their claim. The money, their Lordships considered, was advanced. Furthermore, in September, 1874, Mr. Brooke settled an account with the appellants, and a balance was then agreed upon as due from him, including all the different items which would be the subject of the mortgage. The respondents acquired no interest in the estate until January, 1875, when they took a conveyance from Brooke. The Judicial Committee held that the respondents were therefore bound by the account so settled in 1874. The case appeared to have been very carefully investigated by the Subordinate Judge. The result was they would advise her Majesty that the decree of the High Court ought to be reversed, and the appeal thereto dismissed with costs, and the decree of the Judge of Gorakhpur in regard to the account held to be due would be upheld. It should, however, be varied by omitting that part of it which directed the deed of sale to be cancelled. The respondents must pay the costs of the appeal.

[*L. R.* 16 *Ind. App.* 12; *I. L. R.* 11 *All.* 136.]

Shankar Bakhsh *v.*
Hardeo Bakhsh and Others.

Oudh. LORD HOBHOUSE. *Nov.* 15, 1888.

Oudh estates. The question was whether certain estates of a deceased Talookdar descend according to the law of primogeniture, or are to be divisible into shares among the members of the family. Issue of Government Sunnuds upon settlement after the mutiny. Wrongful issue of a primogeniture Sunnud. Evidence. Sect. 22 of Oudh Estates Act (1869). Can there be a headship in a joint family? Mesne profits. Intentions of the family at time of settlement, and actions of the parties, all point to division of property, and not to heirship by primogeniture. Heirship in accordance with sect. 22, Oudh Act I. of 1869, not therefore applicable. The evidence showed that, although after the mutiny a primogeniture Sunnud was by mistake issued, this was followed by a Sunnud sanctioning a division of shares. In this arrangement all the sons of the Talookdar, including the eldest son (father of the present appellant), appear to have acquiesced, and it was not until after the eldest son's death, when *his* son came to represent the eldest branch of the family, that he was ill-advised enough to set up a claim of primogeniture against the respondents (his uncles). The respondents were plaintiffs in the present suit, and they claimed that they had acquired a separate interest in the talook, and a consequent right to partition as prayed for by them. Both Courts below have decided in favour of the respondents, and the Judicial Committee entirely agree with them, and hold that the respondents are entitled to a decree for partition. On the second claim, namely, for *mesne profits*, the Judicial Committee also pronounced in the respondents' favour. They held that, although in a partition suit relating to an ordinary joint family, mesne profits are not recoverable (as was pointed out in the case of *Pirthi Pal Singh and Another* v. *Thakoor Jawahir Singh*, L. R. 14 Ind. App. 37, *vide* p. 59), still their Lordships consider that if the enjoyment of specified and definite family shares is in any way disturbed, the right to sue for mesne profits

will arise as well as a right to partition. Their Lordships, therefore, in the result, uphold the co-sharership and dismiss the appeal with costs. They also decline to interfere with the decree below as to mesne profits. [*Preliminary objection. Jurisdiction to admit an appeal a second time after it had been once withdrawn.* The preliminary objection taken in this case had its origin as follows: In 1883, the appellant obtained leave to appeal to her Majesty in Council. On 13th June, 1884, he made another application to the Judicial Commissioner, and after alleging that he had documentary evidence to show that a forged document had been filed by the respondents, prayed that he might be permitted to withdraw his appeal, and that there might be granted to him a review of judgment. This application was granted, but three days later he again applied that the leave to appeal might be reinstated, and this was also granted. The respondents, in consequence, at the opening of the appeal before the Privy Council, contended that the Court below acted without jurisdiction, and cited Civil Procedure Code Act (XIV. of 1882), s. 599, and *Radha Benode Misser* v. *Kripa Moyee Debia*, 7 S.W.R. (F.B.) 531. They further remarked upon the fact that no special leave had been applied for in England. The Judicial Committee, after stating that it would be open to the appellant to apply for special leave to appeal now, decided to hear the merits of the case, with the result above stated.]

[*L. R.* 16 *Ind. App.* 71; *I. L. R.* 16 *Calc.* 397.]

Majid Hosain and Others *v.*
Fazl-unnissa.

Oudh. LORD FITZGERALD. *Nov.* 16, 1888.

Deed of gift. Objection to registration proceedings. Objection disallowed and appeal dismissed. The whole question was in this appeal as to whether the registration of a deed of gift of 21st March, 1871, was valid. The objection was raised by the appellant on the ground that the donor, who was a Purdanashin

lady, did not in person attend at the Registrar's office. It appeared, however, that the Registrar himself went to the lady's house, which was very near his office, and that there the deed was properly acknowledged by the lady and executed and registered. The record of registration, attested by witnesses, was furthermore placed upon the books of the Pargana Register. The Judicial Committee agreed with the Courts below that the rules of registration had been complied with. Appeal dismissed, with costs. [*L. R.* 16 *Ind. App.* 19; *I. L. R.* 16 *Calc.* 468.]

Mohima Chunder Mozoomdar and Others *v.*
Mohesh Chunder Neogi and Others.

Bengal. Mr. STEPHEN WOULFE FLANAGAN. *Nov.* 20, 1888.

Limitation. Twelve years' rule. Act XV. of 1877, Article No. 142. *Onus probandi.* The suit was brought by the appellants to recover possession of certain lands of which the respondents were in possession. The Subordinate Judge of Patna gave a decree in favour of the plaintiffs (appellants), but this finding was, on the 6th of March, 1886, reversed by the High Court at Bengal, and the Judicial Committee now upheld that decision and reported that the appeal ought to be dismissed with costs. Their Lordships in giving judgment, said: "A great deal of evidence has been given on the one side and the other as to the original title to these lands, which were claimed by the plaintiffs as part of 'Rajapore,' and by the defendants as part of 'Machuakandi.' It appears to be unnecessary to go into that title. The question is whether, assuming the plaintiffs to have been at some time lawfully in possession, the plaint which was filed on the 30th of July, 1883, was filed within twelve years as required by the 142nd Article of the Limitation Act of 1877, from the date of their dispossession or discontinuance of possession. It is conceded by the plaintiffs that in fact they were dispossessed, or their possession was discontinued from the year 1875, a period of

eight or nine years prior to the bringing of this suit, and that the defendants have ever since been in undisturbed possession; but they allege that they were in possession within four years or more immediately prior to that date. Now, the only question in this case being one of fact with reference to the Limitation Act, it will be well to turn to the judgment of the Judge of the lower Court, and see upon what grounds he based his decision in favour of the plaintiffs and to contrast these with the reasons of the High Court reversing his decision. After referring to certain chittas (which, in their Lordships' opinion, are not evidence of possession within the time in question), he goes to the substantial question upon which his decision is based. He says, 'It is also to be observed that the title of the defendants Nos. 1, 3, 4, and 5 to the mouza "Machuakandi" was created just after the agrarian disturbance in this district. This circumstance alone is sufficient to lead me to believe that the defendants took the advantage of the opportunity to revive their lost right to the mouza "Machuakandi" by inducing the ryots of the chur "Rajapore" to admit them as their landlords'; then he says, 'It was argued by the defendants' pleader, that the plaintiffs failed to prove collection of rent from their alleged tenants, as they did not file any collection papers, and their loss is not properly accounted for. It is proved by the plaintiff No. 1, and the plaintiffs' witnesses, that in 1279 (Hindu chronology) the plaintiffs' cutchery house was blown down by rain and storm, and greater part of the papers were lost, and the defendants' witness No. 1 deposed that occasionally he and his brother Kali Komul used to take papers from their ijmali serishta, and he made over certain papers to his co-sharers at the time of instituting this suit.' Now, merely making a short comment on the first passage which has just been read, it appears to their Lordships that the question for decision is not whether or not the title of the defendants was created just after the disturbance or otherwise, but when were the plaintiffs dispossessed, or when did they discontinue possession? The plaintiffs by their own witnesses have admitted, in fact, that their possession was discontinued, at all events, in July, 1875. By one of their witnesses, their principal

witness, gomashta Panaulla, it appears that in fact they were dispossessed in the year 1873. Many witnesses were examined on behalf of the plaintiffs in this case, to prove their possession within the four years prior to 1875, but it is not necessary to go through their evidence in detail. These witnesses may be grouped in fact into two classes: witnesses who either are or have been in the employment of the plaintiffs, or witnesses who have been tenants upon the lands—witnesses who in fact had been dispossessed by the respondents, whose evidence therefore, when it has to be balanced against other evidence of a contrary tendency, is subject to the remark that it is in accordance with their interests. It is a very singular fact in this case that there appears to be no documentary evidence whatsoever in support of the case which has been made by the plaintiffs here, to show their possession or their receipt of rent for a period within twelve years before the time when the action was brought. Many documents were proved in support of their title to the lands some years previous to that date, but none to prove their possession. . . . It is also a singular circumstance in reference to the destruction of their cutchery house by the cyclone in the year 1872, that all the earlier papers, namely, the papers which were referred to at great length in the case as proving the title of the plaintiffs, as distinguished from their possession, are all forthcoming. How it is that they were not destroyed with all the other papers in that cyclone is not explained, but it is a remarkable thing, and throws the greatest possible doubt and suspicion on the allegation in reference to the destruction of the papers, that papers of that class should be all forthcoming, and that the material papers, those relating to possession, are not produced at all. Bearing in mind that the lands are all cultivated and in the possession of tenants, there is also another class of papers which certainly ought to have been produced. . . . . These papers are, amongst others, the receipts for the rents alleged by the plaintiffs and their tenants to have been paid for the years between the cyclone of 1872 and the year 1875, when they allege their possession first determined; these, although alleged to exist, were not produced. The learned Judge then

says: 'When I showed above that the plaintiffs are the rightful owners of the disputed land, it is for the ryot defendants to show that they are entitled to retain possession of these lands.' That, as a proposition of law, is one which hardly meets with the approval of their Lordships. This is in reality what in England would be called an action for ejectment, and in all actions for ejectment where the defendants are admittedly in possession, and *à fortiori* where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that in this case the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within twelve years before the commencement of the suit, namely, for the two or three years prior to the year 1875 or 1874; and that it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed. Now, turning from the judgment of the Judge of the Court below, to the reasons which were given by the Judges of the High Court for the decree they made, reversing the decision of the Court below, and dismissing the plaintiff's suit with costs, the Court says, in reference to the law of limitation, 'This suit was instituted in the month of Strabun, 1290, and it was therefore for the plaintiffs to show that they had been in possession of the land in suit since Strabun, 1278. Now admittedly, according to the plaintiffs, they were ousted in the year 1282, that is, eight years before the institution of the suit. And we find from the evidence, and particularly from the evidence of their gomashta Panaulla, that virtually they admit having been dispossessed so far back as 1280.' That would be the year 1873. 'In that year, according to the evidence for the plaintiffs, their tenants first grew refractory, and it does not appear that the plaintiffs ever collected rent, or were in possession after that year. That being so, it appears to us that a heavy onus lay upon them to prove that they were in possession during the two years previous, that is, from 1278'—with that observation their Lordships

entirely concur—'and we are further of opinion that they have not succeeded in proving this'—in that observation their Lordships also concur. 'The only documentary evidence adduced on this point is a chitta of the year 1280. This chitta purports to have been prepared by one Tamiz Sircar, who, though alive, has not been called. . . . It may be said that, practically, there is no documentary evidence whatever of the plaintiffs' possession. . . .' Then the learned Judges, commenting on the manner in which the absence of documentary evidence is attempted to be accounted for . . . say, 'We think that . . . the plaintiffs have not discharged the onus that lay upon them.' Then the Judges of the High Court go on to say: 'Now it is quite true that, as regards the small piece of land, measuring ten or fifteen pakhis, which was the subject of the proceedings under sect. 530, Code of Criminal Procedure, the plaintiffs' claim would not be barred, and if those proceedings had been put in, or if there was any evidence to show where these ten or fifteen pakhis were situated, the plaintiffs would be entitled to a decree for that quantity of land. There is, however, no such evidence, and the mere fact that the plaintiffs retained possession of an insignificant portion of the land, will not save their claim as regards the rest from being barred.' It appears to their Lordships that the High Court, in making that observation in reference to the criminal proceedings, must have mistaken the decision of the magistrates, because so far as appears from the judgment in that case, it would seem that in point of fact the magistrate finds that for a period of at least four years prior to the institution of these proceedings there had been peaceable possession on the part of the owners or ryots or tenants of the land of mouza Machuakandi, and this finding, so far from being in support of any contention that these particular lands, whatever they may have been, were in the possession of the tenants or ryots of 'Rajapore,' is distinctly to the contrary. Upon the whole their . . . Lordships, without going further into the matter, or considering the defendants' evidence, which is however cogent to show that they have in fact been in possession for more than twelve years prior to the filing of the suit, are of

opinion that the appeal from the decision of the High Court of Bengal should be dismissed (with costs) and the decree appealed from affirmed." Appellants to pay costs of the appeal.

[*L. R.* 16 *Ind. App.* 23; *I. L. R.* 16 *Calc.* 473.]

Sreemutty Kristoromoney Dossee *v.*
Moharajah Norendro Krishna Bahadoor and Others.

Bengal. Lord Hobhouse. *Nov.* 24, 1888.

Construction of will. Hindu law does not permit of an estate being devised to persons unborn, neither can the principle of English estates tail be introduced into Bengal. Under what circumstances can an absolute estate subject to be defeated by a subsequent event, be created. No intention in this case to make an absolute bequest. Hindu law on the subject of inheritance. Cases cited:—*The Tagore Case*, L. R. Ind. App. Sup. Vol. 47; *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*, L. R. 5 Ind. App. 138; *Tarakeswar Roy* v. *Shikhareswar*, L. R. 10 Ind. App. 51; *The Mullick Case*, 9 Moo. Ind. App. 123. *Punctum temporis* at which the final disposition of the testator's estate is to be ascertained. Decision of the High Court in its *ordinary original jurisdiction* is discharged so far as it relates to the rights of the parties and so far as it dismisses the suit, and new declarations are made. Costs of the suit and of the appeal to be paid out of the residue. The question in this case arises from a passage in the will of Raja Jadubindro Kristna, who disposed of the residue of his estate in the following terms:—

"I give devise and bequeath the residue of my real and personal estate both joint and self-acquired unto my executors, in trust to pay the rents issues profits and income thereof unto my said daughter during her lifetime, and after her death in trust to pay assign and convey the residue of my estate real and personal to my half brothers Rajas Nreepainder Krishna Bahadur and Nurrendra Krishna Bahadur in equal moieties and to the heir or heirs male of their or either of their body, in

failure of which in trust to give the same to the son or sons of my said daughter."

The will is dated 25th March, 1851. The testator died in 1852. His daughter, who was his only child, is the plaintiff and appellant in this suit. She has six sons, all born after the testator's death. His brothers both survived him. One of them, Nreependro, has died, leaving only two sons, both born after the testator's death. The other, Norendro, is living. He had three sons born in the lifetime of the testator, of whom one is dead and two are living, and four other sons born after the testator's death. The defendants and respondents in this suit are Norendro the surviving brother; his six surviving sons, and the representative of the one who has died; the two sons of Nreependro, who are also his executors: and the six sons of the plaintiff. Every person therefore who could possibly claim an interest under the residuary gift is a party to the suit.

The plaintiff contends that the residuary gift is invalid, except so far as it confers life interests on herself and her uncles, and that on the death of Nreependro the moiety of the estate designed for him or his heirs male became vested in her as her father's sole heir. The adverse contention is that the gift is made absolute to each of the testator's brothers, defeasible only in events which have not happened, viz., in each case the death of the brother without leaving male heirs of his body then living. The High Court have adopted the latter view of the case and have dismissed the suit. The material portions of the judgment of the Judicial Committee in this case, which affords considerable elucidation on the law of Hindu wills and inheritance, are now given. "The High Court 'considered that the true intention of the testator was that in the event of his two half brothers having at the time of their death male descendants, they, if alive, or their families as representing them if dead, should take the fee of this property; but that in the event of their having no such descendants at the time of their death, the estate should be divested and go over to the son or sons of his daughter.' This conclusion is rested, first, on the direction to the trustees to '*pay, assign, and convey*,' which, it is said, shows

that the whole estate is to be dealt with; secondly, on the circumstance that no words of limitation or exclusion are attached to the expression 'heir or heirs male of his or their body;' and, thirdly, on a view of the law which is stated thus:—

"'It appears from the *Tagore case*, as I said just now, that if that [the gift to the brothers] is a limited estate in the sense that it is an attempt to give anything to one then unborn, the devise to that person would be invalid. But it is established by the case of *Bhoobun Mohini Debi* v. *Hurrish Chunder Chowdhry*, reported in L. R. 5 Ind. App. 138, and other cases besides, that although according to Hindu law it is illegal to attempt to give an estate to a person not in being, and that the estate which must be given to the first recipient must be the entire estate of the testator, it is competent to a Hindu in making his will to make a provision that the estate which he creates and gives to the recipient of his bounty may be divested or defeated by something which takes place after. That is established by this case, it is admitted by Mr. Evans and Mr. Kennedy, and may be taken as absolute law.'

"The rules of law thus stated do not bear directly on the decision of the High Court, because in their view the will does not, as events have turned out, purport to confer any interest on an unborn person, or any gift over on contingency, but it leaves gifts, made absolute in the first instance, undisturbed by subsequent events. But the whole construction of the will has been argued, quite properly, with reference to these rules. It is important to have them accurately stated. And their Lordships find that the statement of the High Court requires some qualifications.

"The *Tagore case* decides not only that a devise to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid, which is more germane to the present case. There is no rule that the first recipient must take all the interest possessed by the testator, for limited interests are common enough. The rule is that if a Hindu donor wishes to confer an estate of inheritance, it must be such a one as is known to the Hindu law, which an English estate tail is not. In stating the rule relating to the defeasance of a prior absolute interest by a subsequent event,

it is important to add; first, that the event must happen, if at all, immediately on the close of a life in being at the time of the gift, as was laid down in the *Mullick case;* and secondly, that a defeasance by way of gift over must be in favour of somebody in existence at the time of the gift, as laid down in the *Tagore case.*

"The case of *Bhoobun Mohini* conforms to all these rules. There was no gift over in that case. The donor made a gift to his sister Kasiswari in vernacular terms, which, though peculiar and referring only to lineal heirs, this Committee held to be identical in effect with other terms well known, and often used by Hindu donors who intend to pass the whole inheritance, though they mention only children or issue. Then he said, 'No other heir shall be entitled.' This was held to mean that, if Kasiswari died leaving no issue then living, her interest was to cease. In effect the construction was that, if Kasiswari left issue, the absolute interest given to her in the first instance was to remain unaffected, but if she left none it was cut down to a life interest. In the latter case nothing had passed from the donor but the life interest, and when that was spent he or his heir would lawfully re-enter.

"Upon the construction of this will their Lordships are unable to find anything which points to the death of the brothers as the time for ascertaining in what way the property is to be disposed of. The life of the daughter is the period for which the trust continues; it is on her death that the trustees are to pay, assign, and convey; and the question is, to whom? The payment, &c., is contemplated as a single act to be performed at one moment of time, and that time is the death of the daughter. The expression 'pay, assign, and convey' is important to show as much as that. . . . . Their Lordships treat the will in the same way as if the testator had said that, on his daughter's death, the property was to be held in trust for, or that it should go over to, his brothers and the other donees.

"To whom then is the conveyance to be made? None is directed except to the brothers in equal moieties and to the heir or heirs male of their or either of their bodies (or, in simpler

words, to the brothers and their heirs male respectively in equal shares), on failure of which to the sons of the daughter. Their Lordships cannot see where the absolute gift of the property to the brothers comes in. It is given, not to them, but to them and their heirs male. Why should the words 'heirs male' be introduced at all, if an estate descendible to heirs general has previously been given? The words must mean either that the estate of inheritance given to the brothers is a qualified one, or that the heirs male are to take somehow by way of direct gift from the testator. The latter of these two alternatives can only be reached by reading the word 'and' as if it was 'or.' . . . . But upon putting it to Mr. Rigby whether he claimed to read the word 'and' in a disjunctive sense, he at once disclaimed any such contention; and indeed it is obvious that there are great difficulties in the way of such a construction, even if it would better the position of the respondents.

"Their Lordships therefore find that the first of the two alternative constructions is the only possible one. The will is composed in English, the draftsman seems to have had a smattering of English real property law, he clearly knew there was a difference between a son and an heir male of the body, and apparently he had English dispositions of property in his eye. This seems to be an attempt, of a kind not infrequent among Bengal zemindars of late years, to introduce English estates tail into Hindu property, which the law will not allow. At all events, their Lordships must construe the words in their plain and obvious sense; and finding no gift to the brothers, except that which orders a conveyance to them and the heirs male of their bodies, they hold that the intention was to confer on them an estate of inheritance resembling an English estate in tail male. That cannot take effect. But the testator intended to benefit his brothers personally, and his gift to them and their heirs male would if valid have carried with it the enjoyment by each of his share during his life. They think that this intention, though it is mixed up with the intention to give an estate tail, may lawfully take effect, as was held in the case of *Tarakeswar Roy*.

"Whether the words which introduce the gift over, 'in failure of which,' import a general failure of the brother's issue, is a point on which we need not speculate. It is possible that the draftsman, following English models, intended to give a remainder after an estate tail; it is also possible that he was only thinking of the contingency that at the daughter's death, when the trustees came to convey, they might find neither brothers nor issue of brothers in existence. In the first case the gift fails with the estate tail after which it is limited; and in either case the gift fails because the daughter's sons, being unborn at the testator's death, are incapable of taking anything from him.

"It is suggested that a Court of construction may hold, in favour of the intention, that a fee simple or absolute interest is conferred by inapt words or dispositions, just as in English law an estate tail is often held to be conferred by inapt words or dispositions, because it comes nearest to effecting the actual intention of the testator. But if this testator intended not to give an absolute interest, which their Lordships hold to be clear from his introduction of heirs male, it is impossible to say that his intention is more defeated by the law which cuts down his gift in tail to a life interest, than it would be by straining the will to give an absolute interest, in which case the property might pass away from the family to a mortgagee, or a general creditor, or a strange donee. Their Lordships would not be justified in taking any such liberty with the will.

"The plaintiff prays for a declaration of rights, for possession of a moiety of the property, for a partition, and for the appointment of a trustee. The decree, after declaring the rights, gives directions as to the appointment of a trustee and the continuance of a receiver. Except as aforesaid it dismisses the suit. Their Lordships are of opinion that the decree should be discharged so far as it declares the rights of the parties, and so far as it dismisses the suit. Instead of the portion discharged, there should be declarations that, according to the true construction of the will, the gift of the residue, so far as it purports to confer an estate of inheritance on the testator's half brothers and the heirs male of their bodies, is contrary to law and is void; that

in the events which have happened the gift to the sons of the plaintiff, the testator's daughter, is incapable of taking effect; that each of the testator's half brothers took an estate for his life in one moiety of the residue in remainder expectant on the death of the plaintiff; and that, on the death of Raja Nreependro Krishna Bahadoor, the inheritance of his moiety devolved on the plaintiff as her father's heir in remainder immediately expectant on her own life estate under the will, and she therefore became entitled in possession to one moiety of the residue. The High Court should place her in possession of that moiety, and should take steps to effect a partition if either of the parties desires it.

"As regards costs, the High Court thought it just that the several parties should bear their own. Their Lordships think that the rights of all parties under this perplexing will could not have been settled, as by this decree they will be, without bringing before the Court all parties for whom the will expressly designed gifts, or who by a reasonable construction could claim them. The suit, or some like suit, was absolutely necessary, and it is not too extensively framed. The case is one in which it is just to pay the costs of all parties out of the residue in dispute. The decree, therefore, should be varied on this point also. In all other respects it should be affirmed. Their Lordships will deal in the same way with the costs of this appeal."

[*L. R.* 16 *Ind. App.* 39; *L. R.* 16 *Calc.* 383.]

Petition In re Louis de Souza.

British Guiana. LORD WATSON. *Dec.* 1, 1888.

Mr. Louis de Souza, a barrister, prayed for special leave to appeal against a committal for alleged contempt of court, by reason of certain comments alleged to have been contributed by him to the Press of the colony, as a result of which he was sent to prison. He complained of certain orders and adjudications made against him in the months of July and August, 1888. Mr. De Souza's grounds for asking for special leave to appeal

were thus set forth in his petition:—"That the publication of neither of the said letters was a contempt of Court, or punishable as such; that the said Court of British Guiana has no jurisdiction to punish for contempt where no contempt is alleged to have been committed in the face of the Court itself, nor was any matter at the time of the alleged contempt pending before the Court as to which the administration of justice could possibly be obstructed or interfered with; that in any case the Court was precluded from attaching the petitioner, and that the petitioner ought not to have been attached in respect of the letter which appeared in the 'Daily Chronicle' of the 22nd June, 1887, for the following reasons: (*a*) That more than a year had elapsed since the appearance of the said letter without notice being taken of it, judicially or otherwise. (*b*) That the (then) Attorney-General had considered the matter, and refrained from taking any action thereon; and that his abstention, and the grounds thereof, had long been known to the judges of the said Court, at whose request proceedings were taken by the . . . (acting Attorney-General in July, 1888); that the cumulative punishment imposed on the petitioner by the judgment of the 9th July, 1888, and the uncertain punishment imposed by the judgment of the 19th July, 1888, amounting to the suspension of the petitioner from the practice of his profession for at least a year, are inappropriate punishments for alleged contempt of Court." Lastly, "That the question as to the jurisdiction of the Court of British Guiana to punish, as contempts of itself, comments on its proceedings published after their termination, and criticisms on the conduct of its judges in regard to closed and bygone matters, is one of great and general importance, and is likely to occur often; and that the decisions sought to be appealed from are contrary to the due and ordinary administration of the law in the said colony, and are an infringement of the liberty of the Press."

The Judicial Committee delivered the following judgment granting special leave to appeal. "The main ground of the appeal which Mr. De Souza desires to prosecute is, that it was not within the competency of the Court below to deal with his case as one of contempt of Court. *Primâ facie* that objection to the proceedings which took place appears to be well founded;

and their Lordships will therefore humbly recommend her Majesty to grant the petitioner leave to appeal upon depositing the usual security in the registry of the Privy Council.

"With regard to the second part of the application—the staying of execution in the meantime—their Lordships have no power to make any judicial representation to her Majesty touching the exercise of the prerogative right of the Crown. *Any application for that purpose must be made in some other quarter.*"

Somewhat later Mr. De Souza (who had been released by the Colonial authorities, pending his appeal) died, and the appeal was ultimately, at the request of his executors, withdrawn.

[*P. C. Ar.*]

[NOTE.—The other cases of alleged "contempt" which have been dealt with in the Privy Council since the establishment of the Judicial Committee are here appended:—1841. *In re Downie and Arrindell* (by special leave), 3 Moo. 414; *Smith* v. *The Judges of Sierra Leone* (by special leave), 3 Moo. 361. 1848. *Smith* v. *The Judges of Sierra Leone* (a case distinct from the last-mentioned one; by special leave), 7 Moo. 174. 1852. *Rainey* v. *The Judges of British Guiana* (by special reference through the Secretary of State), 8 Moo. 47. 1866. *In re Wallace* (leave to appeal granted by the Supreme Court of Nova Scotia), L. R. 1 P. C. 283. 1868. *Pollard's Case* (by special reference through the Secretary of State), 5 Moo. N. S. 111; *In re McDermott*, 4 Moo. N. S. 110, and 5 Moo. N. S. 466 (by special leave, without prejudice to competency; the leave to appeal subsequently rescinded on the ground of non-competency). 1870. *In re Ramsay* (by special reference through the Secretary of State), L. R. 3 P. C. 427.]

Falle *v.*
Godfray.

Jersey. SIR RICHARD COUCH. *Dec.* 1, 1888.

Will and codicil. Validity of codicil notwithstanding that the will is invalid. Will, which made no disposition of the

residuary estate, is invalid because one of the witnesses to it was more closely related to a legatee under it than the law allows. The main question was, whether this particular witness was a competent witness to the codicil apart from the will. Roman law. Jersey law. English law. Is codicil inherent part of will? The Court below found that the codicil was an inherent part of the will, and that as the will was null, the codicil fell with it. The Judicial Committee being of opinion that in this case the codicil, under which the appellant inherited, was not dependent on the will, report that the appeal should be allowed. The legacies given by the will fall into the residue. *La Cloche* v. *La Cloche*, L. R. 3 P. C. 125; *Corporation of Gloucester* v. *Osborn*, 1 H. L. C. 272; *Woodward* v. *Goulstone*, 11 App. Cas. 469. *Domat*, Part 2, Book 4, tit. 1, sect. 2, Strachan's Translations. The respondent must pay the costs of the appeal.

[14 *App. Cas.* 70; 58 *L. J. P. C.* 61.]

Bhugwandass *v.*

The Netherlands India Sea and Fire Insurance Company of Batavia.

Rangoon. Sir Richard Couch. *Dec.* 1, 1888.

Suit for specific performance of a contract of insurance. Demand for a policy of insurance in terms of open cover. Loss of ship. Binding contract. Liability of insurance company. The appellant brought the suit. The Recorder of Rangoon dismissed the suit with costs, and this appeal is from that judgment. The vessel in which the insured cargo of rice was carried was totally lost in a cyclone on the 10th June, 1885, a little more than two months after setting out on her voyage. The charterer was the appellant. The whole question was as to whether an open cover (or proposal for a policy of insurance) for Rs. 15,000 given by the respondents to one Macrory, the owner of a vessel called the "Copeland Isle," for rice carried therein, was good if assigned by Macrory to the appellant, who was the shipper of

the rice. The appellant, a merchant at Rangoon, in giving his evidence in the suit, stated that he had gone to Macrory and said, if an open cover was given to him free of particular average he would charter the vessel. When he got the open cover he signed the charter-party and then shipped his rice on the "Copeland Isle." Subsequently, he demanded a policy in the terms of the open cover, but it was refused, although the respondents admitted having given a larger policy to one Chetty, who had shipped goods in the same vessel. The respondents contended that their open cover was contracted for with Macrory alone, and that they would not recognize an assignee. The open cover to Macrory did not in any event bind them to disbursements. They further said that the open cover was given to Macrory so as to enable other insurance offices to know that the company considered the vessel a fair risk, that the document was not transferable by indorsement, delivery, or otherwise, and they denied that there was a custom in Rangoon permitting assignment of open covers. Further, they said that Macrory had shipped no rice himself and had no insurable interest. Among the witnesses for the plaintiff below were merchants who were agents for marine insurance companies, and who alleged that it was customary in Rangoon if the companies issued an open cover to A., and afterwards B. shipped the cargo, to offer no objection to issuing the policy to B. The Judicial Committee, reversing the decree below, held, "that the open cover was given to Macrory in order that he might give it to the charterer, and that it was a proposal to insure. Although addressed to Macrory, it could not have been intended for his acceptance, as it was known that he was not going to ship the rice. When Macrory handed the cover to Bhugwandass, it was, in their Lordships' view, a subsisting proposal capable of being accepted by him; and when Bhugwandass asked for policies, there was an acceptance of the proposal, so as to make a binding contract with Bhugwandass to insure and issue a policy in terms of the open cover. The asking for two policies did not prevent the acceptance being sufficient, as the respondents' agent absolutely refused to give any policy. It is to be observed that neither in the

interviews with Bhugwandass, nor in the letters, was it said that the paper given to Macrory was not intended to be an open cover. Their Lordships considered that the acceptance by Bhugwandass was made whilst the offer to insure was subsisting, and was sufficient to complete the contract. The plaintiff is entitled to specific performance, and the Committee advised Her Majesty to reverse the decree of the Recorder's Court, and to make a decree that the defendants or their agents do make and issue a policy of insurance in terms of the open cover, and for the amount therein mentioned, and do pay the costs of the suit. The respondents will pay the costs of the appeal."

[*L. R.* 16 *Ind. App.* 60; *I. L. R.* 16 *Calc.* 564.]

Nandi Singh and Another *v.*
Sita Ram and Another.

[*Ex parte.*]

Oudh. Sir Richard Couch. *Dec.* 1, 1888.

Succession to Hindu estate. Custom may modify the ordinary law. Wajibularj governing the inheritance. Validity of a deed of gift. Claim to estate by the appellants as direct grandsons of one Fatteh Singh, deceased. Fatteh had two sons, one the father of the appellants. The second son, Sheo Singh, married one Bichan Kunwar, and they had a daughter (Mithana Kunwar), but no male child. This daughter married Sita Ram, the first respondent, and their marriage resulted in the birth of a girl (the second respondent). These respondents alleged that they derived title by a Wajibularj custom existing in this part of Oudh (the effect of which was to modify the ordinary Mitacshara law), and by a deed of gift executed by Bichan Kunwar. The Appellants claimed to be Fatteh's heirs according to Hindu law, and, as such, entitled to succeed to Sheo Singh's share on the death of his widow. The following is the important excerpt from the Wajibularj relied on by the respondents:—

"If there be no male child, and any sharer or his wife make

a gift of his or her share during his or her lifetime to his or her daughter or daughter's son, and puts her or him in possession of the same, they will remain in possession."

On the 7th March, 1870, Bichan Kunwar executed a deed of gift of the property in dispute to Musammat Mithana and Sita Ram, the words of gift being followed by "I promise and agree in writing that the donee may, from the date of execution of this instrument, take proprietary possession similar to mine over the gifted property. There has been left no claim right dispute to me or any of my heirs." This gift, in the view of the Judicial Committee, was intended to be and should be construed as an absolute gift. The contention of the appellants in the lower Courts and before their Lordships was that the gift, being invalid as regards Sita Ram, was also invalid as regards Mithana. The District Judge and the Judicial Commissioner have both held that it is a valid gift of the whole to Musummat Mithana. Their Lordships are of this opinion. The gift is to the two donees jointly, and in *Humphrey* v. *Tayleur*, Amb. Rep. 138, Lord Chancellor Hardwicke said: "If an estate is limited to two jointly, the one capable of taking, the other not, he who is capable shall take the whole." This principle does not depend upon any peculiarity in English law, and is applicable to this deed of gift.

Their Lordships advised her Majesty to affirm the decree of the Judicial Commissioner, and to dismiss the appeal.

[*L. R.* 16 *Ind. App.* 44; *I. L. R.* 16 *Calc.* 677.]

Bhaiya Rabidat Singh *v.*
Maharani Indar Kunwar and Others.

Oudh. LORD MACNAGHTEN. *Dec.* 1, 1888.

Adoption. Was it valid? Oudh Estate Act I. of 1869, s. 13, sub-s. 1. Claim by a male relative of the late Maharajah Sir Digbijai Singh, as next reversioner to the riasat of the deceased on the ground that the provisions of the authority to

adopt (given by the Maharajah to his senior widow, the first respondent) had not been regularly or lawfully carried out. The junior widow and the adopted son and the senior widow were made parties (*vide* the cases of *Maharani Indar Kunwar*, and *Udit Narayan* v. *Maharani Jaipal Kunwar*, consolidated appeals, disposed of by the Judicial Committee in March, 1888, L. R. 15 Ind. App. 127). The appeal affirming decisions below is dismissed with costs. The Judicial Committee in giving judgment said:—" Three grounds of objection to the validity of the adoption were urged before their Lordships. In the first place, it was contended that the adoption was invalid, because the authority to adopt was not contained in a registered document. Their Lordships are of opinion that there is no ground for this contention. The Act of 1869 requires the writing by which an authority to adopt a son *is exercised* to be registered. It also requires the authority to be in writing. But it does not require that writing to be registered. Act III. of 1877, s. 17, which does require authorities to adopt a son to be registered, expressly excepts authorities conferred by will.

" In the next place, it was contended that the adoption was invalid, and the bequest to the adopted son of no effect, so far, at any rate, as regards the taluqdari property, because the adopted son was not a person who could take the taluqdari property under an unregistered will. It is obvious that this objection, assuming it to be well founded, would not better the position of the appellant if the senior widow had authority in writing to make the adoption, and did in fact make the adoption in manner prescribed by the Act of 1869. The adopted son would not take until the widow's death, but still he would take to the exclusion of the appellant. Their Lordships, however, are of opinion that the objection is not well founded. In order to make the objection good the appellant has to establish the proposition that the adopted son is not within the exception contained in sect. 13, sub-sect. 1 of the Act, that he is not a person who, under the provisions of the Act or under the ordinary law to which persons of the testator's tribe and religion are subject, would have succeeded to the taluqdari estate or to

an interest therein if the Maharajah 'had died intestate.' The appellant endeavoured to support that proposition by arguing that if the Maharajah had left no will there would have been no authority to adopt in existence. And then, in regard to succession to the estate, Udit Narain Singh would have ranked as the son of Guman Singh (his natural father). But the word 'intestate' in sub-sect. 1 evidently means intestate as to his estate, that is, his estate as that expression is defined by the Act, the taluq or immoveable property to which alone the Act is declared to extend. This is plain on consideration of sect. 13 taken by itself, but it is made still plainer, if possible, by reference to sect. 22, which is closely connected with sect. 13, and which expresses what otherwise would necessarily be implied, and qualifies the word 'intestate' by the addition of the words 'as to his estate.' The last point urged on behalf of the appellant was described by the learned counsel who appeared in support of the appeal as his strongest point. It was this, the senior widow seems to have been unwilling to disregard her husband's injunctions, but at the same time, she was anxious to keep the estate during her life. She obtained from the natural father of the child whom she proposed to adopt, a document (26th October, 1883) in which it was declared that she should have full control during her lifetime over the property left by the late Maharajah. It was not suggested that there was or could have been in the ceremonial of adoption any such condition or reservation, nor is any trace of that condition or reservation to be found in the deed of adoption of the 5th December, 1883. But some months afterwards, on the 28th March, 1884, the senior widow executed what is called a second deed of adoption, by which she purported to revoke the deed of the 5th December, on the allegation that it ought to have contained a provision postponing the interest of the adopted son until her death. On these facts, it was argued that the adoption was a fraud upon the authority to adopt, and therefore void. This point seems to their Lordships equally untenable. The conduct of the senior widow is not altogether to be commended, but it would be extravagant to describe it as fraudulent, or to maintain

that the adoption was made for a corrupt purpose foreign to the real object for which the authority to adopt was conferred. It may be true (as suggested by counsel) that the child of Guman Singh was selected in preference to the child of the appellant because the senior widow had reason to believe that the selection would be less likely to lead to her position being challenged. But it is difficult to understand how a declaration by Guman Singh or an agreement by him, if it was an agreement, could prejudice or affect the rights of his son, which could only arise when his parental control and authority determined. The ceremonies of adoption are unimpeached. The deed of adoption is open to no objection. The second deed is admittedly inoperative." Their Lordships advised her Majesty that the appeal ought to be dismissed, the appellant to pay the costs of it. [*L. R.* 16 *Ind. App.* 53; *I. L. R.* 16 *Calc.* 556.]

Plomley and Others *v.*
Felton and Others.

New South Wales. LORD MACNAGHTEN. *Dec.* 5, 1888.

True construction and effect of a deed of mortgage. Conveyance of property to the mortgagee in fee. Meaning of "original respective estates" in the proviso for redemption. Were estates tail barred for all purposes or only for the purpose of the mortgage? Orders of both Courts below affirmed. *One set of costs only allowed to the several respondents.* The principal question in the litigation was, whether the respondents were entitled to a reconveyance of the property mortgaged in its original shape as devised in a will, or whether the character of the reconveyance had been altered by the mortgage. There was a second question as to whether the Underwood's Estates Acts had operated to effect an immediate conversion in equity into personal estate of all real estate devised by the will. The proceedings had origin out of the following circumstances.

James Underwood made a will devising certain estates to trustees in trust for Thomas Underwood for life with remainder to his children as tenants in common in tail, with cross-remainders between them in tail.

The petitioners in the suit were the respondents. Two children of Thomas Underwood, namely, James Joseph Underwood and Catherine, who married Percy Felton; certain trustees to whom the said Catherine and Percy Felton had conveyed their estate; and the infants Lisson, children of Jane, one of Thomas Underwood's children. The other children of Thomas Underwood, including Maria Macdonell, have died. The appellants are the assignees of Thomas Underwood's life estate under his father's will and also of such estate and interest (if any) in the lands devised as he derived by inheritance from his daughter Maria. By reason of the Underwood's Estate Act of 1873 and the amending Act of 1874, the lands devised to Thomas had been sold, and the Court holding the proceeds thereof the respondents petitioned for payment out of Court of their shares of the fund.

On the 28th of February, 1859, a deed of mortgage was executed for the purpose of securing a debt of Thomas Underwood, the parties to the deed being Thomas Underwood, for the first part, Maria Macdonell (his daughter), and this lady's husband, Randall Macdonell, for the second part, and John Savory Rodd, as mortgagee, of the third part. Their Lordships in their judgment say:—

"The real question depends on the true construction and effect of one instrument—a deed of mortgage in which Maria Macdonell, a married woman, joined, for the purpose of securing a debt of her father by vesting in the mortgagee the inheritance, in fee simple, in certain property of which her father was tenant for life. In the Supreme Court it was held that the operation of the deed was practically confined to that purpose. The learned counsel for the appellants maintained that it had a further purpose, or at any rate a further operation. They contended that the estates and limitations which were barred and destroyed in order to give effect to the mortgage were not

revived or restored in the equity of redemption, and they argued that in coming to a different conclusion, the learned Judges of the Supreme Court misconceived or misapplied the authorities to which they referred.

"Their Lordships think that, in a case like the present, very little assistance is to be derived from reported decisions. Sometimes, it has been said, that where there is a mortgage there is a presumption against any alteration being intended in the title to the equity of redemption. But then the strength or weakness of that presumption must depend upon the particular circumstances of the case, and the question remains, Is the deed to be regarded as a mere mortgage, a mere charge; or is it a mortgage, and a new settlement, or new disposition combined? . . . . In the result, their Lordships think that the only safe rule, ... is this: that each case must depend on its particular circumstances; that in each case the intention must be collected from the instrument which has given rise to the question. . . .

"The deed of mortgage in the present case was duly executed by Mrs. Macdonell in accordance with the requirements of sect. 16 of the Registration Act, 7 Vict. No. 16, which enables married women to dispose of real estate, whether held in fee or in tail, but which does not contain provisions corresponding with those in sect. 21 of the Fines and Recoveries Act, a section introduced into the English Act, as Lord St. Leonards observes, for the purpose of putting an end to such questions as arose in *Innes* v. *Jackson*, Sug. Real Prop. Stat. p. 200."

"The deed of mortgage recites . . . that Thomas Underwood was, under and by virtue of the will of his father (the above-named James Underwood), possessed of an estate for his own life in the whole of the hereditaments described in the first schedule, and in one-fifth of the hereditaments described in the second schedule, and that the remainder dependent upon the life of the said Thomas Underwood was by virtue of the said will vested in the children of Thomas Underwood as tenants in common in tail general. It then states that Thomas Underwood had seven children, all of whom were infants except Maria Macdonell. . . . It recites a previous mortgage by Thomas

Underwood for 800*l.*, and states that he required a further advance of 500*l.*, making in all 1,300*l.*; and that he proposed to secure that sum by adding to the security already held by the mortgagee certain parcels of land described in the third schedule, 'and by inducing the said Randall Macdonell and Maria, his wife, to bar the estate tail in remainder vested in her and in him, in her right, in the lands and hereditaments comprised in the first and second schedules hereto, and to convey the same to the said John Savory Rodd in the manner hereby intended to be effected.' Then follows this recital:—'And whereas the said Randall Macdonell and Maria, his wife, have agreed to join in these presents for the purposes aforesaid.'"

Their Lordships, dwelling on these words, observe as follows:— "It would be going too far to say that that recital confines the operation of the deed to its declared purposes. But certainly it shows no indication of any ulterior purpose. The deed then conveys the property to the mortgagee in fee. And the equity of redemption is limited in these terms:—if the money is paid, then the deed declares that 'the said mortgagee will at the request and costs of the mortgagors, reconvey the said hereditaments unto the said mortgagors respectively, or as they shall respectively appoint, according to their original respective estates and interest therein.'" With reference to the limitation of the equity of redemption in the recital, their Lordships say: "The expression 'mortgagors' had been defined in an earlier part of the deed to mean Thomas Underwood and Randall Macdonell. Whether the property be reconveyed to them or to their nominees the original estates are to be restored.

"Now what is the meaning," their Lordships ask, "of the expression 'original,' as applied to the estates referred to? The learned counsel for the appellants while admitting, as they were compelled to admit, that Thomas Underwood's original estate was the estate which he took under the will, contended that Mrs. Macdonell's original estate was the estate enlarged by the conveyance in the mortgage—the estate which owed its form, and in a sense owed its existence, to the mortgage deed itself. Their Lordships think that that would be an unnatural meaning to

attach to the language used. They also think that it would be too narrow a construction to hold that the only estate intended to be restored was Mrs. Macdonell's immediate estate tail. They think the proviso for redemption refers back to the will as the origin of the title, and necessarily brings in the whole series of limitations contained in the will, including the reciprocal limitations between the beneficiaries as tenants in common in tail *inter se* which are commonly known as cross-remainders.

"There was one argument advanced by the learned counsel for the appellants which deserves notice. They said that according to their construction Mrs. Macdonell was not parting with any portion of her estate; she was merely taking a more beneficial interest in her own estate; and they claimed to be the champions of Mrs. Macdonell's rights. At first sight that argument appears to be plausible; and it would have had very great weight if the estate had been limited in such a manner that Mrs. Macdonell could have dealt with it by will, or disposed of it without the cumbrous formalities which the statute has provided for the protection of married women. But the equity of redemption was not limited to Mrs. Macdonell's separate use. So long as the marriage existed, apparently it would have been necessary for Mrs. Macdonell to have gone through all these formalities again if she had desired to dispose of the estate in favour of her husband or anybody else.

" . . . Their Lordships therefore agree with the learned Judges of the Supreme Court as to the effect of this deed.

"On the second point it is only necessary to say a very few words. That branch of the argument was scarcely pressed seriously. On this point also they agree with the Supreme Court. The Underwood Estate Act was not apparently intended to alter the rights of the beneficiaries under Mr. Underwood's will. It supplies machinery wanting in the will. But it does not, in their Lordships' opinion, effect an immediate or imperative conversion of the estate.

"Their Lordships will therefore humbly advise her Majesty to dismiss the appeal and affirm the judgment of the Supreme Court. . . . There will be only one set of costs allowed to

the respondents, and there will be no costs of John Lisson's application to appoint a guardian *ad litem*."

[14 *App. Cas.* 61; 58 *L. J. P. C.* 50.]

Sivaraman Chetti and Others *v.*
Muthia Chetti and Others.

Madras. Lord Hobhouse. *Dec.* 12, 1888.

Right to repair a sacred tank. Is the function of cleaning and management hereditary? Their Lordships agree with the High Court, and hold that the tank is the common possession of the village, and that no class of the villagers has any right to exclude the rest from contributing to the repairs. The appellants were plaintiffs, and their counsel contended that the evidence established a grant by the State or villagers of land as a site for the tank, and they were willing to repair the tank at their own expense. The High Court decree reversed that of the Subordinate Judge, and the result on appeal to her Majesty in Council was as above stated. It was clear on the evidence that the tank was the property of the villagers, and that the repairs were to be effected by common collections. It was confessedly at the option of the plaintiffs' family whether they should execute the repairs or not. In their Lordships' opinion, it is equally at the option of the other villagers to permit the repairs to be executed by the plaintiffs or to insist on the work being done at the common cost.

"It seems a great pity that there should be litigation on such a ground. Disputes for the purpose of avoiding a charge are much more common than disputes for the purpose of bearing one. But, as we have a dispute of the latter kind, it must be settled, like any other, by law. And that compels their Lordships to hold that the tank remains the common possession of the village, and that no class of the villagers has any right to exclude the

rest from contributing to the repair. The appeal fails, and must be dismissed, with costs. Their Lordships will humbly advise her Majesty to this effect."

[*L. R.* 16 *Ind. App.* 48; *I. L. R.* 12 *Mad.* 241.]

Kali Dutt Jha and Others *v.*
Sheik Abdool Ali and Another.

[*Ex parte.*]

Bengal. SIR RICHARD COUCH. *Dec.* 19, 1888.

Validity of a sale of lands. Power of a guardian (the father of the respondents) to make a sale. Consideration. Sale upheld. Decree of High Court reversed, with costs. The respondents were the plaintiffs, and the object of the suit was to set aside a deed of sale of a share of a Talook, which their father, jointly with the guardian of his wife's minor half-brother, had executed during their minority to the appellants or their predecessors. The contention of the respondents was that their father had not obtained a certificate qualifying him to act as guardian during their minority, and that the sale was not made to pay off any debt due by their estate, and that he had exceeded his powers. The appellants asserted that it had been rightly held on the evidence by the first Court that the sale had been made by the father during the minority of the respondents as their guardian and for their benefit. It was made to satisfy debts for which their mother's estate was liable, and to put an end to litigation and obtain a permanent settlement from the Collector. They further said that the consideration was applied in paying off a debt due from the respondents or their mother's estate. The High Court reversed the decree of the Subordinate Judge, and pronounced for the respondents. The High Court's finding was now reversed by the Judicial Committee. This was not a

case of a sale by a guardian of immoveable property of his ward, the title to which was not disputed, in which case a guardian is not at liberty to sell except under certain circumstances (Macnaghten, Principles of Mahomedan Law, ch. 8, cl. 14). The suit appeared to their Lordships to be an attempt to get back property for which the respondents had received full consideration and of which they had had the benefit. Their Lordships therefore advised her Majesty to reverse the decree of the High Court, to dismiss the appeal to the High Court, with costs, and to affirm the decree of the Subordinate Judge. The respondents will pay the costs of this appeal.

[*L. R.* 16 *Ind. App.* 96; *I. L. R.* 16 *Calc.* 627.]

1889.

Srinath Das *v.*
Khetter Mohun Singh and Others.

Bengal. Lord Hobhouse. *Feb.* 5, 1889.

Suit by the transferee of a mortgage (appellant, plaintiff below) for possession of property. Limitation. Twelve years' rule. Act XV. of 1877, Art. 135. Suit barred. The mortgage, which was the foundation on which the proceedings were based, was effected in 1865 by one Hurri Narain Dey (the first defendant in the suit) in favour of one Shama Soondari Debi (a lady). The other defendants were made parties on the ground that they held possession of several plots of the property by purchase and otherwise from Hurri Narain. By the conditions of the deed, which was in the English form, the payment of the debt was fixed to be met on 17th February, 1866, and the mortgagor was to hold possession until then, but if at that date he made default the mortgagee was to be entitled to entry. On 15th February, 1872, Shama Soondari applied to the Judge of the Twenty-four Pergunnahs to issue a notice of foreclosure on the opposite party under Regulation 17 of 1806. A year was allowed to elapse after the service of notice on Hurri Narain before the case was struck off the file, and it appeared that in March, 1873, Shama Soondari obtained the right to consider herself absolute owner, Hurri Narain's right to redeem being foreclosed. In 1879, the plaintiff (appellant) acquired Shama Soondari's interest, and in September, 1882, he brought a suit against Hurri Narain and his purchasers. The appellant's counsel now argued that Art. 147 rather than Art. 135 of Act XV. of 1877 (the Limitation

Act) was applicable. The suit was justified by the provisions of the Transfer of Property Act of 1882, which repealed Regulation 17 of 1806. Under that Act, Shama Soondari had a new cause of action, viz., a right to maintain a foreclosure suit still. On the failure to redeem, the mortgagee, and therefore her transferee, had a right still existing. The proceedings for foreclosure taken under the regulation were only ministerial to show that no redemption had taken place. There was no suit *qua* suit and no decree. The Judicial Committee agreed with the High Court in holding that the suit was barred under Article 135 of Act XV. of 1877, not having been brought within twelve years of the 17th of February, 1866, at which date the mortgage had not been redeemed, and no new relaxation was afforded by the Transfer Act of 1882. Their Lordships, *inter alia*, said:—

"Hurri Narain has not made any defence at any stage of the suit. Of the other defendants, some either did not appear or did not put in any statement; . . . . eighteen, besides other pleas, contended that the suit was barred by time. Seventeen of them stated that they held plots purchased of Hurri Narain at various dates, ranging from November, 1865, to August, 1866. Some of them stated, as to their own plots, that Shama Soondari was privy to the purchases, and that the price was paid to her agent in reduction of the mortgage debt. But as the latest of these alleged transactions was in August, 1866, the difference between the cases of these defendants need not be considered. One defendant, No. 29, stated that he had purchased two plots of Hurri Narain's land, one in February, 1873, at a revenue sale, the other in December, 1876, at an execution sale. This defendant stands in a different position from the others as regards both time and the effect of the foreclosure proceedings (in 1872); but if his title is impeachable at all, which their Lordships are far from suggesting, it must be in a suit properly framed and conducted for that purpose. With the exception of No. 29, for whose case no issue was framed, their Lordships do not intend to discuss any other plea than that of Limitation. . . . . Article 135 provides that a suit by a mortgagee for

possession of immoveable property mortgaged shall be dismissed, if instituted after twelve years from the time when the mortgagor's right to possession determines. Article 147 provides that a suit by a mortgagee for foreclosure or sale shall be dismissed, if instituted after sixty years from the time when the money secured by the mortgage becomes due. The Subordinate Judge made a decree against all the defendants without distinction for payment, and on default for foreclosure. As regards the question of limitation his grounds were as follows,—that if the foreclosure proceedings (in 1872) were regular, a new starting point of time was gained in February or March, 1873; but if they were irregular, the mortgagee possessed only an inchoate right of possession, and so the mortgagor's right had not determined; that suits for foreclosure were under the Codes of 1859 and 1877 allowed in the Bengal Mofussil; and that the plaintiff had a right to bring this suit quite independently of the Transfer of Property Act of 1882. These reasons lead up to the conclusion that the case falls within Article 147, which allows sixty years to sue.

"From this decree sixteen of the defendants appealed to the High Court. That Court was of opinion that the mortgagor's right to possession determined on the 17th of February, 1866; that the mortgagee's right to bring a suit for possession was barred on the 17th February, 1878 (*i.e.*, twelve years after); that with the right to possession was lost the right to take foreclosure proceedings under the Regulation of 1806; and that suits for foreclosure were then unknown in the Bengal Mofussil. They therefore concluded that the suit was barred by force of Article 135, and they dismissed it against all the defendants except Hurri Narain. They do not assign their reason for not dismissing it against Hurri Narain; but their Lordships presume the reason to be that as against him they took the suit to be one for possession, founded on the title acquired in February or March, 1873, under the Regulation. From that decree the plaintiff appeals.

"All the defendants except Hurri Narain and one other are made parties respondent to the appeal. No one has appeared,

. . . . after taking time to consider, their Lordships find themselves in agreement with the High Court.

"The inferences of fact which the Court is bound to draw from the evidence or the omission of evidence in the case appear to their Lordships to be as follows: the foreclosure was, as against Hurri Narain, perfect on or before the 31st March, 1873; the purchasers from him were not served with notice as required by the Regulation; they therefore remained unaffected by the proceedings, and the relationship of mortgagee and person entitled to redeem continued to subsist between Shama Soondari and them; the purchasers have continued in undisturbed possession since the time of their respective purchases; no interest has ever been paid on account of the mortgage debt; if any part of the principal has been paid in respect of any of the plots, the latest payment was made in August, 1866; therefore if Article 135 is the one applicable to the case, the twelve years there allowed ran out in the month of August, 1878, at the latest.

"In order to succeed, then, the plaintiff must show that Article 135 is wholly inapplicable to his case. To do that, it is contended that Article 135 applies only to those cases in which a mortgagee desires to take possession in that character; that if he wishes to foreclose he may do so within the time limited by Article 147; that on the 1st July, 1882, the right to maintain foreclosure suits was conferred on Bengal mortgagees; and that the Limitation Act immediately fastened on those suits, and provided sixty years as the limit for them.

"To this argument it is sufficient for the present case to answer that in the year 1878, when no suit for foreclosure could be brought, the right of Shama Soondari to possession was wholly extinguished, and the title of the purchasers under Hurri Narain freed from the mortgage. The subsequent creation of suits for foreclosure could not, except by clear enactment, revive the extinct right. And in effect the clear enactment is the other way, for sect. 2 (c) of the Transfer Act says that nothing therein shall affect 'any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of such right or liability.' Their

Lordships consider that, within the meaning of this section, the rights of the purchasers to unencumbered ownership of their plots have arisen out of the legal relations between them and Hurri Narain and Shama Soondari. It is therefore unnecessary to discuss what has been so much urged at the bar, viz., the effect to be attributed to Article 147, a provision which appeared for the first time in the Act of 1877." Affirmed.

[*L. R.* 16 *Ind. App.* 85; *I. L. R.* 16 *Calc.* 693].

Jex (Infant by his next Friend) *v.*
McKinney and Others.

British Honduras. LORD HOBHOUSE. *Feb.* 8, 1889.

Will Case. Gifts to Churches. Is the statute often, though erroneously, called "the Mortmain Act" (9 Geo. 2, c. 36), excluded as inapplicable to British Honduras? Case of other Colonies: *A.-G.* v. *Stewart*, 2 Mer. 143; *Whicker* v. *Hume*, 7 H. L. 134. Their Lordships agree with the Court below that the statute is not enforceable in Honduras. Affirmed. Appellant's next friend to pay costs.

[14 *App. Cas.* 77; 58 *L. J. P. C.* 67.]

Blaine and Others (in their capacity as Trustees of the Guardian Insurance and Trust Company of Port Elizabeth Limited) *v.*
Holland and Others (in their capacity as Executors testamentary of the Estate of the late Charles Lovemore).

Cape of Good Hope. LORD WATSON. *Feb.* 16, 1889.

Partnership agreement for the purpose of an adventure in farming. Liability for loans borrowed for the purpose of carrying on the enterprise. Effect of conditions under which the money was advanced. The particulars of the case were as follows:—One Kirkwood, being the owner of 26,000 acres, was

desirous of associating himself with other persons who might be willing to join in carrying out a scheme for disposing of the property to a company to be formed for the purpose of acquiring it, in pursuance of which scheme it was essential that irrigation works should be constructed, additional lands bought, and other necessary arrangements made. The late Charles Lovemore and Joseph Walker agreed to take part in the adventure, and took shares at the price of 2,000*l.*, one-half of which was instantly paid, and the other half was to be provided for on mortgage of the property upon its contemplated sale to new proprietors. Kirkwood, who was to continue to hold the property in trust for Lovemore, Walker, and other parties, retained himself one-half of the property, and he took the active management of the concern. The only provision with regard to contribution of funds for carrying out the scheme occurs in the 8th article of the agreement, which is in these terms:—"Any land acquired, or which may hereafter be acquired, not already specified in this agreement, shall be bought or acquired for the benefit of the whole of the parties to this agreement, who shall be liable for the cost thereof *pro ratâ*, according to the value of each share held in the said property." Improvements were made upon the property and additional lands were purchased, but the associates ultimately failed to form a company or dispose of the property to advantage. In the course of his management Kirkwood had borrowed from the appellant company three several sums of 2,000*l.* each, and granted a mortgage bond in return therefor. Besides the usual conveyance of the lands in security, the bonds contain a clause expressly binding Kirkwood personally and all his property without exception. The moneys advanced were admittedly applied to the purposes of the adventure. The appellants now sought to recover the whole amount of the loans with interest from the representatives of Mr. Lovemore, on the ground that it was a partnership debt for which all the *socii* were liable *singuli in solidum*. The question in the appeal was, whether on the evidence the contention of the appellants could be supported. The Judicial Committee agreed with the Supreme Court that Lovemore's estate was not liable. The evidence as

to arrangement for the several loans appeared to their Lordships to establish the fact, that Kirkwood in negotiating them had no authority from Lovemore or any of his associates to pledge their personal credit; on the contrary, the evidence plainly implied that Kirkwood intended to bind no one but himself.

"Being of opinion that the appellant company agreed to advance, and did advance, the money now sued for, on the security of the lands, coupled with the personal responsibility of Kirkwood alone, their Lordships will humbly advise her Majesty to affirm the judgment of the Court below, and to dismiss the appeal. The costs of the appeal must be paid by the appellants."

[*P. C. Ar.*]

Mahabir Pershad Singh and Another *v.*
Macnaghten and Another.

Bengal. Lord Watson. *Feb.* 16, 1889.

Suit by the appellants, as representing the mortgagors, to have sales of certain mortgaged property set aside or treated as nullities; to have the mortgage debt extinguished by setting against it certain rents due by the mortgagees (the respondents); and for khas possession of the mortgaged property after the expiry of the respondents' leases in 1889. (For previous litigation between the parties in the Privy Council, *vide P. C. Ar.* Dec. 1873, and 24th Dec. 1882.) A plea raised by respondents that an equity to have accounts taken and to have the rents payable by the respondents credited against the sums due by the appellants under the mortgage bond should have been raised in a previous suit, and was not now enforceable, is upheld by the Judicial Committee, who thus affirm the decisions below. The appellants' claims are held to be barred by sect. 13, Act XIV. of 1882, Civil Procedure Code. A case relied on by the appellants' counsel in support of a contention that the mortgagees purchased the property as trustees for the appellants (*S. M. Kamini Debi* v. *Ramlochar Sircar*, 5 B. L. R. 450) is distinguishable from this. Here the respondents (mortgagees), though they

had purchased at the sales, had obtained leave to bid, whereas in the case cited the reasoning of the learned judge had a direct bearing upon the case of a mortgagee purchasing without leave. Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser. Affirmed with costs.

[*L. R.* 16 *Ind. App.* 107; *I. L. R.* 16 *Calc.* 682.]

Reid and Another *v.*
The Honourable Thomas Garrett.

New South Wales. Lord Hobhouse. *Feb.* 16, 1889.

Construction of the Crown Lands Act of 1884, sects. 76, 78. Right to hold runs leased under earlier statutes at a rent less than that to be exacted by the Crown under the 1884 Act. Is the rate to be computed from before the passing of this particular Crown Lands Act or after? Heard below as a special case under 17 Vict. No. 21, s. 42. The principal question put in the special case was, "Whether the rent of the pastoral lease of the leasehold area, granted to the plaintiffs under and by virtue of the provisions of the 'Crown Lands Act of 1884,' is to be computed from and be payable from the date of the . . . notification in the Government Gazette, or from a date calculated with due regard to the mean date of determination of the leases of the said runs held by the plaintiffs before and at the time of the coming into force of the 'Crown Lands Act of 1884'?" Counsel for the appellants argued that the rent did not commence until a date later than the 1st of January, 1885, when the new Act came into force. Such date ought to be calculated with due regard to the mean date of the determination of the leases existing before the Act came into force. According to their contention it did not appear that there were provisions in the Act whereby the rent of existing leases was to be altered. Their Lordships agree to report against the appellants (taking the same view as the Supreme Court). They were of opinion that the first alternative in the

above question should be answered in the affirmative. The appellants would (under the 1884 Act) have the advantage of a longer holding at the "determined rent" not increased till the end of the first five years of the pastoral lease of the leasehold area, but not the advantage of holding on at the old rent. Appeal dismissed, with costs.

[14 *App. Cas.* 94; 58 *L. J. P. C.* 54.]

The Sun Fire Office *v.*
Hart and Others.

Windward Islands. LORD WATSON. *Feb.* 16, 1889.

Power of an insurance company to cancel a policy. Alleged misdirection to the jury. Special leave to appeal. The question at issue entirely rested on the construction to be put on clause 3 of the conditions set out in the company's policy. The clause ran thus:—"3. If after the risk has been undertaken by the society anything whereby the risk is increased be done to property thereby insured, or to, upon, or in any building thereby insured, or building or place in which property thereby insured is contained, or if any property thereby insured be removed from the building or place in which it is therein described as being contained, without in each and every of such cases the assent or sanction of the society, signified by endorsement thereon, the insurance as to the property affected thereby ceases to attach.

"If by reason of such change, or from any other cause whatever, the society or its agents should desire to terminate the insurance effected by the said policy, it shall be lawful for the society or its agents so to do, by notice to the insured, or to the authorized representatives of the insured, and to require the policy to be given up, for the purpose of being cancelled; provided that in any such case the society shall refund to the insured a rateable proportion, for the unexpired time thereof, of the premium received for the insurance."

The policy was effected by Alice Creagh Hart and five others (the respondents) on the 12th of May, 1885, and it was to run

until the 30th of July, 1886, on forty acres of sugar canes uncut, situate on the Fairfield Plantation, Barbados. The facts of the case are set forth in the judgment of the Judicial Committee as follows:—

"There were three fires on the plantation in June, three in July, one in August, and another on the 25th September, 1885, by which nearly twenty-three acres of canes were burnt. In August an anonymous letter was received by one of the insured, threatening continued incendiarism, and that letter was exhibited to the society's agent. On the 8th October, 1885, the agent gave written notice in due form to the insured that, in consequence of these occurrences, the society terminated the policy from that date, in accordance with clause 3 of the general conditions; and he at the same time tendered repayment of 5*l.* 6*s.* 11*d.*, being the rateable proportion of the premium received for the unexpired term of the insurance. The insured refused to accept the sum tendered, or to give up the policy. The losses sustained through fires occurring before the 8th of October were adjusted and paid by the society. Two fires occurred after that date, the one upon the 20th December, 1885, and the other upon the 30th January, 1886.

"The suit . . . was brought by the insured for the recovery of the damage occasioned by the fires last mentioned. In defence the society relied solely on the effect of its notice of 8th October, 1885, as determining the policy, before either of the losses sued for was incurred. The action was tried in the Court of Common Pleas, at Princetown, on the 7th March, 1887, before his Honour Isaac Richard Reece, acting Chief Judge, and a special jury. The facts already stated were put in evidence; and the learned judge directed the jury to the effect that, the facts not being disputed, the question to be determined was one of law, and not of fact, and that he decided the law in favour of the plaintiffs. The learned Judge ruled as matter of law:—(1) That the words "any other cause whatever," in the third general condition, mean "any change of the same genus" as the changes previously specified, and that the facts in evidence did not amount to such changes in respect of the subject matter of the suit; and (2) that, assuming the defendants' construction

of the third general condition to be correct, they were precluded from exercising their right to determine the policy, by reason of their having advisedly paid for no less than seven fires, in the full knowledge of the circumstances referred to in their notice of the 8th October. The jury accordingly returned a verdict for the plaintiffs, and the Court gave the defendants leave to apply for a rule nisi for a new trial.

"The defendants obtained a rule to show cause why the verdict should not be set aside, and 'instead thereof a new trial granted between the parties,' which was discharged by an order of the same judge who tried the action, dated the 23rd March, 1887. His decision was thereafter affirmed by the Court of Appeal for the Windward Islands, consisting of three members: the Chief Justices of St. Lucia and Tobago, Grenada, and St. Vincent.

". . . The Chief Justice of Grenada concurred in the ruling of the other judges, but was of opinion that a letter of the defendants' agent, dated the 22nd December, 1885, amounted to a waiver of their notice of the 8th October. The letter contains nothing beyond a request that the insured will delay proceedings for the enforcement of certain claims which had arisen before the date of the notice, until the writer had an interview with an agent of the office who was expected from England." On this point of waiver the Judicial Committee considered that it was "difficult to understand how such a request could possibly imply an intention to depart from a notice which did not affect these claims, especially when the communication expressly bears to be 'without prejudice, and without any intention of admitting any liability against the Sun Fire Office under the policy.'" Their Lordships, upon the general question, held that the condition inserted in clause 3 was a bar to the claim of the plaintiffs. "The condition does not involve the avoidance of the policy *ab initio*, or forfeiture of the premium paid by the insured. There may be many circumstances calculated to beget, in the mind of a fair and reasonable insurer, a strong desire to terminate the policy, which it would be inconvenient to state and difficult to prove; and it must not be forgotten that the whole business of fire insurance offices

consists in the issue of policies, and that they have no inducement, and are not likely, to curtail their business, without sufficient cause. On the other hand, the insured gets all the protection which he pays for, and, when the policy is determined, can protect his own interests by effecting another insurance. . . .

"Their Lordships were of opinion that the condition must be read in the literal and natural sense of the language which the contracting parties have chosen to employ, and that it includes any and every cause which could reasonably induce an insurer to desire the termination of the policy. The question remains whether the clause gives the insurers the right to act upon their own judgment, or whether they are bound, if so required, to allege and prove to the satisfaction of a judge or jury, not only that a desire exists on their part, but that they have reasonable grounds for entertaining it. If the determination of the policy would be for the advantage of its business, that would obviously be a reasonable ground for the office desiring to put an end to it; and, *à priori*, one would suppose that the insurers themselves must be the best if not the only capable judges of what will benefit their business. An insurance office may deem it prudent, and resolve to limit its outstanding engagements, and, unless the words of the clause clearly imply the contrary, it cannot be presumed that the parties meant to make such a question of prudent administration the subject of inquiry in a court of law. These and other considerations, already adverted to, have led their Lordships to the conclusion that the sufficiency of the reasons moving them to desire the termination of the risk which they had undertaken is a matter of which the insurers are constituted the sole judges. . . . .

"The necessary legal result of their Lordships' opinion is that *judgment ought to have been entered for the defendants, who are appellants here, at the trial of the cause. But the appellants, in the Court below, only moved for a new trial, and the judgment appealed from was given with reference to that motion. The case must therefore go back to the Court of Common Pleas for Barbados, in order that the proper order may be pronounced. Accordingly, their Lordships will humbly advise her Majesty to reverse the judgment appealed*

from, to make the rule nisi obtained by the appellants absolute, and to order the plaintiffs (respondents) to pay to the defendants (appellants) the costs incurred by them in the Court of Common Pleas and in the Court of Appeal. Seeing that this appeal was brought by special leave, being below appealable value, on the ground that its decision was of general importance to insurance offices, their Lordships think that there ought to be no order as to costs here."

[14 *App. Cas.* 98; 58 *L. J. P. C.* 69.]

Muhammad Yusuf Khan *v.*
Dr. Abdul Rahman Khan.

Oudh. LORD MACNAGHTEN. *Feb.* 20, 1889.

Action by the respondent to set aside an agreement as an alleged forgery. A final judgment of a competent Court which, it may be stated, found the agreement valid, is not appealable. Erroneous interpretation by the Judicial Commissioner of sect. 622 of the Civil Procedure Code, Act XIV. of 1882. Two Courts had declared the agreement genuine, and the judgment of the Judicial Committee, also to the same effect, is as follows :—

"In this case on the 10th of November, 1884, Mr. Young, the Judicial Commissioner of Oudh, set aside the judgment of a competent Court, which by law was final, and without appeal. In so doing he proceeded on an erroneous interpretation which had been placed on sect. 622 of the Civil Procedure Code by the Court of Allahabad, and in ignorance of the fact that the error had been corrected by a judgment of this board in the case of *Amir Hassan Khan* v. *Sheo Baksh Singh*, L. R. 11 Ind. App. 237, to which her Majesty gave effect by her order of the 26th of June, 1884. The order of Mr. Young was brought before Mr. Tracy, who happened at the time to be officiating as Judicial Commissioner in his place. On the 23rd of February, 1885, Mr. Tracy, having regard to the decision of the Privy Council, discharged the order of Mr. Young. Fifteen months afterwards the matter was again brought before Mr. Young on an applica-

tion purporting to be made under sect. 622. That application was incompetent as being a second application for review, and it would have been out of time if it had been regular in other respects.

"On the 22nd of June, 1886, Mr. Young discharged the order of Mr. Tracy on the singular ground that it was made *per incuriam*, and that it was an order which the Court would not have made if it had been duly informed. From that order of Mr. Young special leave to appeal to her Majesty has been granted.

"Mr. Arathoon, who appeared for the respondent, admitted that he could not contend that Mr. Young had any jurisdiction to pronounce the order of the 22nd June, 1886, but he argued that Mr. Tracy's order was wrong, and that Mr. Young's first order was right.

"Their Lordships, however, are of opinion that Mr. Tracy was perfectly right in discharging the first order of Mr. Young; and that neither of Mr. Young's orders can be supported upon any ground whatever.

"Their Lordships, therefore, are of opinion that the order of the 22nd of June, 1886, ought to be reversed, and the order of the 23rd of February, 1885, affirmed, and that the respondent should pay the costs of the proceedings before Mr. Young, in which the order of the 22nd June, 1886, was made. They will, therefore, humbly advise her Majesty accordingly; and the respondent must pay the costs of this appeal."

[*L. R.* 16 *Ind. App.* 104; *I. L. R.* 16 *Calc.* 62.]

Lachman Singh *v.*

Mussumat Puna and Another.

[*Ex parte.*]

Central Province of India. LORD HOBHOUSE. *Feb.* 22, 1889.

Deed of gift proved by secondary evidence. Indian Evidence Act of 1872. Concurrent findings of three Courts in favour of the validity of the gift. Provision of sects. 584 and 585 of the

Civil Procedure Code, Act XIV. of 1882, regarding SECOND APPEALS and the principles under which alone they can be admitted. Subsidiary claim to moveable property in the nature of stock and plant. A question of fact arising from the following circumstances. The respondents, heirs of one Ramchandra, were plaintiffs, and they claimed title to an estate by gift from one Kalli Baboo. If the deed of gift was not established the title of the appellant was good. All the Courts (three) below have held that the gift was proved by a deed of which secondary evidence was gift.

The Judicial Committee in their judgment, affirming the findings below, make the following important observations on the question of Second Appeals:—

"The case is not only within the general rule which this Committee observe, that they will not, unless under very exceptional circumstances, disturb a finding of fact in which the Courts below have concurred, but it is within the more stringent rule laid down by the Code of Civil Procedure. The third Court was the Judicial Commissioner, and to him the appeal was what is called in the Code a second appeal. Sect. 585 of the Code of 1882 says:—'No second appeal shall lie except on the grounds mentioned in sect. 584.' Those grounds are, 'the decision being contrary to some specified law or usage having the force of law,' or 'the decision having failed to determine some material issue of law or usage having the force of law,' or for substantial defect in procedure. It is not alleged here that there is any defect of procedure. Therefore in order that this appeal may succeed there must be some violation of law.

"This Committee is sitting on appeal from the order of the Judicial Commissioner, and it can only do what the Judicial Commissioner himself could have done. . . . Their Lordships find that they are bound by his findings of the facts. Therefore the only questions here are, first, whether a case arose for admitting secondary evidence, which was a proper question of law; and secondly, whether the evidence that was admitted was really and truly secondary evidence."

On the point of admissibility the Judicial Committee refer to

the sections of the Indian Evidence Act, which say, "Secondary evidence may be given of the existence, condition, or contents of a document in the following cases." Two of the cases are,—"When the original is shown, or appears to be in the possession or power of the person against whom the document is sought to be proved," and "When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time."

The secondary evidence which was let in consisted of a copy of a deed filed in another suit, signed by the Judge and marked "Copy according to original and still on the records of the Court." The Courts below found that all the documents belonging to the estate passed into the hands of the appellant, and therefore that the deed in question is in his power or has been destroyed or lost. Their Lordships agreed therefore with the Courts below that the secondary evidence which supported the validity of the gift was admissible, and that the gift was proved. On the subsidiary claim to stock and plant their Lordships made these observations:—"It was said that the appellant, having been in possession of the estate rightfully under a deed of gift from Ramchandra's widow, was entitled to the income during that time, and the Judicial Commissioner has to a certain extent given effect to that contention by adjudicating to the appellant the ownership of some villages which it appears that during that period he purchased out of the surplus or savings from the income. But besides the land he received a certain quantity of chattels which we may call stock and plant, and it is now contended that, as the original stock and plant must have worn out, and the appellant was not under any obligation to replace it, therefore that which he has in fact brought in to replace it belongs to him and not to the estate. So far as there is stock and plant belonging to the three villages which the Judicial Commissioner has adjudicated to the appellant, that he takes. But with regard to the other property which forms part of the estate which is adjudicated to the respondents, their Lordships think that the appellant is in the

position of an ordinary tenant for life who enjoys furniture and plant which wears out from time to time, and which he replaces, and that that which is found attached to the property which the respondents receive must follow the title to that property, and that the decree of the Judicial Commissioner is right in not giving to the appellant any more stock or plant than belongs to the three villages which he has given to him.

"The result is that the appeal fails in every respect. . . . There will be no costs, as the respondents do not appear."

[*L. R.* 16 *Ind. App.* 125; *I. L. R.* 16 *Calc.* 753.]

Anand Kuar and Another *v.*
Tansukh.

[*Ex parte.*]

N. W. P. Bengal. LORD MACNAGHTEN. *Feb.* 22, 1889.

Alleged deed of gift. The execution of it was put in issue and there were concurrent findings against execution having been proved. Appeal dismissed. [*I. L. R.* 11 *All.* 396.]

The Bank of New South Wales *v.*
O'Connor.

Victoria. LORD MACNAGHTEN. *March* 9, 1889.

Action by respondent against the bank. Alleged detinue of deeds. Condition of mortgage. Counterclaim. Equitable defence not raised below. Action not maintainable prior to repayment of the loan, subject of the mortgage.

In this case O'Connor, the plaintiff (now respondent) who was a coach-builder in Beechworth, a small town in daily communication with Melbourne, on the 28th February, 1887, sued the bank in an action for detinue. The litigation arose thus: From October, 1884, O'Connor, who had an increasing business down to the end of 1886, kept an account with the bank. In the course of the year or two subsequent to 1884, he rather

crippled his resources by contesting a seat in the Legislative Assembly, and furnishing a house on the occasion of his marriage. He then incurred a debt to the bank, and to secure this he deposited with the bank the title deeds of a plot of ground where he carried on his business, the land and buildings being estimated to be worth about 400*l.* The mortgage to the bank was made by a deed on the 22nd February, 1886, and was in the form of an absolute conveyance in trust for sale. The proceeds were to be applied in payment of expenses, and then in satisfaction of the debt with interest, and the surplus was to be paid to the debtor as personal estate. The deed had a proviso that nothing therein contained should extinguish, prejudice, or affect any lien or security which the bank was entitled to in respect of the deposit of the title deeds relating to the property.

So late as January, 1887, O'Connor's working account was in credit to the amount of 1*l.* 4*s.* 9*d.* On the following day the account was overdrawn, and it was not again in credit. On February 4th, Hannaford, the manager of the bank, wrote to O'Connor stating that his account overdrawn was 61*l.*, and requiring him to pay in 125*l.* to cover the overdraft and some bills maturing that day. Besides his working account and the account secured by the mortgage, O'Connor had a discount account with the bank. It comprised two classes of bills discounted for him by the bank, (1) bills of which he was indorsee, and (2) acceptances of his discounted at his request for the convenience of other persons. In reply to Hannaford's letter, O'Connor called at the bank and said that he could not pay 125*l.* straight off. He seems to have satisfied Hannaford that the bills referred to in his letter would be provided for. Subsequently there were other negotiations which increased O'Connor's indebtedness, and he then said he would go to Melbourne and get money. This he did. His mother (Mrs. Pye) in Melbourne advanced him 300*l.* in cash, and the money was to be used for lifting the deeds at the bank and for no other purpose. On the 21st February, O'Connor went to the bank, taking with him his mother's money. Hannaford had had made out O'Connor's account up to the 23rd February, showing

indebtedness or liability of 371*l.* 3*s.* 4*d.* The items were as follows:—

	£	s.	d.
Secured account - - - - - -	103	12	0
Working account - - - - - -	81	14	5
Discount account:—			
As indorsee - - - - - -	106	7	6
As acceptor - - - - - -	79	9	5
	£371	3	4

O'Connor objected to the last item of 79*l.* 9*s.* 5*d.*, as the bills would not be due for months. He struck it out, and then tendered the balance and demanded his securities. Hannaford refused to hand them over unless the whole debt and liability were cleared off, saying he had to obey instructions. On February 24th, O'Connor took the money back to his mother. On the 26th, Hannaford wrote to O'Connor, saying that he had had a communication from the head office at Melbourne to the effect that the bank would not insist on payment of the 79*l.* 9*s.* 5*d.* less rebate, though they were entitled to do so. On the 28th, O'Connor issued his writ, and on the 8th March following the bank waived their claim to a general lien. The course of the litigation below was as follows. The jury gave the plaintiff 1,500*l.* for detention, and found that there was due to the bank under the counterclaim the sum of 284*l.* 2*s.* 7*d.* which was afterwards reduced by consent to 202*l.* 1*s.* 0*d.* At the trial, evidence was offered with the view of proving special damages. This was objected to on the ground that the damages were too remote. The Judge admitted the evidence, but reserved the question of its admissibility for the consideration of the Full Court. On the 10th August, 1887, the Full Court held that the evidence was admissible, and on the 26th August adjudged that the decision of the jury was correct. Provision was made for set-off and payment of the balance, and, the bank renouncing any further claim on the deeds, the subject of the action, they were to be delivered up to the plaintiff. The bank was ordered to pay the costs of the action and the costs of the argument before the Full Court, after deducting the costs of the counterclaim.

On the 2nd of November, 1887, the bank moved the Full Court for an order to set aside the verdict for the plaintiff, on the grounds that it was against the weight of evidence, that the damages were excessive, and that evidence had been improperly admitted. The only ground argued was that the damages were excessive. The Court ordered that the verdict should be affirmed, and that the motion for a new trial should be dismissed, with costs.

The bank has appealed to her Majesty in Council from the two orders of the Full Court, and the judgment of the 26th of August, 1887.

The Judicial Committee were of opinion that the action by O'Connor could not be maintained. Their Lordships' reasons, and the exact form of the order which they advised her Majesty in Council to make, are given in the following extracts from their report:—

"If O'Connor had brought an action for redemption on the day on which the writ was issued, he might possibly have been entitled to costs up to the 8th of March. On the other hand, if he had persisted in the action after the bank offered to release the securities on payment of the amount expressly secured, he would, according to the ordinary and settled practice of the Court, have had to pay the costs of the action.

"A mortgagee is entitled to his principal and interest, and the ordinary charges and expenses connected with the security. He is also entitled as of right to the costs properly incident to an action for foreclosure or redemption, though he may forfeit those costs by misconduct, and may even have to pay the costs of such an action in a case where he has acted vexatiously or unreasonably. In *Cotterell* v. *Stratton* (8 Ch. App. 295), Lord Selborne observes that this right, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of the mortgagee as may amount to a violation or culpable neglect of his duty under the contract, and that any departure from these principles would tend to destroy, or at least very materially to shake and impair, the security of mortgage transactions; and he goes on to point out that such a

departure, instead of being beneficial to those who may have occasion to borrow money on security, would, in the result, throw them into the hands of those who indemnify themselves against extraordinary risks by extraordinary exactions. In the present case it is not easy to understand how the bank, or their manager, can be charged with vexatious or unreasonable conduct. It is admitted that Hannaford acted in good faith. Whether the claim to a general lien was well founded or not, there was some colour for it in the mortgage deed. Considering that the bank were careful to take a formal security for 100*l.*, it is difficult to suppose that they would have allowed O'Connor to get so deeply into their books, or that he would have assumed so bold and defiant a tone in his communications with Hannaford, if it had not been taken for granted on both sides that the bank had some security on their hands. . . . Hannaford . . . seems to have taken a reasonable course in sending the deeds up to Melbourne, where Mrs. Pye lived. O'Connor apparently acquiesced at the time in the course proposed. That the affair was not completed in Melbourne was not the fault of the bank or the fault of Hannaford. Unless due to a capricious change of purpose on the part of Mrs. Pye, or to a determination on O'Connor's part to bring a speculative action, it must have been due to want of confidence created in Mrs. Pye's mind by O'Connor's failure to return the money to her at once. On the notes of the evidence there is nothing to account for it but this passage in O'Connor's deposition, "My mother would not lend me the money again. She was angry with me." *The action, however, which O'Connor brought against the bank was not for redemption.* It was an action of *detinue.* The writ was issued in haste. But the statement of claim was not delivered until the 14th April. It is certainly a singular document. It does not refer to the mortgage of February, 1886, or notice the fact that the deeds were deposited as a security. It simply states that the bank, on 21st February, 1887, detained and had always since such time detained from the plaintiff his title deeds. It specifies the deeds, and states that by reason of such detention the plaintiff had suffered damage as follows: 'He was rendered

unable to procure a loan of 600*l.* from Annie Pye, ... and unable to pay his workmen in his business of coachbuilder, and was compelled to discharge some of his said workmen, and was rendered unable to meet his liabilities in his said business, and was sued in respect thereof, and his credit was injured and his trade diminished, and his said business was otherwise injured.' Then it claims a return of the deeds, or 1,000*l.* for their value, and 2,000*l.* for their detention.

"The defence was delivered on the 29th of April. It is equally remarkable. For some unexplained reason, the bank also abstained from referring to the mortgage of February, 1886, which apparently in any view would have been an answer to the action as framed. But they did plead that before the alleged detention the plaintiff deposited the said deeds with them to secure the repayment of 100*l.*, and that the said sum was due at the time of the detention, and still remained due. Without admitting liability, they brought into Court 50*l.* 1*s.*, and they delivered a counterclaim for money due to them.

"In reply, the plaintiff admitted the deposit by way of security, as well as the fact that the sum intended to be secured was due at the time of the detention, and still remained due. He then stated the tender on the 21st of February, and its refusal.

"Instead of applying to have the question raised by the pleadings disposed of at once, and the action stayed or dismissed, the bank allowed the action to be set down for trial. It came on to be tried on the 20th of July, 1887" [with the results above stated].

Their Lordships proceed: "The whole matter is therefore open with this exception, that the bank cannot now be permitted to rely upon the legal mortgage of the 22nd of February, 1886, although it was put in evidence at the trial by the plaintiff. They deliberately elected to treat the case as if they had only an equitable mortgage by deposit, and the appeal must be decided on that footing.

"The learned counsel for the appellants dwelt with much force on the extravagance of a verdict which even their opponents described as liberal, and on the novel dangers to which

mortgagees would be exposed if such a verdict were upheld. They contended, too, that no damages, or at any rate no substantial damages, were due either in fact or in law. These contentions and the arguments by which they were supported would be worthy of careful attention if it were necessary to consider them. But in their Lordships' opinion there is a more serious question which must be disposed of in the first instance. That question is raised on the pleadings, though the attention of the Court below was apparently not called to it. The appellants are to blame as well as the respondent for the way in which the litigation was conducted. But their Lordships are not at liberty to countenance a departure from settled principles, because in the conduct of the action both parties have chosen to ignore them. The question that suggests itself is, *can such an action as this be maintained?* It was treated by the learned counsel for the respondent, and indeed by the learned counsel for the appellants during a great part of the argument, as an action for damages occasioned by a wrongful act arising out of breach of contract. What is the wrongful act? And what is the breach of contract? Their Lordships have not had the advantage of seeing a note of the summing up. But in the Full Court the learned Judge who tried the case states his view as follows: 'In my opinion there was a contract here to deliver up the deeds on payment of a certain sum of money. That was broken when the money was tendered and ought to have been accepted. Then the bank was in the same position as if it had actually taken the money and refused to deliver up the deeds. That was a wrongful detention of another man's property, and therefore a tort.' The bank was no doubt bound to deliver up the deeds on payment of the sum secured, with interest and costs, if any. But in their Lordships' opinion there is no foundation for the proposition that a tender properly made and improperly rejected is equivalent to payment in the case of a mortgage. The proposition seems to be founded on a mistaken analogy. If a chattel be pledged, the general property remains in the pledgor. The pledgee has only a special property. According to the doctrines of common law, that special property is determined if

a proper tender is made and refused. The pledgee then becomes a wrongdoer. The pledgor can at once recover the chattel by an action at law. But it is not so in the case of a mortgage, where the mortgagor's estate is gone at law, nor is it so in the case of an equitable mortgage. A mortgagor coming into equity to redeem must do equity, and pay principal, interest, and costs before he can recover the property which at law is not his. So it is in the case of an equitable mortgage. It is a well established rule of equity that a deposit of a document of title without either writing or word of mouth will create in equity a charge upon the property to which the document relates to the extent of the interest of the person who makes the deposit. In the absence of consent that charge can only be displaced by actual payment of the amount secured. Before the fusion of law and equity a court of equity would undoubtedly have restrained the legal owner of the property from recovering his title deeds at law so long as the charge continued, and now when law and equity are both administered by the same Court if there be any conflict the rules of equity must prevail. In *Postlethwaite* v. *Blythe* (2 Sw. 256), where property had been conveyed to secure a debt of a comparatively small amount, the Lord Chancellor refused to direct a release upon payment into Court of the largest sum to which the debt would in probability amount. Lord Eldon said, 'I take it to be contrary to the whole course of proceeding in this Court to compel a creditor to part with his security till he has received his money. Nothing but consent can authorize me to take the estate from the plaintiff before payment.' To some extent the strictness of that rule has been relaxed in modern times, and it is now the practice, where a proper tender has been made and refused, to make an order giving the mortgagor liberty to pay into Court a stated sum sufficient to cover the amount of principal and interest and the probable costs of the suit, and then upon payment into Court, but not till then, the mortgagee is required by the order to deliver up the title deeds. It would be contrary to equity to order a mortgagee to deliver up the title deeds of property on which he has a security upon any other terms. A mortgagor

has no right even to see the deeds before payment. It is no hardship upon the mortgagor, for if he has made a proper tender he can always obtain his demands on a summary application on the terms of substituting for the security a sum of money equal to the amount secured with a proper margin. A form of order adapted to such a case is to be found in Seton on Decrees, 3rd ed., p. 1040.

"No doubt it is the duty of a mortgagee, on proper notice, or without notice in a case where notice is not required, to accept a proper tender. No doubt that duty is founded upon contract. But there are other terms of the contract of at least equal importance. A court of equity can take all the circumstances of the case into consideration, and do complete justice between the parties, however complicated their relations may be. That is not within the province or power of a jury. If a mortgagee rejects a tender he rejects it at his own risk, and in an action for redemption he may be refused his costs in consequence, or may even be ordered to pay costs. Further, a proper tender will stop the running of interest if the mortgagor keeps the money ready to pay over to the mortgagee: *Gyles* v. *Hall*, 2 P. Wms. 377. But there is no authority for saying that refusal to accept a proper tender is a breach of contract, for which an action at law will lie.

"The learned counsel for the respondent were invited to produce some authority for such an action. One case, and one case only, was cited as a precedent. In *Chilton* v. *Carrington* (15 C. B. 95, 730; 16 C. B. 206), the experiment was tried once and again."

Their Lordships, having stated that this case, so far from being an authority in favour of the respondent, is really an authority against him, conclude their judgment thus:—"Their Lordships are therefore of opinion that it is clear, both on principle and authority, that such an action as the present cannot be maintained. Under these circumstances, their Lordships do not propose to give any opinion as to the admissibility of the evidence objected to or as to the amount of the damages recovered. Those questions, in the view of their Lordships, cannot arise.

"The proper order will be to dismiss the action to allow the verdict on the counterclaim, as reduced by consent, to stand, and to direct payment to the appellants of the reduced amount, together with interest and the costs of the counterclaim.

"As to the costs of the action, having regard to the way in which the bank has acted in the conduct of the litigation, their Lordships have come to the conclusion that there ought to be no costs on either side, and there will be no costs of the appeal."

[14 *App. Cas.* 273; 58 *L. J. P. C.* 82.]

Harding (Administrator of the estate of Maria L. Harding, deceased intestate) *v.*
Howell.

Victoria. LORD FITZGERALD. *March* 9, 1889.

Liability of an administrator who was husband of the intestate. Are certain voluntary covenants by the husband to the wife enforceable against him by the next of kin (the respondent) in providing for the lawful distribution of the wife's estate? The Judicial Committee report to Her Majesty that the decision of Mr. Justice Molesworth, Primary Judge in equity, affirmed by the Full Court, was substantially correct. Having elected to become administrator (his marital right to do so in preference to all others does not admit of question) the husband, to whom the estate passed not beneficially, but as a trustee of his wife's assets, is bound to realise, apply, and distribute the estate according to law, and no matter what sales he purported to have made after the intestate's death of lands which were the subject of the prior conveyance, his liability to account for the estate began at the date of that death. Victoria Administration Act, 1872: *Ognell's Case*, 4th Coke's Reports 48b; and *Johns* v. *Rowe*, Croke's Reports, vol. 4, p. 106. Affirmed with costs.

[14 *App. Cas.* 307; 58 *L. J. P. C.* 76.]

The "Ben Voirlich" *v.* The "Maria."

H. B. M. Supreme Consular Court, Constantinople. Lord Macnaghten. *March* 9, 1889.

Collision between a British steamer, the "Ben Voirlich," of 983 tons, and a Greek schooner, the "Maria," of 128 tons, in the Grecian Archipelago. Lights of the schooner. Each of the vessels brought an action against the other. The Constantinople Court held the "Ben Voirlich" to blame, and decided both actions in favour of the schooner, which sank after the disaster. These findings the Judicial Committee now reversed. In the principal action of the "Maria" against the "Ben Voirlich," the petition would be dismissed with costs. In the cross action, the verdict would be entered for the steamer, and there must be the usual reference as to damages. The master of the "Maria" to pay the costs of the appeal. The collision happened at 2.30 a.m. on Nov. 25, 1886. The night was dark but clear. There was a conflict of evidence as to the kind of wind (if any) prevailing at the time, but a greater conflict still arose on the question as to whether the accident was not caused by the "Maria" not having her proper lights up. The case on the part of the steamer was that just before the collision a red light was flashed up somewhere on the "Maria's" starboard side, when those on board saw that they were on the point of being run down. The captain of the "Ben Voirlich" searched twice with his glasses for a green light, but none was to be seen. The evidence for the "Maria" was directed to prove that her regulation lights were in order. The evidence relating to the circumstances under which the collision occurred was taken before the Registrar. Their Lordships of the Judicial Committee, in their judgment, remarked that a consequence of this procedure was that the judge who decided the case had not the advantage of seeing the witnesses, and observing their demeanour.

The Judicial Committee, in their judgment, dwelt at length upon the evidence *pro* and *con.* There was no doubt some testimony that earlier in the evening the schooner's lights were up, but this did not prove that they were burning at 2.30 a.m. The starboard light may have gone out. The position of the vessels when they struck was of importance, and the "Ben Voirlich's" case on the proofs and on the pleadings was consistent with the statements in the log, and in a protest lodged by the master and crew on arrival at Odessa.

Their Lordships characterised as serious one incident of the evidence, from which it appeared that on the day before the evidence on the part of the "Ben Voirlich" was taken, the captain of the "Maria" called with another man at the office of the agents of the steamer (the principal there being a Mr. Gilchrist), and said to the principal in the firm that he had a proposal to make, that if the gentleman (Mr. Gilchrist) would pay him a sum of money he would exonerate the steamer. On being asked how he could do so, he said he would confess that he had no lights up.

Their Lordships go on to observe: "The captain of the 'Maria' was examined as to this offer, by the counsel on both sides. He shuffled with the questions that were put to him in such a way as to make it impossible to place any reliance on his testimony. Mr. Gilchrist was examined in Court at the trial. There can be no doubt that his evidence is perfectly trustworthy. The only way in which the learned counsel for the 'Maria' attempted to meet this evidence was by calling the transaction a proposal for a compromise."

On the whole, the Judicial Committee had no hesitation in accepting the evidence on the part of the steamer in preference to that on the part of the "Maria." The master of the "Maria" is ordered to pay the costs of the appeal. [*P. C. Ar.*]

Gossamee Sree *v.*
Rumanlolljee (son and representative of Pooroo-shottum) and Others.
(And Cross Appeal.)
(Appeal and Cross Appeal Consolidated.)

Bengal. Lord Hobhouse. *April* 3, 1889.

Title to a Shebaitship. Claims by appellant (plaintiff), as heir by primogeniture, to a consecrated picture or idol, called "Thakoor Dowjee," together with the offerings made to it, and also to a temple raised in Calcutta in honour of the Thakoor Dowjee and another sacred Thakoor. Primogeniture in Shebaitship. Customs of the Bullav Acharjee community. Subsequent gift by a devout lady (Munnee Bibi) of the temple. Limitation. Distinction in title between the two endowments.

The particulars of the dispute are set forth in the judgment of the Judicial Committee, and may be summarised thus: The plaintiff (appellant) in the principal appeal claims to be shebait of the idol, to which peculiar sanctity is attached by the Bullav Acharjee sect, or community of Vishnuvites, to which the parties belong; to the things offered to the idol; and to the possession of a temple in Calcutta in which, during recent years, the idol Dowjee has been placed. The claims are disputed by Rumanlolljee, appellant in the cross appeal and son of the original defendant, one Poorooshottum.

The plaintiff is the representative by primogeniture of the founder of the Bullav Acharjee community. Poorooshottum was a cadet of the same family. All the male members of the family are in their lifetime esteemed by their community as partaking of the divine essence, and as entitled to veneration and worship; but the head of the family has the precedence, and is styled the *tickut.* The plaintiff is the present tickut. His principal seat, apparently the principal seat of the community, was Sree Nath Dwar in Oodeypore.

The plaintiff's grandfather was named Dowjee, who was tickut in his day. In the year 1825 he paid a visit to Calcutta

and presented to his disciples there a consecrated portrait of himself, which has ever since been worshipped, and which is now the subject of contention. It is known as the Thakoor Dowjee; is one of the very numerous presentments of Krishna, and is shown by the evidence to attract many worshippers. Dowjee the mortal died in the year 1826, and he is worshipped in many places through other consecrated portraits, or images of some kind. But thenceforward for many years the connection of the tickut, or of any of the chiefs of his family, with the worship of the thakoor in Calcutta, is very obscure.

For some time prior to 1860 one Tikumjee was mookhea, or ordinary officiating priest. On his death, apparently in 1860 or 1861, his brother Govindram entered on the duties of that post, which he held till his death in 1877. Then, after a short interregnum, Sewloll, the son of Govindram, was appointed, and he apparently holds the post still. By whom these two persons were appointed, and whose servants they were, are matters of controversy.

The Thakoors Dowjee and Beharyjee were removed to the house so granted, and in the course of a few years Dowjee's worshippers, being desirous to still further exalt his worship, raised Rs. 16,000 and built a new temple (that now in dispute) on the site of the house. There are other thakoors, all presentments of Krishna, in the temple, but it was clear from the evidence that the principal object of worship is Dowjee. In 1881, the plaintiff for the first time came to Calcutta, where he was received with great ceremony by a large number of Vishnuvite worshippers, and he performed, on the day after his arrival, the solemn—apparently most solemn—ceremony of Arutty. Some two months later he began to take a more active part in the administration. He inspected the articles belonging to the idol, ordered the money in hand to be locked up, and handed the keys to one Sookloll, who is described as having been the plaintiff's jemadar for eight years in Oodeypore, and for sixteen years at Calcutta. He then demanded an account of the money received by Sewloll, the mookhea, while in charge. It was not very clear what was said or done upon this demand, except that

no accounts were rendered, and that soon afterwards quarrels broke out which culminated in a riot, and the plaintiff's people were driven from the temple. In September, 1881, the plaintiff brought his suit. The case was heard first by a single Judge of the High Court, then on appeal by a Division Bench, and finally by a Full Bench. The first Court dismissed the suit. In the Division Court, the two Judges agreed that the claim founded on custom was not made out, but decided that the plaintiff had a claim to management of the temple, as being descended from the founder. One of the Judges, Wilson, J., however, considered that the whole suit was barred by limitation. The Chief Justice, the other Judge, disagreed with Wilson, J., but as the latter's finding was based on the findings of the original Court on matters of fact, the decree of the first Court was upheld. In the Full Bench, Pigot, J., agreed with the original Court. The two other Judges agreed with the Division Court in maintaining the plaintiff's title from the founder, and considered that the bar of limitation applied to the temple, but not to the idol and moveables belonging to it. Both parties appealed. The plaintiff because he did not recover the temple as well as the management of the idol, and his adversary because the plaintiff recovered as much as he had done. The Judicial Committee reported to her Majesty that the decree below ought to be affirmed, and both appeals were dismissed. They did not, however, agree as to the finding on the point of limitation in regard to the temple. No order was made as to costs. In their judgment, the Judicial Committee first addressed themselves to the question of the plaintiff's claim to the idol or portrait, and after discussing the argument of the appellant's counsel, which sought to show that, neither by general law nor by custom is it demonstrated that the shebaitship descends to the heirs of the founder, and further, that neither by document nor trustworthy evidence had it been proved that, between the mortal Dowjee's visit in 1825 and the plaintiff's in 1881, had such heirs intervened in the affairs of the Thakoor Dowjee, made the following remarks :—

"According to Hindu law, when the worship of a thakoor

has been founded, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution. This principle is illustrated by the decision in the case of *Peet Koonwur* v. *Chutter Daree Singh*, reported in 13 W. R. p. 396, and in the present case some of the learned Judges of the High Court have affirmed it, while none have expressed dissent from it. One learned Judge thought that the principle does not apply to this case, because Dowjee was not the founder of the Calcutta worship. But their Lordships adopt the view of the other Judges, and holding that the mortal Dowjee was the founder, they must also hold that the plaintiff is by general law the shebait of the worship. . . . Their Lordships consider that the reception given to the plaintiff by the congregation of worshippers in February, 1881, and the obedience which Sewloll at first paid to his directions, show that, in their opinion, he occupied a position of the highest authority perfectly well known to them; that those events are inconsistent with the theory that his family had never intervened since the year 1825. . . . It may be that Sewloll consulted his security by taking appointments from Poorooshottum and from the committee. But his taking one from the plaintiff shows that the plaintiff was then intervening, and that his position was recognized."

After adverting to other incidents of the evidence pointing in the same direction, the Judicial Committee proceeded to deal with the question of limitation raised. "With respect to the bar by lapse of time, their Lordships do not consider this suit to be one in which the plaintiff is seeking merely personal relief. Even apart from the sixth and seventh paragraphs of the plaint, which expressly put forth his spiritual character as the foundation of his claim, the nature of the suit is for the proper conduct of the thakoor's worship. It rests quite as much on the right of the thakoor to have the conduct of his worship and his own custody placed in the right hands, as upon the personal right of the plaintiff to property. The suit would rather fall under Art. 124

or Art. 144 than Art. 49 (Limitation Act XV. of 1877). But under whichever of the three articles it falls the starting point of time is unlawful possession or adverse possession. And the evidence leads their Lordships to the conclusion that until the affray of May, 1881, there has been no possession of the thakoor or of his possessions either unlawful or adverse to the plaintiff.

"The result is, that on this part of the case their Lordships agree with the High Court, and on very nearly the same grounds as taken by the majority. . . .

"As regards the temple, the High Court thought the suit barred by time. In that their Lordships cannot agree. The ground is dedicated to the Thakoors Beharyjee and Dowjee, and, except during the building time, it has been occupied by them ever since. If the fact was that the Thakoor Dowjee had been in the custody of, and his worship been regulated by another shebait than the plaintiff for a sufficient time, the plaintiff might be barred; but the reasoning on the former part of the case disposes of that suggestion. There has been no possession of the temple adverse to the Thakoor Dowjee, and no possession of the thakoor adverse to the plaintiff till May, 1881.

"Their Lordships are of opinion that this part of the case must be governed entirely by the terms of Munnee Bibi's dedication. She gave the house and land to the two thakoors, but with the condition attached that Poorooshottum should be shebait. The Thakoor Dowjee, or those who speak for him on earth, need not take advantage of the gift. Munnee Bibi could not of her own authority alter the shebaitship of the thakoor. But if the gift is taken and the condition insisted on, it must be obeyed. It has not been insisted on, and Dowjee must elect whether to change his habitation or to change his shebait." . . .

Their Lordships further added: "There is no reason to suppose that the subscribers did not know of Munnee Bibi's deed, and there is no evidence that the subscriptions, though given to the Thakoor Dowjee, were given with any reference to the question who should be his shebait." Both appeals dismissed. No order as to costs. [*L. R.* 16 *Ind. App.* 137.]

Har Lal *v.*
Mussammat Sardar.

N. W. P. Bengal. Lord Hobhouse. *April* 3, 1889.

Title of appellant to a moiety of a village. Proceedings for mutation of names. Alleged intimidation in procuring the conveyance. The persons who should have been principal witnesses not called. Intimidation not proved. Title upheld. Decree below reversed. Respondent to pay costs. The plaintiff (respondent) is widow of one Ganesh Parshad, who had been registered as owner of the village. He was murdered in April, 1881. This man had been servant and agent in the house of one Dullia's husband, and afterwards of Dullia herself. The appellant, Har Lal, claimed the moiety of the property by gift from Dullia. In May and June, 1881, the plaintiff went before the Patwari and acknowledged Dullia's title to one-half of the village, and a mutation of names from that of Ganesh Parshad into those of the plaintiff herself and Dullia was effected, and Dullia entered into possession of her half. Subsequently the respondent said she had acted under intimidation in agreeing to the division. She alleged that Dullia had incited a caste or sect in the village, called Lodhis, who threatened her with death if she did not transfer half the estate to Dullia. The First Court disbelieved the witnesses and pronounced against the respondent. The High Court reversed the finding below and gave a decree in favour of the respondent. By reason of this conflict of decision upon the question of credibility of witnesses it became necessary for the Judicial Committee to analyse the evidence fully. To them it appeared extraordinary that the plaintiff herself, who would have been a material witness, was not called, for she was not one of those Indian ladies who could not be expected to come forward in a Court of Justice. She was in the habit of appearing in public with her face uncovered, and she did appear before the Patwari, and was examined in the mutation case. Furthermore, her general mokhtear was not called, and yet he would have been a most important witness.

"Having regard, then, to the strange nature of the plaintiff's story, to the position of her witnesses, to her conduct and theirs at the time of the alleged threats, to the contradictions, internal and external, of the evidence adduced, and to the omission of evidence that ought to have been adduced, their Lordships think that her story is entirely incredible, that the Subordinate Judge was quite right in rejecting it, that the High Court ought to have dismissed the appeal to them with costs, that a decree to that effect should now be made, and that the respondent should pay the costs of this appeal." [*I. L. R.* 11 *All.* 399.]

Cooper *v.*
Stuart.

N. S. Wales. LORD WATSON. *April* 3, 1889.

Grant of Crown lands with a reservation. Was the rule against perpetuities as established in England applied in all its entirety to New South Wales at the time the grant was made? Extent to which English law is introduced into a British colony. "Necessities of a young colony." The appellant sought to prove that the reservation for resumption in the grant was void for repugnancy. Their Lordships held, affirming two decisions below, the view that the English rule against perpetuities was not applicable to Crown grants of land, or to reservations or defeasances in such grants to take effect on some contingency more or less remote,—and only when necessary for the public good.

Sir Thomas Brisbane, then Governor-in-Chief of New South Wales and its dependencies, on the 27th May, 1823, made a grant to one William Hutchinson, his heirs and assigns, of 1,400 acres of land in the county of Cumberland and district of Sydney, "reserving to His Majesty, his heirs and successors, such timber as may be growing or to grow hereafter upon the said land which may be deemed fit for naval purposes; also such parts of the said land as are now or shall hereafter be required by the proper officer of His Majesty's Government for a highway

or highways; and, further, any quantity of water, and any quantity of land, not exceeding ten acres, in any part of the said grant, as may be required for public purposes; provided always, that such water or land so required shall not interfere with, or in any manner injure or prevent the due working of the water mills erected or to be erected on the lands and water-courses hereby granted."

The appellant is the successor in title of William Hutchinson, the original grantee.

By a proclamation, dated the 4th November, 1882, Lord Augustus Loftus, the Governor of the colony, in pursuance of the reservation in the grant, and on the recital that the land (the subject of this action) *was required for a public park, gave notice that he thereby resumed and took possession on behalf of the Government of the colony of a parcel of land ten acres in extent,* being part of the 1,400 acres granted to the predecessor in title of the appellant, to the intent that these ten acres should revest in Her Majesty to be used as and for a public park. In terms of the proclamation the Government fenced off the land and excluded the appellant. The appellant then took his action, praying that the reservation might be declared void, that an injunction be issued, and that an account should be taken of the damage caused. He conceded that, assuming the reserved power to be valid in law, it has been duly exercised. After references to Blackstone, 1 Com. 107; *vide* also 1 Salk. 411, 666; *Jex* v. *McKinney and Others* (14 App. Cas. 77), on the question of the extent to which English law is introduced into infant British colonies, the Judicial Committee in their judgment make the following important observations:—

"The rule against perpetuities, as applied to persons and gifts of a private character, though not finally settled in all its details until a comparatively recent date, is, in its principle, an important feature of the common law of England. To that extent it appears to be founded upon plain considerations of policy, and, in some shape or other, finds a place in most, if not all, complete systems of jurisprudence. Their Lordships see no reason to suppose that the rule, so limited, is not required in

New South Wales by the same considerations which have led to its introduction here, or that its operation in that colony would be less beneficial than in England. The learned Judges of the Supreme Court of the colony, in deciding this case, proceed on the assumption that the rule applies there as between subject and subject; and their Lordships are of opinion that the assumption is well founded.

"Assuming next (but for the purposes of this argument only) that the rule has, in England, been extended to the Crown, its suitability, when so applied, to the necessities of a young colony raises a very different question. The object of the Government, in giving off public lands to settlers, is not so much to dispose of the land to pecuniary profit as to attract other colonists. It is simply impossible to foresee what land will be required for public uses before the immigrants arrive who are to constitute the public. Their prospective wants can only be provided for in two ways, either by reserving from settlement portions of land, which may prove to be useless for the purpose for which they are reserved, or by making grants of lands in settlement, retaining the right to resume such parts as may be found necessary for the uses of an increased population. To adopt the first of these methods might tend to defeat the very objects which it is the duty of a colonial governor to promote; and a rule which rests on considerations of public policy cannot be said to be reasonably applied when its application may probably lead to that result.

"Their Lordships have accordingly come to the conclusion that, assuming the Crown to be affected by the rule against perpetuities in England, it was nevertheless inapplicable, in the year 1823, to Crown grants of land in the colony of New South Wales, or to reservations or defeasances in such grants to take effect on some contingency more or less remote, and only when necessary for the public good.

"The decision in the Courts below, with the result of which their Lordships entirely agree, went very much on the case of *Lord* v. *Commissioners of Sydney* (12 Moo. P. C. C. p. 473), and if the decision in that case had been directly applicable it

would have been one which their Lordships would have been bound to follow. But though the decision is not directly in point, its circumstances throw some light upon the present question. It was an action for compensation under the Sydney Water Act of 1853. The compensation sought and awarded was in respect of putting in force a reservation under a grant of 1810, made by Governor Macquarie in terms identical with the grant of 1823, and the Water Act seems fully to recognize the validity of such reservations.

"Their Lordships will, therefore, humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and this appeal dismissed. The appellant must pay the costs of the appeal." [14 *App. Cas.* 286; 58 *L. J. P. C.* 93.]

Srimati Hemangini Dasi *v.*
Kedar Nath Kundu Chowdhry.

Bengal. Sir Richard Couch. *April* 3, 1889.

Hindu law as to maintenance. Suit by a widow against a stepson for moneys to meet maintenance and the expenses of religious acts, and that the said moneys should be declared a charge upon estate. Effect of partition. Mothers must be maintained by *their own sons*, and not stepsons. The facts and the authorities cited are set forth in the judgment of the Judicial Committee, which affirmed the decree of the High Court. Their Lordships said:

"The appellant is the widow of Tara Churn Kundu, who died on the 19th of April, 1865. He left one son, Hurrish Chunder, by the appellant, and two sons, Kedar Nath (the respondent) and Annoda Pershad, by another wife, who died before him. Annoda Pershad died in June, 1882, leaving a will by which Kedar Nath was appointed executor of his estate. The suit was brought on the 13th September, 1884, by the appellant, against Kedar Nath in his own right and as executor

to the estate of Annoda Pershad, and against Hurrish Chunder, and the plaint prayed to have it held that the plaintiff was entitled to get Rs. 500 a month from the properties left by her husband for the expenses of her religious acts and her maintenance, and that the Rs. 500 a month might be declared to be a charge upon the whole of his estate. It also prayed for a decree for Rs. 3,016. 9. 3. 1. 1 krant, on account of maintenance for the past six months and one day. After the institution of the suit, and before the filing, on the 6th December, 1884, of a written statement by Kedar Nath, Hurrish Chunder, who attained his majority on the 3rd November, 1882, instituted two suits against Kedar Nath and others, members of another branch of the family who were co-sharers with Tara Churn in different properties, for a partition of the joint family property. This was set out in the written statement of Kedar Nath, and it was pleaded that if the plaintiff was entitled to any maintenance her claim to it would lie against her son, to be paid out of his share of the joint property which would be allotted to him after partition. On the 20th February, 1886, decrees for partition were made in those suits. The judgment of the High Court on appeal from the Subordinate Judge was given on the 29th July, 1886, and they held, contrary to the decision of the Subordinate Judge, that subsequently to the decree for partition the plaintiff was entitled to maintenance only against the share allotted to her son; and as to the claim for past maintenance, which was for the period since the family had separated, in food and worship, she, having been maintained in the family of her son, could not claim maintenance from her stepsons or their shares, though her son might possibly claim contribution. Accordingly they dismissed the suit as against Kedar Nath.

"The decision as to the arrears has not been questioned before their Lordships, and they entertain no doubt that the High Court was right in taking into consideration the decree for partition. The main question is one upon which there is no distinct text in the Hindu law books. So long as the estate left by Tara Churn remained joint and undivided, the plaintiff was no doubt entitled to claim her maintenance out of

the whole estate. Does that right continue to exist after partition, or is there substituted for it a right to maintenance out of her son's share? According to the Daya Bhaga, ch. 3, sect. 1, vs. 12, 13, where there are many sons of one man by different mothers, but equal in number and alike by class, partition may be made by the allotment of shares to the mothers, and while the mother lives the sons have not power to make a partition among themselves without her consent. In this case the mother seems to take on behalf of her sons. It would seem to follow that, after such a partition, a mother's right to maintenance would be out of the share she took, and not out of shares taken by the other mothers.

"When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of or by way of provision for the maintenance for which the partitioned estate is already bound, and thus it is material to see in what way she takes a share. According to Jímútaváhana it is a settled rule that a widow shall receive from sons who were born of her an equal share with them, and she cannot receive a share from the children of another wife; therefore she can only receive her share from her own sons. (Col. Dig. Book 5, ch. 2, v. 89; 3rd ed., vol. 2, p. 255.) In Sir F. Macnaghten's Considerations on Hindu Law, p. 62, a case in the Supreme Court, of *Sree Mootee Jeeomony Dossee* v. *Atmaram Ghose*, is reported, which was a suit for partition, where a man died leaving two widows and three sons by one, and one son, Atmaram, by Luchapriah the other; and it is said that it was understood and admitted that Luchapriah was not entitled to any separate property upon a partition made between her only son and his three half-brothers, and that she was to look to him for her maintenance.

"The Subordinate Judge in his judgment said the question who was to give the maintenance never properly arose in that suit in the absence of Luchapriah, and if any such question was then decided it was an *obiter dictum*. The question did arise between Atmaram and his half-brothers, and if the contention of the present appellant, that the maintenance is a charge upon the estate and to be taken into account in making the partition,

is right, the Court should have provided for it. The case appears to be a direct authority upon the question in this appeal. Then there is a case reported at p. 75, where a man had three sons by his first wife, two by his second, and two by his third, and all survived him. In a suit for partition it was declared, in accordance with the authority in Col. Dig. before noticed, that the first wife was entitled to one-fourth of the three seven parts of her sons, and the second wife to one-third of the two seven parts of her sons. Nothing is said as to the third wife, one of whose sons had died, and she was his heir.

"The argument addressed to their Lordships for the appellant was that the maintenance is a charge on the estate, and, like debts, must be provided for previous to partition. But the analogy is not complete. The right of a widow to maintenance is founded on relationship, and differs from debts. On the death of the husband, his heirs take the whole estate, and if a mother on a partition among her sons takes a share, it is taken in lieu of maintenance. Where there are several groups of sons, the maintenance of their mothers must, so long as the estate remains joint, be a charge upon the whole estate; but when a partition is made, the law appears to be that their maintenance is distributed according to relationship, the sons of each mother being bound to maintain her. The stepsons are not under the same obligation.

"Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and dismiss the appeal. The appellant will pay the costs of it.

[*L. R.* 16 *Ind. App.* 115; *I. L. R.* 16 *Calc.* 758.]

Syed Rajab Ali *v.*

Syed Amir Hossein and Others.

[*Ex parte.*]

Bengal. LORD WATSON. *April* 3, 1889.

Discretion of a Court to enlarge the time allowed for finding security for an appeal. The High Court judges, considering

that they had not discretion, refused to extend the time for lodging security for an appeal to them. They, however, granted leave to appeal to Her Majesty in Council. The Judicial Committee, in reporting to Her Majesty that the appeal ought to be dismissed, said: "Their Lordships have come to the conclusion that this appeal ought not to be allowed. They are not disposed to agree with the view taken by the learned Judges of the High Court, to the effect that the Court had no discretion to enlarge the time allowed for finding security, or to accept another security in lieu of the bond which had been filed by the appellant upon the 2nd April, 1885. At the same time they are very clearly of opinion, in the circumstances of the case, that if the Court had assumed the discretionary power which their Lordships think they possess, they would not have exercised it rightly if they had acceded to the motion which is said to have been made on behalf of the appellant.

"Their Lordships will humbly report to Her Majesty that this appeal ought to be dismissed." [*P. C. Ar.*]

Syed Lutf Ali Khan *v.*
Futteh Bahadoor and Others.

[*Ex parte.*]

Bengal. Sir Richard Couch. *April* 6, 1889.

Claim for possession of lands acquired by purchase at a sale in execution of a mortgage. Whether the title of the purchaser can be defeated by reason of the mortgagor's purchase of a second mortgage. Judgment below varied. The principal respondent, Futteh Bahadoor, was proprietor of a share of an estate called Jugdispore, and also of an estate called Ranipore. In 1875, having borrowed Rs. 35,000 from Haji Nawab Syed Velait Ali, the second respondent, mortgaged one third share of Jugdispore and Ranipore respectively and certain smaller villages to the latter. In case of default Velait Ali was to be at liberty to realise the principal, with interest, by instituting a suit and

obtaining a decree and executing the same. In 1877 Futteh Bahadoor executed another mortgage, pledging another one third share of Ranipore and the same one third share of Jugdispore to one Juggernath Singh (the third respondent) and another person named Baijnath Singh. In 1878 Velait Ali sued Futteh Bahadoor for the principal and interest due upon the mortgage, but an agreement was come to between Futteh and Velait by which Futteh was to admit the greater portion of the claim. On this footing a decree was made and the mortgage was to stand over until December, 1879. Default having been made, Velait in 1880 obtained a decree for attachment of the interest of the debtor, comprising the one third of Ranipore and the one third of Jugdispore mortgaged in the bond and decree. On May, 20, 1880, attachment was made. In the meantime one Jugul Kishwar, who seems to have taken the place of Juggernath Singh and Baijnath Singh, had on the 2nd April, 1879, obtained a decree against Futteh on the second mortgage. Sales in both executions were fixed for November, 1880, but on the application of Futteh were postponed: that relating to the first mortgage until January, 1881, and that on the second mortgage until November 22, 1880. On the last-named day the properties in the second mortgage were knocked down for Rs. 9 only to one Gunga Pershad, who had been in the service of Juggernath. In February, 1881, this person executed a deed of sale of his purchase for Rs. 100 to one Ram Padaruth. Both the High Court and the Judicial Committee agree that this person was really benamidar for Futteh, the mortgagor. The sale in execution of Velait Ali Khan's decree, which decree, it has been stated, was made by consent upon his agreeing to relinquish part of his claim and give time for payment, took place on the 15th January, 1881. At that sale the appellant became the purchaser of the share of Ranipore for Rs. 12,000, and of the share of Jugdispore, &c. for Rs. 36,000, the sum to be realised by the execution being Rs. 61,265-6, and there was consequently not sufficient to satisfy the mortgage by upwards of Rs. 13,000. Subsequently the appellant was unable to obtain possession, and he therefore brought the present suit. In

it he claimed possession, or if that was not granted a decree for Rs. 36,000, and interest thereon. He also claimed a similar decree for the share of Ranipore, but there is no dispute as to that now, as the appellant did obtain a decree for possession of that property. All the persons interested in the various properties were made parties.

The Subordinate Judge, acting on his finding that Ram Padaruth was the purchaser, ordered that if he did not pay Rs. 36,000, with interest up to the 3rd April, 1884, the plaintiff (appellant) should have power to realise that sum by a sale of the third share of Jugdispore, &c. Ram Padaruth appealed to the High Court, which held that the decree could not be made against him, as he was benamidar for the mortgagor. A decree should be made, however, giving the plaintiff "the benefit of that to which he is entitled, namely, his mortgage lien," and the Judges directed an inquiry as to how much of the mortgage was chargeable upon that portion of the property which formed the subject of that appeal, and directed that so much of the mortgage debt might be realised by the sale of that property. The Judicial Committee consider that the decree of the High Court should be varied, and make the following observations :—

"The direction, and the inquiry upon which it is consequent, seem to be founded on some misapprehension. The High Court treat the appellant as mortgagee in respect of his purchase, and at the same time refuse to give him a charge for the full amount of his purchase-money. As between the appellant and the other parties to the suit there can be no ground for apportioning the original mortgage debt in the manner proposed. . . . Upon the facts which have been stated, their Lordships are of opinion that it would be contrary to equity to allow Futteh Bahadoor to set up against the title of the appellant any right to possession as acquired by his purchase from Gunga Pershad. The sale to the appellant was in the execution of a decree which was made to give effect to a compromise between the mortgagor and the mortgagee. He undoubtedly acquired by his purchase a right to possession against the mortgagor, and the mortgagor ought

not to be allowed to defeat that by having purchased the interest which was sold in execution of the decree upon the second mortgage. The High Court, instead of varying the decree of the lower Court in the manner it has done, should, in their Lordships' opinion, have varied it by decreeing possession of the share of Jugdispore, &c., as there described, in the same manner as possession of the share of Ranipore is decreed, with the like order as to mesne profits and costs."

Futteh is ordered to pay the costs of the appeal.

[*L. R.* 16 *Ind. App.* 129; *I. L. R.* 17 *Calc.* 23.]

Nawab Muhammad Amunulla Khan *v.* **Badan Singh** and Others.

[*Ex parte.*]

Punjaub. Sir Richard Couch. *April* 10, 1889.

Claim to possession of land. Suit barred by limitation. Article 142, Act XV. of 1877. Art. 144 does not apply. Judgment below affirmed. The original plaintiffs, now represented by the appellant, were descendants of one Lutuffulla Sadik, who had held the land or farm in dispute as Mafi. It was immaterial when the title commenced. In 1837 the Mafi was resumed, and at that time the ancestors of the plaintiffs, who had the Mafi, were offered by Government an engagement for payment of land revenue. They declined to take the land on this condition. The defendants (respondents), who have been called Lambardars, and as such represented the villagers, and who already held a large quantity of land, were asked by Government to take up the engagement. For some years, owing to misunderstandings, the negotiation with the defendants was not completed, and the Government appears to have held the land as khas. In 1842, however, a settlement was made with them and with other representatives of the villagers, for the whole of the village, including the land which is the subject of this suit, and making no distinction between the way

in which this land and the other land, of which the villagers were undoubted proprietors, was to be held. The settlement was to expire in 1872. On a revision of settlement in 1879, the plaintiffs applied for what they called a cancelment of the farm to the defendants, and to have possession of their ancestral estate. The defendants refused to surrender the land, and the suit was then brought. The first question raised, was whether the plaintiffs, or rather their ancestors, were proprietors. Upon this, the Commissioner before whom the case came by way of appeal from the officiating Judicial Commissioner of Delhi, held that they were proprietors. This finding was conclusive in a further appeal to the Chief Court, and no question remains respecting the point. The second and more important issue raised, was whether or no the suit is barred by limitation. As to this, the Chief Court, upon the further appeal from the decision of the Commissioner, has held that it was barred, and the Judicial Committee now support this conclusion. In their Lordships' view, the suit was barred under sect. 142 of the Act, which lays down that in a suit for immoveable property, when the plaintiff, while in possession of the property, had been dispossessed or has discontinued the possession, the time from which the period for bringing the suit begins to run is the date of the dispossession or discontinuance. It appears to their Lordships to be clear that when there was this refusal on the part of the plaintiffs or their ancestors to make the engagement for the payment of the revenue, and the Government made the engagement with the villagers (the respondents), there was a dispossession or a discontinuance within the meaning of this Article. Commenting on a doubt which appears to have been felt by some of the Judges below as to what was the effect of the law of limitation in cases of this description, their Lordships say the doubt "seems to have arisen from the introduction of some opinion that there must be what is called adverse possession. It is unnecessary to enter upon that inquiry. *Art.* 144 *as to adverse possession only applies where there is no other article which specially provides for the case.*" Appeal dismissed.

[*L. R.* 16 *Ind. App.* 148; *I. L. R.* 17 *Calc.* 137.]

Tiluckdhari Singh and Others *v.* Chulhan Mahton.

[*Ex parte.*]

Bengal. LORD MACNAGHTEN. *April* 10, 1889.

"Abwabs" case. Are such payments or cesses over and above rent now recoverable by appellants? Regulation 8 of 1793, sects. 54, 55, and 61. Judgment of the High Court against recovery of the cesses upheld. The appellants sought to recover certain sums, which were entered in the zemindary papers as customary abwabs, from the respondent, their tenant. The respondent admitted that he was a tenant, and that he held the lands, some on payment of *nakdi* or cash rent, and other portions on payment of *bhaoli* rent (payment in produce), but he opposed the present claims on the ground that invalid abwabs and cesses were demanded from him over and above what he had a right to pay. The Subordinate Judge pronounced against the realisation of the objectionable abwabs under the law, but on first appeal the District Judge reversed this finding. As regards the nakdi or cash rent, he held that it was certainly payable. As regards bhaoli, he observed that the landlord only got a share, not half of the produce, and the ryots were by custom called upon to meet this cess. The expense of irrigation, &c., fell on the landlord, and if this payment to meet the outlay on irrigation was converted into a payment in cash, the landlords might neglect to keep the lands in good order. On the bhaoli claims he did not think the amounts asked for were excessive. The case was taken by the respondent on second appeal to the High Court, who referred this question to a Full Bench of five judges: "Whether, assuming that the abwabs in question have by the custom of the estate of which the lands form part been paid by the defendant and his ancestors for a good many years, they are legally recoverable by the plaintiff, although they are not actually proved to have been paid or payable before the time of the permanent settlement?" The Full Bench, having taken into consideration Regulation VIII. of

1793, Regulation V. of 1812, s. 3, Act X. of 1859, s. 10, and Act VIII. (Bengal Council) of 1869, s. 11, answered the question in the negative, and directed the suit to be dismissed. The Judicial Committee now upheld the decision of the Full Bench. Their Lordships gave their reasons thus: "The first question seems to be this, Are these payments, over and above rent, properly so called, abwabs within the meaning of the word as used in Regulation VIII. of 1793? They are described in the plaint as 'old usual abwabs,' and they are also described as abwabs in the zemindary accounts. It appears to their Lordships that the High Court was perfectly right in treating them as abwabs, and not as part of the rent. Unquestionably they have been paid for a long period—how long does not appear. They are said to have been paid according to long-standing custom. Whether that means that they were payable at the time of the permanent settlement or not is not plain. If they were payable at the time of the permanent settlement, they ought to have been consolidated with the rent under sect. 54 of Regulation VIII. of 1793. Not being so consolidated, they cannot now be recovered under sect. 61 of that Regulation. If they were not payable at the time of the permanent settlement, they would come under the description of new abwabs in sect. 55, and they would be in that case illegal. Under these circumstances, it appears to their Lordships that the High Court was right in treating them as payments or cesses which could not be recovered." Appeal dismissed.

[*L. R.* 16 *Ind. App.* 152; *I. L. R.* 17 *Calc.* 131.]

Navivahoo and Others *v.*
Turner (Official Assignee) and Others.

Bombay. Lord Hobhouse. *April* 12, 1889.

Is execution of a judgment barred by Limitation Act XV. of 1877, art. 180? Indian Insolvency Act (11 & 12 Vict. c. 21), s. 86. No *scire facias* necessary to revive or execute judgment on account of lapse of time. "Ordinary original

jurisdiction" of the High Court. Charter of justice. Appeal dismissed, with a variation necessitated by reason of the High Court (after the appeal to her Majesty in Council was presented) making an amended remand order.

The appellants were the representatives of an insolvent against whom a judgment of the Insolvency Court had, on 19th August, 1868, been *entered up* in the High Court of Bombay under sect. 86 of the Insolvency Act. The judgment was given in favour of the Official Assignee for a sum exceeding sixteen millions of rupees. Nothing further in process seems to have been done until April, 1886, when, as the result of an application, the Insolvency Court, as provided by sect. 86, gave its sanction to execution being made against the insolvent's future property. In April, 1886, the respondents, having been summoned to show cause why the judgment should not be executed, assigned as cause that under the Limitation Act XV. of 1877, execution was barred. The suit upon the question thus raised came before a single Judge of the High Court (Scott, J.), who held that sect. 86 of the Insolvency Act did not exclude the operation of the law of limitation. On appeal, the High Court reversed this decision, holding that the law of limitation did not apply. The Judges of the High Court differed, however, in their reasons. The conclusion arrived at was now upheld by the Judicial Committee, the material portion of their Lordships' judgment being as follows: "By Article 180 (Act XV. of 1877) an application to enforce a judgment of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction is barred unless made within twelve years from the time when a present right to enforce the judgment accrues to some person capable of releasing the right. By Article 179, an application for the execution of a decree or order of any civil Court not provided for by No. 180 or by the Code of Civil Procedure, sect. 230, is barred unless made within three years from various points of time. It may be taken, for the purpose of the present case, that the starting point of time would be in the year 1868. By Article 178, an application for which no period is provided elsewhere in the schedule to the Act or by the Code

of Civil Procedure, sect. 230, is barred unless made within three years from the time when the right to apply accrues. The case was heard before Mr. Justice Scott, who held that the application was barred by time. From his judgment, it is to be gathered that he thought the case was governed by either Article 179 or Article 180, but it does not appear which. There is a great difference between the two; for Article 179 assigns a fixed starting point of time, whereas Article 180 assigns one that is dependent on the right to enforce the judgment. On the appeal of the Official Assignee, the case was heard before Chief Justice Sargent and Mr. Justice West, who reversed the order of the Court below, and directed that execution should issue. West, J., held that the case falls under Article 180, and that *no present right accrued* till the order of the Insolvency Court, made on the 5th April, 1886. Sargent, C. J., held that the case is not provided for by the Limitation Act at all. From this order of the High Court the present appeal is brought. And the first question is, Whether the judgment of 1868 was entered up in exercise of the ordinary original civil jurisdiction of the Supreme Court? By sect. 86 of the Indian Insolvency Act, it is provided that the Insolvency Court may direct a judgment to be entered up in the Supreme Court; that the production of the order of the Insolvency Court shall be sufficient authority to the officer of the Supreme Court for entering up the judgment; that if at any time it shall appear to the satisfaction of the Insolvency Court that the insolvent is of ability, or has left assets, to pay debts, that Court may order execution to be taken out upon the judgment; that such further proceedings may be had upon the judgment as the Insolvency Court may from time to time order, until the debts are fully paid; and that no *scire facias* shall be necessary to revive or to execute the judgment on account of any lapse of time, but execution shall at all times issue thereon by virtue of the order of the Insolvency Court from time to time. By the High Court Act of 1861, her Majesty received power to erect High Courts, and sect. 11 enacts that all provisions applicable to the Supreme Courts and to their Judges shall be taken as applicable to such

High Courts and to their Judges respectively. The Royal Charter which regulates the Bombay High Court under the provisions of the High Court Act, is dated the 28th of December, 1865. Sects. 11 to 18 are a group of clauses headed 'Civil Jurisdiction of the High Court.' Sects. 11 and 12 describe the local limits of the ordinary original civil jurisdiction, which is said to extend to all kinds of suits within those limits except small cause suits. Sect. 13 gives to the High Court power to remove and to try as a Court of extraordinary original jurisdiction any suit falling within the jurisdiction of any Court subject to its superintendence, when it shall think proper, either on agreement of the parties, or for the purposes of justice. Sects. 15 and 16 confer appellate jurisdiction. Sect. 17 confers authority over infants, idiots, and lunatics. Sect. 18 ordains that the Court for relief of insolvent debtors shall be held before one of the Judges of the High Court, and that the High Court and any such Judge shall have such powers as are constituted by the laws relating to insolvent debtors in India. From this brief statement of the material statutes and charters, it appears that though the Insolvency Court determines the substance of the questions relating to the insolvent's estate, such as the amount of the judgment to be entered up against him, and the propriety of issuing execution upon it, the proceedings in execution are the proceedings of the High Court, and the judgment itself is the judgment of the High Court. And it is clearly entered up in the exercise of civil jurisdiction and of original jurisdiction.

"But it was strongly contended at the bar that this jurisdiction, though civil and original, was not ordinary; and Mr. Rigby argued that the passages of the charter which have just been epitomized, divide the jurisdiction into four classes: ordinary original, extraordinary original, appellate, and those special matters which are the subject of special and separate provisions. But their Lordships are of opinion that the expression 'ordinary jurisdiction' embraces all such as is exercised in the ordinary course of law, and without any special steps being necessary to assume it; and that it is opposed to extraordinary jurisdiction, which the Court may assume at its dis-

cretion upon special occasions and by special orders. They are confirmed in this view by observing the next group of clauses, which indicate the law to be applied by the Court to the various classes of cases; there is not a fourfold division of jurisdiction, but a threefold one, into ordinary, extraordinary, and appellate. The judgment of 1868 was entered up by the High Court, not by way of special or discretionary action, but in the ordinary course of the duty cast upon it by law, according to which every other case of the same kind would be dealt with. It was therefore entered up in exercise of the ordinary original civil jurisdiction of the High Court; and no present right accrued to the Official Assignee to move for execution until the order of the 5th April, 1886, was made. The order of the High Court which is appealed from is dated the 10th December, 1886. After the appeal was presented, and on the 2nd March, 1888, *the High Court amended the order by remanding the case to the Court below, with a declaration that the application for execution was not barred, instead of directing execution at once. Strictly speaking, such an alteration of the order appealed from was beyond the competence of the Court, but their Lordships accept the alteration as indicating the opinion of the High Court as to the best form of order*. The present order, therefore, should be that of 1886 as varied by the High Court itself in 1888. Subject to this variation, the appeal must be dismissed and with costs, and their Lordships will humbly advise her Majesty to this effect."

[*L. R.* 16 *Ind. App.* 156; *I. L. R.* 13 *Bom.* 520.]

The Australasian Steam Navigation Co. (Owners of s.s. "Victoria") *v.*
William Howard Smith and Sons (Owners of s.s. "Keilawarra."

(Two Consolidated Appeals.)

New South Wales. LORD BRAMWELL. *May* 9, 1889.

Collision. Rules for a new trial not maintainable unless amended. Failure to argue. Rules discharged. Judicial

Committee report that the decision below ought not to be interfered with. In this case there were two actions brought, one by the appellants and the other by the respondents, arising out of a collision which occurred in a cutting, or in a space between two channels of certain cuttings, of the Brisbane river. At the trial the Chief Justice directed the jury that the space between the two channels was not a narrow channel within the 7th Regulation of the Queensland Regulations for Ports and Harbours, and *this issue both parties treated as one which should be decided by the judge and not by the jury.* A verdict was found for the respondents in both actions. Thereupon the appellants applied for new trials in each action, on the ground that the Chief Justice should have directed the jury that the space between the outer and inner cuttings—the alleged site of the collision—was a narrow channel within the meaning of the Queensland Regulation Act, 1876, and of the Regulations thereunder. If it was such the "Keilawarra" should by those Regulations have allowed the "Victoria" to pass through the said narrow channel first, as prescribed thereby. When the rules *nisi* came on for argument to show cause why they should not be made absolute, the appellants applied that the rules *nisi* might be amended by it being required that the Judge ought to have left it to the jury whether or no the place in question was a narrow channel. Unless there was such amendment it was impossible to maintain the rules. The Court considered that such amendment at that stage would substitute a question not raised at the trial, and if granted would change the character of the rules *nisi*. The rules were accordingly discharged, but leave to appeal to her Majesty in Council was granted. The Judicial Committee reported that the consolidated appeals of the appellants ought to be dismissed. They said it was impossible that there could be any appeal from a decision so acquiesced in. The Court appealed from had the whole matter before them and determined that they would not grant the amendment, and it was impossible for their Lordships to reverse that exercise of their discretion under the circumstances of this case. In expressing their opinion they guard themselves against saying

that the channel, the place where the accident is supposed to have taken place, was or was not a narrow channel, nor whether the question as to that was or was not properly one for the judge or jury. Appeals dismissed with costs.

[14 *App. Cas.* 318; 58 *L. J. P. C.* 101.]

Tarachurn Chatterji *v.*
Suresh Chunder Mookerji and Others (Minors, by their next friend Thakomoni Debi).

Bengal. SIR RICHARD COUCH. *May* 14, 1889.

Heirship to joint family property. Construction of wills. Definition of dakhilkar. The relationship of the parties is set forth thus:—The appellant (one of the defendants in the suit) is the son of Anund Chunder, who died in 1850. The respondents (the plaintiffs in the suit) are the grandsons (by his daughter) of Madhub Chunder, the brother of Anund. Anund and Madhub originally shared the joint estate between them. Anund died in October, 1845, leaving, as has been said, one son, Tarrachurn (the appellant). The other brother, Madhub, had a son, Kali Churn, who died in October, 1853 (and it was important that he had attained majority before his death) and a daughter, Thakomoni, mother of the respondents. Kali Churn left a widow, Matangini, who died in 1879. At Kali's death his stepmother, Srimati Debi, widow of Madhub, was also alive. The property in suit is the share of Madhub in the joint estate of himself and Anund, and the respondents are entitled to it by inheritance if it is not disposed of by the will of Madhub (No. 1 will in the controversy), which was made shortly before his death, or by the will of Kali Churn (No. 2 will in the controversy), by virtue of one or other of which the appellant Tarrachurn claimed to be entitled to the property. Questions arising upon the construction of the wills were—(1) whether Madhub made an absolute gift to Kali when he reached majority; (2) whether his widow, Srimati, could take advantage of a power to adopt

once the property had vested in Kali Churn and *his* widow; (3) what was the exact nature of Kali Churn's directions as to the administration of the estate as left by him; (4) whether he intended that Srimati and Tarrachurn were in fact to act as trustees for Kali's widow and the lawful heirs of the deceased; or (5) whether he intended that Tarrachurn on attaining majority, which he did not do till after Kali's death, was to take the estate for his own benefit. The Judicial Committee, after hearing exhaustive arguments on both wills, report that the decree of the High Court in favour of the plaintiffs (the respondents) ought to be upheld, with a variation as to the costs in the Courts below. These the Committee considered should be paid out of Kali Churn's estate. The variation is not to affect the costs of the appeal, which are to be paid by the appellant. Their Lordships agree with the High Court below as to the definition to be given to the word "dakhilkar," which, though originally meaning occupant, must, in this case, be construed from the context in which the expression occurs. They also agree with the High Court in the finding that on Kali's death after coming of age leaving a widow Matangini, Madhub's wife, Srimati Debi, would no longer have power to adopt a son, the estate having become vested in Kali's widow (*Thayammal* v. *Venkatarama Aiyan*, L. R. 14 Ind. App. 67, followed). The rest of the conclusions of the Committee are thus stated in the judgment: "Their Lordships are of opinion that the proper construction of the will (Kali Churn's will) is, that it provided for the management of the property on the death of Kali Churn, and gave power to his widow to adopt under certain limitations; that on his death his widow, Matangini, became entitled to his estate, and on her death the plaintiffs became entitled." This was the opinion of the High Court, reversing the decree of the first Court.

[*L. R.* 16 *Ind. App.* 166; *I. L. R.* 17 *Calc.* 122.]

Gregson *v.*
Raja Sri Sri Aditya Deb.

Bengal. LORD HOBHOUSE. *May* 14, 1889.

Suit by the appellant for specific performance of an agreement. Ratification. The liability was incurred by the Zemindar of Patkum (the respondent), who agreed to accept a loan in order to release himself from the restraint of having his estate managed under the Incumbered Estates Act VI. of 1876. Contract for lease and mortgage of the zemindary in consideration for the loan. Is the contract contrary to the policy of the Incumbered Estates Acts (VI. of 1876, and the preceding Act V. of 1884)? Is the agreement of such a character as to be the proper subject of a decree for specific performance? Under the terms the lease was to run for nineteen years from 1884. When the agreement was first entered upon, the estate was being administered by the Commissioners of Incumbered Estates. Subsequently, on payment of the debts on the estate, it was released, and the Zemindar then appeared to have ratified the preliminary contract. Much importance now depended on the powers of the incumbered estates authorities to release estates. The whole issues in the case were, whether the respondent had first of all capacity to enter upon such an agreement, and afterwards whether he became *sui juris* and could ratify it. The respondent contended that the decree of the High Court was right; that the contract was invalid under the Act, and that it was incompetent for a null contract to be susceptible of ratification. Their Lordships consider that the contract was binding upon the respondent, though its terms are to be ascertained by what passed when he was disabled from contracting, and declare that the High Court should have dismissed with costs the appeal from the Sub-Judge of Purulia, who pronounced the agreement valid. Their Lordships also said, that if the appellant desires to have an account of the profits of the property during the time he has been kept out of possession, he has a right to that, he on his part accounting

for the rents which would have been due from him. The respondent must pay the costs of the appeal.

[*L. R.* 16 *Ind. App.* 221; *I. L. R.* 17 *Calc.* 223.]

Jeanneret *v.* Bailey.

New South Wales. LORD WATSON. *May* 14, 1889.

Accident through collision of a horse and cart with a tram motor. Culpability. Verdict with damages given. Appeal against a decision which discharged a rule for a new trial. Their Lordships, considering that the questions were very suitable for consideration of the jury, upheld the decision below. The judgment of the Judicial Committee was as follows:—

"Their Lordships have no difficulty in holding that the judgment of the Court below discharging the rule ought not to be disturbed. The case involves questions of fact very suitable for the consideration of a jury. The statements of the witnesses upon some points are not altogether consistent; but it is obvious that, before the appellant's steam motor with a long tramcar attached came within thirty yards of the respondent's horse and cart, the horse had got into a condition which is variously described by the witnesses as 'restive,' 'fractious,' 'plunging about'; and one of the appellant's own witnesses states that it was easy for anyone to see that the horse was then restive and disturbed by the tram. At that time the horse had turned across the street, and the respondent was at its head, close to the tramway rails; and it is certain that, if the motor had been stopped before it reached the horse, the respondent would not have been injured.

"In these circumstances, the jury had to consider whether the excitement of the horse, and the position of the respondent, were visibly such that common prudence ought to have dictated to the driver of the motor the necessity of stopping, which he could easily have done, his own evidence being to the effect that

he could have pulled up within a couple of yards. It is not for their Lordships to say what verdict they would have found if they had been in the place of the jury. But it is, in their opinion, impossible to say that the jury could not, upon the evidence before them, honestly and reasonably take a view of the facts which necessarily implied fault on the part of the driver. Under these circumstances there can be no reason for interfering with their verdict." Appeal dismissed with costs.

[*P. C. Ar.*]

Australasian Steam Navigation Co. (Owners of the s.s. "Birksgate") *v.*
William Howard Smith & Sons, Limited (Owners of the s.s. "Barrabool"); and
The Owners of the "Barrabool" *v.*
The Australasian Steam Navigation Co.

(Consolidated Appeals.)

New South Wales. LORD WATSON. *May* 21, 1889.

Collision. Cross actions. Effect of having separate trials. Opposite verdicts. Opposite rules. These two actions were tried at different periods, although they were with respect to the same collision, which happened on 9th August, 1883, within the limits of the harbour of Port Jackson. In the first action, the "Birksgate" against the "Barrabool," the jury found the "Barrabool" alone to blame.

In the second action, the jury found the "Birksgate" alone to blame. Both parties applied for rules for new trials, and rules *nisi* were granted. On going forward for rules absolute, the following decisions were given by the Supreme Court: In the case of the "Birksgate" against the "Barrabool," the rule for a new trial was made absolute, and in the case of the "Barrabool" against the "Birksgate," the rule for a new trial was discharged. The owners of the "Birksgate" now appealed against both decisions. Both decisions of the Supreme Court

were affirmed by the Judicial Committee. Their Lordships further decided that the verdict of the jury in the first action should be set aside.

In the course of their Lordships' judgment, the following important paragraphs occur:—

"It is unfortunate that although the parties, the questions of law involved, and the evidence available, were the same in each case, yet there were separate trials.

"The owners of the 'Birksgate' have appealed against both judgments. In the arguments addressed to this Board, their counsel admitted that they could not successfully impeach the verdict in the second case if it were tested by the usual rules applicable in the case of a single trial. But they maintained that both verdicts ought to be subjected to the same test, and that it was incompetent to ascertain the reasonableness of the findings of the jury in the first case by evidence which was submitted, not to them, but to a different tribunal.

"In cases like the present, it appears to their Lordships that the fact of opposite verdicts having been found by two different juries does not devolve upon the Court the duty of exercising the functions of a jury, and of deciding the actions upon their merits. . . . . When the evidence led in each is so fairly balanced that a jury might reasonably find either way, their Lordships are of opinion that both cases ought to be tried again, not separately, but together. If, on the other hand, the verdict in one action is warranted by the evidence, and in the other is 'against evidence' in the ordinary sense of the term, their Lordships see no reason why the one should not be allowed to stand, and the other be set aside. In their opinion, the real question raised by these appeals is, whether the verdict returned at the first trial was, as the appellants maintain, such as the jury might reasonably find upon the evidence before them." The Judicial Committee then proceed to discuss the evidence, and finding that the evidence of the crews of both vessels in the first action is in direct conflict, they do not think "they would be justified in interfering with the finding of the jury if there were *no* test available for ascertaining which set of

witnesses told the truth, other than their demeanour in the witness-box. But that does not appear to their Lordships to be the only test of credibility which is supplied by the circumstances of the present case. There are at least two facts established beyond doubt, which in their opinion directly refute a material part of the testimony of the appellants' witnesses, and cast grave suspicion upon the remainder of it. . . . These facts, which do not admit of controversy, show plainly, in the first place, that up to the time when she was headed for the west channel, no look-out, or a bad look-out, was kept on board the 'Birksgate.' In the second place, taking her witnesses' account of the distance between the two vessels when they did see the lights of the 'Barrabool,' and of the time which elapsed between their seeing these lights and the collision, and considering that the 'Birksgate' was steaming at the rate of five to seven miles an hour, it is simply impossible to reconcile their statements with the fact that the collision took place close to Bradley's Point. . . . In these circumstances, their Lordships, who had the assistance of their nautical assessors, have been unable to avoid the conclusion that the testimony given by the appellants' witnesses is inconsistent with the established facts of the case. There cannot have been a good look-out kept by the 'Birksgate,' and the collision must have occurred just at the time and place when and where the appellants' witnesses allege that they began to approach the 'Barrabool,' then at a considerable distance, on safe courses, starboard to starboard. Giving due effect to these facts, which do not admit of dispute, the only reasonable inference derivable from the evidence appears to be this, that in coming round on a starboard helm, in order to lay her course for the west channel, the 'Birksgate' starboarded so far as to bring her nearer to Bradley's Point, and across the bows of the 'Barrabool,' which, until that time, she had negligently failed to see. For these reasons, their Lordships are of opinion that the weight of evidence is in favour of the conclusion that the 'Birksgate' was alone to blame for the collision, and that the verdict in the first action should be set aside."

The Committee said they would advise her Majesty that the

judgments appealed from ought to be affirmed, and the appellants must pay the costs of the appeals.

[14 *App. Cas.* 321; 58 *L. J. P. C.* 101.]

The Colonial Secretary of Natal (representing the Colonial Government) *v.*
Carl Behrens (in his capacity as General Manager of the Natal Land and Colonization Company, Limited).

[*Ex parte.*]

Natal. LORD WATSON. *May* 28, 1889.

Grant of Crown lands in Natal. Construction of Lands Clauses Consolidation Law, No. 16 of 1872. Demand by Government for a transfer from the owners of a title. No right to demand such transfer. Cases where the question of compensation comes in. Procedure. The appellant, as representing the Colonial Government, was plaintiff, and he sought to have it declared that he was entitled to the transfer of lands taken for the purposes of a railway under the provisions of Law No. 1 of 1881. The Supreme Court held that the above-named Act did not permit of an action, such as this was, being taken to obtain a transfer of title, but that in default of the owner transferring the proper course was to apply to the Court to order the Registrar of deeds to transfer the lands. The Judicial Committee upheld the finding of the Supreme Court. Their Lordships' judgment, which fully sets out the facts of the case and the points in controversy, was as follows:—

"It appears that in making grants of Crown lands in Natal the usual, but not the invariable, practice has been to reserve to the Crown, in the public interest, the right of constructing and maintaining main roads upon the lands alienated. By the Law No. 19 of 1875 the civil engineer of the colony is empowered to enter upon and take possession of so much 'of any of the Crown lands of this colony,' not exceeding *one hundred feet in width*, as may be required for main roads; and for that purpose

the official in question is invested with all the legal rights of the Government with respect to the taking of lands, and raising and carrying away materials for making and repairing main roads, 'whether such rights have been created or reserved by express stipulation of condition in any grant of land, or exist in any way or manner whatsoever.' It is also enacted that no land or materials upon which any building has been erected shall be taken or raised and carried away without compensation to the proprietor. In the case where land has been granted without reservation, and also in the case where, there being a reservation, the land has been improved by cultivation (&c.), the civil engineer is authorized to treat with owners 'who may think proper to require compensation' for the purchase or hire of the land or materials required; and in the event of failure to agree, provision is made for assessing the amount payable by arbitration. The Law No. 1 of 1881, which incorporates the provisions of the colonial 'Lands Clauses Consolidation Law, 1872,' authorized the Lieutenant-Governor . . . to make a line of railway from Pietermaritzburg to Ladysmith. It is declared (sect. 10) that the railways thereby authorized shall 'in respect of all Crown lands heretofore granted by the Government in quit-rent, or freehold, or leasehold tenure, and in or over which the railways . . . . shall be made, be deemed to be roads made . . . for the public good . . . and accordingly the proprietors . . . shall not, except in the cases provided for in their several title deeds, or deeds for compensation, be entitled to any compensation for the land taken for the purposes of the railways.' Provision is made for ascertaining the amount of compensation due in the exceptional cases. For the purpose of constructing the line . . . the colonial authorities . . . entered into possession of five parcels of freehold land belonging to the . . . Colonization Company . . . two of these parcels being portions of the company's estate in the county of Pietermaritzburg, and the other three, parts of their farm of Fountain Hall in the county of Weenan. All the land so taken was unimproved. The two parcels situate in Pietermaritzburg, about 1 acre 3 roods in extent, are of less width than one hundred feet. Of the three

situate in county Weenan, one parcel of forty-nine acres is within that limit; the others, together about 2 acres 4 roods, are beyond it. There is no reservation in the . . . Company's title to their lands in Pietermaritzburg; but the farm of Fountain Hall is held subject to the reserved right of the Government to resume any part of it for the public use and benefit, without paying compensation to the proprietor. The company have made no claim for compensation; and *primâ facie* there do not appear to be grounds for such a claim, unless it be in respect of those portions taken from the farm of Fountain Hall, which are outside the hundred feet limit. The colonial authorities *called upon the company to execute a formal transfer* of these five parcels of land to the appellant. . . . . Upon the refusal of the company to comply . . . a summons was issued from the Supreme Court . . . praying for an order to compel the manager to execute the transfer. . . . . The defendant filed exceptions to the declaration, and after hearing argument upon these the Chief Justice and Cadiz, J., gave judgment in his favour, absolving him from the instance with costs. None of the statutes relating to the powers of the Government to resume Crown lands already granted to a subject, for road or railway purposes, make any reference to the execution of transfers by the owners whose lands are resumed, with the single exception of the Lands Clauses Consolidation Law, No. 16 of 1872. The provisions of that Act are intended to apply, not only to the Colonial Government, but to all private persons and corporations who may obtain special statutory power to take land by compulsion for the purposes of their undertaking. Its enactments with respect to transfers are substantially the same as the analogous provisions of the English Lands Clauses Consolidation Act, 1845. Sect. 47 of the colonial statute enacts that, upon tender to the owner, or deposit 'of the purchase-money or compensation agreed or awarded to be paid in respect of any lands purchased or taken by the company,' the owner shall duly transfer such lands to the company, or as they shall direct; and 'in default thereof, or if he fail to adduce a good title to such lands to the satisfaction of the said company, it

shall be lawful for the Supreme Court, on the application of the secretary or other proper officer of the company, to order the Registrar of deeds to transfer the same.' . . . Sect. 48 provides that, on the owner's refusal to accept the tender or to grant a transfer, it shall be lawful for the company to deposit the money with the Master of the Supreme Court, subject to the control and disposition of the Court. These statutory provisions have no application except in cases where compensation is payable; and it is made a condition precedent of the company's right to a transfer that the compensation due shall not only have been fixed in terms of the statute, but shall either have been tendered or paid into Court. The duty of the owner to transfer is not imperative, but optional, and if he refuse the company's sole remedy is to deposit the money and obtain a transfer from the Registrar. . . . The Attorney-General (for the appellant) argued that these provisions sufficiently indicate the intention of the colonial legislature that a 'company' within the meaning of the Law of 1872 shall be entitled to demand a transfer from the owner of all lands taken from him under statutory compulsion, whether compensation be payable or not. That inference appears to their Lordships to be wholly unwarranted. *Expressio unius est exclusio alterius* is a maxim directly applicable to the present case. When careful provisions are made in regard to transfers in one class of transactions only, there can be no presumption that any part of these provisions was meant to extend to a totally different class of transactions. In cases where land is compulsorily acquired on condition of compensation being made, the statute imposes upon the parties the relative positions of vendor and purchaser. In cases where it is taken by compulsion, and without compensation, no contractual, or quasi-contractual, relation is established between them; and it is difficult to understand on what principle a proprietor who is forcibly deprived of his land without consideration can be held to incur an obligation to grant a conveyance to the persons who take it. Their Lordships cannot, in the absence of express enactment, or of any enactment which could reasonably suggest such an inference, assume it to have been

the intention of the colonial legislature, in enacting expressly that a proprietor who has been fully compensated may grant a transfer or not, according to his own option, meant to enact, by implication, that another proprietor who has been deprived of his land without compensation must execute a transfer, and may be ordained to do so under pain of imprisonment for contempt. Apart from statute the appellant has, in the opinion of their Lordships, failed to show that he is entitled to the transfer which he demands upon any considerations of law or equity. He has not shown . . . that the execution of such a transfer is necessary in order to complete his right to the parcels of land of which he has entered into possession. It appears to their Lordships that when the Government of a colony, or, in other words, the Crown, has lawfully resumed possession of Crown lands alienated to a subject by virtue either of a reservation in the original grant, or of legislative authority subsequently obtained, the right of a subject is *pro tanto* extinguished, and his interest, so far as resumed, reverts to the title of the Crown. These considerations are sufficient to dispose of this appeal, and make it unnecessary to discuss the different positions of certain of the five parcels with respect to the defendants' possible claims for compensation. Where no compensation is due the appellant has no right to call for a transfer, and if compensation is due in any case, he can only obtain a transfer by following the procedure prescribed in the Law of 1872." Affirmed, with costs.

[14 *App. Cas.* 331; 58 *L. J. P. C.* 98.]

Nawab Sultan Mariam Begam and Another *v.*
Nawab Sahib Mirza and Another; and
Nawab Wazir Begam *v.*
Nawab Sahib Mirza and Another.

Oudh. Sir Barnes Peacock. *June* 22, 1889.

Grant of a pension by Mahomed Ali Shah, King of Oudh, to his queen, to be paid "to her and her issue, generation after generation, and womb after womb." Construction of the letter

creating the pension and of a treaty (*vide* vol. 2, Aitchison's Treaties, edit. 1876, p. 144) between the king and the British Government following it. The queen at her death left two grandsons (the respondents) and two granddaughters (the appellants) in the first of the appeals. The appellant in the second appeal, Nawab Wazir Begam, is a great granddaughter. The two first appellants argued that, by the true construction of the documents, they should receive equal shares with the respondents (the males). The annuities were to be *naslan bad naslan* and batn bad batn, *i.e.*, generation after generation and womb after womb. Counsel for Wazir contended she should participate equally also. The king abstained from the use of the word "heirs" and meant offspring, and his intention was to exclude the Mahomedan law of inheritance (Shiah sect), by which the nearer would take in preference to the more remote descendants. The respondents (who were plaintiffs) maintained that the Mahomedan (Shiah) law should prevail, and that the two first appellants should only receive a share equal to half of what they were entitled to as heirs male. If Wazir Begam's claim was to prevail, not only would she, but the children of the appellants would, be let in, and the grant would have to be divided into seventeen shares. The District Court decided that the rights of the parties were not based on inheritance, and that all of them were entitled to equal shares. The respondents then appealed to the Court of the Judicial Commissioner, who held that there was nothing in the treaty which abrogated from the principle that the grant was to descend according to Mahomedan law, and nothing in it or in the latter which so altered that principle as to let in a great granddaughter (Wazir) by a deceased grandson of the queen to take an equal share with her direct grandsons and granddaughters. The word "issue" was equivalent to heirs of the body. Wazir Begam was entitled to nothing. The Judicial Committee now upheld the decision of the Judicial Commissioner with a variation on the subject of costs. Owing to the ambiguity in the words used by the king, and considering that the Courts below differed, the costs of all parties to the suit and in the

appeals would be directed to be paid out of the pension. Their Lordships were also of opinion that, although perpetuity of pension sought to be created by a private person is by ordinary Mahomedan law invalid, in this case, by reason of the treaty being one concluded between two sovereign powers, it takes effect. [*L. R.* 16 *Ind. App.* 175; *I. L. R.* 17 *Calc.* 234.]

Munna Lal Chowdhri *v.*
Thakur Gajraj Singh.

[*Ex parte.*]

Central Provinces, India. LORD HOBHOUSE. *June* 22, 1889.

Deed of sale. Suit for cancellation. Legal necessity. Widow's estate or absolute proprietorship. The Judicial Committee report to her Majesty that the decree of the Judicial Commissioner in favour of the respondent's contentions ought to be affirmed, and the appeal dismissed. Details of the questions in issue are given in their Lordships' judgment, the principal portion of which is here given.

"This appeal is raised on three grounds. The first is this: that the plaintiffs (whose interests are now represented by the respondent), who sue as the heirs of Ratan Singh, are not his heirs, or at least that the evidence which proved that they are his heirs ought not to have been admitted. Their Lordships consider that no objection has been shown to the admissibility of the evidence, and the matter therefore is concluded by the finding of the Commissioner, from whom no appeal upon facts lay to the Judicial Commissioner, whose decree is now under appeal.

"The second ground is that legal necessity for the sale to the appellant ought to have been inferred by the Judge, the sale being by a person purporting to have a widow's estate. Their Lordships are of opinion that that also is concluded by the judgment of the Commissioner. They cannot hold as a matter

of law that the things on which it is alleged that the money raised by the sale was spent constituted a legal necessity for the sale; and indeed it appears to them that the judgments of the Court below have gone upon the principle of examining the items which are alleged to have been spent on matters of necessity, and finding they have no connection with the sale.

"The third point is raised for the first time in these proceedings on the third appeal, and the fourth hearing of the cause. All the parties have proceeded hitherto on the view that the widow of Ratan Singh, who effected the sale, had the widow's estate only; and therefore that, although the sale was perfectly good for her lifetime, it was not good for any period beyond her life, unless legal necessity for the sale could be shown. Acting upon that view, the Courts below have given the plaintiffs a declaratory decree that they are the reversioners and heirs apparent expectant on the widow's death. But it is now said that this widow, Ganga, had something different from the widow's estate; that the effect of an order of the Settlement Officer in the month of July, 1865, was not to give the three widows who then were living the widows' estate, but it was an order effecting a partition of the family, and giving one-third in absolute proprietorship to each of the three widows, and the remaining share to the mother of the deceased Ratan Singh. There may be words in this order about which there is some ambiguity; but reading the order as a whole, their Lordships cannot doubt that the Settlement Officer took Ratan Singh as being the proprietor of the estate, and took the estate as having passed to his heirs upon his death. Why he attributed a fourth to the mother of Ratan Singh does not appear, but no doubt she was entitled to maintenance; and it may have been that the state of things before him at that time led him to believe that it would be a proper way of dealing with the estate to give each of the four who had claims upon it the enjoyment of one-fourth of the estate. That may be so; but their Lordships cannot find upon the face of this order any intention to give to the mother and widows between them anything more than an interest in the widows' estate.

"The consequence is that Ganga, having survived the rest, takes the whole of the widows' estate in the whole of the property, and the inheritance is left to devolve as it may devolve by course of law. The present heirs apparent are the plaintiffs, and therefore they are entitled to the decree." Appeal dismissed. [*P. C. Ar.*]

Hemmuni Singh and Others *v.*
Cauty and Others.

Bengal. SIR RICHARD COUCH. *June* 29, 1889.

Partition between members of a joint Hindu family. Dispute as to boundaries of relative property. Amin's map. Survey map. Evidence of servants very valuable. The appellants were plaintiffs. The Judicial Committee arrive at the conclusion that the decree of the High Court does not give a just division, and recommend that a new division of the land ought to be made by a competent surveyor, and direct a copy of the Amin's map, marked by themselves, to be attached to Her Majesty's Order in Council as a guide to that officer. The map in question is now marked by their Lordships "by a line beginning on the northern boundary at a point in a straight line with the north-west corner of the tank, and going thence to the southern boundary as nearly in a direct line as will conveniently divide the whole area in the proportion of 503 to 536, and that the plaintiffs shall obtain possession of the land lying on the western, and the defendants of the land lying on the eastern, side of such line." The Committee report to her Majesty that the suit should be remitted to the High Court, that the line shall be so marked, and the decree of the High Court be varied accordingly. The parties will bear their own costs of this appeal. [*I. L. R.* 17 *Calc.* 304.]

Pertap Chunder Ghose *v.*
Mohendra Purkait and Others.

Bengal. Sir Richard Couch. *June* 29, 1889.

Claim by appellant for rent, interest and public works cesses. Validity of a kabuliyat. Effect of misrepresentation. Admissibility of an ikrar. Registration Act 3 of 1877, sect. 17, cl. (*h*). Liability of minors for guardian's kabuliyat. Appeal dismissed. This suit was brought by the appellant, and the plaint stated that, on the 21st June, 1881, the first defendant, Rukkhit Chunder Purkait, for himself and as guardian of three minor defendants (two of whom are the first and second respondents), executed a registered kabuliyat, by which he rented certain lands of the plaintiff, engaging to pay an annual rental, and was in occupation of the above tenure; and that, exclusive of payments, there was due for rent and interest on overdue instalments, and for road and public works cesses, and interest thereon, a total of Rs. 1,640. 11. 1, and prayed for a decree for that amount and interest during the pendency of the suit. Rukkhit Chunder, in his written statement, said that he agreed to execute a kabuliyat, and a draft was made out and read to him, and when it was subsequently engrossed on a stamp the plaintiff said it was just the same as the draft, and the defendant, in reliance on that statement, signed the document, but the draft and the engrossment were different. The minor defendants, by their mother and guardian, said they had no knowledge of the kabuliyat, and that Rukkhit had no power to execute a kabuliyat on their behalf. The second Subordinate Judge of 24-Pergunnahs, who tried the case, negatived the allegation that any deception was practised in getting the signature to the kabuliyat, but he held that all the terms of it were not binding on Rukkhit, "the bargain being very unconscionable and consideration very inadequate," and that Rukkhit, whether guardian or manager, had no power to bind the other members of the family, as the contract was not for their benefit. He, however, admitted in evidence an ikrar

or agreement executed on the 25th April, 1880, by Abhoy Churn, the father of the minors and uncle of Rukkhit, who died in April or May, 1881, and who was the kurta or manager of the family, and by other tenants, by which he said they agreed to pay Rs. 2. 12 per bigha. And he made a decree for rent according to the ikrar of 144 bighas 9 cottahs 7 chittacks and 15 gundahs, considering that the defendants were not proved to be bound by the area mentioned in the plaint.

From this decree there were appeals by both parties to the Additional Judge of the 24-Pergunnahs or District Judge. He decided that the Subordinate Judge who founded his decree upon the ikrar had wrongly admitted that document as evidence. It was inadmissible for want of registration. He, however, concurred with the Subordinate Judge in holding that Rukkhit Chunder did execute the kabuliyat, and within the scope of his authority as guardian. The minors were therefore bound by it. There were second appeals by both parties to the High Court, the appellant pleading that the ikrar ought to be admitted. The judges there held that the kabuliyat could not be enforced, and set aside the judgments of both the lower Courts, and dismissed the suit with costs in all the Courts. They did not in their judgment take notice of the admissibility of the ikrar. The Judicial Committee agreed to report that the decrees of the High Court should be affirmed with costs. In the course of their judgment the Judicial Committee made the following observations (1) as to the kabuliyat:—

"The kabuliyat, after the agreement to pay the rent, contains these words—'If you (the plaintiff) or your heirs require the land you and they will take khas possession of it. I (the tenant) and my heirs shall never have occupancy right to the said lands'; and towards the end a clause that if the rent is unpaid the tenants shall at the pleasure of the plaintiff and of his heirs be ejected from the land, and it shall be his and his heirs' khas property. . . . The evidence of the naib, which the District Judge appears to have believed, is that the tenants objected to the condition that khas possession might be taken at will, and therefore they were told that that condition had been

inserted because then the tenants would remain under the influence (of the zemindar), *and that it was not that the plaintiff would actually eject the tenants;* and that, with reference to the condition that khas possession would be taken if rent were not paid by the end of the year, it was said that this was a penalty clause, and that the law was to that effect, and the plaintiff made those statements. It was admitted by the counsel for the plaintiff that the statement of the effect of the law was a misrepresentation. Although the District Judge does not expressly find that there was a misrepresentation, their Lordships think that this is the effect of his judgment. He says, 'Granting that they (the tenants) were under a mistake as to their position, and that plaintiff represented his power, as an auction purchaser, as greater than it really was, this would not amount to such misrepresentation as would vitiate the contract.' In this he was in error. Where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently. If such a representation had not been made the tenants might have refused to sign the kabuliyat. Further, if there is any stipulation in the kabuliyat which the plaintiff told the tenants would not be enforced, they cannot be held to have assented to it, and the kabuliyat is not the real agreement between the parties, and the plaintiff cannot sue upon it."

(2) Upon the question of the admissibility of the ikrar, the Judicial Committee say, "The Subordinate Judge, it has been seen, founded his decree upon the ikrar. The District Judge held that this document was inadmissible for want of registration, as operating to create or declare an interest, and coming under clause (b) of sect. 17 of the Registration Act (3 of 1877). Their Lordships are of opinion that it does not come under that clause, but under clause (h), as a document merely creating a right to obtain another document, which will, when executed, create or declare an interest. . . . It could not be sued upon as an agreement to pay the rent claimed, which the Subordinate Judge held it to be."

In conclusion, the Judicial Committee made some important remarks with reference to "Second Appeals."

"Their Lordships have doubted whether the judges of the High Court, in hearing the appeals, had regard to the provision in the Code of Civil Procedure (Act 14 of 1882), sect. 584, as to appeals from appellate decrees, and thought they were at liberty to consider the propriety of the findings of the district judge upon questions of fact. Certainly there are some passages in their judgment, particularly in the latter part, if not in the former, which suggest this. Their Lordships must observe that the limitations to the power of the Court by sects. 584 and 585, in a second appeal, ought to be attended to, and the appellant ought not to be allowed to question the finding of the first Appellate Court upon a matter of fact." Decrees affirmed and appeal dismissed, with costs.

[*I. L. R.* 17 *Calc.* 291; *L. R.* 16 *Ind. App.* 233.]

Sheikh Muhammad Mumtaz Ahmad and Others *v.* **Zubaida Jan** and Others.

N. W. P. Bengal. Sir Barnes Peacock. *July* 6, 1889.

Claim to lands, &c., by appellants under a deed of sale. Validity of a deed of gift by a mother to her daughter. Definition of Mushaá. Deed of gift upheld as against the claim by sale.

The questions raised were whether a gift of certain landed property, followed by possession, by a mother, Himayat Fatma, to her daughter (the respondents being heirs of this daughter) was valid; whether a sale of the properties in question by the mother's brother and her heir by descent, one Usman, was preferential to the gift; also, whether, as regards the sale, the consideration under it had been wholly or in part paid. The appellants (alleged purchasers and plaintiffs) sought to enforce the sale. The sale deed was executed by Usman. The two

first appellants claimed as direct purchasers from Usmàn, and the third as sub-purchaser. They alleged that the deed was executed by Usman after the Transfer of Property Act (IV. of 1882, s. 54) had come into force. They said that the consideration was paid, and that, since its payment, the respondents had entered into collusion with Usman and interfered with their rights of possession. The respondents, who represented the donor's (Himayat Fatma's) daughter Zahur, said the sale was never completed. The consideration money amounted to Rs. 10,000 in two sums of Rs. 7,500 and Rs. 2,500, and they contended that the larger amount of the two had not been paid at all, and that, though the smaller amount was paid, it was subsequently withdrawn. They relied on the validity of the deed of gift by Himayat Fatma to Zahur, and met the objection that the doctrine of Mushaá in both the Shiah and Sunni schools of Mahomedan law (*i.e.*, the prohibition of the gift of an undivided part in property capable of partition), though it made the gift invalid without possession, was altered in its effect when there was effectual transfer and possession to the daughter by a parent, which, they argued, was the case here. They also alleged that the sale deed by Usman, whom the plaintiffs had made a defendant with them and was now dead, was obtained by fraud. The Subordinate Judge held that the Rs. 7,500 were not paid by the vendees, but that the Rs. 2,500 paid at the time of registration were not taken back; that the deed of gift in favour of Zahur was void. "He said, in the first place, the gift was made in respect of an undivided property. The detail of the properties given at the foot of the plaint shows that some of them are joint. Such a gift is invalid under the Mahomedan law. Secondly, according to Mahomedan law, the delivery of actual possession is necessary. But, in the present case, the donor was in possession of all the properties, and the donee died before she could obtain possession of them. He then gave his reasons for considering that Himayat Fatma continued in possession." The result of the finding was that the Subordinate Judge, considering that only one-fourth part of the alleged consideration for the sale by Usman had been paid, gave a

decree for the plaintiffs for one-fourth of the property claimed in the plaint.

From that decision the plaintiffs appealed to the High Court. The respondents also appealed on the following grounds:—that the Subordinate Court had erred in holding that the gift which was dated 12th February, 1879, was void under Mahomedan law by reason of Mushaá; that the possession was duly carried out on behalf of the donee while the donee was still alive (she died in December, 1879); further, because it was established that the donor, on the demise of the donee, in confirmation of the gift, caused Ahmad Hussain, the husband of the donee, to be placed in possession of the whole of the property previously conveyed by gift to Mussammat Zahur Fatma, the deceased donee; because the finding of the lower Court against the validity of mutation of names, subsequently effected in favour of the husband of the deceased donee, is not correct; while the remarks made by the Subordinate Judge, as to the absence of the formalities of a proper transfer, are not well founded; and, lastly, because the payment of Rs. 2,500, being a portion of the consideration money of the sale deed set up by the respondents, is not proved by the evidence on the record. The High Court, on the appellants' appeal, held that their statement that the Rs. 7,500 were paid to Usman was false, and that the respondents' statement that the Rs. 2,500 were returned was also false. The appeal was dismissed with costs.

The High Court, on the appeal of the respondents, decided that the suit of the appellants ought to be dismissed, on the ground that the plaintiffs (appellants) had failed to establish their right to stand in the place of Usman by reason of the non-payment of the Rs. 7,500. The appellants appealed to her Majesty in Council, and the Judicial Committee now decided to advise her Majesty to reverse the decree of the Subordinate Judge, and both the decrees of the High Court. Both judgments of the High Court were unsatisfactory. That on the appellants' appeal, because the judges did not examine the evidence as to the return of the Rs. 2,500; and that on the respondents' appeal, because the High Court had left the findings

of the Subordinate Court upon the issue of the validity of Himayat Fatma's gift, and the respondents' title thereunder unnoticed. Both these issues their Lordships now discussed at length; on the evidence, they were of opinion that the consideration had not been paid; that even the sum of Rs. 2,500 had not passed to Usman; that there was a valid transfer under the gift to the daughter, and that sufficient possession was taken by the latter before her death. On this point, they drew attention to the circumstance that there was no objection by Usman to the proceedings for mutation of names, and further, that no objection was raised by him to Zahur's title during her lifetime. In the result, they advised her Majesty to reverse the decree of the Subordinate Judge and both the decrees of the High Court; to order the plaintiffs (appellants) to pay to all the defendants, except the representatives of Mahomed Usman, who is dead, their costs in the Courts below, that a finding be entered for the defendants on the first issue (*i.e.*, that the amount of the consideration was not paid), and that the Rs. 2,500 were taken back; and, upon the second issue, it ought to be declared that the deed of gift in favour of Zahur Fatma was executed with the authority of Himayat Fatma, that possession was taken under it, and held in accordance therewith, and that the possession taken under the deed transferred the property. Upon those findings a decree ought to be given for the defendants. The appellants must pay the costs of the appeal.

In the course of their judgment, the Judicial Committee thus adverted to the doctrine of Mushaá:—

"The doctrine relating to gifts of Mushaá was considered by this Committee in the case of *Ameeroonissa* v. *Abedoonnissa* (23 S. W. R. P. C. C. 208), and by the High Court in Calcutta, in *Mullick Abdool Guffoor* v. *Muleka and Others* (L. R. 10 Calc. 1112). The facts of those cases differ from the present, but they throw light upon the doctrine.

"It is unnecessary for their Lordships to express an opinion as to whether the gift in question was invalid or not; for it appears that even if invalid possession given and taken under it transferred the property.

"The authorities relating to gifts of Mushaá have been collected and commented upon with great ability by Syed Ameer Ali in his Tagore Lectures of 1884. Their Lordships do not refer to those lectures as an authority; but the authorities referred to show that possession taken under an invalid gift of Mushaá transfers the property according to the doctrines of both the Shiah and Sunni schools (see pages 79 and 85). The doctrine relating to the invalidity of gifts of Mushaá is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules."

[*L. R.* 16 *Ind. App.* 205; *I. L. R.* 11 *All.* 460.]

Puthia Kovilakath Krishnan Rajah Avergal *v.*
Puthia Kovilakath Sreedevi and Others.

Madras. Lord Hobhouse. *July* 17, 1889.

Disputes over the character of an agreement for a division of a fund. Findings of fact by two Courts below not to be interfered with. Plea of limitation, viz., that the case falls within Article 95 of Act XV. of 1877 not proved; appeal fails, and is dismissed with costs. [*I. L. R.* 12 *Mad.* 512.]

Haidar Ali Khan *v.*
Naushad Ali.

Oudh. Sir Barnes Peacock. *July* 18, 1889.

Claims to lands. Talukdhari rights. Is the suit barred by reason of the existence of a Sanad under the Oudh Estates Act (No. 1 of 1869, and by Act 26 of 1866)? Their Lordships hold that there is nothing in this case to show that the defendant, now represented by the respondent, by any agreement, or by any arrangement, or other means, became clothed with any trust, as regards the lands included in the Sanad. The case, therefore, does not fall within the decisions of *Sookraj Koer* v. *The Government* (in 14 Moo. Ind. App. 112), or the case of *Hurdeo Buksh* (L. R. 6 Ind. App. 161). The defendant is, therefore, entitled as pro-

prietor to the lands included in the Sanad. They declare that the respondent is entitled, as superior proprietor, to the lands included in the Sanad; but the Order in Council is to be without prejudice to the appellant being at liberty to prefer a claim to render proprietary right in respect to a certain portion of the property in "Schedule C." should he be so advised. Appeal dismissed with costs.

[*L. R.* 16 *Ind. App.* 183; *I. L. R.* 17 *Calc.* 311.]

Babu Mungniram Marwari and Another *v.*
Mohunt Gursahai Nund; and
Syed Liakut Hossein *v.*
Mohunt Gursahai Nund.

(Two Appeals not consolidated.)

Bengal. SIR RICHARD COUCH. *July* 20, 1889.

Suits by respondent to set aside a decree and for recovery of property which had been sold in execution of that decree. Guardianship under Act XL. of 1858, s. 3. Contention by the respondent in both appeals that the sale was invalid, he being a minor at the date of it, and not properly represented in the action in which the decree was obtained. Limitation. The appellants were purchasers of respective portions of the property sold under the decree. The details of the litigation may be summarized thus:—

The plaintiff (Gursahai Nund) was the successor as Mohunt of a Muth of one Hurri Pershad Nund, whose favourite disciple he had been. Hurri Pershad Nund had, during his lifetime, borrowed money from Mungniram, the defendant in one of the suits. On 28th September, 1875, Hurri appointed Gursahai as Mohunt and died the next day. Later in the year, Jitlal Nund, brother of Hurri, applied under Act XL. of 1858, for a certificate of guardianship over Gursahai. It appeared, however, that, though the application was made, no formal certificate was ever prepared by the officer of the Court. In 1876, Mungniram

instituted a suit on his mortgage bonds against the plaintiff, whom he described as a minor, disciple, and heir of Hurri under the guardianship of his uncle, Jitlal Nund. Mungniram obtained his decree, and the mortgage properties were sold to Mungniram himself, and the other appellant. In 1882, Gursahai instituted the present suits alleging that he attained his majority in January, 1880. The Subordinate Judge found that although Jitlal Nund had not obtained a formal certificate of guardianship, he was the constituted guardian of the plaintiff, but that as he did not look after the interests of the plaintiff, nor defend the suit, the plaintiff was not bound by the decree. He, however, eventually considered that the suits were barred by limitation. The High Court, on appeal, in the first instance, were of opinion that it was proved Jitlal had, in other suits, acted as guardian, and although the certificate had not been issued, he had acted as guardian. They then decided against the plaintiff and dismissed the appeal with costs. They, however, subsequently entertained a petition for review, and arrived at an opposite conclusion from that given before. They were now of opinion that, upon the construction of the Court Fees Act VII. of 1870, no certificate of guardianship could actually come into existence until the person applying for it had paid stamp duty. They, therefore, reversed, on the review, their previous finding, and gave the plaintiff a decree for possession and for mesne profits, on the ground that he had not been properly represented by Jitlal in the suit for attachment and sale. The first and important question which the Judicial Committee had to deal with was, whether guardianship had been established within the meaning of Act XL. of 1858, s. 3? They were of opinion that it was, and that *when a man obtains an order for a certificate, he does, in substance, comply with the Act apart from the actual issue of the certificate*, and that, if the meaning of the Act of 1858 was that the obtaining the certificate was complied with by obtaining the order, any subsequent provision in the Court Fees Act could not make any difference in the intention of the Legislature.

A second question arose as to the importance of the date when

the plaintiff came of age. A suit to set aside a decree must be brought, according to the law of limitation, within one year from the making of the decree if, at the time, the party is of full age, but, if he is a minor, then within one year of his attaining majority. The plaint in this suit was filed on the 18th August, 1882, and the question is, whether the plaintiff had attained his majority more than one year before that time. The Subordinate Judge arrived at the conclusion that the plaintiff did attain his majority of twenty-one years, which is the age of majority under Act XL. of 1858, more than a year before the suit was commenced. The Judicial Committee, after an analysis of the evidence and admissions, saw no reason for thinking that the conclusion was wrong. The result is that their Lordships will advise Her Majesty that the decrees of the High Court made upon the review should be reversed, and both suits be dismissed with costs in the Subordinate Court and in the High Court, including the costs of the review. This conclusion was correctly arrived at by the Subordinate Judge and by the High Court upon the first hearing of the appeals, although not upon the same grounds as those upon which the judgment of the Judicial Committee is now given. The appellants obtained their costs of the appeals. [*I. L. R.* 17 *Calc.* 347; *L. R.* 16 *Ind. App.* 195.]

Mussumat Sundar *v.*
Mussumat Parbati.

[*Ex parte.*]

N. W. P. Bengal. LORD WATSON. *July* 20, 1889.

Suit brought by one widow (the appellant) against a co-widow for partition of property. A deceased husband, a Brahmin, had formally adopted a boy named Praimsukh, who was his sister's son, and, possibly because he entertained doubts as to the validity of the adoption, he made a will on the 5th July, 1875, by which, subject to provisions for the maintenance of his mother and of his widows, who are the parties to this suit, he bequeathed his whole estate of every description to Praimsukh. The adopted son dying in minority, but after the testator, possession of

property remained with the widows. On the death of Baldeo Sahai, the two widows assumed the possession and management of his whole estates, moveable and immoveable, for behoof of his minor heir, and their names were put upon the register as being the mothers of Praimsukh. After the death of Praimsukh, as found by the subordinate judge, "they obtained possession of the zemindari estates and other immoveable and moveable properties, and they described themselves sometimes as the widows of Baldeo Sahai and sometimes as mothers of Praimsukh." It is obvious, as the Judicial Committee observe, that, if the adoption of Praimsukh was not valid according to the principles of Hindu law, neither of the parties to this case could have any right of succession to him; and, on the assumption that he was legally adopted, it is equally clear that, the estates having passed to Praimsukh under his adoptive father's will, they could not on his decease pass to the present litigants as widows of Baldeo Sahai.

No question is raised in this case with respect to the zemindari estates, which are registered in the joint names of the widows, the respondent, as the senior, being lambardar. A dispute arose between them as to possession of the family residence, gold and silver ornaments, and other articles of value, which they submitted to arbitration, the result being that, on the 15th July, 1880, the arbiters issued an award, being in substance a decree of partition, in virtue of which each of the widows has since been in possession of her separate share of the subjects then in controversy. In consequence of fresh disagreements this suit was instituted by the appellant, in May, 1883, for partition and separate possession of house property which does not form part of the zemindari, and also of certain moveable effects which were not included in the arbitration. The Subordinate Judge considered it unnecessary to determine either point, whether the adoption was valid, or whether the will was efficacious in passing the property to the adopted son, until the estates are claimed by a kinsman of Praimsukh's paternal line or by a reversioner or collateral heir of the husband. He held that in all questions *inter se*, both widows were estopped by their own previous acts and admissions from alleging the invalidity of the adoption; and on

that footing, their respective rights and interests being of precisely the same quality, he was of opinion that neither of them was in a position to resist a demand for partition; he therefore decreed the suit. The High Court, on the other hand, went into the question of the adoption of a son of a lady the adopter could not legally have married, decided it to be invalid, and pronounced that the widows had no estate in law which they could divide. The Judicial Committee recommend that the decree of the High Court ought to be reversed, and that the decree of the Subordinate Judge in favour of partition should be upheld. The respondent to pay the costs of the appeal. The widows are in possession, and have a good title against all the world, except the person who can show a better one. It was impossible to hold that a joint estate was not also a partible one: cases cited and compared, *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; *Armory* v. *Delamarie*, 1 Smith's L. C. 6th ed. 313; I. L. R. 12 All. 51.

[*I. L. R.* 12 *All.* 51.]

McDougall *v.*
McGreevy.

Lower Canada. Sir Richard Couch. *July* 20, 1889.

Transactions in shares between shareholders of the North Shore Railway Company. Transfer of shares from one shareholder (the respondent) to another (the appellant), with condition of redemption. Tender of payment for redemption by the respondent within the specified time. Tender refused on the ground that it was insufficient, by reason of the defendant, immediately after the transfer, having been called upon to pay a call of some seven or eight thousand dollars, including incidental expenses, on account of McGreevy's shares, the call being for McGreevy's share of the preliminary cost of the purchase of the North Shore Railway, for which a syndicate (including the appellant and respondent, as members) had been formed. Sale by appellant of the stock. Was it sold to the respondent's disadvantage, and did he sustain damage? In estimating the value of the shares, were certain bonds to be taken into consideration? The Superior Court gave judgment

for the plaintiff for $83,500 damages. Both parties appealed to the Court of Queen's Bench, and it is from the judgment of that tribunal that the present appeal has been entered by the defendant. The Judicial Committee, taking an opposite view from the Court of Queen's Bench, see no reason to suppose that the plaintiff (the respondent) could have sold the shares at any higher price than that at which they were sold. They were also of opinion that, in estimating the value of the shares, the bonds should not be taken into consideration. There was no damage. The Queen's Bench decision ought to be reversed, and the suit dismissed with costs.

The following portions of the judgment of the Judicial Committee give the facts of the case, and the reasons for the present decision:—

"The respondent McGreevy, being the owner of one thousand $100 shares in the North Shore Railway Company, and being unable to pay a call of 50 per cent. which had been made upon them on the 14th September, 1882, transferred them to the appellant, who was also a shareholder in the company, and took from him a letter of that date, in which it was stated that the transfer had been made with the express condition that McGreevy would have the right to redeem the stock within two months from that date by paying 50 per cent. of the nominal amount of the shares, that is to say, $50,000, and any further call on the same that might be paid 'within said delay,' with interest on such amount. On the 13th November, 1882, McGreevy by his notary made a formal tender to McDougall of $51,125, being $50,000 and interest thereon at 6 per cent., and McDougall refused to receive the amount." Their Lordships then proceed to deal with the declaration in the action which alleged that the defendant sold and disposed of the shares "to his own great profit and advantage, to wit, in the sum of $200,000, which sum the plaintiff could and would have realized on the said stock had he not been deprived thereof by the defendant, and prays a judgment for $200,000, with interest and costs. On the argument of the appeal, it was not disputed that the tender was sufficient, and the only question raised was whether the plaintiff was entitled to recover any

damages. The evidence on that subject was this: McDougall had apparently obtained the control of the whole of the shares of the North Shore Railway Company, and on the 2nd December, 1882, they were all transferred by him to Robert Wright, the treasurer of the Grand Trunk Railway."

The Judicial Committee then analyse the evidence on the question whether or not bonds of the North Shore Railway Company had or had not been issued as a consideration for the transfer of stock, the principal witnesses on the point being Mr. Robert Wright, and Mr. Wainwright, assistant-manager of the Grand Trunk Railway. They also considered the effect of an agreement dated 27th July, 1883, made between the North Shore Company, McDougall, and one Louis Adelard Senécal, by which it was arranged that, on completion of the railway, a large amount of bonds of the company were to be handed to the contractors, McDougall, Senécal, and others. The Committee proceed as follows: "The Superior Court having given judgment for the plaintiff for $83,500 damages, as being the clear profit realized by the defendant on the sale by him of the shares, both parties appealed to the Court of Queen's Bench (appeal side), whose judgment is the subject of this appeal. By that judgment an inquiry by experts was ordered, and they were to report to the Superior Court what other property, franchise, or right, if any, in which McGreevy had no interest, were sold by McDougall and Senécal to Wright in addition to the shares, and what were the relative values of the shares and the other property, franchise, or right sold, and what portion of the consideration paid by Wright or his principals applied to or represented the price of the shares. The grounds of this judgment are stated to be that the measure of damages is the sum which McDougall had received for the shares beyond the amount which McGreevy was bound to refund to him in order to get them back, and that it appears by the evidence that McDougall and Senécal sold the shares, together with other property, in which it does not appear that McGreevy had any interest, for the price and sum of $250,000 in cash, and $1,500,000 in bonds of the North Shore Railway Company, which bonds were subsequently disposed of by McDougall and Senécal at 87½ per

cent. of their nominal value, and subject to certain charges and obligations assumed by them, the nature of which is not clearly established by the evidence in the cause. Their Lordships cannot agree with the Court of Queen's Bench that it is proved that the bonds were part of the price of the shares. They are not unmindful of the answer of McDougall to the question, 'What was the price or consideration that you received for the sale of the shares to Mr. Wright?' who said, 'We got $1,000,000 in cash;' or of Senécal, who said, 'I can tell you now what we have sold the stock in the company for. The transaction was that we received $250,000 in cash, and the bonds of the North Shore Road for a million-and-a-half, that includes everything for the stock and our rights;' or of Mr. Wright, which has been stated. The contract of July, 1883, which is in writing, and which the respondent has not attempted to impeach, affords strong evidence to the contrary. None of these witnesses referred to the written contract, and the answers which they gave to the general questions put to them probably had reference to the effect of the whole series of their transactions, and not to any one of them in particular. At the time when the shares were transferred to Wright, there may have been an expectation of getting the bonds by a subsequent arrangement which is mixed up in the memory of the witnesses with the transfer of the shares, but the written agreement clearly shows for what the bonds were to be given. There is no reference in it to the shares, and the twelfth clause must refer to the agreement to hand over the bonds which immediately precedes it. Their Lordships cannot, in estimating the value of the shares, take the bonds into consideration, and they see no reason to suppose that McGreevy could have sold the shares for more than $50,000. Consequently he has not sustained any damage, and his suit should be dismissed with costs in the Superior Court, each party paying the costs incurred by himself in the two appeals, as was adjudged by the Court of Queen's Bench. Their Lordships will humbly advise her Majesty to reverse the decree of the Court of Queen's Bench, and so to order. The respondent will pay the costs of this appeal." [*P. C. Ar.*]

Farnum v.
The Administrator-General of British Guiana; and
Willems and Wife v.
The same.

(Consolidated Appeals.)

British Guiana. LORD WATSON. *July* 25, 1889.

Construction of the will of H. M. A. Black, who died in Europe, September, 1886, but was domiciled in British Guiana. Act of substitution of administrator pronounced null and void under the terms of will. Executors according to Roman-Dutch law. In the will the testator laid down a scheme for continuing the administration of his estates, by naming several persons to act as administrators on failure of the first two named. The first two named were E. G. Barr and John Moore. If either of these were unable to act John Parry Farnum, the appellant in the first appeal, was next invited to take upon himself the duty. In June, 1887, on the statement that he was about to leave the colony for England, Moore executed a notarial deed, by which he substituted the Administrator-General of British Guiana as administrator in his place. The Colonial Ordinance No. 15 of 1887, which was passed by the Governor and his Court of Policy on the 25th May, came into operation on the 1st day of July, 1887. Sect. 12 enacts that "No testamentary executor or guardian having the power of substitution or surrogation shall substitute or surrogate the Administrator-General without leave of the Court, and if any such substitution or surrogation be executed without leave of the Court, the same shall be void and of no effect." There being no time to lose, the respondent, on the 30th June, 1887, made an inventory of the testator's estate and effects in the colony which constituted the residue of the estate, and took and still holds possession of the same, in virtue of Moore's appointment. The principal question raised in both appeals was, whether the substitution of the administrator by Moore was valid. The appellants in the second appeal were husband and wife, the latter being a residuary legatee. These petitioners prayed for an order calling upon the respondent to

deliver to them a proper account of the estate then in his hands, and to make payment to them of 1,000*l.* to account of the lady's share of residue, on the ground that it was payable at the testator's decease. They alleged that the substitution of the respondent by Moore was invalid, and that the administration of the respondent was without title. The main object of the application, the Judicial Committee were of opinion, was to have it found that, in settling the lady's share of residue, the respondent was not entitled to take credit for the large fees payable to him as Administrator-General under the Ordinance of 1865. [The administrator pleaded in defence that the lady's share of residue was not payable until her youngest sister attained majority, or married. That question, the Judicial Committee say, has now ceased to be of any practical consequence, because the youngest sister attained majority in January, 1889.] The Supreme Court refused the prayer of both petitions. The Judicial Committee now reversed the decisions below. In their judgment their Lordships set forth that the intention of the testator was clear that he desired the administration to be conducted economically "to secure private administration at a cheap rate, and to avoid, if possible, official administration and official fees." Upon the points of law in dispute their Lordships *inter alia* say: "The real question to be determined in these appeals is, who are the donees of the power of substitution? . . . Their Lordships do not think that the language of the testator, when fairly construed, raises the ambiguity which has been so elaborately and learnedly discussed in the Court below. . . . Moore was not, in June, 1887, one of 'the two last surviving of them' (the administrators) within the meaning of the will, and he had therefore no power to confer any administrative office upon the respondent.

"It was urged for the respondent that, according to the Roman-Dutch law, which prevails in the colony, Barr and Moore were executors, and that upon their acceptance of office the nomination of Farnum and Culpeper (the last-named was another possible administrator under the will) became inefficacious. Coming from such a quarter the argument was a very singular one, because, if pushed to its logical consequences,

it would not only deprive Farnum and Culpeper of the right to take up the administration in the events provided by the testator, but would invalidate the substitution by Moore of the respondent himself. But in truth the argument rests upon the fallacious assumption that the office conferred by the testator in clause 13 (of the will) is that of executor in the sense in which the term is understood in the law of England. The Roman law did not recognize the office of executor; the *hæres institutus* was a true heir, although he might be burdened with legacies and *fideicommissa*. This Board had occasion, in the recent case of *De Montmort* v. *Broers* (13 App. Cas. 154), to explain that, according to Roman-Dutch law, the executors of a testament are in reality procurators, and that their powers in relation to the estate falling to the testator's heirs are merely those of management. That such is the law of British Guiana appears from a judgment delivered, in the year 1861, by a former Chief Justice (Arundell) of the colony, which is printed in the papers before us. He states the law of the colony to be that 'the authority of the executors is derived from the will of the testator, which governs and defines the limits of that authority'; and in the case before him he held, in respect of the intention of the testator, as appearing from the text of his will, that the appointment of executor was more of the nature of an attorney or administrator than of a pure executorship. In the present case, the testator has not left in doubt the nature of the office which he meant to confer upon the persons named in clause 13 of the will. He specially constitutes them 'administrators' of the property bequeathed to the residuary legatees, and gives them all the powers by law or custom incident to that office.

"The only other argument of the respondent deserving of serious notice was to the effect that the appellant Farnum cannot prevail in his petition, because the legal effect of declaring the act of substitution void will be to reinstate Moore in office. To that proposition their Lordships are unable to assent. Moore's act of substitution was not merely equivalent to a representation that he was unwilling or unable to continue to administer, but was an actual demission of his office.

"Seeing that the appellant Farnum is now the only qualified

administrator resident in the colony where the estate is situated, the fact that Barr, who is resident in England, also claims to share in the administration can be no impediment to a decree ordaining the respondent to transfer to him in terms of the prayer of his petition. There is no charge of malversation made against the respondent, and he will therefore be entitled, in accounting for the estate, to deduct all outlays necessarily and properly incurred by him; but he will not be entitled to any official fees or to remuneration for personal services in the administration of the estate. . . .

"In these circumstances their Lordships will humbly advise her Majesty to reverse the judgment appealed from in each of these cases; in the petition of the appellants Farnum and Culpeper (*i. e.*, in the principal appeal), to declare the act of substitution by John Moore to be null and void, as being contrary to the terms of the will, and to ordain the respondent, the Administrator-General of the colony, forthwith to transfer and deliver to the said appellant the whole estate of the testator, with the accounts and vouchers thereof, and also to pay to the said appellant and Culpeper their costs in the Court below; and in the petition at the instance of the appellants Pierre Jacques Willems and his spouse, to declare the substitution of the respondent by John Moore to be null and void, to find it unnecessary to pronounce any further deliverance, and also to find neither of the parties to the said petition entitled to their costs in the Court below. The respondent must pay the cost of these appeals.

[14 *App. Cas.* 651; 59 *L. J. P. C.* 10.]

Gilmour and Others *v.*
Mauroit; and
Gilmour and Others *v.*
Allaire.

(Two of a Series of Actions heard as Test Appeals.)

Lower Canada. Lord Hobhouse. *July* 27, 1889.

Right of the appellants, who were holders of a timber-cutting licence, to cut timber on certain lots of lands in possession of

parties (the respondents) who claimed title under a Government location ticket. What are rights of licence-holders in forest reserves? Injunction. Is the injunction perpetual or interim, or does it interfere with the right to prove a better title in another suit? (Public Lands Acts, 1869, 32 Vict. c. 11, s. 16, Quebec.) Their Lordships uphold decisions below, declaring that the respondents are in possession for valuable consideration given to the Crown, and that they are entitled to protection against timber-cutting licences by injunction (Injunction Act of 1878, 41 Vict. c. 14, Quebec), even though, in consequence of the Forests Proclamation of 1883, there may be infirmities in the Crown's title. On the question respecting injunction their Lordships, in dealing with the first appeal, said:—

"That question is whether the plaintiff (Mauroit) is a person who as against the defendants has a right to be protected by injunction within the terms of the Injunction Act of 1878. The Act provides that the Court may grant a writ of injunction ordering the suspension of any act, proceeding, operation, work of construction or demolition, in the following case, amongst others: —'Whenever any person who has not acquired the possession of one year, and who has no valid title to the property, causes work to be carried on upon any land whereof another is proprietor through a valid title, and of which he is in lawful possession.'

"The defendants have certainly never had the possession contemplated by the Act, and their Lordships agree with the holding of the Queen's Bench, that all lots for which a location ticket had previously been granted were excluded from the operation of the timber licence granted to the defendants in October, 1886. The defendants, therefore, had neither possession nor title.

"The plaintiff is in possession for valuable consideration given by him to the Crown, in the course of dealings with the official agent of the Crown, and ostensibly by the authority of that agent. Even supposing that the Crown can annul the instrument which gives him title, it could not treat him as a trespasser. Nor whatever may be the legal powers of the

Crown, as to which their Lordships say nothing, can we consider as a mere nullity the possession of land by one who has paid money for it, and has made improvements on it, and who can hardly be expected to know of legal infirmities in the Crown's title. Their Lordships consider that this is a title sufficiently valid and a possession sufficiently lawful to carry with it the right of protection by injunction; and that the Injunction Act does not open to a defendant a door of escape merely because he may be able to show that the plaintiff's title is one which cannot be made good against all other persons.

"From the statement of reasons by the learned Chief Justice, their Lordships collect that the Court will not, as a general rule, decide a question of title on this kind of proceeding, especially when a third party is interested, as the Crown is here, but that they are in the habit of granting interim protection. It appears to their Lordships that such a practice is in accordance with the provisions of the Act, and has been properly applied in the present instance. The appeal ought to be dismissed, with costs."

With reference to the second appeal, their Lordships observed: "This appeal is subject to the same considerations, the only difference being that the plaintiff's location ticket was granted before the Proclamation of September, 1883, and before the defendants obtained any timber licence at all. Therefore the arguments used to prove the invalidity of Mauroit's title do not apply to Allaire's . . . . This appeal also should be dismissed with costs." [14 *App. Cas.* 645; 59 *L. J. P. C.* 38.]

Senécal (now by order of revivor his widow) *v.* **Pauzé.**

Lower Canada. LORD MACNAGHTEN. *July* 27, 1889.

Action by (the respondent) a curator of a deceased person's estate to recover debentures which had been pledged to the appellant (or rather her husband) as security for the payment

of two promissory notes. Tender by the curator of payment for the notes. Construction of Article 1975, Civil Code. Construction of "unilateral" (old French law) contract. Was the estate of the original pledgor and owner of the debentures (one Pangman now deceased) bound by another agreement to sell his debentures; and, if there was an agreement to sell, was it not limited to a particular purpose and to take place in a particular manner? The Judicial Committee agree with the Court of Queen's Bench, which had reversed a decree of the Court of Review and upheld an order of the first Court, that the value of the debentures was recoverable by the curator at their nominal par value from the appellant, and hold that the objections raised by the appellant against this course fail. The facts of the case, quoting portions of the judgment of the Judicial Committee, may be summarized as follows:—

"On the 31st of January, 1880, one Pangman deposited with Senécal fifty-four debentures of the Laurentian Railway Company of the nominal value of $500 each as collateral security for the payment of two promissory notes of the same date of $1,000 each, payable the one ten months and the other twelve months after date. On the 11th of November, 1880, Pangman died insolvent. His heirs renounced the succession, and the respondent Pauzé, one of his creditors, was duly appointed curator to his vacant estate. On the 6th of April, 1882, Pauzé tendered to Senécal the sum of $2,152, the amount then due in respect of the two promissory notes, and demanded a return of the debentures.

"Senécal refused to comply with this demand; Pauzé then brought the present action to recover the debentures, repeating his tender. The Superior Court (Papineau, J.) gave judgment for the plaintiff, and ordered Senécal to restore the debentures, or in default to account for their par value. This judgment was, however, reversed by the Court of Review on the ground that the tender was insufficient. On appeal, the Court of Queen's Bench, Monk and Tessier, JJ., dissenting, set aside the judgment of the Court of Review, and restored the judgment of the Superior Court, with some variations of no great importance.

From this decision Senécal appealed to her Majesty in Council. . . . On behalf of the appellant, it was argued that the judgment under appeal ought to be reversed and the action dismissed on two grounds."

The appellant's first contention was that the curator's tender was insufficient within the meaning of Article 1975 of the Civil Code. This article was, "If another debt be contracted after the pledging of the thing, and become due before that for which the pledge was given, the creditor is not obliged to restore the thing until both debts are paid." The appellant's counsel pointed out that it was established in evidence, and not, in fact, disputed, that other debts had been contracted and did become due during the currency of the promissory notes, and they argued that it was incumbent on Pauzé to tender a sum sufficient to cover the amount of this indebtedness, as well as the principal and interest secured by the promissory notes.

The second contention of the appellant was based upon an agreement or "unilateral contract" dated the 13th September, 1878. Under this document it was alleged that Pangman (others also joined in the agreement) had contracted to sell forty-eight debentures of the Laurentian Railway debentures to one Greene, who had afterwards (in 1882) assigned his rights to Senécal for valuable consideration. Senécal relying on this assignment now claimed that he was entitled to hold all but six debentures as his own, giving credit for their stipulated price. The balance of Senécal's claims on Pangman's estate might be set off against the remaining six debentures. Dealing with the first plea, the Judicial Committee, who did not call upon respondent's counsel, could not agree with the view taken on behalf of the appellant. "As the learned Chief Justice (Dorion) observes, Pauzé complied strictly with the terms of the contract of deposit by tendering the amount due in respect of the promissory notes. Senécal, no doubt, might have claimed to hold the debentures until both debts were paid if he had been prepared to restore the debentures. It appears, however, that he had either parted with them already or was fully resolved at the time to treat them as his own property; he had no intention of restoring them in any event. In these

circumstances, though he alleged that other sums were due to him from Pangman's estate, he did not set up by way of defence the right which Article 1975 gives to the holder of a pledge."

With reference to the second plea of the appellant, the Judicial Committee deal with the circumstance of the incorporation and construction of the Laurentian Railway (36 Vict. c. 44, Quebec).

"In 1878, the line seems to have been completed and in working order, but the receipts were certainly not more than sufficient to pay the working expenses, and the credit of the company was at a very low ebb."

On the 13th of September, 1878, the agreement relied on by the appellant was signed. Their Lordships then proceed:—

"It does not appear that Greene took any action upon the document until March, 1882. On the 13th March, 1882, a conditional agreement (afterwards confirmed by 45 Vict. c. 19, Quebec) was made between the Laurentian Railway Company, of which Senécal was then president, and the Canadian Pacific Railway Company, for the purchase by the latter of the Laurentian Railway, in consideration of the Canadian Pacific Company redeeming the $300,000 debentures of the Laurentian Railway Company. About this time, Greene seems to have called upon Murphy and Bellefeuille, two of the persons who subscribed the document of September, 1878, to transfer their debentures for the sums therein mentioned. They both refused to do so, and no proceedings were taken to enforce the claim. About the same time, Greene wrote upon the document an acceptance in the following terms, 'I accept the above agreement, N. H. Greene,' and upon the 10th of April, 1882, by a memorandum on the document, he purported to assign for value his rights under it to Senécal."

After touching upon the view taken by Chief Justice Dorion that no contract was made binding the estate when Greene wrote the words "I accept the above agreement," inasmuch as Pangman was then dead, and secondly because his estate was insolvent, the Judicial Committee report their finding to be as follows:—

"Their Lordships cannot resist the conclusion that the docu-

ment of September, 1878, is not to be regarded as an unilateral agreement binding the signatories for an indefinite time to sell their debentures to Greene at a certain price, but that it was an arrangement made between persons having a common interest in the Laurentian Railway Company for the purpose of defining and limiting their respective claims against the company, and that it was placed in Greene's hands in order to facilitate some financial operation in regard to the railway which was then on foot or in the immediate contemplation of the parties, and intended for their common benefit.

"If this be the true view, it appears to their Lordships that it was not competent for Greene to make use of the document contrary to the real intention of the parties, and to treat it as an agreement for sale of which he might avail himself for his own benefit whenever he chose. The second ground of appeal therefore fails also."

Finally, their Lordships saw no reason for deciding that the debentures should be taken at less than their par nominal value. Appeal dismissed, with costs. [14 *App. Cas.* 637.]

Mutual Provident Land Investing and Building Society, Limited *v.*

Macmillan and Wife.

New South Wales. SIR BARNES PEACOCK. *July* 27, 1889.

Title in property. Was a power of attorney to sell given by a spinster (now married, and joined with her husband as respondent) revoked before her attorney made transfer of the land to another? New South Wales Powers of Attorneys Act, 17 Vict. No. 25, s. 1. Alleged parol revocation. Revocation by reason of marriage. Verdict of jury declaring that there had been revocation. Application for new trial refused by Supreme Court. The Judicial Committee are not prepared to say that this refusal was wrong.

They were of opinion that the sole object of the statutory declaration under the Act was to protect a *bonâ fide* purchaser

without notice of revocation. They could not say that the jury, in giving a general verdict against the appellants, who claimed under title of a conveyance from the purchaser, were not entitled to infer from the evidence that the purchaser here had at the time of the purchase cause to suspect the truthfulness of the attorney's declaration that the power had not been revoked. Order of the Supreme Court affirmed with costs.

[14 *App. Cas.* 596; 59 *L. J. P. C.* 52.]

Seth Jaidayal *v.*
Ram Sahae and Others.

Oudh. SIR BARNES PEACOCK. *July* 31, 1889.

Action arising out of a loan and a mortgage for it. Terms of the contract not complied with by the borrower. Cross allegation of non-compliance. What relief to be given to the representatives of the lender. The Judicial Committee held that the contract was not void, which was the finding of the Subordinate Judge, and agree with the Court of the Judicial Commissioner that the respondents, who represent the original lender, ought to be compensated to the amount of the loan paid over to the borrower. The Judicial Committee, although they agreed that the contract was valid, said it was one which the defendant was unable to fulfil. In consideration of a promised advance of Rs. 21,000 he contracted to put the lender into possession as lessee of lands for twelve years from the 23rd September, 1877 (*i.e.*, within the period of limitation). He showed, however, that he had only received Rs. 16,000 out of the Rs. 21,000, and it also appeared that the borrower on his part had not put the lender into possession. The Judicial Committee, quoting their own words, say, "It turned out that the estate had been seized into the hands of the collector under a decree against the defendant, and it was impossible for him to put the plaintiff into possession.

"Then the question arises, what were the damages for their not being put into possession? The damages awarded were for the Rs. 16,000 which had been received, and interest upon that

amount from the date of the contract, at 12 per cent. If the defendant had given possession, as was intended by the terms of this contract, the plaintiffs would have had the property for a period to commence from the 23rd of September, 1877, as a security for Rs. 16,000 and interest.

"The plaintiffs not having been put into possession, and the defendant not being able to give them possession, the damages which they sustained by not having that security for the Rs. 16,000 and interest were the Rs. 16,000 and interest which the Judicial Commissioner has allowed." Affirmed, with costs.

[*I. L. R.* 17 *Calc.* 432.]

Strang Steel, & Co. and Others *v.*
A. Scott & Co.

Rangoon. LORD WATSON. *Aug.* 1, 1889.

Shipping law. Jettison through default of master. Liability of consignees to pay a contribution to general average before delivery of their goods. The s.s. "Abington" from London to Rangoon ran aground in the Gulf of Martaban. Part cargo jettisoned to lighten the vessel, after which she reached her destination in safety. On arrival at Rangoon the local agents for the ship (the appellants) intimated to the respondents and other consignees of cargo that a deposit of one per cent. upon the value of their goods would be required before delivery "against probable average claim"; and on the following day they made a further intimation that the amount of deposit required would be five per cent. A correspondence ensued, in the course of which the respondents made various tenders, all of which were refused. Later they paid the required deposit under protest, and obtained delivery of their goods. They then instituted this suit for recovery of their deposits and for damages for retention of their goods upon the allegation that they had before payment made a tender entitling them to delivery. On the same day as the suit was filed they applied for an injunction to restrain the appellants from remitting to England the deposit. These

appellants undertook to retain the claimed amount in their own possession and without the issue of an injunction, and no further proceedings have been taken in that application. On the 5th February, 1887, the respondents were allowed to add to their original action the allegation that they were not liable to contribute for "general average" on account of ship or cargo, because all loss was due to the negligence or misconduct of the master.

The case was tried twice before the Recorder. In the result he gave the respondents a decree for Rs. 1,592.11, the deposit demanded of them and paid by them, and for Rs. 200 in name of damages, with costs of suit.

The Judge found as a matter of fact that the stranding of the ship was occasioned by the master, and he held that no claim for general average arises to the owner of cargo jettisoned when the peril which necessitated jettison is induced by the fault of the ship. He, however, indicated that the respondents had made tender entitling them to demand immediate delivery of the goods before they paid the deposit to the appellants. On the hearing of the appeal by the Judicial Committee, three points were raised by the appellants:—(1) That innocent owners of cargo sacrificed for the common good are not disabled from recovering a general contribution by the circumstance that the necessity for the sacrifice was brought about by the master's fault. (2) That the bills of lading for cargo on the "Abington" excepted "any act, neglect, or default whatsoever of pilots, master, or crew in the management or navigation of the ship." (3) That the respondents did not, before the 25th October, 1886, make a sufficient legal tender. The appellants conceded that the "Abington" was stranded through the negligence of the master, and the respondents admitted that the ship and cargo were placed in such a position of danger as to make it prudent and necessary to sacrifice part of the cargo in order to preserve the remainder of it and the ship. The Judicial Committee reported to her Majesty that the decision of the Recorder ought to be reversed and the action be dismissed with costs in the Court below. The respondents must also pay the costs of the appeal.

The Committee in their judgment animadverted upon the rights and remedies which the owners of cargo generally have in a proper case of jettison.

"Some of the qualities of their right, and of the remedies by which it may be enforced, have been authoritatively defined. Each owner of jettisoned goods becomes a creditor of ship and cargo saved, and has a direct claim against each of the owners of ship and cargo for a *pro ratâ* contribution towards his indemnity, which he can enforce by a direct action. . . . (*Dobson* v. *Wilson*, 3 Campb. 484).

"Again, it is settled law that, in the case of a general ship, the owner of goods sacrificed for the common benefit has a lien upon each parcel of goods salved belonging to a separate consignee for a due proportion of his individual claim. The cargo not being in his possession or subject to his control, his right of lien can only be enforced through the shipmaster, whom the law of England, following the principles of the Lex Rhodia, regards as his agent for that purpose. The duty being imposed by law upon the master, he is answerable for its neglect.

"The rule of contribution in cases of jettison has its origin in the maritime law of Rhodes, of which the text, as preserved by Paulus (Dig. L. 14, Tit. 2), is, '*Si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.*' The principle of the rule has been the frequent subject of judicial comment."

Their Lordships then say: "It appears from the proceedings in this suit that the average claims at the instance of cargo owners exceed $30,000, and there is a small claim on account of ship. The fault of the master being matter of admission, it seems clear, upon authority, that no contribution can be recovered by the owners of the 'Abington,' unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers. But the negligent navigation of the master cannot, in the opinion of their Lordships, afford any pretext for depriving those shippers whose goods were jettisoned of their claim to a general contribution. They were not privy to the master's fault, and were under no duty, legal or moral, to make a

gratuitous sacrifice of their goods, for the sake of others, in order to avert the consequences of his fault. The Rhodian law, which in that respect is the law of England, bases the right of contribution not upon the causes of the danger to the ship and cargo, but upon its actual presence. . . . The owners of goods thrown overboard having been innocent of exposing the 'Abington' and her cargo to the sea peril which necessitated jettison, their equitable claim to be indemnified for the loss of their goods is just as strong as if the peril had been wholly due to the action of the winds and waves."

The leading cases referred to in the judgment are, *Crooks and Company* v. *Allan*, 5 Q. B. D. 38; *Burton* v. *English*, 12 Q. B. D. 220; *Schloss* v. *Heriot*, 14 C. B. N. S. 59; *Wright* v. *Marwood*, 7 Q. B. D. 67. Parsons' Law of Insurance, Vol. II. 285; and the same writer's Law of Shipping, Vol. I. 211.

[*L. R.* 16 *Ind. App.* 240; 14 *App. Cas.* 601; 59 *L. J. P. C.* 1.]

Kissorymohun Roy and Others *v.*
Hursook Dass.

Bengal. LORD WATSON. *August* 1, 1889.

Action for damages for wrongful attachment of jute. Market value. Liability for delay in sale. Law of execution in India different from that of England. *Walker* v. *Olding*, 1 H. & C. 621. The appellants, in a suit before the Subordinate Judge, obtained a decree for debt against two persons known as the Deys. In terms of sect. 483 of the Civil Procedure Code, Act XIV. of 1882, they had, during the dependence of the suit, applied for attachment in security of 1,900 bales of jute, believing it to be the property of the Deys. On proceeding to attach (in November, 1883), the respondent alleged that 848 of the bales had been purchased by him from the Deys, and that seventy-five other bales were held by him as a lien for advances. Upon the attachment being made, the respondent preferred a claim under sect. 278 of the Code to the goods, but it was disallowed by the Subordinate Judge on 15th April, 1884.

On the 28th April, 1884, the respondent, as authorized by sect. 283 of the Code, instituted the suit in which this appeal is taken before the High Court at Calcutta, in order to establish the rights which he claimed in the goods, and for damages in respect of their wrongful attachment. By decree dated the 28th December, 1884, Wilson, J., declared that the respondent was sole and absolute proprietor of the 848 bales, and had a valid and effectual lien upon the remainder for advances exceeding their value, and assessed damages at Rs. 24,584, being the market value of the jute at the time of the attachment. The High Court, on the 13th March, 1886, affirmed the judgment of Wilson, J., with costs.

Pending these proceedings, the jute had, in June or July, 1884, been sold by order of the Subordinate Judge, when, owing to the intermediate fall in the market, the price obtained for the bales was about half of what they were worth at the date of the attachment.

The validity of the respondent's claim to these 922 bales of jute depends upon the authenticity of the documents of title produced and founded on by him, which has been affirmed in this action by the concurrent findings of both Courts below. In the argument addressed to the Judicial Committee, the appellants did not impeach these findings; but they maintained that damages were assessed on an erroneous principle, and that the respondent was not entitled to recover more than the price which the jute realized when sold by order of the Subordinate Judge in the year 1884.

The appellants now contended that to condemn them in payment of the market value of the jute on the 28th November, 1883, was, in reality, to make them responsible for delay occasioned by litigation, and that the respondent could not recover the difference between that value and the depreciated price arising from such delay, unless he alleged and proved that they had litigated maliciously and without probable cause.

The Judicial Committee said that was a rule which obtains between the parties to a suit when the defendant suffers loss through its institution and dependence. It does not apply to

proceedings taken by the injured party, after the wrong is done, in order to obtain redress. But, in this case, there has been no action and no proceeding instituted by the appellants against the respondent, Hursook Dass. The summary proceeding under sect. 278 was taken by the respondent for the purpose of getting the release of an attachment issued in a suit to which he was not a party. He therefore was not bound to prove that the appellants resisted his application maliciously and without probable cause. Neither did the Judicial Committee agree with a second contention of the appellants, namely, that a judgment creditor is not responsible for the consequences of a sale of goods illegally taken in execution in satisfaction of his debt. *Walker* v. *Olding* would have been an authority of importance had the law of execution been the same in India as in England, but there is in that respect no analogy between the two systems. In England, the execution of a decree for money is entrusted to the sheriff, who is bound to use his own discretion, and is directly responsible to those interested for illegal seizure. In India, warrants for attachment in security are issued on the *ex parte* application of the creditor. In the present case, by the terms of the perwana, no discretion was allowed to the officer of the Court in regard to the selection of the goods which he attached; his only function was to secure under legal fence all bales of jute in the respondent's premises which were pointed out by the appellants. The illegal attachment of the respondent's jute on the 28th November, 1883, was thus the direct act of the appellants, for which they became immediately responsible in law; and the litigation and delay, and consequent depreciation of the jute, being the natural and necessary consequences of their unlawful act, their Lordships are of opinion that the liability which they incurred has been rightly estimated at the value of the goods upon the day of the attachment. Affirmed, with costs.

[*L. R.* 17 *Ind. App.* 17; *I. L. R.* 17 *Calc.* 436.]

Babu Ram Singh and Another *v.*
The Deputy Commissioner of Bara Banki.

Oudh. LORD HOBHOUSE. *Nov.* 6, 1889.

Suit for declaration of proprietorship in certain villages by virtue of a deed of gift. Claim by members of a family against the heir. Oudh Estates Act (I. of 1869). Points of adverse possession, and claim to sub-proprietorship not raised in the plaint. Impossible to raise them now. The appellants (plaintiffs) sought to be declared proprietors of villages for the purpose of obtaining mutation of names on the ground that in 1850, the son of the then Talukdar or Rajah had made a deed of gift to his uncle who was the father of the appellants. The Deputy Commissioner is defendant as representing the interests of the present Talukdar, and, on his part, it was shown that the lands in dispute were included in the Taluk granted after the Mutiny under the provisions of Act I. of 1869; that the Talukdar has paid the Government the revenue of the whole Taluk, and that the plaintiffs have been in the habit of paying him that share of the revenue which would be payable for the villages held by them. Both Courts below decided against the plaintiffs, and the Judicial Committee uphold these findings. Their Lordships, *inter alia*, said: "The genuineness of the deed is disputed; but it has been held to be genuine by the Judicial Commissioner; and, for the purposes of the present appeal, the correctness of that holding may be assumed. But there is no doubt that the deed of gift (whether it is an absolute gift, or one for maintenance only, is a matter of dispute) was displaced by Lord Canning's proclamation; and that the Sanad of the Taluk conferred an absolute title upon the grantee *primâ facic.*

"The plaintiffs base their claim upon the principle of those decisions of this Committee, in which it has been held that the conduct of the holder of a Sanad has been sufficient to establish against him a liability to make good, out of his Sanad, interests in the property which he has by that conduct either granted to other people, or given them ground to claim. But the plaintiffs

do not show that there has been any such conduct beyond the fact that they have been left in possession of the property during the whole time of the troubles in Oudh, and down to the present time. . . .

"Their Lordships are of opinion that the mere fact of possession, which is consistent with an intention to give maintenance as well as proprietorship, does not establish any case against the Talukdar obliging him to make the plaintiffs proprietors of that portion of his Taluk." The Judicial Committee further held that the point of adverse possession, which was not taken in the plaint, and the question of a claim to sub-proprietorship could not be raised now for the first time. Appeal dismissed, with costs. [*L. R.* 17 *Ind. App.* 54; *I. L. R.* 17 *Calc.* 444.]

Sheik Mahomed Ahsanulla Chowdhry *v.*
Amarchand Kundu and Others.

Bengal. Lord Hobhouse. *Nov.* 9, 1889.

"*Wakf*" *Case.* Was there a genuine "wakf" or not? Can certain property be seized in execution proceedings? Construction of the deed by which the alleged dedication for charitable purposes was made. The appellant (the plaintiff) was a son of the person who executed, in 1864, the so-called fisabilillah wakf, the construction of which is now in dispute. The second defendant, one of the respondents in the suit, was the appellant's brother; another defendant and respondent being owed money by the said second defendant, obtained an order for attachment of the property mentioned in the wakf. The appellant, stating that the property was wakf, and that he was Mutwali, brought the suit to have it declared that it could not be attached or disposed of in execution proceedings. In the course of the arguments, numerous text-books and decisions were cited on the plaintiff's side to show that a wakf may, according to Mahomedan law, embrace provisions for the family of the grantor; and, on the defendant's side, that there can be no wakf, unless the whole property is primarily and substantially dedicated to charitable

purposes. In the wakf, several clauses were inserted dealing with the necessary requirements for keeping up the family. There were also expressions intimating the grantor's desires for enlarging and enriching it. Then followed a direction that the family were "to continue to perform the stated religious works according to custom." The Subordinate Court held that a valid wakf was created. The High Court, on the other hand, dismissed the suit so far as it sought to have the properties declared wakf, and released from attachment. There were certain charges upon the property to be met, but otherwise it could be attached. The Judicial Committee reported to her Majesty that the appeal ought to be dismissed with costs. While treating as correct the view taken by Mr. Justice Kemp in the case of *Muzhurool Hug* v. *Puhraj Ditarey* (13 S. W. R. 235), to the effect that when the proceeds of an estate were primarily devoted to charitable purposes, subordinate and later arrangements for a family did not invalidate a wakfnama, they, nevertheless, considered this particular wakf invalid as such. They "agree with the High Court that the gift in question is not a *bonâ fide* dedication of the property, and that the use of the expressions 'fisabilillah wakf,' and similar terms in the outset of the deed, is only a veil to cover arrangements for the aggrandisement of the family, and to make their property inalienable." Appeal dismissed, with costs.
[*L. R.* 17 *Ind. App.* 28; *I. L. R.* 17 *Calc.* 498.]

Woolcott and Another *v.*
Peggie.

Victoria. LORD MACNAGHTEN. *Nov.* 14, 1889.

Action by purchasers for specific performance of a contract for the sale of real property. Rescission of contract by the vendor. Is such rescission under a condition in the contract valid? Their Lordships agree with the Court below that it was. The judgment of the Judicial Committee was as follows:—

"This is a purchasers' action for specific performance of a contract for the sale of some real property. The defence was

that before the action was brought the contract had been annulled by the vendor under a condition in the contract. There was a counter-claim, the result of which necessarily depended on the result of the action.

"The condition on which the vendor relied provided that in case the purchaser should, within the time limited, make any objection to, or requisition on, the title which the vendor should be unable or unwilling to remove, it should be lawful for him to annul the sale.

"The requisition which led to the question between the parties was in substance this: The purchasers called the attention of the vendor to the fact that on the registry there appeared to be the entry of a previous contract by him for the sale of the very same property to a Mr. Taylor, and they required that this entry should be removed. After some little delay, which is fully accounted for by the circumstances of the case, the vendor stated, apparently with perfect truth, that he had never heard of the entry before the purchasers brought it to his notice; and he asserted, and apparently with equal truth, that he had never entered into such a contract as that referred to in the entry. The vendor at once set about getting the entry removed. He commenced proceedings against the person who had improperly procured the entry to be made, but as that person had left the colony, he found that it was impossible to bring the matter to a speedy issue. All this was communicated to the purchasers, and they were asked what course they proposed to take. They were willing to give time if the vendor would give an indemnity, but otherwise they insisted on the entry being removed according to the requisition, that is, removed forthwith, or at any rate before the vendor was to be at liberty to deal with any part of the purchase-money. The vendor was unwilling to give the required indemnity, and unable to remove the entry forthwith. At last, on the 2nd of September, 1887, one of the purchasers, who was a solicitor, and had the conduct of the matter, wrote as follows: 'With regard to Mr. Taylor's claim, I will, as already stated, give you any reasonable time to clear this away. Unless you accept my offer, which is in terms of your letters and the

contract, on or before Monday next I shall take such action as I may be advised to enforce the same.' That was, in distinct language, threatening the vendor with litigation unless he accepted the purchasers' offer. Their offer was an offer to give time on condition, but only on condition, that he gave an indemnity. The vendor intimated that he should be obliged to annul the sale. The purchasers still insisted on what they considered to be their strict rights. Under these circumstances the vendor gave notice that he rescinded the contract. Their Lordships agree with the Courts below that he was justified in so doing."

"Whether his action is to be regarded as founded upon inability to remove the objection in accordance with the exigency of the requisition, or on unwillingness to proceed further on the footing of a subsisting contract, in face of the consequences with which he was threatened (which seems the more natural view), is wholly immaterial. In either case, he was entitled to rescind the contract, provided he acted in good faith."

"Their Lordships, therefore, will humbly advise her Majesty to dismiss the appeal, and the appellants will pay the costs."

[15 *App. Cas.* 42; 59 *L. J. P. C.* 44.]

Mohunt Modhusudan Das *v.*

Adhikari Prapanna and Another.

Bengal. SIR BARNES PEACOCK. *Nov.* 15, 1889.

Security for costs. Discretion of the judges of the High Court to enlarge time for giving security for costs in the matter of an appeal to them. Was it properly exercised by a refusal to extend the time? Sect. 549 Code of Civil Procedure (Act XIV. of 1882). The Judicial Committee decline, under the circumstances of this case, to interfere with the ruling of the High Court. Appeal dismissed with costs.

[*L. R.* 17 *Ind. App.* 9; *I. L. R.* 17 *Calc.* 516.]

Budri Narain (a minor) *v.*
Sheo Koer.

Bengal. SIR RICHARD COUCH. *Nov.* 15, 1889.

Appeal to High Court struck off because security not filed. Limit of time for furnishing security in respect of the costs of an appeal. In this case there had been several extensions of time granted, and it appeared, finally, when an application for review was made, that the party seeking the appeal was ready and willing to give security in cash, if his previous offers of security were not acceptable. The Judicial Committee considered that the powers of the Court, in their discretion, to grant further extension of time had not, under the circumstances of this case, been sufficiently exercised (sect. 549 Code of Civil Procedure); and their Lordships recommended that a decree should be made in accordance with that delivered in the case of *Kuar Balwant Singh* v. *Kuar Doulut Singh* (L. R. 13 Ind. App. 57), thus allowing the appeal with costs. As, however, the record was bulky, they directed that, on taxation of costs in this matter, it would be proper for the Registrar, in considering the amount which should be granted for the costs of perusing the record, to accede only so much as was applicable to the question now argued and decided. Respondent to pay the costs of the present appeal.

[*L. R.* 17 *Ind. App.* 1; *I. L. R.* 17 *Calc.* 512.]

Mohini Mohun Das and Others *v.*
Bungsi Buddun Saha Das and Another.

(Three Appeals consolidated.)

Bengal. LORD MACNAGHTEN. *Nov.* 19, 1889.

Actions to recover money lent. Were the suits defective for want of parties? The three suits were filed on the 2nd November,

1883, by one of the plaintiffs who, on the plaints, mentioned the co-plaintiffs, but the latter had not themselves signed the plaints. The question was whether it was necessary that these co-plaintiffs should have signed the plaints. Subsequent to the filing of the plaints, the Court made an order (which is by the Judicial Committee declared to be valueless) making one of the co-plaintiffs, whose name was mentioned, a party. If the date of the commencement of the suits was to be taken as from the filing of that order, the suits would be barred by Schedule II., Article 67, of Act XV. of 1877.

The Judicial Committee held that there was no rule under the Civil Procedure Code (sections 30 and 34 discussed), making it compulsory for a co-plaintiff to sign the plaint. The proper date of the suits was the 2nd November, 1883, and it was within the period of limitation. They find that the proper parties were on the records, and reverse the Decrees below. They also remand the case to the High Court, with a direction that, as the suits were not barred by limitation, they should be tried on the merits by the Subordinate Court. Leave is to be given to the parties to raise such issues and to adduce such evidence as they may be advised, and the costs which have been incurred in the Subordinate Court are to abide the results of the suits. The costs which have been incurred in the High Court, and the costs of these appeals, are to be paid by Bungsi Buddun Saha Das.

[*I. L. R.* 17 *Calc.* 580.]

Gobind Lal Roy *v.*
Hemendra Narain Roy Chowdhry.

Bengal. SIR BARNES PEACOCK. *Nov.* 19, 1889.

Suit for possession of villages. Construction to be put upon an ijara lease. The lease in question was granted by the grandfather of the respondent to his wife, with the stipulation that it was to last for 125 years, and be continued "to the son or sons

of that wife." The lady had a son who died before her, but he left a son, the present respondent. The appellant, within whose putni estate the leased property lay, argued that as the grantees and the son of the lady were dead, the property should revert to him.

The Judicial Committee agreed with the Courts below, and held that there was nothing in the lease to show that it was the intention of the grantor to limit it to a shorter period, and that the respondent should be left in possession. The intention of the grantor was that the ijara was granted to the wife and her heirs. Ruling in *Tej Chund Bahadoor* v. *Srikanth Ghose*, 3 Moo. Ind. App. 272, followed. Affirmed with costs.

[*I. L. R.* 17 *Calc.* 686.]

Rai Babu Mahabir Pershad *v.*
Rai Moheshwar Nath Sahai and Another.

[*Ex parte.*]

Bengal. LORD HOBHOUSE. *Nov.* 20, 1889.

Liability of ancestral estate for father's debts. Sale. What was sold? Was it the joint family interest, or was it only such share as a father would take on partition? Their Lordships held that the respondent (the plaintiff) could only succeed in impeaching the sale if he proved that the family debts were contracted for immoral purposes, and that on the question of facts in this case the entire corpus of estate (5 a. 4 p. in extent) was sold. The contention of the appellant (the purchaser) at the sale was therefore correct. Decree of the High Court reversed with costs. Cases considered: *Nanomi Babuasin and Others* v. *Modun Mohun and Others*, L. R. 13 Ind. App. 1; *Bhagbut Pershad and Others* v. *Girja Koer and Others*, L. R. 15 Ind. App. 99.

[*L. R.* 17 *Ind. App.* 11; *I. L. R.* 17 *Calc.* 584.]

Kumar Biseswar Roy and Another *v.*
Kumar Shoshi Sikhareswar Roy and Another.

Bengal. LORD HOBHOUSE. *Nov.* 22, 1889.

Court of Wards Act (Bengal Council), No. 9 of 1879, sect. 55. Authority of the Court to institute suit on behalf of minors necessary. In this suit the manager of an estate in 1879 did, for the purpose of saving limitation, authorize the plaintiff (now represented by the appellants) to enter a suit at his own risk. Such authority was within the manager's powers by reason of the second portion of sect. 55, but the first portion laid it down that, unless the sanction of the Court of Wards was given, no prosecution of a suit on behalf of minors could be embarked on. So far from consenting to the suit being prosecuted, the Court refused all such authority in writing. After several postponements at the request of the plaintiff to enable him to see if he could get the Court to change their opinion, but his efforts being futile, the suit was struck off the file of the Civil Court. In 1884, when the minors (the appellants) came of age they petitioned the Court for a restoration of the suit. The application was refused by both the Subordinate Court and the High Court. The present appeal from this decision was then brought. The Judicial Committee affirmed the decree of the lower Courts, and dismissed the appeal with costs.

[*L. R.* 17 *Ind. App.* 5; *I. L. R.* 17 *Calc.* 688.]

The Secretary of State for India in Council *v.*
Srimati Fahamidunnissa and Others.

Bengal. LORD HERSCHELL. *Nov.* 30, 1889.

Claim by Government to levy additional tax on land re-formed on the site of a permanently settled estate, and the rent for which has been regularly paid without abatement since the settlement. Is the decision of the Revenue authorities final, or has a Civil Court power to review their decision, and to

declare that the proceedings of the Revenue authorities in assessing such land were *ultra vires*? Both questions depended on the construction of Act IX. of 1847. *Vide* also principles of prior legislation under Bengal Regulations 1 of 1793, 2 of 1819, and 3 of 1828.

[This appeal was twice argued before their Lordships' Board.]

The plaintiffs were zemindars or putnidars of all but a four-gunda share of a one-fifth divided share of a zemindari. The remaining four-gunda share belonged to one Shama Churn Gangooh, who refrained from joining in the suit, and was in consequence made a defendant. A mouza, called Mohun Sureswar, which fell within the ambit of the plaintiffs' share, was the subject of the litigation. In 1792, the mouza contained an area of over 10,000 bighas of land, and upon that area Government revenue was assessed under the permanent settlement at a rate which was to last for ever. Subsequently the action of the Rivers Ganges and Brahmaputra caused the area to be submerged. Later still, some portions of it emerged from the water. And, indeed, from time to time the land kept reappearing and disappearing again. In 1877 the lands of the mouza were only about 2,000 bighas in extent. At that time, under the provisions of the 1847 Act, a survey was made, and in the survey map then prepared less than a half of the original mouza was to be traced—certain other lands visible the Deputy Collector believed were accretions to neighbouring mouzas. The plaintiffs said these lands were re-formations of their old area. Subsequently, on the Deputy Collector declaring that the emergent land was not re-formation and was liable to assessment, the plaintiffs appealed to the Commissioner of Dacca, who allowed the appeal only as to a portion, which he considered was marked as part of the plaintiffs' mouza in a map of 1859. The plaintiffs again appealed, this time to the Board of Revenue, who rejected the prayer of the plaintiffs and declared that the land in dispute did not exist at the time of the permanent settlement and must be assessed. The present suit was instituted in 1882, the object being to obtain a declaration that the lands in suit were part of the original mouza. The Subordinate

Judge considered that the plaintiffs had established the identification of the lands as part of their property. The District Judge, however, held that the Civil Court had no jurisdiction to traverse the ruling of the Revenue authorities, as it was a question of assessment only, and the plaintiffs' title to the lands and to a settlement of those lands was not in issue, as they were undoubtedly an accretion to the mouza Sureswar. The High Court, resting their judgment on the Regulation Laws, were of opinion that the Civil Courts were competent to try whether the Revenue authorities had acted within their jurisdiction, and in this case they had acted *ultra vires.* They, however, referred the following points to a Full Bench of the judges:—(1) Whether the provisions of Act IX. of 1847 are applicable to land re-formed on the site of a permanently settled estate, the revenue of which estate has been paid without abatement since the permanent settlement? (2) Whether, if these provisions are not so applicable, a Civil Court should, in the exercise of its discretion, make a decree declaring that the proceedings of the Revenue authorities in respect of such land are *ultra vires?* The last-named tribunal decided that lands included in a permanently settled estate were not liable to further assessment, but that any land not so included was liable to assessment; that the jurisdiction to decide the liability of lands which the Revenue authorities possessed before 1847 was taken away from them by the Act of that year; and that, though in the matter of lands undoubtedly liable to assessment their assessment of them was final, the Civil Courts were competent, in the event of disputed liability, to inquire whether such liability existed. This finding the Judicial Committee now report ought to be affirmed, and the appeal is dismissed with costs. In the course of their judgment their Lordships reviewed at length the legislation prior to 1847. "This review, . . . in their Lordships' opinion, makes it clear that whilst it was intended to bring under assessment lands not included in a permanent settlement, whether they were waste or gained by alluvion or dereliction, all such lands as were comprised in permanently settled estates were to be rigorously excluded from further assessment. And, in addition to this, the proprietors of such estates were assured

that they could protect themselves against any action of the Revenue authorities which would tend to infringe upon their rights by appeal to the Civil Court. Their Lordships think it equally clear that lands within the limits of settled estates which had become covered with water, and afterwards reformed, were not lands 'gained from the river or sea by alluvion or dereliction' within the meaning of this legislation, which is confined to lands so gained 'since the period of the settlement.' . . . It appears to their Lordships, . . . that the purpose of the Act of 1847 was merely to change the mode of assessment in the case of a class of land, already liable to be assessed under existing legislation, viz., land gained by alluvion or dereliction which was not included within the limits of a permanently settled estate. The terms of the 1st section point to this and nothing more, and the details of the legislation support the same conclusion. It is only to lands 'gained' from the sea or river by alluvion or dereliction that the legislation is applicable. Their Lordships have shown from an examination of the previous legislation the construction which must be put upon these words, that they must be limited to lands gained since the period of the settlement. It is only in relation to these lands, therefore, that the previous enactments are to cease to have effect. The 3rd section empowers the Government of Bengal, in any district in which a survey has been completed and approved by the Government, to direct decennially a new survey of lands on the banks of rivers and on the shores of the sea, in order to ascertain the changes that may have taken place since the last previous survey, and to cause new maps to be made according to such new survey. Sect. 6 provides that 'whenever, on inspection of any such new map, it shall appear to the local Revenue authorities that land has been added to any estate paying revenue directly to Government, they shall without delay duly assess the same according to the rules in force for assessing alluvial increments.' Their Lordships cannot think that it was intended by such a provision as this to deal with the case of lands in permanent settlement which had become derelict of the sea or a river. They cannot be said to have

been 'added' to the estate to which they already belonged. Considering the solemn assurance given by the Government to the owners of permanently settled estates that they should not be liable to further assessment in respect thereof, their Lordships find it impossible to hold that it was ever intended by this enactment to subject them to an added assessment in respect of land for which they were already assessed, because they had the misfortune to be practically deprived of it for a time by an incursion of the sea or river. And no violence is done to the language of the enactment by rejecting a construction which leads to such a conclusion. . . .

"But then it is said that the local Revenue authorities having assessed the land, and the Board of Revenue having made an order confirming their action, such order is, by the very terms of sect. 6, made final, and that there is an express provision in sect. 9 that no action in any Court of Justice shall lie against the Government or any of its officers on account of anything done in good faith in the exercise of the powers conferred by this Act. Their Lordships cannot conceive that it was intended by these enactments to deprive the owner of a permanently settled estate of the protection assured to him by the Regulation of 1819. When once the conclusion has been reached that the provisions of the Act of 1847 are inapplicable to the case of re-formed land being part of a settled estate in respect of which the full assessment has continued to be paid, it appears to follow that neither the local Revenue authorities nor the Board of Revenue can effectually render such land liable to assessment. It has been shown that, under the previous legislation, the owner of such lands was expressly given an appeal to the Civil Court as a protection against any attempt of the Revenue authorities to subject him to additional assessment. The provisions contained in Clause XXXI. of the Regulation of 1819 are in no way repealed or affected by the Act of 1847. The action of the Revenue authorities was, therefore, in their Lordships' opinion, wholly illegal and invalid. Their Lordships cannot hold that the Board of Revenue can, by purporting to exercise a jurisdiction which they did not possess, make their order upon such a matter final, and exempt themselves from the

control of the Civil Court. It is argued that where the acts done were within the powers conferred by the Act of 1847, the protection afforded by sect. 9 would be unnecessary, and that it must be applicable to acts done in assumed exercise of the powers conferred but really in excess of them. But full effect can be given to this section without holding that it deprives the owner of a permanently settled estate of that right of appeal which is given to him in order that he may have determined in a Civil Court 'the justness of the demand' of the Revenue authorities.

"The case, as it appears to their Lordships, may be shortly put thus:—The Board of Revenue have, in violation of the right solemnly secured to the owner of a permanently settled estate, claimed to subject his land to an additional assessment, a claim which has been declared by legislation to be wholly illegal and invalid. Thereupon, the owner exercises the right conferred upon him by the Regulation of 1819, and appeals by suit to the Court of Judicature to reverse the decision of the Revenue authorities. In bar of this suit the answer set up is, that a subsequent law empowers the Revenue authorities to assess, by new machinery, lands of a description within which the land in question does not fall, and makes the orders of the Board of Revenue thereupon final. Their Lordships are at a loss to see how this can be any answer. If it had been intended to take away from the proprietors of estates the power, by application to the Courts, to obtain immediate redress in any case in which 'the Revenue authorities shall violate or encroach on the rights 'secured to them by the permanent settlement,' it would have been done in express terms, and not by such enactments as are contained in the Act of 1847. It seems to their Lordships that it would be an erroneous interpretation of that statute to hold that it rendered the Board of Revenue supreme, and enabled them to make valid and effectual a proceeding on their part which the law had declared to be wholly illegal and invalid." Appeal dismissed. Appellant to pay costs.

[*L. R.* 17 *Ind. App.* 40; *I. L. R.* 17 *Calc.* 590.]

The Ocean Steamship Company (Owners of SS. "Hebe") *v.*
The Owners of SS. "Arratoon Apcar."

Vice-Admiralty. Straits Settlements. LORD MACNAGHTEN. *Nov.* 30, 1889.

Collision between steamships in the Straits of Malacca. Regulations for Preventing Collisions at Sea. Variance of decree below. Both vessels to blame. No costs of the appeal. The collision occurred at 3.35 a.m. on a fine clear morning with a southerly wind. Vessels approached in opposite directions with all proper lights burning. The Judge of the Vice-Admiralty Court held the "Hebe" alone to blame. She was navigated with reckless negligence, and the persons in charge of her were ignorant and incompetent. At the hearing of the present appeal, the counsel for appellants, though not denying that the "Hebe" was to blame, contended that the evidence of the respondents' own witnesses proved that the "Arratoon Apcar," was also in fault. They said that "the 'Arratoon Apcar' infringed the Regulations for Preventing Collisions at Sea in three particulars. They argued (1) that the 'Arratoon Apcar' ought to have slackened speed before the green light of the 'Hebe' came into view the third time; (2) that the engines of the 'Arratoon Apcar' ought to have been stopped and reversed at the time when the officer in charge gave the order 'hard-a-port'; and (3) that at any rate the engines of the 'Arratoon Apcar' ought to have been *reversed as well as stopped* before the collision." The excuse put forward at the trial for not reversing was that the "Arratoon Apcar" had a left-handed screw, and that its action would have "deadened" the effect of the port helm if the engines had been reversed. With some hesitation the learned Judge accepted this excuse, and exonerated the "Arratoon Apcar" from blame. This finding the Judicial Committee now reverse. After observing on the circumstance

that the Judge below sat without having the assistance of assessors, their Lordships say, "They are advised by their nautical assessors that before the green light of the 'Hebe' appeared the third time there were sufficient indications to the officer in charge of the 'Arratoon Apcar' (supposing him to have been a person of ordinary skill using reasonable care) to show that the two vessels were approaching so as to involve risk of collision. They are further advised that a prudent seaman in the position in which that officer was placed by the conduct of those on board the 'Hebe' would have stopped, or at the least have slackened speed, until the course of the approaching vessel could be made out with something like certainty.

"Under any circumstances, their Lordships would be slow to differ from their nautical assessors on a question of navigation. In the present case, thinking as they do that the risk of collision was not determined when the 'Arratoon Apcar' ported the second time, they see no reason for not giving effect to the advice which they have received. They are, therefore, obliged to hold that the 'Arratoon Apcar' was to blame for not slackening speed in good time before the third appearance of the 'Hebe's' green light.

"The error on the part of the 'Arratoon Apcar' may seem venial compared with the misconduct of those on board the 'Hebe.' But their Lordships have no power to absolve a vessel which infringes the regulations for preventing collisions at sea from the consequences prescribed by statute unless a plea of necessity is made out.

"The view which their Lordships have taken under skilled advice renders it unnecessary to pronounce an opinion on the conduct of the officer in charge of the 'Arratoon Apcar' after the 'Hebe's' green light appeared the third time. It was probably too late then to prevent a collision. Their Lordships, however, think it right to say that they are not satisfied that the excuse for not reversing ought to have been accepted as sufficient, nor are they convinced that the officer in charge of the 'Arratoon Apcar' after he saw the danger was justified in going to the wheel before giving orders to stop. Though the

time lost was short, there was an appreciable delay in complying with the regulations.

"In the result, their Lordships will humbly advise her Majesty that the decree under appeal ought to be varied by pronouncing the 'Arratoon Apcar' to blame as well as the 'Hebe,' with the usual consequences, including a direction to assess the damages sustained by the 'Hebe,' and by discharging the order as to costs. There will be no costs of the appeal."

[15 *App. Cas.* 37; 59 *L. J. P. C.* 49.]

Alison and Others *v.*
Burns.

New South Wales. Sir R. Couch. *Dec.* 11, 1889.

New South Wales Crown Lands Act of 1884 (48 Vict. No. 18, s. 14). Construction of other sections. Powers of the Minister of Lands to alter and fix the yearly rental of leasehold land and the amount of licence fees of resumed areas of pastoral lands after the respective rates of payment had already been appraised by the Land Board. Action by the appellants to recover from the Government certain moneys paid by them under protest to meet the enhanced rates demanded by the minister. Special case. The Judicial Committee, reversing the judgment of the Supreme Court, held that the excess amounts should be returned to the appellants, the minister having acted *ultra vires*. In their judgment their Lordships went back to earlier acts, 25 Vict. No. 2 (1861), and 43 Vict. No. 29 (1880), with the view of considering how the principle of appraisement by appraisers, which was a leading incident in the 1884 Act, came to be developed. The Land Board under the Act of 1884 was a body possessing more than mere recommendatory powers.

Their Lordships say:—"Sect. 14 regulates the procedure of the Board. It is to have power to hear and determine all complaints and other matters brought before it, and to conduct all

inquiries sitting as in open Court, and take evidence on oath. . . By sub-sect. 6 the minister may return to the Local Land Board for revision, re-hearing, or further consideration any case or matter which shall appear to him to have been improperly or insufficiently considered or determined by the Board. The minister might under this have returned the appraisement to the Board for revision. The giving him this power appears to show that the Board was intended to have more than a mere power of recommending to the minister what the rent should be.

"After an examination and consideration of the various sections of the Act, and the previous legislation, their Lordships are unable to agree with the learned Judges of the Supreme Court that 'the policy of the Act seems, in all cases between the Crown and its tenants where rent or the amount of compensation to be paid to Crown tenants is concerned, to place the minister in the position of a landlord with supreme power to fix the rent which the Crown tenant is to pay, limited only by ministerial responsibility to Parliament.' It seems to them to be the policy and intention of the Act that the Local Land Board and the minister should concur in fixing a fair rent for the occupation of Crown lands by persons who are recognized by the Act as having a preferential claim to occupy them. In their Lordships' opinion, the Minister had not power to act as he did in the case of either the rent or the licence fee, and judgment ought to be entered for the plaintiffs for both the sums mentioned in the case, with interest at five per cent., and costs. They will therefore humbly advise Her Majesty to allow the appeal and reverse the judgment of the Supreme Court, and order judgment to be entered for the plaintiffs accordingly. The respondent will pay the costs of the appeal."

[15 *App. Cas.* 44; 59 *L. J. P. C.* 34.]

Lala Gowri Sunker Lal and Others *v.* Janki Pershad and Others.

[*Ex parte.*]

Bengal. Sir Richard Couch. *Dec.* 11, 1889.

Validity of a sale of an estate for arrears of land revenue. Conditions of Act XI. of 1859 regulating such sales. The question raised in the suit by the plaintiffs (the respondents), was whether the sale of their Zemindary of Dumaria for arrears should not be set aside. The grounds of their contention, stated briefly, was that upon the true construction of the Act and under the particular circumstances of the case, the property ought to have been exempted from the sale. The lower Court dismissed the suit, but the High Court reversed the decree, ordered the sale to be set aside, and declared that the respondents were entitled to possession. The Judicial Committee now declared the sale a good one, and reversed the decree of the High Court accordingly.

It appeared that when a notification was issued that by reason of arrears the estate would be sold on the 24th September, 1883, and was duly published, the Collector of Sarun made an order in these terms :—" Payments of revenue in arrear will be received in the Treasury up to the time of sale. Applications for exemption on the ground of payment will be received up to 1.30 p.m., but they must be supported by Treasury receipts for payment in full of all demands. No applications will be received, and no payments will be accepted, after the sale has commenced."

The Judicial Committee, in giving the reasons for their judgment, explain as follows the details of the case :—" On the 22nd September Bindeswari Pershad Singh, one of the respondents, presented a petition to the Collector, stating that in mehal Dumaria there was an arrear of Rs. 8. 12. 5, in consequence of default in payment of revenue made by the other shareholders, and that he had brought the amount of arrears, and praying

that it might be received and entered in the account and the mehal released from sale. On the back of this petition there is a written order, dated the 24th September, that the office report be submitted, and after entries of the office reports there are the following :—

" 'Receipt not produced before sale.

" 'C. C. QUINN.

" 'The 25th September, 1883.'

" 'Accept on payment of all Government demands.

" 'R. C. P., Sarun Collectorate.

" 'The —— September, 1883.'

"In the lower Court, and in the High Court, the last entry is spoken of as made on the 22nd September, 1883. It does not appear for what reason. Mr. Quinn was the Collector. It is not known who was the person who used the initials R. C. P., but no issue was raised in the suit as to the authority to make that entry, and that cannot now be disputed.

"In the judgment of the lower Court it is found that the payment was not made before 1.30 p.m. on the 25th September, to which day the sale of Dumaria and a number of other estates in arrear had been duly adjourned by the Collector, and at the time of the sale no Treasury receipt was produced. The payment was made at the Collector's office some time before 2 p.m. on the 25th and before the commencement of the sale, but after the officers had left the office and gone to the Collector's ijlas (bench) to attend it. Thus the order of the 24th September, called the general order, under which an exemption might have been granted, was found not to have been complied with, and the plaintiffs were obliged to rely upon what is called in the issues the special order dated the 22nd September. The lower Court held that this is not an order for exemption under sect. 18 of Act XI. of 1859. The High Court has held that it is. That Court says the effect of the order may be expressed as follows,— 'I exempt this estate from sale, provided the arrears are paid before sale.' It appears to their Lordships that what is called the special order is not such an order as is intended by sect. 18.

It should be an absolute exemption, not an order which may have effect as an exemption or not according to what may happen or be done afterwards. The section says it shall be competent to the Collector or other officer, at any time before the sale, to exempt the estate from sale. The Collector is to record in a proceeding the reason for granting exemption. Although this, as the High Court says, may be done at any time, the reason should exist at the time the exemption is granted, and not be a fact which may happen afterwards, or an act which may or may not be performed. The words 'Accepted, &c.,' have been called by the lower Courts an order, and considered as one, but it may be doubted whether they are more than a note by one of the Collector's officers that the Rs. 8. 12. 5 would be received, and therefore the mehal would be released from sale.

"There is another and, their Lordships think, a fatal objection to the decree of the High Court. Sect. 25 makes it lawful for the Commissioner of Revenue to receive an appeal against any sale made under the Act if preferred within a specified time, and gives him power to annul any sale made under the Act which shall appear to him not to have been conducted according to its provisions. Sect. 26 gives power to the Commissioner, on the ground of hardship or injustice, to suspend the passing of final orders in any case of appeal from a sale, and to represent the case to the Board of Revenue, who, if they see cause, may recommend the Local Government to annul the sale, and the Local Government may do so, and cause the estate to be returned to the proprietor on such conditions as may appear equitable and proper. And sect. 33 enacts that no sale shall be annulled by a court of justice upon the ground of its having been made contrary to the provisions of the Act, unless the ground shall have been declared and specified in an appeal made to the Commissioner. The plaintiffs appealed to the Commissioner. In their grounds of appeal they say the Collector on the 24th September passed a general order, and they complied with it. They do not mention any order of the 22nd September. The Subordinate Judge thought paragraph 1 of the memorandum of appeal was sufficient, but it is not. It only says the sale is

fit to be set aside for reasons detailed in the following paragraphs. If the case now set up had been stated in those paragraphs, the Commissioner would have inquired into it, and if he thought there was hardship or injustice might have represented the case to the Board of Revenue. The second issue, as summarized by the Subordinate Judge, is, "Does sect. 33 of XI. of 1859 bar the suit?" and upon his opinion of paragraph 1 he held that it did not bar the suit. In the judgment of the High Court this issue is not noticed. It is said that the two points upon which the parties went to trial were—1st, Was the amount due for arrears paid before the sale commenced? 2nd, What was the meaning and legal effect of the orders of the 22nd September and 24th September? This is a misapprehension. The issue upon sect. 33 was tried by the Subordinate Judge. It was decided against the defendants, but the decree being entirely in their favour it was not necessary for them to file a notice of objection under sect. 561 of the Code of Procedure. They could support the decree on the ground that the second issue ought to have been decided in their favour. The High Court ought to have decided that issue, or have shown in their judgment a reason for not doing so. If it had been decided that the suit was barred by sect. 33, the appeal to the High Court ought to have been dismissed.

"Upon both the grounds which have been considered their Lordships are of opinion that the decree of the High Court ought to be reversed, and the appeal to that Court dismissed, with costs, and the decree of the lower Court affirmed."

The respondents, other than the Secretary of State for India in Council (who has been made a respondent), are ordered to pay the costs of this appeal.

[*L. R.* 17 *Ind. App.* 57; *I. L. R.* 17 *Calc.* 809.]

Petitions of the Governing Body of Christ's Hospital and Others against the Scheme of the Charity Commissioners for the Administration of Christ's Hospital.

LORD CHANCELLOR (LORD HALSBURY). *Dec.* 14, 1889.

Appeals of the Governors of Christ's Hospital, of the Corporation of London, and of various public institutions, against the scheme of the Charity Commissioners for the re-modelling of Christ's Hospital. The history of the school and objects of the foundation since its inauguration in Henry VIII.'s reign are fully described in the pleadings. The nature of objections of the various petitioners are exhaustively examined. In the result, the scheme of the Commissioners is affirmed by the Judicial Committee except in one particular (all other petitions, save that of the Governors of Christ's Hospital, as constituted by Act 22 Geo. 3, c. 77, are dismissed). The particular exception rendered it necessary to remit the scheme back to the Charity Commissioners, with a declaration that it is erroneous so far as it fails to embody the provisions required by sect. 16 of the Endowed Schools Act, 1869, and so far as it requires persons in charge of a boarding-house to allow exemptions from prayers and religious worship. The wording of sect. 16 of the Endowed Schools Act, 32 & 33 Vict. c. 56 (1869), textually is as follows:—"In every scheme (except as hereinafter mentioned) relating to an endowed school the Commissioners shall provide that if the parent or guardian of, or person liable to maintain or having the actual custody of, any scholar who is about to attend such school, and who but for this section could only be admitted as a boarder, desires the exemption of such scholar from attending prayer or religious worship, or from any lesson or series of lessons on a religious subject, but the persons in charge of the boarding-houses of such school are not willing to allow such exemption, then it shall be the duty of the governing body of such school to make proper provisions for enabling the scholar

to attend the school and have such exemption as a day scholar, without being deprived of any advantage or emolument to which he would otherwise have been entitled, except such as may by the scheme be expressly made dependent on the scholar learning such lessons. And a like provision shall be made for a complaint by such parent, guardian, or person as in the case of a day school." In the course of their Lordships' judgment the following important paragraph finds a place:—"This part of the scheme (sect. 80) contains a provision which, so far as their Lordships know, is quite novel. It provides that when exemption from attendance on religious worship or teaching has been claimed for a scholar in the way prescribed by sect. 16 of the Act, every person in charge of a boarding-house of any school of the foundation shall allow such exemption. To this the governors object, and their Lordships think that it is not warranted by the Act. In sect. 16 it is enacted that (when sect. 19 does not apply) 'in every scheme . . . the Commissioners shall provide that if the parent . . . of any scholar who is about to attend such school, and who but for this section could only be admitted as a boarder, desires the exemption of such scholar . . . but the persons in charge of the boarding-house of such school are not willing to allow such exemption, then it shall be the duty of the governing body of such school to make proper provisions for enabling the scholar to attend the school, and have such exemption as a day scholar.' The Commissioners are here ordered to insert in their scheme the exact provisions of the section. If exemption is claimed for a boarder, and the persons in charge of the boarding-house are not willing to allow it, what is to be done? The Act says that provision shall be made 'for enabling the scholar to attend the school, and have such exemption as a day scholar.' The scheme says that the persons in charge of the boarding-house shall be bound to allow the exemption. These two directions are contradictory of one another, and in this respect their Lordships are of opinion that the scheme is erroneous."

[15 *App. Cas.* 172; 59 *L. J. P. C.* 52.]

1890.

Phillips *v.*
Martin.

[*Ex parte.*]

New South Wales. LORD MACNAGHTEN. *Jan.* 28, 1890.

Title to land. Validity of deeds. Evidence as to signature. Motion for new trial and to set aside verdict is dismissed below. This judgment was affirmed by the Judicial Committee. In this case the Supreme Court dismissed the appellant's application for a rule *nisi* for a new trial of issues directed to be tried in the matter of an application by the appellant to bring certain lands under the Real Property Act, and in the matter of a caveat lodged by the respondent. The issues were these:—(1) Did one Caroline Martin sign a disentailing assurance dated January 22, 1875? (2) Did Caroline Martin sign a deed of conveyance of the 1st June, 1875? On both issues the jury found in the negative. The Judicial Committee consider that the questions were pre-eminently for the jury to decide. They saw the demeanour of the witnesses, and had before them the alleged original signatures on the deeds and on the caveat. There was no allegation, moreover, of misdirection. Their Lordships, in recommending the dismissal of the appeal, say:—"The appellant contends that the verdict was against the evidence or against the weight of the evidence. It is settled that a verdict ought not to be disturbed on that ground unless, to use the words of Lord Herschell in *The Metropolitan Railway Company*

v. *Wright* (11 App. Cas. 152), 'it was one which a jury, viewing the whole of the evidence reasonably, could not properly find.'"

The Committee then proceed to say that they consider the jury might properly find, as regards the first deed, that it was not signed by Caroline Martin, who had sworn that she never did sign it. Moreover, the scrawl which is said to be her signature, bears no resemblance to her admitted signatures, and very slight resemblance to the words which form her name. Having come to this conclusion, and finding that Mrs. Martin admittedly got nothing for parting with her life interest, if indeed she did part with it, the jury might not unreasonably come to the conclusion that her alleged signature to the deed of conveyance was not written by her, although it bears a close and singular resemblance to her admitted signatures. Appeal dismissed; appellant to pay costs. [15 *App. Cas.* 193.]

Booth and Others *v.*

Ratté.

Ontario. SIR RICHARD COUCH. *Feb.* 1, 1890.

Right to maintain an action and claim damages for alleged obstruction in a navigable river. Evidence. Construction of indentures under which title to riparian rights is set up. The suit was brought by the respondent against the appellants who were owners of saw mills at Ottawa on the Ottawa river. He claimed damages on the ground that the defendants (appellants), who occupied mills about half a mile higher up the river than the respondent's wharf and boat-house, obstructed the river at his wharf by sawdust, blocks, and chips of wood, &c., which, coming from the sawmills in floating masses, collected near the boat-house. No evidence was given below by the defendants (appellants). They rested their case solely on the ground that the plaintiff had no title to maintain the action. To find what was the basis of this argument it was necessary to consider whence the respondent derived his title as a riparian owner with privilege to have a wharf and boat-house, by the use of which

he carried on a business of letting out boats. It appeared from the evidence that a grant from the Crown was made in 1850 to one Joseph Aumond of a piece of land and a portion of water, extending to a point in the river two chains length from the shore. This and kindred Crown grants were rendered lawful in Upper Canada by Act 23 Vict. c. 2, s. 35, Canada Statutes. It was apparently within this two chains length that the wharf and boat-house lay, and had been in existence over twenty years. Aumond appears to have sold portions of the water lot to different persons, and amongst these one portion was conveyed to a person named Prevost. In 1867, to quote from the judgment of the Judicial Committee, Prevost sold and conveyed to the respondent "part of the water lot granted by the Crown to Aumond, by the following description of the boundary towards the river—'thence along the northerly line of Cathcart Street in a westerly direction to the water's edge of the river Ottawa, thence along the said water's edge down the stream in a northerly direction to the line of Bolton Street.' It will be observed that here the boundary on the river side is called the water's edge, whilst in the Crown grant the boundary of the land granted is two chains from the shore, and the contention of the defendants at the original hearing and in the appeals was that the plaintiff was not entitled to the two chains."

The suit was first heard by Proudfoot, J., sitting alone in the Chancery Division of the High Court of Justice. He dismissed the suit, declaring that Aumond by his grant took the soil of the river subject to public rights of navigation; that he had conveyed that soil of the river to Prevost, but that Prevost had not conveyed it to the respondent, and that, as the river was a navigable one, the respondent had not acquired rights for a wharf and boat-house by occupation. There was an appeal then by the plaintiff to the Divisional Court, which reversed the decision of Proudfoot, J., and the judgment of the Divisional Court was upheld by the Court of Appeal. The Judicial Committee now decided that the two latter judgments were right, and dismissed the appeal with costs. Their Lordships, *inter alia*, made use of the following observations in their judgment:—

"The plaintiff has from the time when the wharf and boat-house was first placed there occupied it without any question or objection by either the Crown or Prevost, and by means of it has been doing a very considerable business as a letter of boats, &c. This is not a case of a stranger taking possession of part of the two chains. The plaintiff moored the wharf to the bank where he thought fit, by virtue of his purchase, and had possession. The expression 'along the water's edge' may either signify the line which separates the land from the water, or a water space of greater or less width constituting the margin of the river. The description in the conveyance is capable of being explained by possession, and it appears to their Lordships that the possession which, in this case, has followed upon the conveyance is sufficient to give the plaintiff a good *primâ facie* title to the whole of the two chains as against Prevost. Even if he had not such a title and occupied only by the permission of Prevost, that would be sufficient to entitle him to maintain the action. No question arises in this case as to the wharf and boat-house being an obstruction to the navigation, but it may be noticed that the Chancellor, in his judgment in the Divisional Court, says:—'Here all the tendency of the evidence as to the position of the plaintiff's bank, the bay there formed at a distance of 700 feet from the main channel, the great width of the Ottawa, its ample facilities for shipping apart from the comparatively narrow strip where the plaintiff's wharf is moored, the fact that the plaintiff has thus occupied the property in question for over twenty years, all strongly suggest that he has done nothing detrimental to river and navigation, but that, on the contrary, his wharf has been a benefit to the boating public.' So far from being an obstruction to navigation, the maintenance of a floating wharf of that kind is, in the circumstances stated by the learned Chancellor, a positive convenience to those members of the public who navigate the river with small craft. As a riparian owner the plaintiff would be at liberty to construct such a wharf and would be entitled to maintain an action for the injuries to it which are complained of.

"For these reasons their Lordships agree with the Divisional

Court and the Court of Appeal that judgment should be given for the plaintiff, and they will humbly advise Her Majesty to affirm the judgment of the Court of Appeal and dismiss this appeal. The costs will be paid by the appellants."

[15 *App. Cas.* 188; 59 *L. J. P. C.* 41.]

Khagendra Narain Chowdhry and Others *v.* **Matangini Debi** and Another.

(Consolidated Appeals.)

Bengal. LORD MORRIS. *Feb.* 5, 1890.

Claim by zemindars of two adjoining pergunnahs to a "sota" or stretch of water. There were two suits. The disputants, who each brought a suit against the other, being the Zemindars of Mechpara or their representatives, and the Zemindars of Chapar or their representatives. The Subordinate Judge had decided in favour of the Zemindars of Mechpara, and had given them a decree, setting aside an order of attachment which had been issued by the magistrate under the 530th and 531st sections of the Criminal Procedure Code (Act X. of 1882), and declaring in favour of their title to the sota in dispute, and to the consequent relief. The High Court, on the other hand, in two decrees declared that there was an insufficiency of proof of title produced by either set of zemindars, and dismissed both suits with costs. Upon a review of the evidence, their Lordships agree with the High Court that neither set of claimants had proved the right to exclusive possession, but they thought that the decrees of the High Court must be discharged for another reason, viz., that although neither party had proved exclusive title, there could be no doubt that the sota did belong to both zemindari properties, and both disputants were entitled to possession, and not the Government which, upon the result of the findings below, had entered into possession. Their Lordships were cognizant of the fact that the Government, which had never made any claim to the sota, had really only taken

possession as stakeholders. The result that their Lordships arrive at is that the decrees of the Subordinate Court and of the High Court should be respectively reversed, and each of the parties be declared entitled to an equal moiety of the sota opposite to and adjoining their respective zemindaris, and be decreed to be put into possession thereof accordingly, and that both of the parties having failed in their contention as to an exclusive possession each should bear their own costs of the litigation in the Subordinate Court, in the High Court, and of these appeals; and their Lordships will humbly advise her Majesty accordingly.

[*L. R.* 17 *Ind. App.* 62; *I. L. R.* 17 *Calc.* 814.]

Hayat-un-Nissa and Others *v.* Sayyid Muhammad Ali Khan.

N. W. P. Bengal. LORD WATSON. *Feb.* 8, 1890.

Succession to the immoveable estate of one Wazir-un-Nissa, a Mahomedan lady, who died childless and intestate on 26th October, 1881. The rules of succession in Mahomedan law, applicable respectively to the Shia and Sunni sects, are different, and the question at issue was whether Wazir-un-Nissa, when she died, was a member of the Shia or the Sunni community. The appellants, who were the female descendants of the deceased's *maternal* uncle, claimed by reason of Wazir-un-Nissa being, as they alleged, of the Shia sect. If she was a Shia, they would be her legal heirs. The respondent, a collateral relative of Wazir-un-Nissa in the ascendant line, and claiming succession through an unbroken line of males in the lady's family, contended that the deceased was of the Sunni community. Wazir-un-Nissa was admitted to have been for many years the wife of a staunch member of the Shia sect. He died in 1865, *i.e.* sixteen years before his wife. Upon the evidence, the Judicial Committee reported that the decree of the High Court ought to be affirmed, with costs. Their Lordships noted particularly the evidence which pointed to the lady's father having been treated as a

Sunni, and also to the circumstance that after her husband's death she appeared to have paid a visit to the Ajmere shrine of the Sunnis, and on the way thither partook of the holy meals, and availed herself of the pious services of a *pir*, or spiritual guide of the Sunni sect. On the whole, "their Lordships have come to the conclusion that the evidence applicable to the period preceding the death of her husband tends, though not strongly, to the inference that from her birth until her marriage Wazir-un-Nissa was a Sunni. It is not matter of dispute that, during the whole period of her married life, her outward acts and observances amounted to a profession of the Shia faith. What the just inference from these facts would have been, had she died on the same day as her husband, it is not necessary to consider. The evidence applicable to the period following the dissolution of her marriage appears to their Lordships to point strongly to the conclusion that throughout her widowhood she was a member of the Sunni sect, having returned to the religion of her youth, and discarded that which was temporarily imposed upon her by the necessities of her position as a Shia wife."

[*L. R.* 17 *Ind. App.* 73.]

Manning *v.*
The Commissioner of Titles.

Western Australia. Lord Hobhouse. *Feb.* 22, 1890.

Process of registration of proprietorship in land. Interpretation of Transfer of Land Act, 1874 (sects. 19 and 21). Question whether the Commissioner of Titles in refusing to register land when no caveat was entered under the Act, exceeded his powers. The Judicial Committee agreed with the Supreme Court that the Commissioner was not bound to register title merely because notices had been advertised and no caveat had been entered. The 19th and 20th sections of the Transfer of Land Act for the most part ran thus:—

"19. If it shall appear to the Commissioner that any such

transaction as aforesaid has been registered, and that all encumbrances affecting the land . . . have been released, or that the owners thereof have consented to the application, or that any encumbrance . . . may be specified in the certificate of title, and continue outstanding, the Commissioner shall direct notice of the application to be advertised, once at least, in one newspaper, . . . circulating in the neighbourhood of the land, and to be served on any persons named by him, and shall appoint a time not less than fourteen days, nor more than twelve months from such notice, or from the advertisement, or the first of such advertisements, if more than one, on or after the expiration of which the Registrar shall, unless a caveat shall be served forbidding the same, bring the land under the operation of this Act.

"21. If before the expiration of the time limited in the notice aforesaid for lodging a caveat the Registrar shall not have received a caveat forbidding the bringing of the land in question under the operation of the Act he shall bring such land under this Act by registering in the name of the applicant, or in the name of such person as may have been directed in that behalf, a certificate of title to such land in the form in the second schedule hereto."

Manning, the husband (now deceased) of the appellant, applied on the 25th July, 1887, to be registered as the proprietor of a certain location by virtue of possession. On the 8th August following the Commissioner (the Commissioner having meanwhile made requisitions on his title which were replied to by Manning's solicitors) stated that he considered the title fairly made out. He advertised according to sect. 19, and fixed the 29th October as the last day for lodging caveats. None was entered, but, in the language of the special case, " 'on the 24th October the Commissioner forwarded to the solicitors for the applicant a declaration and certain depositions on oath which he had taken without notice to the applicant, and which tended to throw doubt on the applicant's possession.' "

On the 28th October the Commissioner formally notified to the solicitors that the application was rejected.

The whole question in the case is as to whether such rejection is beyond the power of the Commissioner. The applicant, to quote again from the special case, contended "that the Commissioner having once expressed himself satisfied with the title as proved by the applicant, and having advertised . . . and no caveat having been entered, his power to reject is gone, and it is imperative upon the Registrar, under sect. 21 and the general scope of the Act to bring the land under the Act by registering the same in the name of the applicant."

Upon these facts the Commissioner stated the special case, in which Manning's solicitors concurred, and which was heard with the result above mentioned. The Judicial Committee in their judgment observe: "Nothing was stated to show the nature of Manning's title except that it rested on possession, or the nature of the evidence against it except that it brought the allegation of possession into doubt." The actual point raised in the special case, and argued in the Supreme Court and here, is whether on the 8th August, 1887, the Commissioner and the Registrar became mere machines for registration in case no caveat should be lodged.

The Judicial Committee report to her Majesty that the appeal ought to be dismissed, and in their judgment make use of the following observations amongst others. "It must be admitted that the strict literal construction of the sections above set forth is in favour of the appellant's view. But the whole purview of the Act must be looked at."

Having discussed sects. 17 and 18, their Lordships say: "As regards sect. 18, then, it is not disputed that the Commissioner is an official bound to exercise his intelligence, and not a mere machine, as the literal force of the words would make him. Now when we have once reached the conclusion that such a meaning must be read into sect. 18, we cannot refuse to read it into sect. 19, and then it is for those who insist on his mechanical action to show at what point his discretion ceases and his obligation to follow a rigid rule begins.

"It is not contended that the Act anywhere defines this point, or that it orders the Commissioner to sign a certificate of title

except so far as such an order may be implied by the direction to the Registrar in sect. 21. The appellant's counsel contend that in a case falling within sect. 19 the discretion of the Commissioner is at an end when he has decided to advertise and serve notices. By that time, they argue, he must be taken to have completed his investigations, and in fact in this case he did intimate to the applicant's solicitors that the title had been fairly made out. But it appears to their Lordships that the investigations cannot be complete until it is seen what the notices produce. They may not necessarily produce caveats, for those can only be lodged by persons making claims on their own behalf, but they may produce information showing that registration of the applicant would not be right. If a certificate of title is issued in error, the Commissioner may, under sect. 117, take steps to cancel it. Supposing, then, that, before certificate, the Commissioner finds, either from fresh information or on reconsideration, that he is in error, what is he to do? The appellant's counsel contend that, if he has issued notices and there is no caveat, he must give the certificate and then take steps to cancel it. It seems to their Lordships that such a course is not rational and is not obligatory under the Act, but that the proper course in such a case is to refuse the certificate.

"The applicant is not without remedy in such a case. If the Commissioner exercises his discretion wrongfully or erroneously the applicant may, under sect. 120, first require him to set forth his reasons, and then summon him before the Supreme Court to maintain his case. In that proceeding the whole substance of the case may be thoroughly examined. Here the applicant has not chosen to take that course, but has preferred to insist that the Commissioner is bound, by the issue of notices . . . and by the non-appearance of any caveat, to register the claim of title. As the applicant fails in that contention this appeal must be dismissed, and with costs."

[15 *App. Cas.* 195; 59 *L. J. P. C.* 59.]

Rani Hemanta Kumari Debi *v.*
Brojendra Kishore.

Bengal. Sir Richard Couch. *Feb.* 25, 1890.

Enhancement of rent suit. Effect of a *Ruffanama* (or compromise)—guardian of minor. "Second appeal," or appeal from an appellate decree. This case was of great importance, as being one of those as to which the High Court rightly reversed the finding of the First Appellate Court—error in procedure being manifest and there being good ground of second appeal. Sect. 584, sub-sect. 6, Civil Procedure Code Act XIV. of 1882. The details of the case may be summarized thus:—The present suit was instituted in 1882 by Maharani Surat Soonderi Debi on behalf of her son, a Rajah named Jotendro Narain Roy. Both mother and son have died during the litigation, and the appellant Hemanta, who is the widow of the Rajah Jotendro, now represents the original plaintiff. The claim was for enhancement of the rent of a taluk. The appellant is entitled to a 10-anna share of the zemindari and another person to a 4-anna share. It appeared that so long back as 1825 a ruffanama or deed of compromise was entered into by one Rani Bhubanmoyi, who was the widow of Rajah Juggut Narain, to whom the property had belonged, and who had adopted, before the execution of the deed, Harendra Narain Roy, the grandfather of the claimant Rajah Jotendro. By this ruffanama the respondents contended all claims for enhanced rent against themselves and predecessors in title were barred for ever, it having been entered into to end litigation over the very question of enhancement and to prevent legal delays and uncertainty. Bhubanmoyi, they said, was at the time guardian for the adopted son Harendra. The appellant based the claim for enhancement on the ground that the ruffanama was contrary to the interests of the then minor Harendra, and was not now binding upon his successor. The Subordinate Judge of Mymensingh, before whom the present suit came, held that the compromise did bar enhancement.

On appeal the First Appellate Court (the District Judge) held that it did not, the reason for the decision being that the compromise was against the interests of the minor. The High Court, when the matter was brought on second appeal before them, analysed the procedure adopted by the District Judge and his reasoning. In the opinion of the High Court the District Judge was in error in reopening certain litigation between Harendra in 1856 (when his adoptive mother Rani Bhubanmoyi was dead) to set aside the ruffanama. The suit in question was finally dismissed, after being remanded to the lower Courts for further hearing, on account of non-appearance of the parties. The High Court at the close of their judgment, *inter alia*, say: "We are of opinion that although the dismissal of the suit of Harendra Narain Roy (in 1854), under sect. 1, Act XXIX. of 1841 did not preclude a fresh suit, still if any such suit be brought, the parties would be bound by the decision of the Sudder Dewani Adawlut so far as it decided any material issue. The District Judge in this case is in error in re-opening that question. We must therefore take it that the ruffanamas (deeds of compromise) were executed by Rani Bhubanmoyi as the guardian of Harendra Narain Roy. We find also that the same rent fixed by the ruffanamas has been received by successive owners of the zemindari for about fifty-seven years." The High Court also referred to the remarks of the District Judge (on the question whether the compromise was beneficial or not to the adopted son) with regard to a decree made in 1851, passed, as he said, "in favour of the owner of the 4-annas share." As to this the High Court remarked, "that decree which was passed in 1851 has no bearing upon the question whether the ruffanamas executed in the year 1825 were clearly and unmistakably to the detriment of Harendra Narain Roy."

The Judicial Committee agreed to report in favour of the views of the High Court, and in doing so exemplify what the effect of the decree in 1851 was. It "was obtained by the Government, after there had been a purchase at a sale for arrears of revenue not paid by the owner of the 4-annas share, and the District Judge appears to have been in error in treating

that as a decree passed in favour of the owner of the 4-annas share. The Government was in a different position from that in which the owner of the 4-annas share would be, and there is no evidence in the case upon which the District Judge could found his judgment reversing the decree of the first Court, and deciding that this compromise was not beneficial to the adopted son, an infant at the time it was made. When the judgments come to be looked at, it appears that he has reversed the decree of the first Court in the absence of any evidence—certainly in the absence of any evidence upon which he might reasonably come to the conclusion that the deed of compromise was not for the benefit of the adopted son." The Judicial Committee then make these observations on the question of "second appeals":— "This appears to be a case in which, under the provision of the law that there is a second appeal where there has been a substantial error or defect in the procedure of the lower Court, the High Court was right in reversing the decree of the District Judge and leaving, as it did, the decree of the first Court—which held that the deed of compromise was a binding one, and therefore that the suit for the enhancement of rent ought to be dismissed—to stand." Decree of High Court affirmed with costs.

[*L. R.* 17 *Ind. App.* 65; *I. L. R.* 17 *Calc.* 875.]

Bhagwan Sahai *v.*
Bhagwan Din and Others.

N. W. P. Bengal. Sir Barnes Peacock. *March* 11, 1890.

Equity to redeem property. Construction of instruments. Sale in 1835. Was the sale conditional or absolute? The actual terms made by the predecessors of the respondents with the predecessor of the appellant in 1835 were that the property in question would absolutely be transferred to the latter if within ten years the purchase-money was not paid back. On the respondents endeavouring (as plaintiffs in the present suit) in 1884 to redeem on payment of the purchase-money, they

contended that the original agreement partook of the character of a mortgage, and was therefore redeemable within a period of sixty years, under sect. 148, sched. 2 of Act XV. of 1877. They argued that clause 134 of the same Act, sched. 2, on which the appellant relied, did not apply to the suit, because in this case the transfer of the so-called first mortgagee's interest was made by auction sale in 1852 to others. The Subordinate Judge decreed in favour of the respondents. He did not uphold the contention that the eventual purchasers considered that they were acquiring an absolute interest. The High Court affirmed this finding in favour of the respondents, not only citing certain cases as authorities, but making reference to sect. 29 of Regulation XI. of 1822 in proof that the purchasers, in a case like the present, bought only the right and interest possessed by the defaulter. Both decisions were discarded by the Judicial Committee, who in effect held that, according to the true construction of the two documents relating to the original transfer, no such relationship as that of mortgagor and mortgagee was established. On failure of the terms of the compact the transfer became absolute. There was in effect an absolute agreement to sell, with a right to re-purchase within ten years, and the condition failed. Their Lordships approved of the principles laid down in *Alderson* v. *White* (2 De G. & J. 105) and quoted the Lord Chancellor's words therein—"after a lapse of thirty years cogent evidence is required to induce it (a Court) to hold that an instrument is not what it purports to be"—a ruling afterwards maintained in the case of *The Manchester, Sheffield & Lincolnshire Rail. Co.* v. *North Central Waggon Co.* (13 App. Cas. 568). Their Lordships, in conclusion, said: "It is clear that this case was not one of mortgagor and mortgagee, but one of an absolute sale with a right to repurchase within a period of ten years. Under these circumstances their Lordships think that the decision of the High Court ought to be reversed, and that their Lordships should now give the judgment which the High Court ought to have given, namely, to reverse the decision of the First Court, and to dismiss the suit with costs in both Courts. Respondents to pay the costs of the appeal."

[*L. R.* 17 *Ind. App.* 98.]

Ram Lal *v.*
Saiyid Mehdi Husain and Others.

Oudh. LORD MACNAGHTEN. *March* 13, 1890.

Suit to recover money advanced. Concurrent findings on certain points. The rule not to disturb such findings is observed, notwithstanding that a certain portion of evidence was not considered by the first Court. The suit was brought by the appellant to recover moneys alleged to have been advanced by him to the first respondent Saiyid Mehdi Husain as agent for a lady, who being now dead is represented by the two last respondents. A sum of Rs. 30,000 was claimed as due on a bond which was registered on the 19th September, 1883. A further sum of about Rs. 9,000 was claimed as having been advanced in various amounts between the 20th September, 1883, and the 25th December in that year. The District Judge gave a decree for the whole amount claimed on the bond. On appeal and cross-appeal the Judicial Commissioner disallowed Rs. 4,000, and the disallowance formed one of the grounds of the present appeal. The Judicial Committee advised her Majesty to dismiss the appeal, the appellant to pay the costs of it; but *although the respondents lodged separate cases, only one set of costs would be granted to them.* The following were important portions of their Lordships' judgment:—

"In support of his claim to the Rs. 9,000, the appellant relied, first, on oral evidence of a promise to repay the amount; both Courts rejected this evidence. Secondly, he relied on certain accounts which he produced; both Courts rejected those accounts. Thirdly, he relied on an alleged receipt purporting to be signed by Mehdi Husain, and to be dated the 26th December, 1883. The respondent on oath denied that the signature was his. The lower Court rejected this receipt for want of a stamp. The Judicial Commissioner remanded the case for further evidence as to the genuineness of the document. When the case came back he rejected the alleged receipt on the merits. And so the claim failed in both Courts.

"It was contended by the learned counsel for the appellant

that the case, as regards the Rs. 9,000, does not fall within the ordinary rule applicable to two concurrent findings of fact, because the lower Court had not an opportunity of considering, and did not consider, the evidence as to the genuineness of the receipt of the 26th December, 1883. *Their Lordships are not prepared to hold, either in this particular case or as a general rule, that the mere fact that a part of the evidence in the suit has not been considered by the lower Court, prevents the ordinary rule from applying when both Courts have arrived at the same result.* In the present case, however, as the whole of the evidence has been brought to their Lordships' notice, they think it right to add that, in their opinion, the Judicial Commissioner could not have come to any other conclusion.

"When the case was remanded the appellant did not think proper, or was unable, to produce any evidence as to the genuineness of the receipt on which he relied; but for some reason or other the respondent Mehdi Husain, called the appellant, and in cross-examination by his own pleader the appellant said that the receipt was signed by Mehdi Husain. There was no corroborative evidence on the point. . . . As regards the Rs. 4,000, there are not two concurrent findings of fact. Here the position of the parties is reversed. The respondent, Mehdi Husain, relies on an acknowledgment or *rukka* which the appellant says is not genuine. The Judge of the lower Court decided against Mehdi Husain principally on two grounds. One was that the *rukka*, if genuine, ought to have been mentioned to the Registrar when the bond was registered; the other was that the respondent in another suit had made a statement with regard to the advance of the money which the learned Judge considered, 'if not false, certainly to be misleading.' Their Lordships cannot attach any significance either to the fact that the *rukka* was not mentioned to the Registrar, or to the statement in the other suit which appears to their Lordships not to be inconsistent with the respondents' present case. Having listened to the evidence, their Lordships find themselves unable to dissent from the finding of the Judicial Commissioner."

[*L. R.* 17 *Ind. App.* 70; *I. L. R.* 17 *Calc.* 882.]

Pirthi Pal Kunwar *v.*
Rani Guman Kunwar and Another.

[*Ex parte.*]

Oudh. SIR BARNES PEACOCK. *March* 13, 1890.

Right to obtain a declaratory decree that a certain adoption was void. Discretion of the Court in refusing relief rightly used. The suit had its origin from the following circumstances. Ratan Singh, Talukdar in the Sitapur district, died in 1837, leaving a son and a widow (Rani Guman Kunwar), the latter of whom is first defendant in this suit. The son died in 1869, also leaving a widow (the plaintiff appellant). In 1883 Rani Guman executed a deed in which, purporting that the Raja Ratan had directed her in his will to adopt a son, she recited that she had adopted Maneshwar Baksh (the second defendant) as son to her husband, and that she had bequeathed all her property to him. The plaintiff appellant in 1884 brought this suit, asking that the adoption by Rani Guman be declared void. The District Judge of Sitapur gave a declaration in the plaintiff's favour to the effect that the succession, when it did take place, would take place as if no such document as that executed by Rani Guman existed. On appeal the Judicial Commissioner reversed this finding, and dismissed the suit with costs on the ground that it would be difficult, if not impossible, to decide who should become reversioner to Rani Guman when she died. The plaintiff could obtain no relief under her decree, and her rights would be in no way prejudiced by delay. Their Lordships of the Judicial Committee affirmed this decree, citing in support of their opinions the subjoined extract from the judgment in the case of *Sri Narain Mitter* v. *Sri Kishen Soondery Dassee* (11 B. L. R. at p. 190; and L. R. Ind. App. Sup. Vol. 149):—"It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under the circumstances of the case to grant

the relief prayed for. There is so much more danger than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation."

[*I. L. R.* 17 *Calc.* 933.]

Nawab Jibunnissa and Others *v.* Nawab Syed Asgar and Others.

Bengal. SIR RICHARD COUCH. *March* 14, 1890.

Validity of a putni grant and of a kobala. Shiah law. Were they to operate according to their tenor? Adequacy of consideration.

The respondents in this appeal brought a suit against the appellants, in which they alleged that one Dilrus Banu Begum died possessed of considerable property, and that they were, according to the Shiah law, of which sect the family were members, her heirs, and as such were entitled to the estate left by her. The defence depended upon transactions which took place on the 3rd and 4th of August, 1876.

The details of the case revealed that both documents, putni and kobala, were executed between a Mahomedan Purda Nashin lady, the aforesaid Dilrus, and a relative, the grandson of the lady's brother. The effect of these was to pass (by the putni lease) her lands and (by the kobala) to pass by sale her house and ground for certain consideration. The Judicial Committee affirmed the decrees of the High Court and of the Subordinate Court. It was not proved that consideration was paid. No fraud had been practised upon the lady, but it appeared to their Lordships that the deeds were not intended to operate according to their tenor. It was held, that in reality the lady did not purpose to part the property *in præsenti*, as the deeds made it appear she did. Affirmed, with costs. [*I. L. R.* 17 *Calc.* 937.]

Haidar Ali and Another *v.*
Tassaduk Rasul Khan and Others.

Oudh. SIR RICHARD COUCH. *March* 15, 1890.

Right of succession to a Talukdhari in Oudh. Construction of the Oudh Estates Act, I. of 1869. Validity of a statement purporting to be of a testamentary character. Definition of "will" in sect. 2 of the Act. Tribal custom of the Hanifa or Sunni sect of Mahomedans. Both Courts below gave decrees in favour of the respondents, and these are now approved.

This was a case of preferential heirship in a family. The facts of the case are set forth in the judgment of the Judicial Committee, which, in its main features, was as follows:—

"The plaintiff and appellant, Haidar Ali, is the elder brother of Raja Farzand Ali Khan, Talukdar of Jehangirabad, who died without leaving any male issue. He held a sanad for the estate of Jehangirabad, and his name was entered in list No. 2 (Talukdar Lists), prepared according to Act I. of 1869. He left four kinds of property:—

"1. The talukdari estate conferred by the sanad.

"2. Landed property acquired by him from other talukdars.

"3. Immoveable property acquired from persons other than talukdars.

"4. Moveable property, money, and debts.

The plaintiff, Haidar Ali, claimed to be the Raja's sole heir and successor, and entitled to the first and second classes of property, and to so much of the fourth as might be held to be heirlooms under the provisions of sects. 14 and 22 of Act I. of 1869, and to a fourth share, according to Mahomedan law, of the third class of property and of the fourth, exclusive of heirlooms. The other plaintiff and appellant is a purchaser of part of Haidar Ali's interest. The defendants, the respondents, were in possession, and had obtained mutation of names in their favour in the Revenue Department. Their grounds of defence will be

conveniently noticed as the case with regard to each class of property is considered.

"As to the first class, the defence of Tassaduk, who was in possession of it, was founded on a document, dated the 6th April, 1860, and a formal will of the Raja dated the 19th August, 1879. The first of these is a statement by Raja Farzand Ali in reply to inquiries by the Government under Circular Orders regarding the succession of Talukdars. It is as follows:—

"'I am Raja Farzand Ali Khan Bahadur, Talukdar of Jehangirabad, &c. Whereas the Government has been pleased to confer upon me the proprietary rights in this estate, to be enjoyed from generation to generation; I do hereby request that after my death my estate may be maintained intact and without partition according to Raj Gaddi custom, and that, owing to my not having a male issue, Zebunnissa, who is my daughter by Rani Abbas Bandi, daughter of Raja Razzak Bakhsh, shall be considered entitled to succession and inheritance. But as I have taken Tassaduk Rasul from my brother Mardan Ali Khan, and have commenced to bring him up and educate him as my son, if he finishes his education during my lifetime and is married to Zebunnissa, he shall after me succeed to my estate as my adopted son.'

"The Raja made other replies about the same time, the taluk being in three districts, in which no reference was made to his daughter or Tassaduk Rasul, and it was contended that the reply of the 6th April was not intended more than the others to be testamentary; but in a letter from the Raja to the Deputy Commissioner, dated the 20th June, 1877, in reply to questions that had been asked, he said, in reply to the fourth question, which was to give the name and title of any boy who might be his successor, whether his begotten or adopted son, 'The reply to this question refers to the will which has been submitted to the Lucknow district through the tahsil of Kursi on 6th April, 1860.' This shows that he intended that to be his will. Their Lordships are of opinion, following the judgment of this Board in *Hurpurshad* v. *Sheo Dyal* (L. R. 3 I. A. 259), that it is a will

within the definition in sect. 2 of Act I. of 1869. It is therefore a complete answer to the plaintiff's claim to Jehangirabad.

"It was contended that it was revoked by the will of the 19th August, 1879, the Raja having in that said that no document of any sort purporting to be a will or petition, the context whereof is wholly or partly repugnant to it, should be deemed to be admissible. But it is not repugnant. In this the Raja says that having adopted Tassaduk Rasul Khan as his son he has appointed him his successor, and he is to be the owner of his entire property estate and raj, as a Raja and Talukdar, and as he is married to his daughter the estate shall successively 'descend to devolve' on the descendants of the daughter. Also the will of 1879 was not registered in accordance with sect. 20 of Act I. of 1869, and consequently as regards the talukdari estate is invalid. It cannot, therefore, operate as a subsequent will to revoke the will of 1860, nor was that will revoked by the Act of 1869 as was also contended. There is, however, another defence to this part of the claim, which also applies to the second class of property if it was acquired according to sect. 14 of the Act. The pedigree, which is admitted by all parties to be correct, shows that Haidar Ali was not the eldest brother of Farzand. There were two elder brothers, Sahib Ali and Mardan Ali, who died before Farzand, both leaving sons, and the sons of Sahib were not parties to the suit. Tassaduk is a son of Mardan Ali, and Nawab Ali, who died pending the appeal, the father of the respondent Naushad Ali, was his eldest son.

"The plaintiff claims, as the elder brother of Farzand, to be his sole heir and successor under sect. 22 of Act I. of 1869. The section begins by saying that if a talukdar or grantee whose name shall be inserted in the 2nd, 3rd, or 5th of the lists mentioned in sect. 8, or his heir or legatee, shall die intestate as to his estate, such estate shall descend as follows, and then there are eleven sub-sections forming a scheme of descent. The plaintiff claims under sub-sect. 6, but in construing that the whole of the sub-sections should be looked at. The first says the estate shall descend to the eldest son of the talukdar and his

male lineal descendants. The second says that if such eldest son shall have died in the lifetime of the talukdar leaving male lineal descendants, the estate shall descend to his eldest and every other son successively according to their respective seniorities and their respective male lineal descendants. The third says that if such eldest son shall have died in his father's lifetime without leaving male lineal descendants, the estate is to descend to the second and every other son of the talukdar successively according to their respective seniorities and their respective male lineal descendants. That male lineal descendants here are intended to include the descendants of a son dying in his father's lifetime is apparent from sub-sect. 4. That is, 'Or in default of such son or descendants,' then to such son of a daughter as has been treated by the talukdar in all respects as his own son and to the male lineal descendants of such son. The estate is to go to the daughter's son only in default of male lineal descendants of a second or other son. In sub-sect. 4, male lineal descendants of a daughter's son must have the same meaning as in sub-sect. 3, for by sub-sect. 5 the estate is to descend to a person adopted by the talukdar only in default of such son or descendants, viz., a daughter's son or his male lineal descendants. The 6th section says, in default of an adopted son the estate is to descend to the eldest and every other brother of the talukdar successively according to their respective seniority, and their respective male lineal descendants. The words here should, in their Lordships' opinion, be held to have the same meaning as they have in sub-sects. 3 and 4. In sub-sect. 7 the words are, 'in default of any such brother,' to the widow, omitting 'descendants,' but their Lordships cannot think it was intended by this omission to postpone the succession of male lineal descendants of brothers who died in the talukdar's lifetime till after the persons mentioned in sub-sects. 7, 8, 9, and 10, and only to allow such male lineal descendants to succeed under sub-sect. 11 according to the ordinary law to which the talukdar is subject. It is the reasonable construction that the brothers were intended to take in the same manner as sons. It therefore appears to their Lordships that the plaintiff

has no title to Jehangirabad, or to the property which, by virtue of sect. 14, was subject to the same rules of succession.

"This also disposes of the suit as regards the second class of property, which the plaintiff claimed under the same title as the first class. It was objected by Mr. Mayne, on behalf of Naushad Ali, who claimed to be entitled to it under a codicil of the 1st November, 1879, that the property was not proved to have been acquired according to sect. 14. The question does not appear to have been raised in the lower Courts. . . . . If this property is not within sect. 14, it is in the same condition as to succession as the property in classes 3 and 4. Haidar Ali claimed one fourth of these classes, excluding heirlooms, as one of the heirs of Farzand Ali, according to the Muhammadan law, and alleged that the defendants did not acquire any rights to it under the will of the 1st November, 1879. This will has been found by both the lower Courts to be genuine, and it excludes Haidar Ali. It is therefore an answer to his claim as heir.

"But the defendants also relied upon a custom of the Shaikh Kidwai tribe, to which the Rajas Razzak Bakhsh and Farzand Ali Khan belonged, that sons, adopted sons, and daughters succeed in preference to and in exclusion of other heirs, by which the plaintiff's claim in opposition to Zebunissa, the daughter, must fail. It was not disputed that the Rajas belonged to that tribe. Both the lower Courts have found that there is such a custom among the Shaikh Kidwais, and their Lordships see no reason in this case for departing from the settled practice of this Committee where there are concurrent judgments of the Courts below upon a question of fact. There is therefore a good defence to the whole of the plaintiffs' claim, and the suit has been properly dismissed. Their Lordships will humbly advise her Majesty to affirm the decree of the Judicial Commissioner, which dismissed the appeal to him from the decree of the District Judge dismissing the suit, and to dismiss this appeal. The appellants will pay the costs of it."

[*L. R.* 17 *Ind. App.* 82; *I. L. R.* 18 *Calc.* 99.]

Brown *v.*
The Commissioner for Railways.

New South Wales. LORD MACNAGHTEN. *March* 15, 1890.

Compensation for coal under surface of lands required for a railway. Arbitrators appointed under the Colonial Railway Act, 22 Vict. No. 19, having disagreed, the action was brought to enforce the claim. Verdict of jury for 6,600*l.* in favour of the appellants. The appeal is brought against a rule absolute for a new trial. The Judicial Committee having considered fully the evidence of experienced colliery managers and men of science and skill in the case agree to report that the rule should be set aside and the costs of the trial of the rules *nisi* and absolute and of the appeal are to be paid by the respondent. Their Lordships were of opinion that the question in issue at the trial was a matter for the jury to determine, and that it is impossible to say that the verdict was one which a jury, viewing the whole of the evidence reasonably, could not properly find. In the course of their judgment their Lordships make use of the following important *dictum in practice* :—"It would be wrong to lay down such a rule as the learned Chief Justice (in the Supreme Court) seems to enunciate, and to impose upon a person whose land has been taken from him against his will the burden of proving by costly experiments the mineral contents of his land as a condition precedent to obtaining compensation, merely because the opinion of experts may be in conflict on the subject, or because, in the opinion of a Court of Appeal, the weight of the scientific evidence is adverse to the claim."

[15 *App. Cas.* 240 ; 59 *L. J. P. C.* 62.]

In re Mathusri, Jeejoy, Amba and Others.

Madras. SIR BARNES PEACOCK. *April* 24, 1890.

The question raised in this appeal was, whether the High Court had exercised their discretion soundly in refusing to remove the receiver and manager of the estate of the widows

of the Maharajah of Tanjore. The appeal was admitted by the High Court. There was no respondent. The estate of the late maharajah came into the possession of the East India Company by an Act of State in 1856. (Vide *Secretary of State for India in Council* v. *Kamachee Boye Sahaba*, I. L. R. 7 Mad. 476.) The High Court were of opinion that there was a probability of future litigation if the management of the property was restored to the ladies. The Judicial Committee reported that the High Court had used proper discretion, and affirmed their decree.

[*I. L. R.* 13 *Mad.* 390.]

Robert Watson & Co. and Another *v.*
Ram Chand Dutt and Others.

Bengal. Sir Barnes Peacock. *April* 25, 1890.

Dispute regarding shares of land, and for ijmali possession. Extent of the interest of the plaintiff. Character of deeds of endowment. Were they intended to take effect? Tenants in common. Injunction.

In this case considerable importance was attached to the earlier proprietorship of the lands in dispute, for they belonged to joint family property. Importance was also placed on character of certain deeds of endowment. The chief reason for inquiring into these details, however, had for its object the investigating how much land on the one side could be claimed by the appellants deriving title as holders from a lady member of the joint family, and on the other hand, how much land certain members of the family claimed as their own. There was no doubt that the appellants and respondents were co-sharers of this family land, and each appeared to have khas properties attached to the respective lands besides. The main question, however, was one of tenants in common in India, and whether that co-tenant who cultivated certain of the lands for indigo plantations could be restrained by injunction on the part of a non-cultivating co-sharer, from preventing that non-cultivating co-sharer entering upon the land or enjoying the fruits of his

labour. The details as to the shares the appellants and respondents respectively held in the land at the origin of their co-sharership was of moment, but prior in importance arose the question whether holders of one portion could cultivate an indigo garden, and take the profits thereof without interference, or whether, resisting such interference, an injunction may be lawfully granted against the cultivator.

The District Judge, while regretting that an amicable arrangement had not been arrived at, gave a decree in favour of the plaintiffs, the respondents. On appeal and cross appeal, the High Court modified the decree of the District Judge and upheld the injunction restraining the appellants from excluding the respondents from their enjoyment of the joint possession of the lands, &c. The evidence showed that the appellants, when entering, had taken over factories for indigo manufacture, and had cultivated "waste" lands here and there for developing their trade. The Judicial Committee considered fully the law as regards tenants in common in England and tenants in common in India, and in the result recommended that the High Court's decree upholding an injunction should be reversed. A portion of their Lordships' judgment dealt with allocation of shares to respective co-sharers and the effects thereof; the principal paragraphs were as follows:

"It was contended on the part of the plaintiffs (respondents), that the acts of the Watsons amounted to what in England is called an actual ouster, and that the plaintiffs were entitled to a decree ordering them to be put into ijmali possession with the defendants, but it appears to their Lordships that the plaintiffs have not established a right to have such a decree; and for the same reason they think that so much of the decree of the District Court as declares that they are entitled to get joint possession ought to be reversed. It seems to their Lordships that if there be two or more tenants in common, and one (A.) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant in common (B.) attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which

A. is engaged and the profitable use by him of the said part, and A. resists and prevents such entry, not in denial of B.'s title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A. would not entitle B. to a decree for joint possession. Their Lordships are further of opinion that the decree of the District Judge, so far as it orders an injunction to be issued, ought to be reversed. It appears to their Lordships that, in a case like the present, an injunction is not the proper remedy. In India, a large proportion of the lands, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husbandlike manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected, a work which, in ordinary course, in large estates would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal, the Courts of justice, in cases where no specific rule exists, are to act according to justice, equity, and good conscience, and if, in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital.

"Upon the whole, their Lordships will humbly advise her Majesty to reverse the decree of the High Court, and to order the plaintiffs, respondents, to pay the costs incurred by the defendants in that Court. And further to declare that the plaintiffs, respondents, are entitled to only two thirds of 14 annas, or of fourteen sixteenths of the khas land, or, in other words, to two thirds of seven eighths of the 4,128 bighas, the quantity of the khas lands as determined by the decree of the District Judge; also to reverse the decree of the District Judge so far as

it declares that the plaintiffs are entitled to get joint possession with defendants No. 1; and also so far as it directs that an order of injunction be issued; also to reverse that portion of the decree which orders 'that, on payment of excess Court fees proportioned to the excess of the amount found due over the valuation of the plaint, calculated at the rate of 8 annas per bigha of the decreed lands from the beginning of 1291 Amli until the date of possession, the plaintiffs shall get two thirds of 14 annas share, in accordance with the decision of the 6th issue,' and in lieu thereof to order and declare that the plaintiffs do recover from the defendants No. 1 a sum of money calculated at the rate of two thirds of 7 annas per bigha a year for 4,128 bighas, as compensation in respect of the exclusive use and benefit by the defendants No. 1 of 4,128 bighas, from the beginning of the year 1291 Amli to the 4th of January, 1886, the date of the said decree; also to affirm the decree of the District Judge so far as it relates to costs.

"It may be right to mention, with reference to that portion of the decree above recommended which relates to compensation, that the rate of 8 annas per bigha was not disputed by the Watsons, appellants, and that the High Court were not prepared to dissent from the finding of the District Judge in fixing the area of the khas lands at 4,128 bighas.

"The respondents must pay the costs of this appeal."

[*L. R.* 17 *Ind. App.* 110; *I. L. R.* 18 *Calc.* 10.]

Durga Choudhrain *v.*
Jawahir Singh Choudhri.

Central Provinces. LORD MACNAGHTEN. *April* 25, 1890.

Widow's suit for declaration of right to her husband's property. Was there partition of ancestral estate. Provisions of Central Provinces Land Revenue Act (XVIII. of 1881). "Second appeal." Only grounds on which it can be brought. Construction of sect. 584 Civil Procedure Code, Act XIV. of 1882, also sub-sections thereof. *Futtehma Begum* v. *Mahomed Ausur*, I. L. R. 9 Calc. 309; *Nivath Singh* v. *Bhikki Singh*,

I. L. R. 7 All. 649, are cases which do not give a correct statement of the law. The authorities approved by their Lordships are *Awangamanjari Chowdhrani* v. *Tripura Soondari Chowdrani*, L. R. 14 I. A. 101; *Pertab Chunder Ghose* v. *Mohendra Purkait*, L. R. 16 I. A. 233. The appeal was brought against a decree of the Judicial Commissioner of the Central Provinces, passed on second appeal, affirming a decree of the Commissioner of the Nurbudda Division, which had reversed a decree of the Assistant Commissioner of Narsinghpur.

The appeal came before the Board with the usual certificate from the Judicial Commissioner, to the effect that it involved a substantial question of law.

The Judicial Committee dismiss the appeal as an idle one, appellant to pay the costs. The following remarks were made in the course of their Lordships' judgment:—"Nothing can be clearer than the declaration in the Civil Procedure Code that no second appeal will lie except on the grounds specified in sect. 584. No Court in India or elsewhere has power to add to or enlarge those grounds. It is always dangerous to paraphrase an enactment, and not the less so if the enactment is perhaps not altogether happily expressed. Their Lordships therefore will not attempt to translate into other words the language of sect. 584. It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the First Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding." [*I. L. R.* 18 *Calc.* 23.]

Maharaja Luchmeswar Singh *v.*
The Chairman of the Darbhanga Municipality.

Bengal. SIR RICHARD COUCH. *April* 25, 1890.

Legality of proceedings relating to the acquisition of land by the Darbhanga Municipality. Powers and rights of managers

under the Court of Wards Act (IV. of 1870, B.C.) and the Land Acquisition Act (X. of 1870, B.C.) respectively.

The question was whether certain lands owned by the Maharaja of Darbhanga were validly transferred while he was a minor under management to the municipality of the town of Darbhanga according to the provisions of the Land Acquisition Act, 1870 (B.C.). The lands in dispute were sought to be acquired for the benefit of the town, and ultimately, the lands having passed to the control of the municipality, a public ghât or landing place and a market were erected thereon. When the transfer (August, 1875) was made the appellant was a minor under the Court of Wards. The chief officer of the Court of Wards for the district of Darbhanga was the Commissioner of Patna. The local manager of the minor under him was Colonel J. Burn. The Collector of the Darbhanga district was at the time *ex officio* chairman of the municipality. After a declaration in the *Calcutta Gazette* under the terms of the Land Acquisition Act that the land in question was much needed for the public benefit, the collector wrote to the manager of the minor a letter, from which the following is an extract:—

"Permit me to invite your attention to the last clause of sect. 3 of the Act. From this it appears that you, as far as acquisition of land under this Act is concerned, are as competent to act for the minor Maharaja as he himself would be were he of age. This being so, I trust you will favour me with the expression of your consent to the sale of the land. The object in view is to benefit the town."

In reply the manager wrote as follows:—

"I have the honour to represent that, from the tenor of sect. 68 of Act IV. of 1870 (B.C.) (the Court of Wards Act), you will perceive that the Court of Wards has not power to alienate raj land except for the purposes mentioned in that section; but I beg the matter be submitted to the Court of Wards for orders. I have no objection to present the land in question to the town, but doubt my power to do so." The Collector appears to have written to the Commissioner of Patna, who represented the Court of Wards, on the 19th of May.

This letter is not in the proceedings, but its contents may be inferred from the notice of it in the reply of the Commissioner on the 2nd June (1875). That is, "Sir, I have the honour to acknowledge the receipt of your letter, No. 62, dated the 19th ultimo, regarding the land belonging to the Darbhanga raj made over to the municipality, free of cost, for the construction of a bathing ghat. In reply, I beg to state that Act X. of 1870 came into force on the 1st June, 1870, while Act IV. (B.C.) of 1870, though it purports to have come into force on the same date, does not appear to have been sanctioned until the 17th June, 1870. As regards the procedure to be observed in the case, you should offer the manager one rupee compensation, and allow the manager to refer the point to the Board of Revenue, with whose sanction the award can undoubtedly be accepted, and acceptance of the award will act as a valid conveyance."

On the 14th July, 1875, the Collector wrote to the manager enclosing a copy of the Commissioner's letter, and saying, "I hereby offer you one rupee as compensation for the land in question, and request you to refer the point to the Court of Wards, with a view to obtaining sanction for the acceptance of the offer." Upon which, on the 16th July, the manager wrote back to the Collector asking him to obtain the authority of the Board of Revenue to accept the one rupee as compensation. This letter appears to have been sent by the Collector to the Commissioner of Patna, and by him to the Board of Revenue. On the 4th August, 1875, the officiating secretary of the Board of Revenue wrote to the Commissioner that the member in charge had no objection to the manager of Darbhanga estate accepting the compensation of one rupee for the land belonging to the estate which had been taken up by the Darbhanga municipality. On the 19th August, 1875, the rupee was paid by the Collector, and the manager gave a receipt for it, describing it as a nominal compensation for the raj land taken up by the municipality. The land was thereupon taken possession of by the municipality, a bathing ghat was erected upon a portion of it, and the rest has been used by the municipality as a market.

In February, 1886, the maharaja, who came of age in 1879, brought the present suit to recover possession of the land and for mesne profits and damages. The District Judge of Mozufferpore made a decree in favour of the maharaja. This finding was reversed by the High Court, and the suit was dismissed. The Judicial Committee now recommend her Majesty to reverse both decrees below. In their judgment their Lordships say:— "Although the Court of Wards had not power to alienate the land for the purpose for which it was required possession might have been lawfully taken of it if the provisions of the Land Acquisition Act had been complied with. But they were not. The collector made no inquiry into the value of the land. He was the chairman of the municipality, and his sole object appears to have been to benefit the town, forgetting that, as the representative of the Court of Wards, it was his duty to protect the interests of the minor, and to see that the provisions of the Act were complied with. It is not true, as the High Court seems to have thought, that, as the maharaja, if he were of age, might waive the right to compensation, his guardian might do so." Their Lordships proceed to animadvert upon the offer of a rupee, but observe that the letter making the offer was not signed by the Commissioner but by a subordinate officer. They then give their views as to the proper construction to be put upon sects. 14, 15, and 16 of the Act. "Sect. 15 says that if the Collector considers that further inquiry as to the nature of the claim should be made by the Court, or if he is unable to agree with the persons interested as to the amount of compensation to be allowed, he shall refer the matter to the determination of the Court in manner after appearing. A reference to the Civil Court was made by the Collector on the 7th February, 1876, months after the rupee had been paid and accepted. That acceptance as compensation is stated in the reference, and it is also stated that all the claimants for compensation except four had agreed to the Collector's award and accepted the compensation tendered to them. . . . The document then concludes:—'As they have refused to accept this compensation, and as it appears to the officiating collector

that their claims are preposterously high . . . the matter is referred to the district judge for decision under sects. 15 and 18 of the Land Acquisition Act.' This cannot be held to be a reference of a claim to compensation by the manager of the Darbhanga estate, his claim being treated as settled.

"The claims of the four who had refused to accept the compensation tendered to them are the matter referred, and their Lordships can see no ground for the opinion of the High Court that on this reference the whole matter was open to the District Judge, and that 'he could inquire, and possibly he did inquire, whether or not the consent was binding on the minor.' . . . there is no trace in the proceedings of the District Judge having made such an inquiry. Their Lordships are clearly of opinion that the reference had not the effect which has been given to it by the High Court, and that the decree reversing the decree of the District Judge cannot be supported. But the latter decree must be modified. The District Judge, in allowing mesne profits, has taken the income for the three years 1883 to 1885, and has set that off against the Rs. 5,000 which it was admitted by the plaintiff he was bound to pay to the defendant for the money expended on the land. This income was received by the municipality after the expenditure of a considerable sum of money on the land. . . . And it appears from the Collector's letter of the 10th May that the manager had claimed rent for the land at the rate of Rs. 16. 5a. 3p. per annum. Their Lordships therefore think that Rs. 50 will be a proper sum to allow for mesne profits for the three years. That sum only must be deducted from the Rs. 5,000.

"Their Lordships will therefore . . . advise her Majesty to reverse the decrees of the High Court and the District Judge, and to make a decree that, on payment to the defendant of Rs. 4,950, the plaintiff recover possession of the land claimed in the plaint, and that he recover the costs of the suit in both the lower Courts. The respondent will pay the costs of this appeal." [*L. R.* 17 *Ind. App.* 90; *I. L. R.* 18 *Calc.* 99.]

Shri Kalyanraiji and Another *v.*
The Mofussil Co., Limited, and Others.
(Consolidated Appeals.)

Bombay. LORD MACNAGHTEN. *April* 25, 1890.

Right of the managers of a temple to recover allowances (called lago) on the sale of cotton. Alleged established trade custom. Is it legal? Act XX. of 1839, and Act XIX. of 1844.

The early Act XX. of 1839, was cited in this case to show the course legislation was taking, namely, in the direction of abolishing a levy of hucks and fees of every description. The Act which, however, affected the question in these suits was that of 1844, which provided as follows:—

"It is hereby enacted that from the 1st day of October, *all town duties*, kusab veeras, mohtarfas, ballootie taxes, and *cesses of every kind on trades* and professions under whatsoever name levied within the Presidency of Bombay, and not forming a part of the land revenue, shall be abolished."

These appeals (consolidated) were from two decrees of the High Court affirming decrees of the Assistant Judge of a District known as Broach, which had reversed the decree of the first Court, that of the Subordinate Judge of Broach. The Judicial Committee affirmed the decrees of the High Court of Bombay, with costs of the appeals against appellants, holding that the impositions were no longer justifiable. The following were important observations finding place in the judgment of the Committee:—

"The late appellant, who was plaintiff in the two suits which have been consolidated, was the managing proprietor of a temple in Broach, known as the Shriji Mandir. In that capacity he claimed to be entitled to a lago, or perquisite, or tax, of 2 annas per bale on all cotton bought in and exported from Broach. The present appellants are his representatives.

"It must be taken for the purposes of this case that from time immemorial, before and up to the year 1844, this lago was claimed and received as of right by the managing proprietor of

the temple for the time being, and it may be assumed that the claim had a legal origin, and that, but for an Act of the legislature passed in 1844, it would still be enforceable in a Court of law. . . .

"In dealing with the Act of 1844, it was contended by Mr. Finlay that the lago now in question does not come under the head of 'town duties.' In this their Lordships are disposed to agree. . . .

"Owing to its brevity the Act is not free from obscurity. But their Lordships think that there is no sufficient reason for giving the expression 'cesses on trades and professions' the restricted meaning to which the appellants desire to confine it. The Act abolishes cesses 'of every kind' on trades 'under whatever name levied.' The appellants would limit the abolition to one kind and one kind only. Is this lago a cess or tax on a trade? Mr. Finlay argued that though it was a tax affecting trade, it could not fairly be described as a cess upon a trade. Their Lordships, however, think that it properly comes within that description. . . . Upon the main point, therefore, their Lordships are of opinion that the appeals fail."

Their Lordships then discussed the efficacy of the second point raised, namely, that there existed an understanding or custom in the locality that the buyers of cotton in Broach had come under some sort of obligation in the nature of a trust which made them liable as trustees to the claim of the original plaintiff. As to this, the Judicial Committee say—

"It seems to have been the practice for the native cultivators selling cotton in Broach to allow a walthar or rebate of one rupee for every candy or two bales. There can be no doubt that this walthar was originally intended to meet or cover certain charges or allowances, of which the Mandir's lago was one; and it was said on behalf of the appellants that the native cultivators would naturally be disposed to take this burthen on themselves because they were interested in maintaining the worship of Shriji. . . . . There is not the slightest evidence that the respondents accepted the position of trustees for the plaintiff, or consented to receive moneys for his use. The cotton sellers may

or may not have a valid claim against the cotton buyers in respect of so much of the walthar as may appear to be attributable to or connected with the lago, but such claim, if valid, cannot give any right to the representatives of the plaintiff against persons who undertook no obligation towards the plaintiff. Appeals dismissed. Appellants to pay costs.

[*L. R.* 17 *Ind. App.* 103; *I. L. R.* 14 *Bom.* 526.]

Maharaja Radha Pershad Singh *v.*
Mir Torab Ali and Others.

(Consolidated Appeals.)

Bengal. Sir Richard Couch. *April* 25, 1890.

Boundary. The case related to disputes over the execution of an Order in Council of 17th May, 1879. Thakbust map. Survey map. The Judicial Committee hold that no ambiguity in the words of the judgment or of the Order in Council exists. The question at issue arose thus:—By the Order in Council of 1879, it was decided that the Maharaja, the present appellant, had established his title to certain areas of land above the northern banks of the river Ganges. The Judicial Committee, in making their report to the Queen on that occasion, had to refer to an Amin's map made in 1839. They, however, considered that another map made in the same year, a Thakbust map, was more correct. They laid down, therefore, that the Maharaja was entitled to recover "so much, if any, of the land claimed by him as was demarcated by the Thakbust map and proceedings of 1839." When the Order in Council was afterwards put into execution, it was contended a third map, a survey map of the same year, had come to light, and that it appeared from it that the appellant ought to obtain a larger quantity of land than that delineated in the Thakbust map.

The Judicial Committee in dismissing the present appeal said:—"Now whatever may be the merits of the one map or the other, about which it is not necessary to say anything,

because their Lordships have not the materials before them to enable them to say whether the survey map is the map which ought to have been used by the Judicial Committee when this judgment was given, the words of the judgment and of the Order in Council are not in any way ambiguous. There is no difficulty in interpreting them. They say distinctly that the Maharaja is to recover what was demarcated by the Thakbust map and proceedings of 1839, and it appears from the judgment to be obvious that the proceedings in 1839 meant the proceedings relating to the Thakbust map. It could hardly be that their Lordships, when they gave that judgment, intended by the words 'proceedings of 1839,' to include a survey map which it is now said differs from the Thakbust map and is sought to be used to correct it. The lower Courts, in the execution of this Order in Council, appear to have taken the right view, and their Lordships will therefore humbly advise her Majesty that the appeal be dismissed and the decree of the High Court be affirmed. The appellant will pay the costs of this appeal." [*P. C. Ar.*]

The Shaw, Savill and Albion Co., Limited, *v.* The Timaru Harbour Board.

New Zealand. THE LORD CHANCELLOR (LORD HALSBURY). *April* 30, 1890.

Loss of a ship and cargo. Alleged negligence in navigation by a servant of the Harbour Board. Competency of the Harbour Board to enter into pilotage contracts, or to employ a person as pilot for the management of a particular private vessel. Construction of the Timaru Harbour Act, 1876, and the Harbours Act, 1878. The appeal was brought by the company who were owners of a vessel called the "Lyttleton," against an order of the Court of Appeal of New Zealand, whereby the verdict of a jury for sums of 14,000*l.*, value of the ship, and 17,000*l.*, value of the cargo, was set aside and judgment entered for the Harbour Board. The majority of

the Court of Appeal directed judgment to be entered for the respondents on the ground that no sufficient notice of action, as required by the local statutes, had been given by the plaintiffs. The Judicial Committee affirm the result of the order of the Court of Appeal, but for a different reason, namely, that under the Harbour Acts the Harbour Board was not competent to undertake private pilotage contracts, and that they could not be held liable for the accident to the "Lyttleton."

The following were the chief reasons for their conclusion given in the judgment:

"The plaintiff company owned a vessel called the 'Lyttleton,' and on 12th June, 1886, while under the conduct and management of a person named Storm, the 'Lyttleton' was sunk, as was alleged, by want of due care by Storm, who was a licensed pilot, and also was the deputy harbour master of the harbour of Timaru.

"With respect to the questions of fact involved in this appeal, their Lordships are of opinion that no ground has been shown for disturbing the verdict of the jury. They are of opinion that the loss of the vessel was due to the mismanagement and want of skill of the person then acting as pilot, and that the management of the tug (which, with the pilot on board, was assisting the vessel) did not in any material degree contribute to the catastrophe.

"In this view of the facts they are confirmed by the opinion of the nautical assessors.

"The next question raised on the appeal is the validity of the notice of action, and this in turn depends upon the proof of agency in the person by whom, in fact, the notice of action was given.

"That question was a question of fact, and if no arrangement had been arrived at by the parties, must have been submitted to the jury. By consent, that question was withdrawn from the consideration of the jury, and left for the determination of the Court.

"It is not necessary for their Lordships to express any opinion upon this part of the case, inasmuch as the serious and important

ground upon which the case was argued depended on the competency, in point of law, of the Timaru Harbour Board as constituted by statute, to enter into pilotage contracts. . . .

"Now the ambit of the Harbour Board's powers is prescribed by statute. That for their own purposes they might employ a pilot for the purpose of moving vessels which neglected the orders of the harbour master in his capacity of administering the shipping in and about the harbour, may be true enough. But their sole duty, as constituted by statute, in respect of pilots was to license pilots, between whom and themselves the only relation which the law contemplated as existing was that they should be under their supervision and under their jurisdiction for the purpose of being duly licensed; but once licensed, the pilot had to make his own bargain with the shipowner, and would incur in that contract of pilotage only his own personal liability for the due performance of his duty. . . . Their Lordships are of opinion that what is not permitted to the Harbour Board under the statute is prohibited; they are not therefore authorized to pledge public funds for the purpose of entering into private engagements, and cannot be held responsible for the default of their harbour master, who in fact was acting as pilot for the vessel, not, in the view their Lordships take of the facts, as harbour master, but as pilot engaged by the parties themselves. . . .

"The facts of the case are peculiar in this respect, that the transaction in question was out of the ordinary course of duty in more aspects than one. It would be intelligible that the Harbour Board should with their own tug and harbour master aid vessels in entering or departing from the harbour, having taken care that both their harbour master and the appliances at his command were sufficient for the purpose of effecting the object desired. In this case the tug boat (by which the Harbour Board were in the habit of assisting vessels as they did) was out of repair; the parties, at their own risk, appear to have employed a steam tug not the property of or habitually under the command of the harbour master. . . .

"Their Lordships, however, are of opinion that, even had the

misfortune happened in the use of the steam tug according to the ordinary practice and by the person who, as a matter of fact, was the harbour master, the Harbour Board had no authority to enter into such a contract, as they were not entitled by statute themselves to become pilots, but only to license others for that vocation.

"Their Lordships will, therefore, humbly advise her Majesty that this appeal should be dismissed, and that the judgment of the Court of Appeal of New Zealand should be varied by entering judgment for the defendants, and that the appellants pay the costs of the suit and of this appeal."

[15 *App. Cas.* 429; 59 *L. J. P. C.* 77.]

Dewan Ran Bijai Bahadur Singh *v.*
Rae Jagatpal Singh (son of Jagmohan, deceased); and

Rae Jagatpal Singh *v.*
Dewan Ran Bijai Bahadur Singh

(Appeal and Cross Appeal, Consolidated); and

Rae Bisheshar Baksh Singh *v.*
Dewan Ran Bijai Bahadur Singh and Rae Jagatpal Singh.

Oudh. Sir Barnes Peacock. *April* 30, 1890.

Rival claims of members of a family to a taluka through heirship, and to four villages through alleged purchase. Was there exclusion from inheritance by the insanity of an heir? Was the estate an impartible one, and did it descend according to primogeniture? Oudh Estates Act, I. of 1869, s. 8 and s. 22, cl. 11. Character of the purchase of the villages by a person who had no interest as an heiress in the talook. To whom do they belong?

The details of the respective claims are set forth in the judg-

ment of the Judicial Committee, the main portions of which were as follows:—

"These appeals relate principally to a talook called Dasrathpur, which was created by a sunnud by the governor-general after Lord Canning's proclamation, and as to which it was stated that it was a condition of the grant that it should descend to the nearest male heir under the rule of primogeniture. The estate was entered in the lists No. 1 and No. 2 established by sect. 8 of Act I. of 1869; and consequently, according to a former decision of this Board, it descended under the rules pointed out in sect. 22 of that Act. The last male owner of the estate was Rudra Narain Singh, who died in the year 1869; and according to clause 11 of sect. 22 it descended to the heir according to Hindu law. He died a minor without having been married, and his mother, Kharaj Kunwar, became his heir, and took a mother's interest in the estate, which is not an estate for life, but a woman's estate by inheritance. A mutation of names was made in which her name was entered together with that of Saghu Nath Kunwar, who was the stepmother of the last owner of the talook (Rudra Narain), and who had no interest as an heiress. Kharaj Kunwar, the mother, died in the year 1879, but the stepmother, Saghu Nath, remained in possession up to the time of her death on the 21st of November, 1881. Upon her death Ran Bijai Singh (a connection but not a very near relative of the plaintiffs) took possession of the estate. (This possession he held under the terms of Saghu Nath Kunwar's will, which was duly registered according to the terms of Act I. of 1869.) . . .

"The action out of which these appeals arise was brought by Jagmohan, who was the eldest son, and Bisheshar, who was the third son of Pirthipal against Ran Bijai for the recovery of the estate of which he had held possession. They were the nearest relatives entitled to succeed, but for Drigbijai Singh, who was the second son of Pirthipal. Drigbijai was not made a party to the suit, though he was living at the time when it was commenced. He never claimed the estate. According to the construction which their Lordships put, and which seems to have

been put in the Courts below, upon sect. 22, the estate descended as an impartible estate, and consequently Jagmohan and Bishe-shar could not take jointly. Regarding the question which of those two should take, it was rightly decided that Jagmohan was the proper heir if he was not excluded from inheritance in consequence of insanity. The question of Jagmohan's sanity or insanity appears, so far as the talook is concerned, to be the main question now before their Lordships."

Their Lordships then proceed to examine all the evidence, that of medical men and others, and arrive at the same conclu-sion as the Judge of first instance, viz., that Jagmohan was not so insane as to be incapable of inheriting. "None of his family, prior to the application for a certificate of insanity, long after the right to the succession had attached, ever treated him as insane. The priests allowed him to perform all his religious duties. He performed the oblations to his father, which accord-ing to the religion of the Hindus would have no beneficial effect, and ought not to have been performed by him, if he had been in a state of insanity." In their Lordships' view, there were not sufficient grounds for the Judicial Commissioner dis-agreeing with the finding of the first Court on the issue of insanity.

They remark that it was not his brothers, but "Ran Bijai, the defendant, (who) sets up the insanity of Jagmohan, not as showing that he himself had a title in consequence of the insanity, but as a technical objection. His case is, 'Jagmohan is insane, and not competent to inherit, and therefore I have a right to remain in possession till the right person sues me'— that is, until the sons of Drigbijai, who was the heir if Jagmohan is excluded, come forward and assert their right. But they do not come forward, nor do they claim the estate. It is therefore to be inferred that they do not consider Jagmohan to be excluded from the right to inherit. That appears to their Lordships to dispose of the case so far as the talook is concerned. But another question was raised with regard to some villages. It appears that some villages were purchased by Saghu Nath before her death and whilst she was in possession of the talook,

and that she had left those villages by her will to Ran Bijai, who took possession of them. *Both Courts have concurred in finding that those villages were not purchased by Saghu Nath out of the profits of the estate, but that they were purchased by Ran Bijai in her name, and that he provided the money for their purchase.* But, even if this had not been so, Saghu Nath was merely a trespasser upon the estate, and if she trespassed upon the estate and received the mesne profits, it is not clear that a Court of Equity would earmark those mesne profits, and say that because the mesne profits must have been expended in the purchase of the villages they necessarily passed with the estate. It is not the case of a widow inheriting and purchasing property out of the assets of the estate which she takes as widow, for those have been considered by law as an augmentation of the estate; but this is the case of a stepmother who was not entitled to succeed to the estate, and who, if she disposed of any portion of the rents and profits, was disposing of them as profits which she had received as a trespasser.

"Under these circumstances their Lordships think that Ran Bijai is entitled to the villages.

"In the course of the proceedings Jagmohan died, and Jagatpal, as his eldest and, their Lordships understand, his only son, was admitted to represent him in the appeal. But the Judicial Commissioner has awarded the estate to him as if he was the plaintiff in the suit, whereas he ought to have awarded it to him as the heir and representative of his father, Jagmohan." (The Judicial Commissioner, in fact, found that although Jagmohan was insane, and therefore incapable of inheriting, his son, Jagatpal, was not so.) "In that respect their Lordships think that the decree of the Judicial Commissioner ought to be modified. As regards the moveable property mentioned in the Judicial Commissioner's decree, their Lordships at the commencement of the argument asked what property was the subject of appeal, and it was stated by the learned counsel that the moveable property was not a subject matter of the appeal. The Judicial Commissioner has awarded certain moveable property to the substituted appellant, but it is not a subject

of the appeal. Their Lordships upon the whole will therefore humbly advise her Majesty that the decree of the Judicial Commissioner be varied by describing Jagatpal as the 'substituted appellant, as representative of his father, Jagmohan,' instead of describing him as 'the minor plaintiff,' and, subject to such variation, that the decree be affirmed. The appellant, Dewan Ran Bijai, must pay the costs of his appeal.

"In the appeal of Bisheshar their Lordships will humbly advise her Majesty that that appeal be dismissed. The appellant must pay the costs of both the respondents in that appeal."

[*L. R.* 17 *Ind. App.* 173; *I. L. R.* 18 *Calc.* 111.]

Jogendro Bhupati Hurri Chundun (a Minor under Guardianship) *v.*
Nityanund Mansingh and Another.

Bengal. Sir Richard Couch. *May* 1, 1890.

Title to an *impartible* raj zemindary. Mitakshara law. Right of the respondent, a "dasiputra" or illegitimate son (by a female servant) of a Raja among a people known as the sect of Sudras to succeed to ancestral estate of the said Raja in the absence of male issue to his deceased legitimate son and by virtue of survivorship. The Judicial Committee, upholding both decisions below, consider that the claims of the illegitimate son to succeed the legitimate son must be upheld. It was shown that the legitimate son of the parent Raja died without male issue. The illegitimate son was the plaintiff in the suit. The defendants at first were the three widows of the last Raja, the legitimate son of the parent Raja and half-brother of the respondent, who set up that the appellant, Jogendro Bhupati (also made a defendant) had been adopted by the said legitimate son, and that he was the rightful successor. There was yet another defendant at first, viz., a third son of the parent Raja by a woman called Asili. The last Raja, the legitimate son of the parent Raja, left a daughter only. The Judicial Committee

in their judgment say that, although the estate was by custom impartible and only descendible to a single heir, yet the rules which governed succession to partible properties had to be considered in arriving at a decision; in other words, an important issue was what would be the right of succession, supposing instead of being an impartible estate it were a partible one.

Their Lordships considered that a case in the Bombay High Court (*Sadu* v. *Baiza and Another*, I. L. R. 4 Bomb. 37), practically settled the question, and in the course of their judgment said:—"There (*i.e.*, in the case mentioned) the two sons, the legitimate and the illegitimate, survived the father, and upon the death of the legitimate son the question was whether the illegitimate son was entitled to succeed to the whole of the estate. The Mitakshara in chapter I., sect. 12, deals with the rights of a son by a female slave in the case of Sudras which is the present case, and the first verse is:—'Even a son (so) begotten . . . . may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share, and one who has no brothers may inherit the whole property in default of daughter's sons.' The second verse is:—'The son (so) begotten obtains a share by the father's choice, or at his pleasure. But after [the demise of] the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share; that is, let them give him half (as much as is the amount of one brother's) allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters. But if there be such, the son of the female slave participates for half a share only.' Now it is observable that the first verse shows that during the lifetime of the father, the law leaves the son to take a share by his father's choice, and it cannot be said that at his birth he acquires any right to share in the estate in the same way as a legitimate son would do. But the language there is very distinct, that 'if the father be dead the brethren should make him partaker of the moiety of a share.' So in the second

verse the words are that the brothers are to allow him to participate for half a share, and later on there is the same expression:—'The son of the female slave participates for half a share only.' The learned Chief Justice of the Bombay High Court notices these passages, and after observing that the Mitakshara makes no special provision for the case of the death either of the legitimate or of the illegitimate son after the death of their father and before partition, he says:—'But the effect of what he has said being, as we think, to create a coparcenery between the son of the wedded wife and the son of the female slave, we understand him as tacitly leaving such a case to the ordinary rule of survivorship incidental to a coparcenery, and that accordingly the survivor would take the whole if the other died without leaving male issue.' It appears that in the course of the argument the question was put to the learned counsel by the Chief Justice as to what would be the case if, instead of the legitimate son being the one who had died, the illegitimate son had died, and the legitimate son survived, and it was apparently admitted, that in such a case the legitimate son would take the share of the illegitimate son by survivorship. If that be so, their Lordships cannot see any reason for holding that the illegitimate son would not take by survivorship in the case of the death of the legitimate son. It cannot be a different right—in the one case a right by survivorship, and in the other, no right by survivorship. There is not only the judgment of the Chief Justice, and two other Judges of the High Court of Bombay, but the case came before them by appeal, there being a difference of opinion between the two Judges before whom it came in the first instance, and one of those learned Judges was a Hindoo, Mr. Justice Nanabhai Haridas, who carefully examined the authorities, and came to the same conclusion. It is not necessary to quote more of his judgment than this passage: 'I would therefore hold that the plaintiff and Mahadu, being male members of an undivided Hindu family, governed by the Mitakshara law, the former'—that is the illegitimate son—'upon Mahadu's death without male issue, became entitled to the whole of the immoveable property of that family, there

being no question about any moveable property in this special appeal.' "

In the expression of these views, finding support also from a decision of the High Court at Calcutta, the Judicial Committee agree. They are of opinion that the plaintiff was entitled to succeed to the raj by virtue of survivorship, and that the judgment of both the lower Courts should be affirmed. Appeal dismissed with costs. [*L. R.* 18 *Calc.* 151.]

Srimantu Raja Yarlagadda Mallikarjuna *v.*
Srimantu Raja Yarlagadda Durga and Another.

Madras. Sir Richard Couch. *May* 1, 1890.

The "*Devarakota*" zemindary case. The appellant and respondents are brothers. The appellant is the eldest brother and the suit was brought by the first respondent against him and against the third brother, who has now been made a respondent. The object sought to be attained in the suit was the partition of a large estate, known as the Devarakota estate, of which the appellant was in possession. Question whether the property was partible or impartible, also whether the property descended by rule of primogeniture. District Court had held the estate was impartible. The High Court held that it was partible. The Judicial Committee traced forwards the devolution of the property from the year 1766, when the family was numbered in the convention (of that year) by which the northern Circars, of which Devarakota was a portion, were transferred to the East India Company. Their Lordships were of opinion, upon the evidence, that what was said by this Board in the judgment in the *Hunsapore case* (12 Moo. Ind. App. 35) was applicable to the present appeal. The estate continued to be impartible, and the rule of primogeniture succession to it had not been altered. *Inter alia* they observed:—

"The question whether an estate is subject to the ordinary Hindu law of succession, or descends according to the rule of

primogeniture, must be decided in each case according to the evidence given in it. In this it appears that the claim of the plaintiff under the ordinary Hindu law has been answered, and that the decree of the District Court disallowing the claim ought not to have been reversed. Their Lordships will therefore humbly advise her Majesty to reverse the decree of the High Court, and to affirm the decree of the District Court, with the addition of the costs of the appeal to the High Court. The respondents will pay the costs of this appeal."

A petition to rehear this appeal was dismissed by the Judicial Committee, 20 March, 1891. As to the question of rehearing of appeals, see the following authorities:—*Ex parte Kisto Nauth Roy*, L. R. 2 P. C. 274; *Rajunder Narain Rae* v. *Bijai Govind Singh*, 2 Moore, Ind. App. 181; *Dumaresq* v. *Le Hardy*, 1 Moore, P. C. C. 127; *Ranee Surnomoyee* v. *Shoosheemookhee*, 12 Moore, Ind. App. 244, 254; *Hebbert* v. *Purchas*, L. R. 3 P. C. 664; *The Singapore*, 7 Moore, N. S. 551; *Venkata Narasimha* v. *The Court of Wards and others*, L. R. 13 Ind. App. 155.

[*L. R.* 17 *Ind. App.* 134; *I. L. R.* 13 *Mad.* 406.]

Main and Others *v.*
Stark.

Victoria. The Earl of Selborne. *May* 15, 1890.

Classification of teachers in the State schools of Melbourne. Construction of the Public Service Act of Victoria of 1883 (47 Vict. No. 773).

The appeal was brought by the appellants as classifiers of school teachers under the Act, against a rule absolute directing the issue of a writ of mandamus calling upon them to enrol the respondent, Miss Stark, in a different class of school teachers than that in which the classifiers had placed her. The lady had been a school teacher before the Act passed. Sect. 49 provided that, "every school teacher employed in a State school at the time of the passing of this Act shall be classified as in this Act provided," *i. e.*, not according to any arbitrary discretion of

the classifiers, but in the exercise of such discretion as within definite limits is given them by the Act. The question was whether Miss Stark, who was put by the classifiers into the category of "junior assistants," a position never held by her before, was not entitled, on full consideration being given to the whole tenor of the Act, to be ranked in a higher and better grade, viz., that of assistant teacher. To quote from the judgment of the Judicial Committee—

"The Court below have thought that the classifiers have done wrong, and that she was not in point of fact a junior assistant; that they had no discretion to classify as a junior assistant any one who was not so in point of fact, but that, having had a definite status in a State school to which she had been appointed as far back as the 30th of October, 1879, under a certificate of earlier date, which entitled her to fill the office of assistant teacher in any State school, and head or principal teacher where there was no assistant teacher, that was a status which gave her a right to be put into one of the three sub-classes of class 5. No question was raised as to the particular sub-class, because she was content to be placed in the lowest. The question for their Lordships is whether the Court was right in holding that she had not the status of a junior assistant, within the meaning of the Act."

Their Lordships refer to the words of sect. 52, "The classifiers in preparing the first classified roll shall place every teacher employed at the time of the passing of this Act in the class corresponding to the school in which he is employed, and his position therein," and consider that they seem to be just in principle.

"You are not to alter the position of the teacher. You are to classify him in the first roll as you find him. That does not go any way towards establishing the proposition, either that this lady was in any proper sense a junior assistant, or that she is to be deemed so."

The Judicial Committee in the result agree with the Court below that the respondent had made out her title to be ranked as an assistant teacher, in lieu of that of "junior assistant."

In this case special leave to appeal was granted on the condition that the appellants should pay the respondent's costs in any event. See Order in Council in this case, 17 May, 1890. This procedure followed the course taken when leave to appeal was granted in the case of *Moniram Kolita* v. *Kerry Kolitany, vide* Order in Council, 13 May, 1875 (P. C. Ar.); *vide* also *Spooner* v. *Juddow,* 6 Moo. 257.

[15 *App. Cas.* 384; 59 *L. J. P. C.* 68.]

La Banque d'Hochelaga and **Another** *v.* **Murray** and **Others.**

Lower Canada. SIR BARNES PEACOCK. *June* 25, 1890.

Liability of alleged shareholder in a company. Were these parties ever organized as shareholders, or was the company only to be put into operation on certain conditions? Issue of letters patent for the formation of the company. Right of her Majesty (sects. 1,034 and 1,035 of the Code of Civil Procedure) to annul letters patent. Construction of Act (31 Vict. c. 25 (Quebec Act)). Decree of Queen's Bench affirmed, with amendment of judgment to the effect that the letters patent should be wholly instead of partially annulled and repealed.

The facts of the case are set forth in their Lordships' judgment, which, abbreviated, was to the following effect:—

"In May, 1883, the appellants, La Banque d'Hochelaga, obtained in the Superior Court a judgment against the Pioneer Beetroot Sugar Company, Limited, for $40,800. 80, with interest and costs, and on or about the 30th May, 1883, the said appellants, under the provisions of the Quebec Statute, 31 Vict. c. 25, issued a writ of execution upon the said judgment, to which, on 25th June, 1883, the sheriff made a return of *nulla bona.* In the month of June in the same year several actions were commenced by the appellant bank, as creditors of the said company in respect of the said unsatisfied judgment against the defendants respectively as shareholders of the said

company, to recover from them the amounts remaining unpaid upon the shares alleged to have been held by them respectively in the above-mentioned company; and the question in each of the said actions was, whether or not the said defendants were liable as shareholders in the said company.

"In the case of the defendant William G. Murray (put forward as a test action), he denied that he had ever promoted or been party to the incorporation of the said company, or connected therewith in any way, and alleged that if his name had been used it had been used without his authority. He denied that he had ever been treated as a shareholder, or had ever been entered as a shareholder in the books of the company.

"On the 27th July, 1883, the company was ordered to be wound up, and John Fair was duly appointed liquidator. He afterwards obtained leave to intervene, in order that any amount recovered in the said action might be paid into the hands of the said liquidator, to be distributed, according to law, amongst the creditors of the company; and in September, 1884, Thomas Darling was substituted for the said John Fair as intervener.

"It was enacted by the statute 31 Vict. c. 25, s. 2, that the Lieutenant-Governor in Council may by letters patent under the Great Seal grant a charter to any number of persons, not less than five, who shall petition therefor, constituting such persons and others who may become shareholders in the company thereby created a body corporate and politic for certain purposes therein mentioned.

"The Beetroot Sugar Company, Limited, was under the Act incorporated by letters patent, issued under the Great Seal of the Province of Quebec. The letters patent were issued upon a petition presented to his honour the Lieutenant Governor of Quebec in the names of Gerhard Lomer, the defendant, William G. Murray, the other defendants, and other persons, stating that they had associated themselves together for the purpose of establishing a joint stock company for the manufacture of sugar from beetroot in the said province. The petition was verified by the solemn affirmation of Gerhard Lomer, in which he declared

that to his knowledge the allegations and averments of the said petition were true, and it was accordingly recited in the letters patent that the said Gerhard Lomer, the defendants, and the said other persons had by petition represented that they were desirous to be incorporated by the name of the Pioneer Beetroot Sugar Company, and that the truth and sufficiency of the facts stated in the said petition had been established to the satisfaction of her Majesty.

"Parol evidence was given in the actions on the part of the defendants, but the whole of that evidence was objected to, and a motion was made by the bank that all parol evidence adduced by the defendants to contradict their subscription in writing to the capital stock of the said company, or to contradict the said letters patent or anything mentioned therein, should be declared illegal and be rejected. In December, 1884, the defendants instituted proceedings for improbation of the said letters patent under Article 154 and following Articles of the Code of Civil Procedure for Lower Canada, with the object of having their names struck out of the said letters patent. That application was dismissed by the Superior Court, and the judgment having been in this respect affirmed by the Court of Queen's Bench, from which there has been no appeal, it is not necessary to consider it further. In December, 1884, the Hon. L. O. Taillon, as Attorney-General of the province of Quebec, filed an information against the said company and the appellant, Thomas Darling, as liquidator thereof, and the bank as *mise en cause*, whereby after alleging, amongst other things, that the abovementioned letters patent had been obtained by fraudulently suggesting that the defendants and others had petitioned for the grant of the same, and were desirous that the same should be granted, and alleging that the defendants had represented that they could not adequately defend themselves without the benefit of a *scire facias*, he prayed that a writ of *scire facias* should issue as provided for in sect. 51 of the Act, and be made known to the said company, and to the said Thomas Darling in his quality of liquidator of the said company, and to the said La Banque d'Hochelaga, ordering them and each of them to appear and

show anything which they or either or any of them might have or know why the said letters patent should not be declared fraudulent, null and void, *at least* in so far as the said defendants were concerned.

A writ of *scire facias* was issued according to the terms of the information. Thereupon the company, declaring that they severed in their pleading from the *mise en cause*, demurred to the said information, because, amongst other reasons, the remedy sought to be invoked by the informant, to wit, the process of *scire facias*, cannot be applied except to set aside the letters patent themselves, which was not sought to be done in the present case. The company also, without waiver of their demurrer, pleaded to the said information, and, amongst other things, alleged that it was specially false that the persons at whose request the said information was issued, that is to say, the defendants in the said actions, never participated in the application for the issue of the letters patent in question, nor ever subscribed for stock in the said company, that the said letters patent were issued on the fifteenth day of July, eighteen hundred and eighty, and were published according to law.

The action of the bank against the defendant, William G. Murray, together with the intervention of the said Thomas Darling, and the information for the writ of *scire facias*, together with the proceedings in improbation and the motion to reject the evidence above mentioned, were heard in the Superior Court, before the Hon. Mr. Justice Loranger, and in or about June, 1886, the learned judge gave judgment in the said action granting the motion for the rejection of evidence, and dismissing the application for annulling the letters patent, and ordering the defendant, William G. Murray, to pay the amount claimed from him into the hands of the intervener, the liquidator of the said company, to be distributed according to law. Similar judgments were delivered in the Superior Court in the other actions. In March, 1887, the Hon. Honoré Mercier, Attorney-General for Quebec, was substituted for the Hon. Louis Taillon. The defendants and the Attorney-General respectively appealed against the said judgments, and the cases, having been consoli

dated by order of the Court of Queen's Bench, were heard in March, 1888, by the Chief Justice and three other judges. The said Court (*dissentiente* Tessier, J.) on the 19th May, 1888, gave judgment reversing the judgment of the Superior Court on the information for the *scire facias*, and it was ordered that the letters patent should be repealed, cancelled, and annulled in so far as the defendants were concerned, and the actions of the appellant bank against the defendants were dismissed.

"Their Lordships concur with the majority of the judges of the Court of Queen's Bench in their findings of fact. From these it appears that the defendants were never organized as shareholders, and that no allotment of stock was ever made to them; that they had proposed the formation of a joint stock company, which, however, was only to be put into operation on certain conditions, and especially that of obtaining a government subsidy, without which it was distinctly understood that the company should not be formed; that the conditions not being fulfilled, they abandoned the project, and their names were never entered in the list of shareholders.

"Their Lordships are of opinion that the names of the defendants were inserted in the petition for the letters patent without their sanction or authority. . . . There was therefore no ground for making them liable except the statements in the letters patent. . . . The Court of Queen's Bench annulled the letters patent only so far as the defendants were concerned, but their Lordships are of opinion that the Code (*vide* sects. 1,036, 1,037) does not in such a case as the present authorize a partial annulment of letters patent. To annul the letters patent as to some only of the members of the corporate body in the present case would be to alter the constitution of the corporation created thereby. . . . A material question was, however, raised by the demurrer to the information as to the construction of the prayer of the information and writ of *scire facias*. It was contended that there was no prayer to have the letters patent wholly annulled, and that the information and writ of *scire facias* merely asked for an annulment so far as the defendants were concerned. Their Lordships cannot put such a

construction upon the words of the prayer. . . . The words 'at least' make a great difference in the meaning. Their Lordships' construction of the prayer is this, that the Court should declare that the letters patent were fraudulent and void, but that if the Court should think fit to declare anything less, the least that should be declared should be that the letters patent were fraudulent and void in so far as the defendants were concerned.

"Their Lordships . . . are bound to advise her Majesty to order that the letters patent be entirely annulled.

"The letters patent being annulled, there is an end of the actions at the suit of the bank and of the interveners against the defendants as shareholders in the incorporated company.

"Their Lordships will advise her Majesty to amend the judgment of the Court of Queen's Bench on the information for the writ of *scire facias*, by ordering the letters patent to be entirely repealed, cancelled, and annulled, instead of ordering them to be partially annulled and repealed as therein specified, and to order the said judgment to be affirmed in all other respects. Also to affirm the judgment of the Court of Queen's Bench in the several consolidated actions, including those portions of the said judgment which relate to the interventions and the interveners. The appellants must pay the costs of this appeal." [15 *App. Cas.* 414; 59 *L. J. P. C.* 102.]

Madho Parshad *v.*

Mehrban Singh (Minor under Guardianship of his Mother).

[*Ex parte.*]

Oudh. LORD WATSON. *June* 25, 1890.

Suit by respondent, who claimed title by survivorship to the interest of his uncle (the vendor), for cancellation of deeds of sale, or for a declaration of pre-emption. Were the sales made for the personal benefit of the vendor and without legal neces-

sity? Can a sharer in an undivided joint family estate alienate his undivided share without consent of another co-sharer? Right of co-sharer to enforce partition. Cases discussed:—*Sadabart Prasad Sahu* v. *Phoolbash Koer*, 3 Bengal L. R. 31; *Deendyal Lal* v. *Jugdeep Narain Singh*, 4 L. R. Ind. App. 247; *Suraj Bunsi Koer* v. *Sheo Pershad Singh*, 6 L. R. Ind. App. 88; *Mahabur Persad* v. *Ramyad Singh*, 12 Bengal L. R. 90. Decree that the alienation was void by the Law of Mitakshara as applicable in Oudh is upheld. In this case partition of the family property had *not* taken place, and the vendor was now dead. But the Judicial Committee, in dwelling upon the question whether, if partition had taken place, the appellant might not have had an equity to realize his debt, say:—"Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process. So long as his interest is indefinite, he is not in a position to dispose of it at his own hand, and for his own purposes; but, as soon as partition is made, he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property. Actual partition is not in all cases essential. An agreement by the members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of a member's interest in the estate, or a sale under the execution." [*L. R.* 17 *Ind. App.* 194; *I. L. R.* 18 *Calc.* 157.]

The Sanitary Commissioners of Gibraltar *v.* Orfila and Others.

Gibraltar. Lord Watson. *June* 28, 1890.

Liability for the management, control, maintenance, and repair of public highways. Alleged breach of duty on the part of Sanitary Commissioners. Scope of the Sanitary Orders

in Council for Gibraltar of the 20th December, 1865, and 19th July, 1883. Appeal against a judgment for 55,000 pesetas in respect of a verdict, and against the refusal of a rule to set aside the verdict and grant a new trial. *The Mersey Docks cases* (1 H. L. E. & I. 93; 5 H. L. E. & I. 104) cited on the point of liability. Decree and order below recommended to be reversed.

The damage in this case was caused by the fall of a retaining wall and a portion of the road behind it upon the respondents' property. The Judicial Committee having referred to the rule expressed by Lord Blackburn and approved by the House of Lords in *The Mersey Docks cases*, to the effect "that in every case the liability of a body created by statute must be determined upon a true interpretation of the statutes under which it is created," dwelt at length in their judgment on the construction of the above-mentioned Orders in Council. In coming to the conclusion they did, their Lordships observed :—

"Under these Orders of 1865 and 1883, the Sanitary Commissioners of Gibraltar stand in a very different position from that occupied by the Mersey Docks trustees and similar bodies in this country. They are appointed by the Governor, and may be dismissed by him for misconduct. Their powers of levying rates are controlled by the Colonial Secretary, subject to an appeal to the Supreme Court. They cannot raise money on the security of the rate, except with leave of the Governor, and then only to the extent of 25,000 pesetas, a sum less than half the amount for which the Court below has given a decree against them; and in cases when it is necessary to raise more than that amount it must come from Government moneys, if approved by one of her Majesty's Principal Secretaries of State. The only duty expressly laid upon them with respect to retaining walls is to maintain and repair them for the safety of passengers and ordinary traffic. And, lastly, it is expressly provided that, in executing the order, they must conform to any rules and regulations which the Governor may think fit to make.

"Their Lordships are, in that state of the facts, unable to resist the conclusion that the Government, in so far as regards

the maintenance of retaining walls belonging to it, remains in reality the principal, the Commissioners being merely a body through whom its administration may be conveniently carried on. They do not think that it was the intention of the Crown, in giving the Sanitary Body administrative powers subject to the control of the Governor, to impose upon it any liability, which did not exist before, in respect of original defects in the structure of the retaining wall which supported the Castle Road.

"Their Lordships desire to add that, assuming the Commissioners would have been liable in respect of their failure to strengthen the foundations of the wall, on its being proved that they were negligently ignorant of its defects, there was, in their opinion, no evidence of such negligence to go to the jury. No doubt the result showed that its foundations were or had become insecure, but until the result occurred no one suspected it. Captain Buckle, R.E. (one of the expert witnesses for the respondents), says that a special inspection would have disclosed the danger; but the witness was himself the engineer of the Sanitary Commissioners for a period of three years, and at that time the propriety of making an inspection never occurred to him. It is obvious that no examination, short of taking down the foundations of the wall, would have led to the discovery of its defects. . . .

"Their Lordships are . . . of opinion that the decree and order of the Court below must be reversed, and judgment entered for the appellants without costs; and they will humbly advise her Majesty to that effect. There will be no costs of this appeal." [15 *App. Cas.* 400; 59 *L. J. P. C.* 95.]

O'Rourke and Another *v.*
The Commissioner for Railways.

New South Wales. Lord Watson. *June* 28, 1890.

Practice. Award of arbitrators upon a claim for the expenses of constructing a railway. Principle of taxation of costs after

the award. Was it open to the Court after the appellants had obtained a verdict for a portion of their claim to give the respondent a verdict for the residue of that claim, and then declare that it would be competent to the Prothonotary on the taxation of the appellants' costs to satisfy himself as to what issues the respondents had succeeded, and so make an apportionment to each side of costs? Was the course taken in contravention of the agreement of the parties? In their Lordships' opinion the judgment below was erroneous. Order reversed, and the cause remitted with directions to tax only the costs of the appellants upon the verdict entered for them pursuant to the award.

The details of the case are set forth in the following passages from the judgment of the Judicial Committee:—

"The appellants constructed part of a railway line, under a contract with the respondent, who is the Commissioner for Railways, and, disputes having arisen as to the payments to which the appellants were entitled, they brought an action against the respondent before the Supreme Court of the Colony. Their declaration, which contains two counts on an indenture, one in damages, and a fourth in *indebitatus*, concludes for a lump sum of 100,000*l*. . . . In the course of the litigation they furnished particulars of their claim for goods sold and delivered, amounting in all to 39,799*l*. 5*s*. 1*d*., but there is no specification in the pleadings of the sums claimed under the other counts of the declaration. The respondent's answer consisted of a general denial of all the appellants' allegations; and the appellants joined issue on his pleas.

"When the cause was ripe for trial, the parties agreed to refer it, and all matters therein in dispute between them, to the determination of three arbitrators, the award of a majority to be final and conclusive. The terms of the arrangement were embodied in a decree by consent, bearing date the 22nd December, 1886; and these, so far as material to the issues raised by this appeal, are as follows:—'*The award of the said arbitrators to be for a sum certain for the plaintiffs, or an award for the defendant, as the arbitrators may find;* such award . . . .

when made to be delivered by the said arbitrators to the Prothonotary . . . . the party in whose favour the said award shall be made may, . . . *enter the said award as the verdict in this cause, and shall be at liberty to sign final judgment thereon,* the arbitrators to assess their fees at the foot of the award; *the costs of this action, and of the arbitration, and of and incidental to the reference to arbitration, and of the award, to follow the verdict so to be entered and to be taxed in the ordinary way.*'

"The arbitrators differed in opinion, and a majority signed and delivered their award on the 10th September, 1887, by which they awarded the sum of 20,433*l.* 10*s.* 11*d.* to the appellants, and assessed the fees of the three arbitrators at 1,804*l.* 5*s.* each. No application was made to set aside the award within the time prescribed, and, in terms of the decree already cited, a verdict was entered for the appellants, on the 11th October, 1887, for the sum found due to them by the award, with interest from its date, by signing an incipitur of judgment.

"The appellants then brought in their bill of costs for taxation, which included the whole costs of the action and arbitration, and incidental thereto, and also of the award. The amount of the bill was 22,983*l.* 15*s.* . . . When the bill of costs came before the Prothonotary, the respondents objected to the principle on which it was drawn up, and maintained that the appellants were not entitled to claim costs in respect of the issues upon which they had presumably failed. After hearing parties and considering the matter, the Prothonotary, on the 2nd November, 1887, issued an order adjourning the taxation until the 21st of the month, 'so as to give the defendant time to bring in his costs for taxation on the issues on which he has, in my opinion, succeeded.' It is hardly necessary to observe that the matter, with which the taxing officer thus assumed that he had the right to deal, was one wholly beyond his jurisdiction. It involved no question of taxation, but of the respondent's right to have a verdict entered for him, which would carry costs.

"In consequence of the course taken by the Prothonotary, the appellants moved for a rule absolute in the first instance, directing him to review the principle which he had adopted in

taxing their costs. The respondent, on the other hand, moved for a rule to show cause why the award should not be set aside, in so far as it omitted to find the several issues joined between the parties, and to specify the items and claims of the appellants which were disallowed by the arbitrators, and also why the award should not be sent back to the arbitrators, as to the matters so omitted, for such findings as might be necessary for the just and proper taxation of costs between the parties. These motions were heard together before a full Court, who gave effect to neither of them. The learned Judges ordered the *postea* to be amended by entering a verdict for the appellants for 20,433*l.* 10*s.* 11*d.*, and a verdict for the respondent for 79,566*l.* 9*s.* 1*d.*, being the residue of the appellant's demand, and declared 'that it will be competent for the Prothonotary of this Court, on the taxation of the plaintiffs' costs, to satisfy himself by the evidence of the arbitrators herein, or upon such other evidence as may be brought before him, as to what parts of the plaintiffs' claim the defendant having succeeded is entitled to his costs.'

"The judgment of the Court was delivered by Mr. Justice Windeyer, who justifies the amendment of the *postea* by reference to the colonial case of *Little* v. *Sandeman* (12 N. S. W. Rep. 263), and the decision of the Queen's Bench of England in *Traherne* v. *Gardner* (8 E. & Bl. 161). Their Lordships do not question the soundness of these decisions, which nevertheless appear to them to have no application to the facts of the present case. . . . The directions given by the Court to their Prothonotary, in the decree appealed from, strongly illustrate the unreliable character of the cost-carrying verdict which they entered for the respondent. They delegate to that official the duty of ascertaining, by examination of the arbitrators and others, 'as to what parts of the plaintiffs' claim the defendant having succeeded is entitled to his costs.' Such an inquiry is obviously beyond the functions of a taxing officer. The Court itself, and not he, must determine what were the issues raised for trial, and upon which of these, and to what extent, the defendant is entitled to a verdict. Their Lordships are also of opinion that the Court below erred in authorizing a general

examination of the arbitrators 'with a view to the prothonotary informing himself as to the issues upon which the defendant succeeded.' The judgment of the House of Lords in *The Duke of Buccleuch* v. *Metropolitan Board of Works* (5 E. & I. App. 418), upon which Mr. Justice Windeyer relied, is, when rightly understood, a direct authority to the contrary. The principle which was laid down by Mr. Baron Cleasby in that case (p. 433), and accepted by the House, was thus explained (p. 462) by Earl Cairns:—'He (*i.e.*, the arbitrator or umpire) was properly asked what had been the course which the argument before him had taken . . . The award is a document which must speak for itself, and the evidence of the umpire *is not admissible to explain or to aid*, much less to attempt to contradict (if any such attempt should be made) *what is to be found upon the face of that written instrument.*' In this case it is obvious that an examination of the arbitrators would not disclose how far the defendant had succeeded, unless they were asked what sum, if any, they had awarded to the appellants under each count of the declaration, a line of examination which is plainly incompetent.

". . . Their Lordships are of opinion that the course followed by the Court below, whilst in other respects unwarrantable, is in direct contravention of the agreement of parties; and they will therefore humbly advise her Majesty to reverse the order appealed from, with costs to the appellants in the Court below from and after the 2nd November, 1887, and to remit the cause, with directions to the Prothonotary to tax the costs of the appellants (plaintiffs in the Court below) upon the verdict entered for them pursuant to the award. The respondent must pay the costs of this appeal."

[15 *App. Cas.* 371; 59 *L. J. P. C.* 52.]

Railton *v.*
Wood.

New South Wales. Lord Field. *June* 28, 1890.

Construction of New South Wales Insolvent Act, 5 Vict. No. 17 (1841), sect. 41. Action for pound breach and alleged wrongful

removal of impounded goods. Were the goods *in custodiâ legis*, and was the respondent justified in taking goods out of the possession of the appellant's bailiff? This was an appeal against an order setting aside a verdict for the appellant and directing the same to be entered for the respondent, and also from an order discharging a rule to increase the damages for the appellants to a larger amount, viz., 1,067*l.* 2*s.*, being both damages and costs. The facts of the case shortly stated are as follows. The appellant, the plaintiff below, is a lady who is owner of the "Telegraph" Hotel at Inverell, New South Wales. She had leased the premises to one Gorman, who, in August, 1887, was in arrear with rent for more than six months. On August 2 the lady distrained upon all the goods in the hotel and afterwards impounded and made an inventory of them. On the same day a man named Bell, by the authority of the respondent, claimed possession of the goods. On August 4, Gorman having committed an act of insolvency, the estate was put under sequestration in terms of the Insolvent Act, but beyond giving the appellant notice of the sequestration and of his appointment as official assignee, the latter in no way interfered with the appellant's distress. On the 8th August, however, the respondent, to quote their Lordships' judgment, "forcibly and against the will of the bailiff (the goods being still impounded) removed them from the premises, and on the 11th August the present action was brought for that pound breach and removal under the Colonial Statute 15 Vict. No. 11, by virtue of sect. 18 of which the appellant claims to be entitled to treble damages.

"The case was tried before his Honour the Chief Justice of New South Wales and a jury. The above facts were given in evidence, and it also appeared that the respondent claimed to justify what he had done upon the ground that the goods had become his property under a bill of sale executed by the tenant, and dated the 7th May previous to the distress. By that deed (the validity of which was not disputed) the goods in question were assigned to the respondent by way of mortgage for securing an advance of 1,800*l.* The deed also comprised the licences, goodwill, and lease of the hotel, and contained the usual clauses assuring to the tenant quiet enjoyment until default, and giving

to the mortgagee power to seize and sell in that event. The value of the goods was put by the appellant at something more than 1,000*l.*, and by the respondent at 600*l.* It did not appear what sum was due upon the mortgage, but it seems to their Lordships to have been assumed below and to be in accordance with the probabilities of the case that the sum secured was far in excess of the value of the security, and that there was therefore no beneficial interest in the goods vested in the tenant, and that the whole property was in the respondent. Upon these facts the learned Chief Justice directed a verdict for the appellant for single damages 355*l.* 15*s.* 4*d.*, but reserved leave to her to move to increase the amount as the Court might direct, and to the respondent to move to enter the verdict for him. Under this leave cross rules were obtained, and after argument the respondent's rule was made absolute and the appellant's discharged, and it is in both these respects that the appellant complains. The argument below and at their Lordships' bar was properly directed to the only material question in the case, which is, whether the respondent was justified in taking the goods out of the possession of the appellant's bailiff after the order for sequestration." The question depended, as their Lordships say, upon the proper construction of the Insolvent Statute, which was one for "giving relief to insolvent debtors, and providing for the due collection, administration, and distribution of insolvent estates," and the 41st section of which ran thus:—"That no distress for rent shall be made or levied or proceeded in after any order made or sequestration as aforesaid, but the landlord or party to whom the rent shall be due shall be entitled to receive out of the assets of the estate so much rent as shall be then due, not exceeding six months' rent in the whole, and shall be allowed to come in as a creditor and share rateably with the other creditors for the overplus."

As to the construction of the particular section their Lordships observed:—"The respondent's contention is that all further dealing by the appellant with the distress after the making of the order of 4th August was prohibited, and that there was therefore no longer any bar to the removal by him of

his own goods, whilst the appellant urged that the prohibition only applied to a distress upon goods which formed part of the insolvent estate to be administered as assets, and also that, even otherwise, the prohibition in question was at the election of the Official Receiver and did not justify the pound breach by the respondent.

"Upon this latter contention it is not necessary for their Lordships to express any opinion, they having come to the conclusion that the appellant's contention upon the construction of the statute is well founded, and that the judgment of the Court below cannot be supported."

To again quote from the judgment of the Judicial Committee: "The special policy of the statute is . . . in harmony with the established policy of legislation in bankruptcy or insolvency, which aims at placing limitations upon the exceptional remedy of the landlord when it comes into competition with the interests of the general body of creditors, and the special language of the section points to that policy in the present instance.

"It places a limit upon the undoubted legal right of the appellant to a preferential hold upon specific property which was amply sufficient to meet her claim, and it substitutes for it a payment of the rent in full for six months, leaving her to her right of proof for the rest, but inasmuch as the payment in full is to come out of the assets of the estate, the reasonable inference is that the remedy taken away was one which was in force as against the estate, and not against the goods of a third party, who, if the respondent's contention is correct, would take all the benefit of the limitation of the remedy, and contribute nothing to the substitute. Again, the respondent's construction would tend to throw upon the insolvent estate a liability to pay six months' rent in full out of assets which would not in any way arise from the abandonment to the estate of any equivalent. It appears to their Lordships, therefore, that to read the prohibition as affecting a distress of goods the property of a third party, would be extending it beyond the scope of the general object and policy of the Act, and injurious to the landlord's rights.

". . . The judgment of the Court in the present case does not appear to their Lordships to have rested upon any construction put by the Court itself upon the statute. Their judgment appears to rest almost entirely upon the authority of a prior case of *Cohen* v. *Slade*, cited below, and decided in the Supreme Court, New South Wales, in 1871 (12 Sup. Ct. Rep. N. S. W. 88). But that case cannot, in their Lordships' view of the true principle of construction to be applied, be regarded as an authority to be followed, and their Lordships are also unable to agree in the view taken by the Court below, that that decision had become so incorporated with the general law and practice of the colony as to lead to the reasonable belief that it had been acted upon so as to render it desirable to uphold it."

Having in their judgment dwelt with approval on the case of *Hill* v. *East and West India Dock Co.* (22 Ch. D. 14; and on appeal, 9 App. Cas. 453) upon the tendency of the 23rd section of the Imperial Bankruptcy Act of 1869; vide also *Brocklehurst* v. *Lawe* (7 E. & B. 176), their Lordships decide as follows:—"Judgment reversed. Rule to enter the verdict for respondent discharged. Rule *nisi* to enter judgment for the appellant made absolute with treble damages and all costs below." The respondent must pay the costs of this appeal.

[15 *App. Cas.* 363; 59 *L. J. P. C.* 84.]

In re F. W. Quarry (a Pleader).

[*Ex parte.*]

N. W. P. Bengal. Lord Watson. *July* 5, 1890.

Suspension of a certificated pleader for twelve months. Was there "reasonable cause" for the suspension within the meaning of sect. 13 of Act XVIII. of 1879? Was the *quantum* of punishment excessive? The appellant was heard by his counsel on Saturday, June 28th, on an application to stay the execution of an order of the High Court of the North-Western Provinces pending an appeal at his instance, and their Lordships on that

occasion directed the petition to stand over, and on July 5th allowed the appellant to be heard on the merits of his appeal. The Judicial Committee now reported to her Majesty that the appeal ought to be dismissed.

[*L. R.* 17 *Ind. App.* 199; *I. L. R.* 13 *All.* 93.]

Ram Charan *v.*
Debi Din and Others.

[*Ex parte.*]

N. W. P. Bengal. SIR RICHARD COUCH. *July* 8, 1890.

Joint family property. Question whether partition between brothers had taken place. Onus of proof. Concurrent judgments on the question of fact that partition had taken place had been delivered by the lower Courts. Affirmed.

[NOTE.—As to concurrent judgments on question of fact not being always binding on Committee, see *Tayammaul* v. *Sashachalla Naiker*, 10 Moo. Ind. App. 429.]

[*I. L. R.* 13 *All.* 165.]

Maina and Others *v.*
Brij Mohan and Others.

N. W. P. Bengal. SIR BARNES PEACOCK. *July* 9, 1890.

Rights of religious sects, the Sannadhias and the Chaubeys, in respect to offerings and management of a sacred Ghât. Is a suit brought by the respondents for a declaratory decree maintainable? Reversed with costs, Judicial Committee holding that the respondents were not entitled to the rights now claimed, but with reservation of opinion as to possible other rights of

either party. The Judicial Committee, while declaring that they need not endorse all his reasons, concur with the finding of the Subordinate Judge who had heard the witnesses, and had an opportunity for studying their demeanour. That judgment in its finding ran thus :—

"The plaintiffs (now respondents, the Sannadhias) in this case have no connection with the Bisram Ghât; they are Sannadhia Brahmins, having no concern whatever with the property which was used by the Chaubeys as the place of their worship. Bisram Ghât is the worshipping place of the Chaubeys, in the vicinity of which the plaintiffs, who are Sannadhias, have their temples. My inspection of the place has fully convinced me of this. The documentary and oral evidence abundantly establish this conclusion to my entire satisfaction. Both sects, the Sannadhias and the Chaubeys, are bitter enemies to each other, and could not be expected to have a common place for their worship."

The plaintiffs (the respondents) sought for a declaratory decree under sect. 42 of Act I. of 1877. The wording of the section was, "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right; and the Court may in its discretion make therein a declaration that he is so entitled; and the plaintiff need not in such suit ask for any further relief. *Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.*"

The plaintiffs represented, as has been said, a sect called the Sannadhia Brahmins, and claimed that their title had been ratified by reason of gifts for repairs to the Ghât in question and the temples appurtenant thereto, and denied the right of any others but themselves to be managers of the said Ghat. The Judicial Committee in their judgment, reversing the decree of the High Court, say:

"It is not necessary for their Lordships, in concurring with the judgment of the Subordinate Judge, to agree in all his reasons. It is quite consistent with the decree which he passed

dismissing the suit that the plaintiffs may have some right in Bisram Ghât; but they have not proved any right to have it declared that they are entitled as Mutawallis to have an interest to the extent of one-third of the offerings" made by Pilgrims to that Ghât. The First Court laid down certain issues, the fourth one being, "Are the plaintiffs guardians of Bisram Ghât, vested with a right to receive the offerings made in it, to superintend the repairs and erection of the building there, or are they priests at Swami Ghât, plying their professional duty there?" "It might be," the Judicial Committee observe, "that they were priests of Swami Ghât, and yet might also have an interest in Bisram Ghât. The whole point of the issue is—were they guardians of Bisram Ghât, with a right to receive the offerings made in it, and to superintend the repairs and erection of buildings there?"

The High Court did not decide whether the plaintiffs were Mutawallis entitled to one-third, but referred to a firman produced by them, of the Emperor Furrukh Shah. This document the Judicial Committee consider did not vest any rights in either party. The finding of the High Court was that the respondents belonged to the Chaubey sect, and it seemed to be conceded that if they did belong to that sect, they were entitled to enjoy the privileges and rights of the Chaubey community concerned therein. The Judicial Committee, *per contra*, see nothing on the record to show that there was any concession by the appellants of the kind indicated by the High Court. The Judicial Committee are of opinion that the judgment of the High Court has gone on a wrong principle, it merely stating that if the plaintiffs belonged to the Chaubey class they were entitled to all they claimed, and that they did belong to the Chaubey class. It appears to their Lordships that the learned judges of the High Court have not sufficiently kept in view the only real question raised in this case, namely, whether the plaintiffs have proved that they, as Mutawallis or managers of the Bisram Ghât, are entitled to one-third of the donations given by pilgrims to that Ghât, and also that certain suits, particularly suits heretofore decided against the contentions of

the respondents, and which, it was alleged by the respondents, were brought about by collusion on the side of the party of the appellants, were fictitious. In their Lordships' opinion, "the plaintiffs have not made out a case for the declaratory decree which they claimed, and certainly they have not made out a right to have the decree (mentioned on the record) obtained by the defendants from the Munsif's Court, at Mathra, against Bhagwan Das, set aside, and to have the amount recovered from the defendants in that suit used in the repairs of the Bisram Ghât.

"Their Lordships think, therefore, that the decree of the High Court ought to be reversed, and the decree of the Subordinate Judge affirmed; but holding that the plaintiffs are not entitled to the right claimed or to the relief sought, their Lordships wish it to be distinctly understood that they do not express any opinion with respect to any other rights, if any, which either of the parties to the suit may have or claim to have in the aforesaid Bisram Ghât." The respondents are ordered to pay the costs in the High Court and of the appeal to England.

[*L. R.* 17 *Ind. App.* 187; *I. L. R.* 12 *All.* 587.]

Maharaja Radha Pershad Singh *v.*
Lal Sahab Rai and Others.

(Consolidated Appeals.)

N. W. P. Bengal. Lord Watson. *July* 12, 1890.

Relative position of the parties in the litigation. Liability of certain shares of immoveable estate to attachment and sale. Ownership of the land. Who were judgment debtors in a previous suit? Is the claim barred by sects. 13 and 43 of the Code of Civil Procedure Act X. of 1877.

The suit was instituted by the respondents (holders of ancestral property), to obtain relief against the attachment and sale in execution of a decree for mesne profits, at the instance of the appellant, of certain shares of immoveable estate in a talook and elsewhere. The judgment debt was alleged to be due from their (the respondents') ancestor. Much depended on the ques-

tion as to whether the representatives of the respondents were made parties in the litigation throughout. Also there was a question of *res judicata*. The consolidated appeals were from two decrees of the High Court, one of which reversed a decision of the Subordinate Judge of Ghazipur, and decreed the respondents' suit as prayed, and the other dismissed a cross appeal instituted by the appellant. The Judicial Committee upheld the findings of the High Court in favour of the respondents, and recommended that the judgments be affirmed, with costs, laying down, *inter alia*, that an operative decree obtained after the death of a defendant, by which the extent and quality of his liability, already declared in general terms, are for the first time ascertained, cannot bind the representatives of the deceased, unless they were made parties to the suit in which it was pronounced. Appellant must pay the costs of the appeals.

[*L. R.* 17 *Ind. App.* 150; *I. L. R.* 13 *All.* 53.]

The "City of Peking" *v.*
The Compagnie des Messageries Maritimes (owners of the "Saghalien").

[Two separate appeals between these parties were heard by the Judicial Committee. The first was decided by their Lordships on Dec. 1, 1888, and the second was finally disposed of after a report from the Registrar in Causes Ecclesiastical and Maritime on 12th July, 1890. Both appeals are placed here together for convenience of reference.]

FIRST APPEAL.

The "City of Peking" *v.*
The "Saghalien."

Vice-Admiralty Court, Hong Kong. LORD WATSON.
Dec. 1, 1888.

Collision in Hong Kong Harbour between the "City of Peking," steamer, and the steamer "Saghalien," the latter at

the time (2 o'clock p.m.) being at anchor, and in a state of readiness for an early departure on her voyage to Europe. Precautions necessary when currents are met with, other vessels being in the proximity. Necessity of having both anchors ready. Judgment below affirmed and appeal dismissed with costs. The evidence showed that the "City of Peking" entered the harbour from the east against a half ebb tide, and was proceeding on her way to her own moorings. Her own witnesses say that if she had continued to obey her helm she would have passed the "Saghalien." The course was, however, obstructed by two large junks which were in reality at anchor, but having sails set, and these bulging with a light wind were assumed to be moving. The speed of the "Peking" was accordingly reduced. The witnesses for the "Peking" asserted that immediately afterwards, when she had not yet got abreast of the "Saghalien," her head was suddenly caught by a strong tidal current, which at once canted the helm round to port. The description of what followed is taken from the statement of details as given in the judgment of the Judicial Committee:

"The captain, who was himself in charge upon the forward bridge, then gave three consecutive orders, all of which were promptly obeyed. He first ordered the helm to be put hard-a-port, but that had no effect. At that moment his vessel was less than twice her own length from the 'Saghalien,' and he at once saw that there was imminent danger of collision. In fact, the two ships were so near to each other that in his judgment he could not have got clear of the 'Saghalien' by going full speed ahead. He accordingly gave the order to stop and reverse, and at the same time directed the third officer to go to the chief engineer and tell him to back her as hard as possible. On the return of the third officer from that errand, but not till then, he gave the order to drop the starboard anchor, which was the only one ready to let go, the port anchor having been unshackled just before they came abreast of Kowloon Point (a promontory in the harbour). These proceedings failed to stop her way, and the stem of the 'City of Peking' struck the

'Saghalien,' which was then heading to the north, nearly amidships, causing damage both to hull and cargo." Having analysed the evidence, the Judicial Committee reported to her Majesty that the "City of Peking" was alone to blame, thus arriving at the same result as the Judge of the Vice-Admiralty Court. Their Lordships, however, commented as follows on one finding of the Judge below, namely, that the "City of Peking" was actually steered throughout upon a course which brought her at right angles on the "Saghalien." They say, "Except upon very clear testimony, their Lordships would be unwilling to hold that a well-equipped vessel like the 'City of Peking,' with her officers and crew at their posts and on the look-out, had deliberately run down a ship at anchor, but there appears to be no ground for that inference in the present case." They go on to add that the only witnesses who sought to support that charge had little or no opportunity of studying the vessel's complete course.

Their Lordships proceeded as follows:—

"Whilst their Lordships are prepared to acquit the 'City of Peking' of having steered a straight course for the 'Saghalien,' it does not necessarily follow that, in their opinion, she must be absolved of all blame in the matter. When a vessel under steam runs down a ship at her moorings in broad daylight, that fact is by itself *primâ facie* evidence of fault; and she cannot escape liability for the consequences of her act, except by proving that a competent seaman could not have averted or mitigated the disaster by the exercise of ordinary care and skill.

"The appellants attribute the collision wholly to the effect upon their vessel of the current which caught her head, to counteract which they maintain that every reasonable precaution was used which ordinary skill and prudence could suggest. It appears to be an undoubted fact that, in certain states of the weather, at half ebb, the tide setting eastward sweeps down the western shore of the promontory of Kowloon, and is thereby deflected, and runs with considerable force in a southerly direction across the fairway. These currents are exceptional, but

that they do occasionally, although at distant intervals, occur, is known to mariners who frequent the harbour, and was known to the captain of the 'City of Peking.' The evidence on both sides establishes that it is impossible to lay down any rule in regard to the recurrence of these exceptional tides; they may occur at any time, even when least anticipated, and a cautious mariner is therefore bound always to keep in view the possibility of their being met with. There can be no reason to doubt the statement of the captain that he did not expect to meet with a current of the force of that which he encountered, but, however little expected, it was his duty to be prepared for such a contingency. The fact that he had been compelled, by the apparent position of the two junks, to keep to the southern edge of the fairway made that duty the more imperative. Their Lordships are not prepared to hold that, using all due precaution, he was not entitled to steer upon the course which he proposed to follow. The liability or non-liability of his ship appears to them to depend upon this consideration,—whether, at the time when she was caught by the current, he was prepared to use, and did actually use, all ordinary and proper measures for averting the collision?

"There is a serious conflict of testimony as to the actual force of the current at the time of the collision, some witnesses estimating it at half a knot, and others at nearly five knots, an hour. Their Lordships do not think it necessary to decide between these conflicting views, or to determine the precise strength of the current on the occasion in question. It appears to them that, assuming his statement on that point to be correct, the evidence nevertheless establishes that the captain of the 'City of Peking' failed, in two particulars, to take proper steps for checking the way of his ship.

"In the first place, their Lordships have been advised by their nautical assessors, and they have no hesitation in holding, that the starboard anchor ought to have been dropped at the same time when the order to stop and reverse was given. That an appreciable interval of time must have elapsed between the

giving of the second and third orders is made clear by the evidence of the captain and third officer; and the second captain of the 'Saghalien' is probably not far wrong in his estimate of distance when he states that, at the time it was dropped, the two vessels were not more than 200 feet apart. Seeing that 60 fathoms or 180 feet of chain were payed out with the anchor, there must have been very little time for it to operate before the collision occurred.

"In the second place, their Lordships have been advised that, in the circumstances in which the 'City of Peking' was placed, her port anchor ought also to have been in readiness, and ought to have been let go so soon as the ship ceased to obey her helm in consequence of the current. In that opinion they entirely concur. In such circumstances, the keeping of both anchors in readiness is a safe and ordinary precaution, it being impossible to predict which of the two it may become necessary to drop, or that both will not be required. That a second anchor, if dropped in time along with the first, would have had a material influence in averting the collision, or minimizing its effects, can hardly be questioned by the appellants, whose third officer states in his evidence, 'I dare say two anchors would have held her.' The fact seems to have been that those in charge of the 'City of Peking,' although they ought to have been aware of the possibility, thought there was no probability of danger from a current; and, acting on that speculation, they allowed the port anchor to be unshackled before the junks were reached. In other words, they took their chance, and the ship must bear the consequences.

"It is right to state that these views are in entire accordance with certain of the findings in the Court below. Their Lordships will humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed. The appellant must pay the costs of the appeal."

[14 *App. Cas.* 40; 58 *L. J. P. C.* 64.]

Second Appeal.

The ss. "City of Peking" *v.*
The Compagnie des Messageries Maritimes and Others.

Vice-Admiralty Court, Hong Kong. Sir Barnes Peacock.
Dec. 14, 1889, *and July* 12, 1890.

This suit had its origin in the result of the former suit in which, by the decision of the Hong Kong Court (subsequently affirmed by Her Majesty in Council in the tenor of the judgment stated above), the "City of Peking" was found to be alone to blame. By the decision in the first suit, the whole matter of loss and damage was referred to the Registrar of the Hong Kong Vice-Admiralty Court to ascertain the amount of damages caused by the collision, and the Registrar was to report thereon. He did report for a large sum, including one item for 5,000*l.* odd for demurrage, *i.e.*, damages for the "Saghalien" having had to be put in dock, and her place taken by other vessels—which it was alleged had, owing to the disaster, to be turned back before completing their voyage—while fresh vessels had to be taken from other routes to keep up the service. The whole question in this appeal was whether a charge for demurrage ought to be granted as over and above the already discovered amount of damages for the collision and repairs to the injured steamship. The Court below pronounced in favour of this item for demurrage being granted. On the other hand, the Judicial Committee, after full examination of the evidence as to the alleged loss by demurrage, came to the conclusion that no demurrage claim could, in this case, be upheld. The company who were able at once to substitute men and ships had not lost by substituting other ships and sailors to carry on their regular routine of voyages. It was an error to refer to the Registrar the question of the number of days the "Saghalien"

was laid up for repairs when really no loss of profits was caused thereby by reason of the company being in a position to place other vessels on the line to do her duty, all other damages for the accident and repairs having been adjudged upon. Their Lordships, on the whole, "are of opinion that the amount claimed and allowed for demurrage, so far as it includes any damage on account of the loss of the *use* of the 'Saghalien,' ought to be disallowed. They cannot, however, say that the company may not have incurred some expenses in respect of the 'Saghalien,' such, for instance, as the lodging, maintenance, and wages of the crew, and it may be other expenses incurred during the period of her detention which would not have been incurred if she had not been detained. These may have been included in No. 50, the item claimed for demurrage, and, if so, their Lordships think that the plaintiffs are entitled to recover them under that item (see *The Inflexible*, Sw. Ad. Rep. p. 204). It would be very inconvenient and would be attended with considerable expense to the parties to send this case back to the Registrar at Hong Kong. The head office of the company is in France, and the officers there will doubtless be able to supply the necessary information and affidavits as to the items of the portage bill, and as to the nature and extent of the necessary and reasonable expenses, if any, incurred at Hong Kong with reference to the 'Saghalien' during her detention. Their Lordships are not prepared to make any report to her Majesty before it shall have been ascertained whether any and what expenses of the nature above indicated were incurred by the company. They, therefore, refer it to the Registrar of Her Majesty in Causes Ecclesiastical and Maritime to ascertain and report whether, having regard to the above remarks, any and what expenses were properly incurred by the company with reference to the steamship 'Saghalien' during her detention at Hong Kong between the 29th day of November, 1886, and the 25th of January, 1887."

The above was the judgment of the Judicial Committee as delivered 14th December, 1889. The Admiralty Registrar in England having made his report, the matter came up again

on 12th July, 1890, when their Lordships delivered the following judgment, which was approved by the Queen in Council.

"Upon the hearing of this appeal, their Lordships declared their opinion that the decree or order appealed against ought to be reversed, so far as it allowed the sum of 5,352*l.* 4*s.* claimed for demurrage, with interest thereon and costs, but they added that they could not say that the company might not have incurred some expense in respect of the 'Saghalien,' such, for instance, as lodging, maintenance, and wages of the crew, and, it might be, other expenses incurred during the period of her detention, which would not have been incurred if she had not been detained, and their Lordships referred it to the Registrar of her Majesty in Ecclesiastical and Maritime Appeals to ascertain and report to this Board in respect of those matters. Their Lordships having considered the report of the Registrar, and the evidence adduced before him, are of opinion that the whole of the sum claimed for demurrage ought to be disallowed, and that the respondents have not shown that they are entitled to any sum in substitution thereof. Under these circumstances, their Lordships will humbly advise her Majesty that the decree or order appealed against ought to be reversed, so far as it allows the sum of 5,352*l.* 4*s.* claimed for demurrage, with interest thereon and costs; and that in other respects it ought to be affirmed. The respondents must pay the costs of this appeal, including the costs of the reference to the Registrar, and of the motion to this Board consequent upon his report."

[15 *App. Cas.* 438; 59 *L. J. P. C.* 88.]

Lyons *v.*
Hoffnung and Others.

New South Wales. LORD HERSCHELL. *July* 15, 1890.

Action by assignee of an insolvent's estate. Right to stop goods *in transitu.* Appeal against rule setting aside verdict and for a new trial. Was there misdirection? *Dixon and others* v.

Baldwen and another, 5 East, 175; *Bethell* v. *Clarke*, 20 Q. B. D. 615.

The appellant in this case was plaintiff, and sued in the action as assignee of one William Clare to recover the value of goods seized by Hoffnung and others, the respondents, at a port called Rockhampton in Tasmania. The facts showed that Messrs. Hoffnung were merchants at Sydney. From them Clare purchased the goods in question and had them marked $\frac{WC}{K}$, *i.e.*, William Clare, Kimberley. He deposed at the trial that he gave Messrs. Hoffnung orders to send the goods when packed to Messrs. Howard, Smith & Co.'s steamship wharf in Sydney. To quote the judgment of the Judicial Committee—"He stated that he gave no other instructions, but on cross-examination he admitted that he had told Marks that the goods were going to Kimberley; that he was going to take the goods there; that they were going with him. The evidence given by Marks was, that a day or two before the purchase he saw Clare, who told him that he was going to Kimberley; that he wanted the goods he was purchasing to be shipped by the first boat, which was the 'Gambier'; and evidence was also given by Davis that at the date of the purchase Clare had stated that he was undecided whether the goods were to go by the 'Gambier' or some other vessel, but that he would let them know; and that he came two days later and told them the goods were to be shipped by the 'Gambier' to Kimberley.

"Messrs. Howard Smith & Co., to whose wharf the goods were to be sent, are shipowners, and were known to both parties to be then loading vessels for the port of Kimberley, the earliest of their vessels to sail being the 'Gambier.' The goods were sent by the respondents to Howard Smith & Co.'s wharf, and a document was sent with them which was initialed on behalf of Howard Smith & Co. by one of their employés, which was in these terms:—'Wm. Howard Smith and Sons, Limited, Sydney, 20/5/86. Steamer "Gambier." For King's Sound. Shipper, S. Hoffnung & Co. Consignee, W. Clare. Goods, Kimberley.' It appears that in respect of some of the goods, those apparently that were in bond, a more elaborate form of receipt was given

by the shipowners, but in those receipts also Hoffnung & Co. were described as the shippers of the goods, Clare as the consignee, and the place of destination as Kimberley."

On the subsequent insolvency of Clare, Messrs. Hoffnung stopped the goods *in transitu*, and the action for damages was then instituted against them by the appellant. The jury gave a verdict for the plaintiff with 505*l*. damages. A rule was afterwards obtained to set aside that verdict and for a new trial, on the ground that the findings of the jury were against the weight of evidence, and also on the ground that the learned Chief Justice had misdirected the jury. The alleged misdirection was thus set forth in the application for the rule:—"That his Honour, it is submitted, erroneously told the jury that if Clare handed up to Howard Smith & Sons (Limited) the bills of lading, or shipping receipts, received by him from the defendants, and received from Howard Smith & Sons (Limited) another bill of lading, it was of no moment whether the latter bill of lading contained the names of the defendants as shippers, because if at that time they entered into a contract with Clare to carry these goods, and were paid freight, then there would be a fresh contract with Clare, under which Howard Smith & Sons (Limited) became Clare's agents, and it would be equivalent to a delivery to Clare."

The present appeal is against the grant of this rule absolute. The first question the Judicial Committee had to consider was, whether the verdict could be supported as being right upon a true view of the facts. Reliance was placed by the appellant on the fact that the receipts were handed over by the respondents to Clare, and that being in possession of these receipts he (Clare) obtained from Howard Smith & Co. a bill of lading. Moreover it was now contended by this appellant that the *transitus* ended, as between Clare and the respondents, at Howard Smith & Co.'s wharf. To quote from their Lordships' judgment:—"He (Clare) stated that in the bill of lading he was named as consignee, but that the name of Hoffnung & Co. (who as vendors sold the goods to Clare) did not appear as shippers.

Their Lordships think that some doubt may well be entertained whether he is accurate in that statement. . . . The circumstance is wholly immaterial. The goods were undoubtedly carried by the vessel 'Gambier' on a voyage to Kimberley, and were in transit upon that voyage at the time when, owing to the insolvency of Clare, the respondents stopped them. The arrangement for the freight at which the goods were carried appears to have been made in contemplation of this and other purchases by Clare before the date when those purchases were effected. The shipowners undertook, in consideration of the fact that he was about to have a considerable quantity of goods shipped, to carry them somewhat below the ordinary freight. . . . Even assuming that the jury were entitled to disregard all the oral evidence in the case except that given by Clare, and to act upon that evidence alone, in the opinion of their Lordships the decision ought to have been in favour of the defendants in the action.

"It appears to their Lordships that, upon the undisputed facts of the case, the right to stop *in transitu* under the circumstances proved at the trial was clear. The goods at the time of the purchase were undoubtedly intended by the purchaser to pass direct from the possession of the vendors into the possession of a carrier to be carried to a destination intimated by the purchaser to the vendors at the time of the sale. . . . It is obvious that Clare was not going to take these goods with him in any other sense than that he intended himself to be a passenger by the vessel on which they were to be shipped, and by which they were to be carried, his intention being that the goods should be shipped on board that vessel as cargo in the ordinary way, carried by carriers to their destination, and there delivered to him."

These circumstances appeared to their Lordships sufficient to indicate that the right to stop *in transitu* existed, and in proof of their opinion they referred to the findings in *Dixon and others* v. *Baldwen and another* (5 East, 175); *Hunter* v. *Beale* (cited in *Ellis* v. *Hunt*, 3 T. R. 467); also *Bethell* v. *Clarke* (20 Q. B. D.

615), wherein the Master of the Rolls said: "When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu* and may be stopped."

The Judicial Committee proceed to say: "The present case appears to fall distinctly within the terms there employed. The goods had not been delivered either to Clare or to any agent of his *to hold for him* otherwise than as a carrier, but were still in the hands of the carrier as such and for the purposes of the transit . . . to their destination, Kimberley. . . .

"Under these circumstances it seems difficult to understand the contention that the right of stoppage *in transitu* did not exist. The learned Chief Justice, in summing up to the jury, appears to have told them that if Clare made a new contract with Howard Smith & Co. in respect of the carriage of these goods after they came into their possession, that would be sufficient *to constitute a delivery to Clare*, which would put an end to any right to stop *in transitu*. Their Lordships gather this from the particular direction complained of, and which formed one of the grounds on which the rule was granted. . . .

"If his Honour intended to instruct the jury that such a contract entered into between Clare and the shipowners would be equivalent to the shipowners holding the goods for Clare otherwise than as carriers, and becoming his agents so as to create a new transaction, having its initiation only at that time, their Lordships are unable to agree with the law which appears to have been laid down. If the goods were received by Howard Smith & Co. to be carried to Kimberley, and this was indicated as the destination of the goods *at the time when the vendors were instructed to deliver the goods to the carriers*, then, in the view which their Lordships take, it is immaterial whether a fresh bill of lading was obtained by Clare or whether that bill of lading contained the name of Clare or of the defendants as shippers. . . . The goods passed direct from the hands of the

vendors into the hands of the carriers to be carried to the destination then contemplated by both parties." Affirmed with costs. [15 *App. Cas.* 391; 59 *L. J. P. C.* 79.]

Barton *v.*
The Bank of New South Wales.

New South Wales. LORD WATSON. *July* 15, 1890.

Action by an administrator to redeem lands upon payment of liabilities. Terms of a conveyance to the bank, are they express and unequivocal? Was there absolute conveyance, or were the lands held by way of security only? Admissibility of evidence. The Primary Judge in Equity decided in favour of the plaintiff (appellant), Barton, who had sued to redeem the mortgaged parcels of land as administrator of the estate of the transferor, one William Barton. On appeal, the Full Bench of the Supreme Court reversed that finding. This last decision the Judicial Committee now upheld, and the appeal was dismissed with costs. Their Lordships saw no reason to doubt the justice of admitting collateral evidence by which it was sought to prove that the relationship of mortgagor and mortgagee still existed between the parties, and, upon this point, made the following observations:—"Where there is simply a conveyance and nothing more, the terms upon which the conveyance is made not being apparent from the deed itself, collateral evidence may easily be admitted to supply the considerations for which the parties interchanged such a deed; but where, in the deed itself, the reasons for making it, and the considerations for which it is granted, are fully and clearly expressed, the collateral evidence must be strong enough to overcome the presumption that the parties, in making the deed, had truly set forth the causes which led to its execution." The Judicial Committee held that, notwithstanding the right to admit such evidence, it required very cogent evidence indeed to disturb the "plain terms" of the indenture entered into to cover his debt to the bank by William

Barton, and, in the result, they held that the terms mentioned fully warranted the bank's lien for an absolute conveyance to them of the parcels of land in dispute. Appeal dismissed. Appellant to pay costs. [15 *App. Cas.* 379.]

Montaignac and Cyprien Fabre and Company *v.* Shitta.

Lagos. LORD HERSCHELL. *July* 17, 1890.

Principal and agent. Liability for loans. Authority given to agent. What (if any) responsibility on lender to make inquiries. Appeal by special leave.

In this case, the Supreme Court of Lagos affirmed an order of the Divisional Court. The respondent had lent money, 6,000*l.*, augmented by interest, to one Del Grande, believing him to be a fully empowered agent for the purpose of borrowing of the appellants' firm of Cyprien Fabre & Co. He brought the action for recovery of the money. The question raised in the litigation was, whether the powers given to Del Grande extended to the authority to borrow (in the particular way described) on the firm's account, and upon the terms and rates of interest agreed upon in the lending? The respondent's counsel contended that Del Grande had authority, and that Del Grande's firm was bound by his contract. There was every reason to place reliance upon his actions, and if his actions as agent were not justified, the justification lay between him and the firm whose undoubted agent he was. The whole question rested upon the borrowing powers which the agent might rightfully be presumed to have. The appellants argued that the particular transaction now in question between the respondent and a substituted agent (Del Grande) was so far out of the ordinary course of business at Lagos that the loan could not properly be charged against them as principals. They also said that the lender ought to have made inquiries, when he would have discovered that the substituted agent was not really bor-

rowing on behalf of Fabre & Co., a firm of recognized stability, respectability, and perfect solvency at Marseilles. They further argued that if authority to borrow generally was established, such authority did not extend to the terms alleged, or the rate for interest. From the statement of the facts in the case, it would appear that in 1878 the appellant firm gave their powers of attorney to one Settimio Carrena, to act for them and administer in the name of their house, "Cyprien Fabre & Cie.," all the businesses of their important French firm on the west coast of Africa, between Cape St. Paul and the River Benin. The power of attorney was wide in its scope, and, *inter alia*, gave power to the person appointed to hand over his responsibilities to a worthy substitute. On June 4th, 1879, Carreno passed his responsible powers over to Del Grande, with knowledge of the duties the last-named took upon himself. The Judicial Committee in their judgment say that it was not disputed that the power to manage and administer the business on the West Coast conferred some authority "to raise money, inasmuch as the raising of money was necessary for the proper carrying on of the business affairs which were to be administered by their agent. Their Lordships think it cannot be doubted upon the evidence that the agent had authority to raise the moneys that were necessary for the purpose of the business, and to employ for the purpose all ordinary means." In the result, the Judicial Committee agree with both Courts below, and advise her Majesty that the appeal ought to be dismissed, the appellants to pay the costs of it. In so doing they said: "If in the absence of the means of raising money needed for a business by a sale of bills, or by obtaining accommodation from some other merchant with whom the house had transactions, an agent who had to raise the money for his firm must have had recourse to one of these native financiers or money-lenders, then, in the opinion of their Lordships, the power which this agent possessed under his mandate from his principals would authorize his borrowing from such a source under such circumstances; and if the occasion might have arisen on which his borrowing powers would have been properly interpreted as comprising the recourse

to such means as these, then their Lordships do not think it was incumbent upon the lender to inquire whether in the particular case the emergency had arisen or not; but if he, in good faith and without any notice of the fact that the agent was not obeying or intending to obey the mandate of his employers, advanced money to him, the loan would be one by which, having regard to this authority to their agent, they would be bound, and he would be entitled to recover."

[Decree of the Supreme Court affirmed. Appellants to pay costs of the appeal.] [15 *App. Cas.* 357.]

Umesh Chunder Sircar *v.*
Zahoor Fatima and Others.

Bengal. Lord Hobhouse. *July* 19, 1890.

Questions arising out of a series of mortgages on shares of Mahomedan family property. Construction of the deeds. Priority of mortgage. Effects of sale, and relative rights of purchasers and mortgagees. Interest.

The mouza named "Sirdilla," in the Gaya district, in relation to parts of which the mortgages were executed, was family property which, in 1867, was partitioned. Shares of the mouza, amounting to about 12 annas, were at that time thus distributed. To Saiyed Sultan Ali, the head of the family, 5 annas, 13 dams, and 6 cowries; to his two sons, Farzund Ali and Farkut Ali, 2 annas each; to Hosseini, wife of Farkut, 2 annas, 2 dams, 4 cowries. In 1871, Sultan Ali granted a mokurreri lease of 1 anna, 14 dams, for life at a rent of 1 rupee to his second wife, Amani, the stepmother of his sons, with the condition that, if no child was born to him by her, that share should go to his aforesaid sons. Later on, a series of mortgages were executed, some before the death of Sultan Sani and others afterwards, by the two brothers and Hosseini, by the brothers alone, or by one brother in favour of the respondents. Several of these had come by assignment into the hands of the appel-

lant, and one of them executed by the three mortgagors jointly for a 2 annas share had come by inheritance into the hands of Zahoor Fatima, the first and principal respondent. The suit was brought by the plaintiff, now appellant, and he made all persons interested parties, claiming the right of a puisne mortgagee of the 12 annas to redeem prior incumbrances, or alternatively demanded a sale of the mortgaged property, and an order that, out of the proceeds, the mortgage money due to all parties should be paid according to priorities. The first Court, by a decree of 17th September, 1883, decreed in favour of the plaintiff for a right to redeem and for a sale, and from that decree the only defendant who appealed to the High Court was Zahoor. The High Court, on 10th September, 1885, varied the judgment of the Subordinate Judge. In addition to lands there was also a house at Sahebgunge (undivided at the time of the partition) which was mortgaged. This was put into the deeds so as to bring the mortgages within the registration area of the Sub-Registrar of Gaya. The Judicial Committee, while agreeing with certain of the views taken in both Courts below, decide to recommend her Majesty to discharge the decree of the High Court, and to make a declaration set out in full below, and in all other respects, save in the alteration resulting from the declaration, to affirm the lower Court's order. Their Lordships, in their judgment, first dealt with the question of a fraction of the mouza, known as the "17 dams." The question as to this share arose thus: Zahoor having obtained a decree against Farzund alone, on a mortgage which had been executed to her by Farzund in 1878, during the lifetime of Sultan Ali, of a 1 anna share of Sirdilla, caused an attachment and sale, not only of the 1 anna, but also of the "17 dams," which was the moiety of the proprietary interest which had been retained by Sultan Ali at the partition, and which on his death descended to Farzund. The first Court held that the plaintiff had a prior right to the 17 dams, being a "definite interest" transferred by heirship to Farzund. The High Court considered that Zahoor had shown a better title. The second important question, raised among certain subsidiary ones as to priority of mortgage and

respective rights of redemption, dealt with the "2 annas share," and the mouzah which had come into the possession of Zahoor. It was on these two questions principally, the "17 dams" share and the "2 annas share," that the High Court differed from the Subordinate Court. In other respects, including the right of sale generally, the High Court agreed with the Subordinate Court in its more essential points.

The following was the judgment of the Judicial Committee:—

"Their Lordships are of opinion that the house in Sahebgunge should be included in the direction to sell, and they will now express their opinion as to the question of the 17 dams of property as to which the plaintiff and the defendant, Zahoor, each claims to be the absolute owner. The question is, who acquired the ownership first in point of time? The plaintiff's claim depends on his purchase of the 17th July, completed on the 22nd September, 1879. If that is a valid purchase, it is prior to the purchase of the defendant, which did not take place till the year 1881; and the plaintiff is entitled to that share of the property. The purchase took place under these circumstances. On the 14th April, 1879, one Iswardyal, who for this purpose is identical with the plaintiff, having got a decree on a mortgage, applied to enforce it 'by attachment and sale of the immoveable properties owned by the judgment debtor' (the judgment debtor being Farzund Ali the mortgagee), 'as specified in the inventory mentioned below.' The inventory mentioned below specifies 1 anna out of 16 annas of mouza Sirdilla, the property mortgaged in the bond; and also 7 annas out of 16 annas of Sirdilla owned by the judgment debtor, which was property not mortgaged in the bond. That application includes 8 annas of the family property. Eight annas was a larger share than Farzund Ali was actually entitled to, because he and his brother held equal shares in the property, and their sister-in-law Hosseini had a share also; but the circumstance that the description of the property includes more than the judgment debtor was actually entitled to would not tend to exclude the 17 dams in question from that description. The sale took place, and the certificate was granted on 22nd September, 1879, and it is there certified

that the decree-holder has been declared as the purchaser of the judgment debtor's right in 1 anna out of 16 annas which was mortgaged, and so forth, and by another certificate there is a similar declaration as to the 7 annas. So that it is quite clear that the intention was to attach and to sell whatever right and interest the judgment debtor Farzund had in the 8 annas of the property. The question is, what interest had he as regards these 17 dams. That depends upon the construction of the deed of the 26th January, 1871" (the deed by which Sultan Ali made over the Mokurreri lease to his second wife). Having referred to this deed which, as has been before stated, set out the reversion to the sons in case of the wife leaving no other child, their Lordships held that in the events which had happened there was no obscurity about it. They proceed: "At the time of the attachment Sultan Ali was still living, and at all events in contemplation of law there might be a child to take. . . . . Between the attachment and the sale . . . . Sultan Ali died, and then the contingency, such as it was, was entirely put an end to. . . . It does not, in their Lordships' view, very much signify whether Sultan Ali was alive or dead at the time of the sale, but they wish to guard themselves against being supposed to concur in an argument that was presented at the bar, to the effect that if between the time of attachment and the time of sale events should happen which would have the effect of accelerating or enlarging the interest of the judgment debtor as it stood at the time of attachment, that augmented interest would not pass by the sale which purports to convey all that the judgment debtor has at the time. But taking the case most strongly against the plaintiff, supposing that he could get nothing but that which was capable of attachment, and was actually attached on 14th April, 1879, their Lordships hold that this interest in remainder is a property which was capable of being attached, and which was intended to be attached. It is said that by sect. 266 (C. P. C. Act XIV. of 1882) this property was not liable to attachment, because it is there provided that 'The following particulars shall not be liable in attachment'; and among them is:—

'(*k*) an expectancy in succession, by survivorship or other merely contingent or possible right or interest.' It seems to their Lordships that in all probability the High Court, who held that the 17 dams were not attached, must have had this section in their view, though they do not refer to it, because they treat the case as if the two sons had no interest during the life of their father, but as if, upon the father's death, they inherited the property from him. But that is not the case, excepting as regards the one rupee which for this purpose may be thrown out of consideration altogether. Except as regards that one rupee they inherited nothing from him. He had in his lifetime parted with the whole property, either to Amani Begum, his wife and her children by him, or to his two sons. *That interest given to the two sons appears to their Lordships not to fall within the description of an expectancy or of a merely contingent or possible right or interest.* Their Lordships therefore hold that, as regards the 17 dams, the plaintiff has the priority, and that the decree of the High Court is erroneous to that extent."

The Judicial Committee next give their attention to the dispute respecting the two annas—on which also the Courts below had differed. The question was "whether the plaintiff (the appellant) had a right to treat the defendant Zahoor as being only a mortgagee of the share of the property which was purchased by her in execution, and on that footing to redeem her mortgage. The District Judge thought that the plaintiff had that right, and gave him a decree accordingly. The High Court thought otherwise, and varied the decree by dismissing the plaintiff's suit so far as regards the 2 annas in question. By the mortgage bond, marked B^2, dated the 29th July, 1873, Farzund Ali who owned 4 annas of Sirdilla, Farhut his brother who owned 4 annas, and Hosseini the cousin who owned about 2 annas 4 dams, mortgaged 2 annas of the whole mouza to Arshad Ali, the predecessor in title of Zahoor, to secure Rs. 2,000 with interest at 24 per cent. On the 26th May, 1875, the then owner of the mortgage brought a suit against the three mortgagors, and obtained a decree on the 23rd June, 1875. The decree was for 'the amount of the suit' with costs and interest for the period

of pendency of the suit, and for future interest at the rate of Rs. 6 per cent. per annum, and for sale of the mortgaged property. The decree was not executed till the 15th December, 1879, when the property, described as 2 annas of Kusba Jurra, was put up for sale to realise Rs. 3,582 5a. 1p. the decretal amount, and was purchased by Zahoor, who then owned the mortgage, for Rs. 4,700. Between the date of Zahoor's mortgage and the suit brought to realise it, five other mortgages were executed, two by the three mortgagors, two by Farzund and Farhut, and one by Farhut alone, each mortgaging undivided shares (not further identified) in Sirdilla; and four of these mortgages became vested in the plaintiff. Afterwards, a number of other mortgage deeds were executed, some by one of the owners of Sirdilla, some by another, making altogether about thirty mortgages of undivided shares, most of which became vested in the plaintiff. In deciding that the plaintiff had become mortgagee of the property comprised in Zahoor's mortgage, and was therefore entitled to redeem her, the District Judge allowed no distinction between the *mortgages prior to the suit* of the 26th May, 1875, and those subsequent to it, or those subsequent to the decree of the 23rd June, 1875. He appears to think that because at any time before actual sale the mortgagor himself, and anybody to whom he may have transferred the property, can come in and redeem the property by paying the debt, therefore it follows that after sale the mortgagor's transferee, if not a party to the proceedings, can do the same thing. But if the transfer took place *pendente lite*, the transferee must take his interest subject to the incidents of the suit; and one of those is that a purchaser under the decree will get a good title against all persons whom the suit binds. Their Lordships think that the High Court were right to confine their attention to the mortgages made prior to Zahoor's suit, for the purpose of deciding whether the plaintiff is entitled to redeem Zahoor. But the High Court thought that it was necessary for the plaintiff to show that the whole of the 2 annas comprised in Zahoor's mortgage passed under the subsequent mortgages to the plaintiff, and calculations of great nicety have been entered

into for the purpose of showing that the whole did not pass. Their Lordships do not follow the calculations because they are founded on an erroneous view. After effecting the joint mortgage each of the three mortgagors had a right to redeem the mortgagee, and each could transfer his interest, and with it that right. And it is sufficient to say that by mortgage B 7, dated the 11th May, 1875, Farhut transferred to the plaintiff's predecessor in title a share in the property which he had not got without taking in his share comprised in Zahoor's mortgage. Probably by earlier mortgages, certainly by that mortgage, the right to redeem Zahoor in a properly constituted suit was acquired; and it has never been lost, because the plaintiff was no party to Zahoor's suit. It was, indeed, argued by Mr. Mayne that the sale in 1879 had the effect of shutting out all puisne incumbrances. But their Lordships consider that the right view on this point has been taken in both the Courts below. *Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor, to which they are never made parties.* Mr. Doyne (for the appellant) then contends that the decree is wrong in directing a sale of the whole property, and leaving the rights of the parties to be worked out against the purchase-money, and he claims to treat the suit as a redemption suit. To this it is sufficient to answer, that the plaint asks for a sale, and that the plaintiff has not, till the hearing of this appeal, suggested that the Court should deal with the property in any other way. The decree is right in ordering a sale, and the respective rights of the plaintiff and Zahoor in the purchase money must be adjusted on the footing that the plaintiff has the right to redeem Zahoor's 2 annas."

Their Lordships in the rest of their necessarily lengthy judgment discuss the question on what terms the redemption is to be made in point of interest on the mortgage debt, particularly as to when it is reducible by a decree from its date, and when it is to continue payable at the contract rate. "*The Court's power to regulate interest is given by sect.* 10 *of Act XXIII. of* 1861, *which answers to the* 209*th section of the present Civil Procedure Code*

(*Act XIV. of* 1882). That power is given when a plaintiff sues for money due to him, and it is a discretionary power to give such rate as the Court may think proper by decree. The decree can only operate between the parties to the suit and those who claim under them. The plaintiff, getting the security of a decree, has his interest reduced in the generality of cases. But the plaintiff in this case comes to take away from Zahoor the benefit of the decree. It would be unjust if he could use the decree to cut down her interest, while he deprives her of the whole advantage of it. His case is that, as to him, Zahoor is still but a mortgagee, and if so, she should be allowed such benefit as her mortgage gives her. If Zahoor had not got a decree, and the plaintiff had come to redeem a mortgage, he must have paid whatever interest her contract entitled her to, and the Court would have had no jurisdiction to cut it down; and that is the position in which the parties are placed by the decree in this suit. There is a penal rate of interest (120 per cent.) imposed by the mortgage, but it is clear that, in 1875, that was not claimed. Nor do their Lordships consider that it can now be claimed. Setting that aside, the justice of the case demands that Zahoor should be able to claim such interest as her contract gives her up to the time when she took possession of the mortgaged property. Supposing the redemption effected by the plaintiff, what is Zahoor's position? She was mortgagee of the 2 annas of the old mouza Sirdilla or Jurra, the touzi number of which was 1,013, and the sudder jumma Rs. 797. She then purchased the ownership, subject to the plaintiff's mortgage or mortgages, of 2 annas of Kusba Jurra, which bears another touzi number, and a smaller sudder jumma, and which was formed out of 12 annas of the former mouza Sirdilla or Jurra belonging to the family of the mortgagors. She has therefore a right to redeem the plaintiff as regards these 2 annas, on paying such sum as he can properly claim against them in respect of the four mortgages effected prior to the 26th May, 1875. What that sum may be it is impossible to tell with the present materials, but it can and should be ascertained by inquiry, and a reasonable time should be allowed to

Zahoor to elect whether or no she will redeem." Their Lordships, in the result upon the whole case, agree to make the undermentioned report. "Advise her Majesty to discharge the order of the High Court (10th September, 1885), and instead thereof to order as follows:—

"Declare that the plaintiff is entitled to redeem the mortgage of the 29th July, 1873, upon payment to Zahoor of the principal and interest moneys secured thereby, reckoning interest at the rate of 24 per cent. per annum up to the day on which possession of the mortgaged property was awarded in execution to Zahoor, and no later. Declare that if the plaintiff exercises such right of redemption, then on payment by Zahoor to him of all moneys paid by him for redemption of the mortgage of the 29th July, 1873, and of such costs of this suit, including the costs of the appeal to the High Court and of this appeal, as are properly chargeable on the property comprised therein, and of all other moneys, if any, which are due to him on the security of the property comprised in the mortgage of the 29th July, 1873, in respect of the other mortgages which were effected prior to the 26th May, 1875, and which afterwards became vested in him, Zahoor is entitled to redeem the share of Kusba Jurra which was purchased by her under the decree of the 23rd June, 1875, and possession of which was awarded in execution to her by the Court in the same suit. Let the Court make such inquiries and take such accounts as are proper for carrying the above declarations into effect, and fix reasonable periods of time within which the plaintiff and Zahoor respectively shall exercise the rights of redemption hereby declared to belong to them. Declare that if the plaintiff and Zahoor respectively do not exercise their rights of redemption within such time as the Court by its final order in that behalf may direct, they shall respectively be foreclosed and debarred from all right of redemption. In all other respects let the decree of the 17th September, 1883, stand affirmed. Order Zahoor to pay to the plaintiff the costs of the appeal to the High Court. Zahoor must also pay the costs of this appeal.

[*L. R.* 17 *Ind. App.* 201; *I. L. R.* 18 *Calc.* 164.]

Bishambar Nath and Others *v.* Nawab Imdad Ali Khan.

(Appeals Nos. 13, 14, 15, and 16 of 1887, and No. 5 of 1888.)

Oudh. LORD WATSON. *July* 23, 1890.

Appeals by judgment creditors. Question whether money receivable by the judgment debtor (the respondent) as pension is liable to be taken in execution for his debts. Civil Procedure Code, Act XIV. of 1882, sect. 266 (g). Their Lordships consider that the respondent's pension is protected from execution by the provisions of the Code.

In this case the appeals were instituted at the instance of creditors of Nawab Ali Khan, one of the heirs, according to Mahomedan law, of the late Malka Jehan, who was the principal wife of Mahomed Ali Shah, the last King of Oudh. In all the appeals the same question was raised, viz.:—Whether a monthly allowance payable to the respondent by the Indian Government, under an arrangement made between the King of Oudh and the Governor-General of India in the year 1852, is liable to be taken in execution for his debts?

Their Lordships of the Judicial Committee decided that they were bound by their own decision in the case of *Nawab Sultan Mariam* v. *Nawab Sahib Mirza and another;* and *Nawab Wazir* v. *Nawab Sahib Mirza and another* (L. R. 16 Ind. App. 175).

The Civil Procedure Code of 1882, sect. 266 (g), enacts that "Stipends and gratuities allowed to military and civil pensioners of Government, and political pensions," shall not be liable to attachment and sale in execution of a decree. The pensions in question were the result of an engagement in perpetuity between two sovereign powers, the British Government and the last King of Oudh, at a time when there was no distinction between State property and private property vested in the King, and could not be attached or interfered with by judgment creditors. *Inter alia*, their Lordships said: "It is probable (although the point is not one which it is necessary to determine in this case) that the enactments of sect. 266 (g) of the Code were not meant to cover pensions payable by a Foreign State, when remitted for

payment to their pensioner in India; but these enactments certainly include all pensions of a political nature payable directly by the Government of India. A pension which the Government of India has given a guarantee that it will pay, by a treaty obligation contracted with another sovereign power, appears to their Lordships to be, in the strictest sense, a political pension. The obligation to pay, as well as the actual payment of the pension, must, in such circumstances, be ascribed to reasons of State policy. Being of opinion that the respondent's pension is protected from execution by the provisions of the Code, their Lordships consider it unnecessary to express any opinion with regard to his pleas founded on the Pensions Act (XXIII. of 1871), and the Oudh Wasikas Act (XXI. of 1886)." In one of the appeals (six of the seven appeals were consolidated, the seventh appeal is the one to which reference is now to be made) a plea of *res judicata* was taken upon the ground, apparently, that a ruling by the Judge in one application for execution ought to be held conclusive against the judgment debtor in every other application for execution of the same decree. The plea requires no further notice, because the decree or order upon which it is rested has not been produced." Judgments appealed from are affirmed. The costs of the appeals to be paid by the appellants.

[*L. R.* 17 *Ind. App.* 181; *I. L. R.* 18 *Calc.* 216.]

King *v.*
Frost;
Underwood and Others *v.*
Frost;
Price and Another *v.*
Frost; and
Plomley and Others *v.*
Frost.

New South Wales. Lord Macnaghten. *July* 23, 1890.

Construction of the will of James Underwood as determining, in the events which have happened, title to real estate specifi-

cally devised by the said will as well as title to residue. Interpretation of the terms "survivors and survivor" as contradistinguished from "others and other." *Madan* v. *Taylor* (45 L. J. Ch. 569) cited. Testator left five sons. Three of these left children. The last of the five sons to die was William. The question is, what has become of William's property? To each of his sons the testator, James Underwood, gave a specified portion of his real estate and an equal share of the residue. The effect of the will was that each son took for life with remainder to his children as tenants in common in tail with cross remainders between them. The present appellants are children of certain of the sons, or trustees of marriage settlements, or purchasers of interests. The respondent is surviving trustee under the will of the second son, Edward, whose son was now heir-at-law, and his contention was that there was an intestacy as to both the specific and residuary devises in favour of William Underwood and his children. Neither Joseph, the eldest son, nor William left issue. The facts showed that William Underwood, the last son to die, executed a disentailing assurance in his own favour of all property to which he was entitled under the will of James Underwood or otherwise, and died without issue. By his will William Underwood left his real and personal estate absolutely to his wife. King, the appellant in one of the appeals, was her attorney. In the will of James Underwood the important clause, called the "accruer" clause, ran thus:—

"I do hereby declare that in case any or either of my said five sons shall depart this life without leaving any child or children him or them surviving, then I devise the share or shares of such son or sons unto and equally between the survivors and survivor of them my said sons and their respective heirs as tenants in common in tail."

The Judicial Committee in construing the will thus stated the interpretation which they were prepared to put upon the terms "survivors and survivor" as employed in this document:— "In the present case, however, there is no ground for departing from the obvious ordinary and natural meaning of the word survivor. It would be difficult to imagine a case more free

from every circumstance which could justify such a departure. The survivorship indicated in the accruer clause must be survivorship with reference to the person on whose death the share is to go over. The obvious meaning of the words 'survivors and survivor' in that clause is—such of the sons as may be living at the time of the death on which the disposition of the property is altered."

In the judgment of the Equity Judge of the Supreme Court his Honour decided that in the events which had happened, William's share was not disposed of by the accruer clause, and declared that subject to the interest taken by William during his life in the property devised to William Underwood and his children either specifically or by way of devise, the testator died intestate as to the whole of such property. The Judicial Committee take the same view. So far the appeals fail. There was, however, a point to which the Equity Judge had not been directed, and the consideration of this led the Judicial Committee to make the following observations and recommend a variance of the order made below.

"William's share consisted both of specifically devised real estate and of a share of the residue. So far as it consisted of residue there is an intestacy immediately. But as regards the specifically devised property, the remainder or reversion expectant on William's death without issue was caught by the residuary devise and passed under it.

"There would be a declaration that, on the death of William without issue, so much of his share as consisted of the testator's residuary real estate was undisposed of by the will, but that so much thereof as consisted of specifically devised real estate passed by the residuary devise and stood limited upon trust for the five sons of the testator as tenants in common for life with remainders over as in the will mentioned, and that by reason of the death of Joseph Underwood (the eldest son) without issue his one-fifth share therein devolved upon his four brothers who survived him as tenants in common in tail, and that in the events which happened William's one-fifth share having already passed as residue was undisposed of by the will. It must be referred back

to the Master in Equity to complete the inquiry directed by the order of the 19th February, 1886, on the footing of this declaration. In other respects the order under appeal will stand. Their Lordships will humbly advise her Majesty accordingly.

"Their Lordships understand that subject to their sanction the parties have arranged that the costs of these appeals shall be borne in the same manner as the costs have been borne in the Court below. Their Lordships will make an order to that effect."

[*These appeals were not consolidated. Cases were put in by each set of appellants, and separate cases were also lodged by the respondent.*] [15 *App. Cas.* 548; 60 *L. J. P. C.* 15.]

Budha Mal *v.*
Bhagwan Das and Another.

Punjaub. SIR RICHARD COUCH. *July* 23, 1890.

Claim to share of family property alleged to be joint, and as yet undivided. Has partition under Hindu law been established, and was there a tacit agreement to hold separate portions? "Second appeals" in the Punjaub. The Judicial Committee, on the facts stated, agree with the three Courts below that a partition of the ancestral estate had taken place so far back as 1854, followed by continuous possession, although no formal document establishing such appeared to have been drawn up, and pronounce against the claim of the appellant, a member of the family who now sought for partition. Their Lordships said *inter alia* in their judgment "upon the question which was the real issue between the parties, whether there had been a partition of the family property, there are the findings of three Courts, all of which appear to have looked very carefully into the evidence. The judgments are very full, and nothing has been urged before their Lordships by the learned counsel for the appellant which in any way shows that the conclusion which they came to was not a fair inference from the evidence in the case. It does appear that more than forty years ago—although there might not have been any

formal document drawn up between these persons—there was a partition of the family property.

"The Additional Commissioner dismissed the plaintiff's suit entirely, but on appeal to the Chief Court, it appeared that there was a small portion of the property of which there had been no partition; and on that ground the Chief Court modified the decree of the Additional Commissioner by excepting that portion from the decree dismissing the suit. That decision has not been appealed from by the respondent.

"The result, therefore, is that their Lordships will humbly advise her Majesty to affirm the decree of the Chief Court, and to dismiss this appeal, and the appellant will pay the costs."

The decision of the Committee was not given without certain important observations in relation to the law in the Punjaub regarding appeals which are now well recognized in Bengal as "second appeals." In this case, there was an appeal to the Chief Court of the Punjaub from an appellate Court, namely, that of the Additional Commissioner. The Judicial Committee respecting this made certain remarks to the effect that although this was an appeal from an appellate Court it was not limited, as such appeals under the Code of Civil Procedure Act XIV. of 1882 are, to questions of law. An appeal from an appellate Court to the Chief Court of the Punjaub is not limited as such are under the Procedure Code, sect. 584, for, as regards the Punjaub, evidence may be dealt with and questions of fact may be open for decision. The Act XVII. of 1877, sect. 38, providing for such appeals was replaced by sect. 40 of the Punjaub Courts Act XVII. of 1884. Decisions below affirmed with costs.

[*I. L. R.* 18 *Calc.* 302.]

Kali Kishore Dutt Gupta Mozoomdar *v.* Bhusan Chunder.

Bengal. SIR BARNES PEACOCK. *July* 26, 1890.

Heirship to property. Alleged relationship as heir-at-law on one side; validity of an adoption on the other. Admissibility

of an alleged copy of an anumati patra as secondary evidence. Genuineness of a will which supported the anumati patra. This was an appeal by the appellant from a decree of the High Court at Calcutta reversing a decree of the Subordinate Judge of Goalpara, who was also Deputy Commissioner of that District, and from two interlocutory orders of the High Court in the appeal to that Court from the Subordinate Judge. Judgment of the Subordinate Judge criticized as very unsatisfactory. Their Lordships uphold decision of the High Court in favour of the adoption, and also affirm the two interlocutory orders admitting a copy of the anumati patra (which had been lost), and a deposition of one important witness. In their Lordships' judgment, the Judicial Committee say, in effect, that the High Court acted rightly in receiving the evidence which the Subordinate Judge considered was inadmissible, and held that on the evidence generally, and on the newly admitted evidence, the adoption of the respondent was proved. Their Lordships concur generally with the High Court in their findings upon the facts, and they will humbly advise her Majesty to affirm the judgment of the High Court, and the interlocutory orders before referred to. The appellant must pay the costs of the appeal.

[*L. R.* 17 *Ind. App.* 159; *I. L. R.* 18 *Calc.* 20.]

Srimati Bibi Jarao Kumari *v.*
Rani Lalonmoni and Another.

Bengal. Sir Richard Couch. *July* 26, 1890.

Claim to lands. What lands included in a mortgage deed were debuttur. The plaintiffs at the origin of the suit were the present appellant and her Zemindar, to whom she was putnidar. They contended that a certain mouza was mortgaged to them by the respondents or their predecessors in title less debuttur lands, the area of which was specified in the mortgage deed as eighty-seven bighas. The respondents, in answer to the plaint, sought to prove that an area much in excess of eighty-seven bighas were debuttur, and that the plaintiffs were not entitled

to the amount of land in the mouza taken as a whole which they claimed. The Subordinate Judge gave judgment for the plaintiffs, holding that the statement set forth in the deed of mortgage could not be gainsaid. The High Court, on the other hand, pronounced for the respondents, holding that the arrangement contemplated by the mortgage was to exclude all lands which might be proved to be valid debuttur. In deciding what was debuttur, weight was given by the High Court to a thakbust map of 1869, made two years before the mortgage, the admission of which the judges of the High Court considered was a correct guide under sect. 83 of the Indian Evidence Act I. of 1872, and had been erroneously rejected by the Subordinate Court. The Judicial Committee considered that the judgment of the Subordinate Judge was the correct one. The thakbust map was made by an amin who had no authority to say what portion of the lands was debuttur, and was of no weight against the admission in the mortgage deed. Furthermore, sect. 83 of the Indian Evidence Act had not the effect which the High Court gave to it of making *ex parte* statements (probably by the defendants' agents) of what was debuttur made to the amin evidence in the matter. They recommend her Majesty to reverse the decree of the High Court so far as it modifies the decree of the Subordinate Judge and dismisses the plaintiffs' suit, and directs the then plaintiffs to pay costs, and to order in lieu thereof that the respondents do pay the costs of the appeal to the High Court, and the costs of the suit in the Court of the Subordinate Judge as provided by his decree. The respondents will pay the costs of this appeal.

[*L. R.* 17 *Ind. App.* 145; *I. L. R.* 18 *Calc.* 224.]

Murugaser Marimuttu *v.*
De Soysa.

Ceylon. Lord Hobhouse. *Nov.* 12, 1890.

Claim in an action of ejectment by appellant (plaintiff below) to be declared proprietor of the Dicklandé estate by right of a

mortgage deed. Mortgagor and respective mortgagees. Covenant by plaintiff to pay all sums due on mortgage not fulfilled. Effect of a fiscal sale. Appeal fails. Decrees of the Supreme Court at trial of an appeal there, and in review affirming a decree of the District Court at Negumbo sustained. Appeal to the Privy Council dismissed with costs. The facts of the case are stated by the Judicial Committee in the following portions of their Lordships' judgment:—

"In this case the plaintiff, Marimuttu, claims possession of the Dicklandé estate under a conveyance from one Nannytamby, dated the 26th of September, 1878. That deed of conveyance shows that a person named Tambyah was mortgagee in possession of the estate, and that the amount of his mortgage was unascertained; that it was the subject of a suit pending in the Supreme Court, and was to be decided by principles laid down by the Supreme Court. And the plaintiff covenants with his vendor that he will pay and discharge all sums of money due to Tambyah as mortgagee in possession of the premises. Whether those accounts have been completed and the sum has been ascertained is a matter of dispute between the parties. There is an order of the District Court of Kalutara on the subject, but it is contended by the plaintiff that the accounts which are affirmed by that order have not been taken in accordance with the principles laid down by the Supreme Court. In the view their Lordships take of this case, it does not signify whether the accounts have been finally ascertained or not. The nature of Tambyah's mortgage was this. In point of form he was the purchaser out and out of the estate from Nannytamby. But the conveyance to him was disputed by a creditor of Nannytamby, who instituted a suit for the purpose of setting it aside as fraudulent. In that suit the Court held that the true contract between the parties was not a contract of sale out and out, but that money had been advanced, and by its decree of July the 2nd, 1875, it ordered that Tambyah should stand as mortgagee in possession for the amount of money advanced, and it went on to decree that when the accounts had been taken, and the amount due upon the mortgage ascertained and repaid by

Nannytamby to Tambyah, Tambyah should be bound to re-transfer the estate to Nannytamby. Therefore Tambyah was owner of the estate to the extent that he could properly remain in possession of it until he was paid the amount which was due on the transactions between him and Nannytamby. Subsequently to the sale to the plaintiff in 1878, Tambyah took certain proceedings under which sales of the estate were made. The details are a little complicated, and it is not now material to go into them. But ultimately the defendant (respondent) became the purchaser of the estate at a fiscal sale, and he now claims to be absolute owner of the estate under that sale. The plaintiff contends that he was no party to the proceedings by Tambyah, and that he is not bound to recognize the sale to the defendant. Whether that is so or not has been the subject of much argument, and was the subject of difference among the Judges in the Court below. But for the purpose of the present decision, and for that purpose only, their Lordships will assume that the plaintiff is right in his contention. Supposing he is right, what is the effect? The effect must be to replace Tambyah, or anybody who stands in the shoes of Tambyah, in the position which Tambyah held under the decree of the Court as mortgagee in possession. He would be in lawful possession of the estate until he is paid the money due to him on the transactions between Tambyah and Nannytamby.

"The plaintiff now asks to be declared the owner of the Dicklandé estate, and that the defendant * * * * be ejected therefrom * * * * and he further asks for damages, and for a sum of Rs. 15,000 a year during the time for which the defendant has been in possession. Not a single word about payment of the mortgage which is due either to Tambyah or to the defendant. What the plaintiff desires by his plaint is to get into possession without any payment at all. That seems to their Lordships to be in the teeth of the decree of 1875; to be in the teeth of the contract which the plaintiff entered into when he made his purchase from Nannytamby, and to be a glaring injustice towards the defendant, who has honestly paid for his estate and is entitled at least to all that Tambyah himself could

claim. Their Lordships were told that there were some authorities in the Courts of Ceylon which would show that such an injustice as that was lawful. They hardly expected that such authorities would be produced; at all events, they have not been produced; and their Lordships must hold that there is no ground in justice and in law for the relief that the plaintiff asks. This is a case in which the plaintiff should be held strictly to the relief that he prays for. It is suggested at the bar that he may be entitled to redeem. He may be so entitled, and for the purpose of this decision it is assumed in his favour that he is so entitled; but he does not ask it, and their Lordships do not know at this moment that he wishes it. On the contrary, so far as the materials on this record go, their Lordships have reason to think that he does not wish it, because in 1882 he did institute a suit to redeem Tambyah, and he apparently never proceeded beyond the filing of the plaint. Now he prays for a totally different relief, and it must be taken that he does not desire any relief except that which he prays for. That relief cannot be given him for the reasons indicated above, and his plaint must therefore be dismissed. Appellant to pay costs of appeal. [(1891) *App. Cas.* 69; 60 *L. J. P. C.* 26.]

Petition in the Matter of Rahimbhoy Hubibbhoy *v.* Turner (Assignee of an insolvent's estate).

Bombay. LORD HOBHOUSE. *Nov.* 15, 1890.

Petition for special leave to appeal. Leave below refused on the ground that the decree complained of was not a final one within the meaning of sect. 595 of the Civil Procedure Code, Act XIV. of 1882. The Judicial Committee reported that leave to appeal ought to be granted to the appellant (defendant below). To quote their Lordships' words:—"In point of fact no other ground has been assigned for presenting this petition, and no other ground has been argued here excepting the one

ground that the Court below did not take the right view of the word 'final' in the Civil Procedure Code. Therefore, to test that point, their Lordships have to look at what was the real question before the Court when this decree was made."

"The plaintiff in the suit (Turner) alleges that the defendant is accountable to him upon several claims. The defendant alleges that he has got legal defences to every one of those claims, and that he is not accountable at all. The Court held that the legal defences put forward were valid as to some of the claims, and as to others of the claims that they were invalid, and therefore that the defendant must account. It is true that the decree that was made does not declare in terms the liability of the defendant, but it directs accounts to be taken which he was contending ought not to be taken at all; and it must be held that the decree contains within itself an assertion that, if a balance is found against the defendant on those accounts, the defendant is bound to pay it. Therefore the form of the decree is exactly as if it affirmed the liability of the defendant to pay something on each one of these claims, if only the arithmetical result of the account should be worked out against him. Now that question of liability was the sole question in dispute at the hearing of the cause, and it is the cardinal point of the suit. The arithmetical result is only a consequence of the liability. The real question in issue was the liability, and that has been determined by this decree against the defendant, in such a way that in this suit it is final. . . . In their Lordships' view the decree is a final one within the meaning of sect. 595 of the Code." [*L. R.* 18 *Ind. App.* 6; *I. L. R.* 15 *Bom.* 155.]

Hurro Nath Roy Chowdhry *v.*
Rundhir Singh and Others.

Bengal. Sir Barnes Peacock. *Nov.* 20, 1890.

Loan transactions. Were certain amounts advanced for *necessary* purposes, and were they binding on a widow's estate

now in the hands of reversioners? Set-off. Interest. The High Court disallowed certain of the charges against the family estate and this decision the Judicial Committee now endorse. When the suit was brought the first defendant was the widow, who entered into the mortgages in return for loans from the plaintiff. The second defendant was her adopted son, and she entered into the engagements on behalf of herself and as guardian of that adopted son. Summarized, the facts were:—

The plaintiff (appellant) alleged that the money was borrowed by the widow whose indebtedness is in dispute, and who is now represented by the respondents, who are reversioners, the widow having died, for three purposes. These were for litigation expenses, maintenance of the widow and deb-sheba, and for payment of Government revenue. The Judges below struck off the claim for litigation expenses, there being no proof what those expenses were. As regards the maintenance of the widow and deb-sheba the Judges could not say that the plaintiff was entitled to a decree as against the estate for the moneys said to have been advanced, except as regards a sum of Rs. 2,239. There was an admission by the lady and other proof that this amount had been paid by plaintiff. For Government revenue there was also proof to the amount of Rs. 12,418 : 10 : 6. The Judges of the High Court thus hold the plaintiff to be entitled to a total of Rs. 14,657 : 13 : 6, and the Judicial Committee hold that this amount upon these transactions had been rightly credited. The question then arose whether a sum of Rs. 10,000 received by the plaintiff's principal man of business on account of the Ijara rent ought not to be deducted from the total of Rs. 14,657 : 13 : 6. The High Court in their decision deducted this sum, leaving the amount due to the appellant at Rs. 4,657 : 13 : 6. The Judicial Committee affirm the decisions laid down in the decree of the High Court, and *inter alia* make these important observations:—"Their Lordships think that the plaintiff ought to have seen that this sum (the amount for Ijara) was applied in reduction of the debt for which the estate was liable, and that the judgment of the High Court was right in deducting the whole of that sum. . . . It is contended for

the plaintiff that he was not bound to see to the application of the money. The rule laid down in *Hunoomanpersaud Panday's Case* (6 Moore's Ind. App. p. 424) (cited by counsel for the appellant) is this:—'Their Lordships think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think under such circumstances he is bound to see to the application of the money.' But then their Lordships proceed further and give the reason why he is not bound to see to the application of the money. They say: 'The purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application.' In this case the plaintiff did have the control and actual application of the money, and having that control and application he was bound to see that the money was properly applied."

There was also a further question relating to interest. As to this, which was fixed in the mortgage deeds at 18 per cent., their Lordships held that, although there was *legal necessity* for the widow to borrow at that high rate, considering the security, that high rate was not necessary. The rate of interest had therefore properly been reduced to 12 per cent. Appellant to pay costs of appeal. [*I. L. R.* 18 *Calc.* 311.]

Lala Muddun Gopal Lal and Another *v.*
Khikhinda Koer.

Bengal. LORD MACNAGHTEN. *Dec.* 13, 1890.

Heirship in family estate. Hindu law (Mitacshara law) with respect to incapacity of one member of a family to succeed, said member being born deaf and dumb. Effect of compromises in the family, and eventually of a tamliknama executed by the head member, Kuldip. Decision of the High Court Judges,

who held that the acts of Kuldip, as then head of the family, did not tend to making over estate to the heir of his incapacitated brother, approved by the Judicial Committee, but on other grounds.

There were concurrent findings in the Courts below that Kuldip's brother, Sadhoram, through whom the first appellant claimed, was deaf and dumb.

The facts of the case are set forth in their Lordships' judgment, which was as follows:—

"Kishen Jewan Lal, who seems to have acquired, or succeeded to, considerable property, moveable and immoveable, was the head of a Hindu family governed by the Mitacshara law. He died in the year 1835. He left issue three sons. . . . . Kuldip was the eldest, and it is upon his acts and conduct that the question in this case mainly turns. The second son was Madhoram. He died about a year after his father's death, without issue, leaving a widow named Rajbunsi. The third son, Sadhoram, was not more than two or three years old when his father died. Twenty-two years afterwards, the position of the family was this:—Kuldip was advanced in years. He was apparently a widower, and without issue living, except one daughter, Ram Lochun, and one grandson, the son of that daughter, who was named Biseswar. Rajbunsi was living, and entitled to maintenance under a compromise following litigation and a previous ineffectual compromise. Sadhoram was a widower and childless; but it appears that he had been deaf and dumb from his birth, and it is found that he was incapable of inheriting or succeeding to property according to Hindu law. In this state of things, on the 18th June, 1867, Kuldip executed a document called a tamliknama, stating the deaths of Sadhoram's mother and wife, and the particular circumstances which showed that Sadhoram, by reason of his incapacity, had no interest in the property, and making over the whole of the property to Biseswar" (in this document this expression found a place, "I have no other heir entitled to my estate, and to that of the said Sadhoram"); "and Biseswar was then publicly invested with possession. Kuldip died on the 9th May, 1870,

Sadhoram having died in the previous year. Biseswar died in 1876, without issue, leaving his wife, Khikhinda, who is the present respondent. On Biseswar's death she succeeded to the property, and continued to enjoy it, without any interruption from Biseswar's mother, Ram Lochun, who lived till 1880. In 1882 the appellant, Muddun Gopal, brought the present suit." (The second appellant was made a party for the purposes of the appeal, as being a purchaser of a share of the estate.) "By his plaint, he (Muddun Gopal) made no claim to the estate left by Kuldip. He left over that claim, he said, for another occasion. His case was that Sadhoram survived Kuldip, and that on Sadhoram's death, Biseswar illegally took possession under the tamliknama, and he sued for recovery of possession of the property of Sadhoram, whose nearest heir he claimed to be." (As a matter of fact, this first appellant was the nearest agnate male member of the family of Kuldip, if the contentions of the respondent failed.) "The Subordinate Court dismissed the suit, having found that Sadhoram was incapable of inheriting, and also that he died before Kuldip. Muddun Gopal appealed to the High Court. The High Court agreed with the Subordinate Court both as to the incapacity of Sadhoram and the survivorship of Kuldip; but for some reason not very apparent they seem to have thought that Muddun Gopal ought to be permitted to make out his case in some other way if he could; and accordingly with the consent of the respondent, given for some reason which is also not very apparent, they remanded the case to the subordinate Court, for the trial of certain issues. One of those issues was whether any and what title passed by the tamliknama. Further evidence was taken, and in the result the Subordinate Court held that, though Sadhoram was incompetent to take by inheritance, he might take by gift, and that Kuldip, by recognizing him as joint owner after his incapacity must have become apparent, had created a new title in his favour. Both parties took objections to the finding of the Subordinate Court. On the 12th January, 1887, the High Court pronounced final judgment. As to the legal result of Kuldip's conduct, the High Court were of opinion that it had the effect of giving a new and

valid title to Sadhoram, either by way of family arrangement or by virtue of the law of limitation. They discussed the effect of the tamliknama, and the effect of Biseswar's possession, which they held to have been exclusive; and they came to the conclusion that the law of limitation ran against Muddun Gopal from Sadhoram's death at the latest, and that the suit was accordingly barred. Their Lordships are of opinion that the dismissal of the suit may be justified on other and, perhaps, sounder grounds. They are unable to agree with the High Court in thinking that the acts and conduct of Kuldip operated to create a new title in Sadhoram. Undoubtedly, up to the year 1856, Kuldip did in every way and on every occasion recognize Sadhoram as jointly interested with him in the family property. Nothing, perhaps, shows this recognition more plainly than the line of defence adopted in the litigation with Rajbunsi, in which her claim was defeated by setting up Sadhoram's interest." (Rajbunsi brought a suit in 1843 against her brother-in-law, Kuldip, claiming a third share of the estate. Sadhoram was made a party in the suit by his guardian. This suit was dismissed on the ground that Kuldip, being a member of a Mitacshara joint family, of which his brother Sadhoram was a member, and Kuldip not himself being guardian of Sadhoram, could not, by his arrangement with Rajbunsi, affect the family estate in which Sadhoram was interested jointly with himself.) "It is also shown by a deed of conveyance, by a petition for registration, by leases, and other documentary evidence. But nevertheless their Lordships think it would be wrong to hold that Kuldip's position was prejudiced by his conduct. Kuldip naturally and properly treated his afflicted brother as a member of the family, and entitled to equal rights, until it became absolutely clear that his malady was incurable. Their Lordships think it would not be reasonable, or conducive to the peace and welfare of families, to construe acts done out of kindness and affection to the disadvantage of the doer of them, by inferring a gift when it is plain that no gift could have been intended.

"Their Lordships are satisfied that there is no ground for supposing that Kuldip intended to divest himself of his own

property or to waive any rights accruing to him by reason of Sadhoram's incapacity; and they are equally clear that there is no principle of law founded on the doctrine of estoppel, or laches, or the law of limitation or otherwise, which compels them to hold that under the circumstances of this case, Kuldip's acts and conduct had an effect and operation which he could not have intended or contemplated. Their Lordships therefore think that the suit was properly dismissed, and that this appeal ought also to be dismissed, and they will humbly advise her Majesty accordingly. The appellants will pay the costs of this appeal."

[*P. C. Ar.*]

Jenoure *v.*
Delmege.

Jamaica. LORD MACNAGHTEN. *Dec.* 19, 1890.

Damages (50*l.*) for alleged libel. New trial, moved for by defendant, Mr. Jenoure, a magistrate, refused below. Special leave to appeal applied for by Mr. Jenoure granted by her Majesty in Council. Direction to jury. Privileged communication. *Bona fides* by sense of duty. The Judicial Committee, reversing decision below against the rule for a new trial, report to her Majesty that there ought to be a new trial. The action was brought by the respondent, a doctor in the colonial service at Jamaica, against the appellant, a magistrate in the same parish as the doctor practised in, for alleged libel contained in a letter which the appellant, Mr. Jenoure, addressed to the Inspector of Constabulary in the island. The letter set out a case of alleged neglect. The main ground for the application for leave to appeal was whether or not there was not misdirection with regard to the question of privilege. In their judgment the Judicial Committee observe:—

"The Chief Justice told the jury that it was the duty of the appellant, as a Justice of the Peace, to bring circumstances such as those mentioned in his letter to the notice of the proper authorities. Their Lordships may observe in passing that, in

their opinion, nothing turns on the position of the appellant as Justice of the Peace. To protect those who are not able to protect themselves is a duty which every one owes to society. The Chief Justice went on to tell the jury that the proper authority to whom such a complaint should have been submitted was the superintending medical officer; but he also told them that, if they thought that the appellant had addressed the letter to the Inspector of Constabulary by an honest unintentional mistake as to the proper authority to deal with the complaint, then the communication would not be deprived of any privilege to which it would have been entitled had it been addressed to the superintending medical officer. So far the summing up seems to be open to no objection. The Chief Justice then proceeded to explain to the jury that the existence of privilege was contingent on whether, in their opinion, the appellant honestly believed the statements contained in the letter to be true. . . ."

Their Lordships add: "There can be no doubt . . . that the Chief Justice gave the jury to understand that it lay upon the appellant to prove affirmatively that he honestly believed the statements contained in the alleged libel to be true, and that, unless and until that was made out by him to their satisfaction, it was not incumbent on the respondent to prove express malice. Curran, J., took the same view of the authorities, and Northcote, J., concurred. Notwithstanding some *dicta* which, taken by themselves and apart from the special circumstances of the cases in which they are to be found, may seem to support the view of the Chief Justice, their Lordships are of opinion that no distinction can be drawn between one class of privileged communications and another, and that precisely the same considerations apply to all cases of qualified privilege. 'The proper meaning of a privileged communication,' as Parke, B., observes (*Wright* v. *Woodgate*, 2 C. M. & R. 577), 'is only this: that the occasion on which the communication was made rebuts the inference *primâ facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which

the communication was made.' There is no reason why any greater protection should be given to a communication made in answer to an inquiry with reference to a servant's character than to any other communication made from a sense of duty, legal, moral, or social. The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case *bona fides* is always to be presumed. Their Lordships consider the law so well settled that it is not in their opinion necessary to review the authorities cited by the Chief Justice. The last case on the subject is *Clarke* v. *Molyneux* (3 Q. B. D. 237), to which, unfortunately, the attention of the Supreme Court was not called. That was a case, not of master and servant, but of a communication volunteered from a sense of duty. A verdict was found for the plaintiff. But it was set aside by the Court of Appeal on the ground of misdirection. In giving his judgment, Cotton, L. J., used the following language, every word of which is applicable to the present case. 'The burden of proof,' he said, 'lay upon the plaintiff to show that the defendant was actuated by malice; but the learned judge told the jury that the defendant might defend himself by the fact that these communications were privileged, but that the defendant must satisfy the jury that what he did he did *bonâ fide*, and in the honest belief that he was making statements which were true. It is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty.' Their Lordships are therefore of opinion that there was a misdirection on a material point, which may have led to a miscarriage. Indeed it is difficult to see how the jury could have done anything but find for the plaintiff, having regard to the way in which the question was presented to them. The jury were told that it was for the defendant to prove that he honestly believed the statements in his letter to be true, whereas the letter itself put those statements forward, not as

matters of the truth of which the writer had satisfied himself, but as matters calling for inquiry and consideration by the proper authorities. Their Lordships think that the verdict cannot stand, that the judgment entered thereon and the orders of the 26th July, 1888, and the 5th September, 1888, ought to be discharged, and that there ought to be a new trial, but only on the terms that the plea of justification is not to be raised again. It seems to their Lordships that that issue has been finally disposed of. As regards the costs in the Court below, their Lordships think that the respondent is entitled to the costs of the issue as to justification, and that the other costs of the trial and the costs of the motion for a new trial, and the argument upon the rule before the Supreme Court ought to abide the result of the new trial. Their Lordships will humbly advise her Majesty accordingly. The appellant must have the costs of this appeal."

[(1891) *App. Cas.* 73; 60 *L. J. P. C.* 11.]

1891.

Gibbs *v.*
Messer, McIntyres, and Cresswell.

Victoria. LORD WATSON. *Jan.* 24, 1891.

Victorian Transfer of Land Statute, No. 301 of 1866. Object of statute is "to give certainty to the title to estates in land and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive." Effect of registration by an unfaithful attorney in favour of a fictitious person. Invalid mortgage. The facts briefly stated were:—Mrs. Messer, the original plaintiff, now the first respondent, residing in Scotland, was owner of land in Hamilton Colony of Victoria. In 1884 the lady was joined by her husband, who left behind him in the colony, in the custody of one Charles James Cresswell, a local solicitor, her duplicate certificates of title and also a power of attorney by which she had authorized her husband to sell, mortgage, or otherwise dispose of the lands. The litigation arose out of the behaviour of this attorney, Cresswell. During the absence of Mr. and Mrs. Messer from the colony, Cresswell forged a transfer of the lands by Mr. Messer as his wife's attorney to "Hugh Cameron," described as a grazier. In reality there was no such transferee in existence. Purporting to follow the procedure laid down in the Land Transfer Act, Cresswell, representing himself to be the agent of "Hugh Cameron," produced the transfer dated 11th August, 1885, along with the Messer certificates of ownership, to the Registrar of Land Titles,

who thereupon cancelled Mrs. Messer's name in the folios, and issued the usual duplicate certificate in the name of Hugh Cameron.

Still professing to act as agent for Hugh Cameron, Cresswell next arranged with the defendants, the McIntyres, for a loan of 3,000*l.*, to be secured by mortgage. He wrote, with his own hand, a deed of mortgage, bearing date the 10th October, 1885, purporting to be executed by Cameron, he himself being the subscribing witness, whose attestation is required by the statute. Upon the faith of that document the *bonâ fide* mortgagees, the McIntyres, paid the money to Cresswell, who forthwith appropriated it to his own purposes. When they presented their mortgage for registration, the Registrar declined to enter it until he was satisfied that the Hugh Cameron registered as proprietor was not identical with a person of the same name who had recently been made bankrupt. They accordingly obtained from Cresswell a statutory declaration, purporting to be sworn by his client Hugh Cameron before himself, as a commissioner of the Supreme Court of the colony for taking affidavits, to the effect that the declarant had never taken the benefit of any Act relating to bankruptcy. Mr. Messer on his return to the colony in 1886 discovered the frauds, and instituted the present suit on behalf of Mrs. Messer against the Registrar, against McIntyres as mortgagees of Cameron, and against Cresswell. At this period Cresswell had absconded, leaving no assets. The plaint asked for an order for cancellation of the certificates in the name of Cameron; for the issue of a new certificate free from the incumbrance of the McIntyres' mortgage, or alternatively in the event of the mortgage being held to constitute a valid incumbrance on Mrs. Messer's title, for a declaration that the plaintiff shall be at liberty to redeem, and that the moneys necessary therefor be paid out of the "assurance fund," a fund which under sect. 144 of the Act is, under certain circumstances of fraud, made amenable for the purpose. The Judge of First Instance sustained the validity of the mortgage, but ordered that the plaintiff should be at liberty to redeem, and that the defendant, the Registrar, should pay to her, out of the assurance

fund, her costs of the action, all moneys from time to time paid by her for interest in respect of the mortgage, and also all moneys necessarily paid by her for principal, interest and costs in order to its redemption. His decision was affirmed on appeal by the Full Court, with the variation that the plaintiff was found liable in costs to the mortgagees, to be added to her own costs of suit, and repaid to her by the Registrar out of the assurance fund. The Judicial Committee, upon full consideration of the details of the case and the policy and construction of the Act, discharge both of the decrees, and make a new declaration in lieu thereof, the effect of which is to declare the mortgage invalid and to re-vest the lands in Mrs. Messer; to order the McIntyres to pay Mrs. Messer her costs of suit in both Courts below; to order Cresswell to pay the Registrar of Titles (the now appellant) his costs in the Courts below and here, and to pay the McIntyres all such costs, either incurred by them or paid by them to the plaintiff, as hereby provided, and finally to direct that the McIntyres pay to the plaintiff (Mrs. Messer) the costs of this appeal. The more important passages in the reasons given in the judgment of the Judicial Committee are here set forth:—

"It is clear that the registration of the name of Hugh Cameron, a fictitious and non-existing transferee, cannot impede the right of the true owner, Mrs. Messer, who has been thereby defrauded, to have her name restored to the register. Accordingly, in the absence of Cresswell, who has not appeared to defend, the controversy between the litigant parties has been mainly if not wholly confined to the question whether the mortgage is or is not an incumbrance affecting Mrs. Messer's title. If the mortgage is valid, their Lordships see no reason to doubt that Mrs. Messer has been deprived of an interest in her land, in consequence of fraud, within the meaning of sect. 144, and that, failing recovery from Cresswell (against whom she has taken all the proceedings which the clause requires), she is entitled to receive the amount payable for its redemption out of the assurance fund. On the other hand, if the mortgage does not constitute an incumbrance upon her title, Mrs. Messer will

obtain a full measure of relief, and can have no claim against the fund. . . .

"The object (of the Act) is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. . . . In the present case, if Hugh Cameron had been a real person whose name was fraudulently registered by Cresswell, his certificates of title, so long as he remained undivested by the issue of new certificates to a *bonâ fide* transferee, would have been liable to cancellation at the instance of Mrs. Messer; but a mortgage executed by Cameron himself, in the knowledge of Cresswell's fraud, would have constituted a valid incumbrance in favour of a *bonâ fide* mortgagee. The protection which the statute gives to persons transacting on the faith of the register is, by its terms, limited to those who actually deal with and derive right from a proprietor whose name is upon the register. Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration.

"The difficulty which the mortgagees in this case have to encounter arises from the circumstance that Hugh Cameron was, as Mr. Justice Webb aptly describes him, a 'myth.' His was the only name on the register, and, having no existence, he could neither execute a transfer nor a mortgage. The mortgagees have endeavoured to surmount that difficulty by arguing that, in the circumstances of the case, Cresswell must be held to have been *de jure*, if not *de facto*, the proprietor whose name was on the register, and that their mortgage, executed by him in the name of Hugh Cameron, is therefore as valid as if Cresswell's own name had been on the register, and he, and not Cameron, had been the apparent mortgagor. That argument found favour with both Courts below. . . .

"The opinion expressed (by the Full Court) appears to recognize the principle that a mortgagee, advancing his money on the faith of the register, cannot get a good security for himself except by transacting with the person who, according to the register, is the proprietor having title to create the incumbrance. So far their Lordships agree; but they do not concur in the inferences which the learned Judges have drawn from the facts in evidence, with respect to the position of Cresswell throughout these transactions, and his true relation to the name entered on the register as that of the proprietor. They are unable, upon the facts proved, to affirm that Cresswell 'assumed' the name of Hugh Cameron for the purpose of dealing with Mrs. Messer's land. A man cannot, with any propriety, be said to assume a name, or in other words an *alias*, unless he acts personally under that name, or asserts it to be his own designation. Nothing could be farther from Cresswell's purpose than his assumption of the name of Hugh Cameron; on the contrary, the mainspring of his fraudulent device consisted in representing Hugh Cameron to be a real person, a grazier, who had no connection with himself beyond that of an ordinary client. In pursuance of that device, he professed to transact with the McIntyres in the capacity of Cameron's law agent, he attested what purported to be Cameron's signature to their deed of mortgage, and he gave them a document, used by them in order to obtain registration of their right, which bore that Hugh Cameron had appeared personally before him, and had signed the document in his presence, after making oath to the verity of its contents. The McIntyres must, in these circumstances, have understood Cresswell and Hugh Cameron to be distinct individualities. They nowhere allege the contrary; and if they had even suspected that Hugh Cameron was only another name for Cresswell, they would not have been justified in completing the transaction without inquiry. The McIntyres cannot, therefore, as a matter of fact, be held to have dealt on the faith of the certificate as evidencing the proprietary title of Cresswell. The truth is that Hugh Cameron was in no sense an *alias* of Cresswell's, but a fiction or puppet created by him, in order that it might appear

to be an individual having a separate and independent existence. The reasoning of the learned Judges fails to appreciate the difference between these two things. If Cresswell had, as they say he did, 'assumed' the name of Hugh Cameron, and had used it fraudulently, he would not have been a forger. His fraud, in that case, would have lain in the representation that Hugh Cameron was his own designation, and he would, no doubt, have been amenable to the criminal law in respect of such fraud. But, in first registering a fictitious Hugh Cameron as proprietor of the land, and then executing and delivering a mortgage in the name of Hugh Cameron, Cresswell represented the mortgagor to be a person other than himself, and committed the crime of forgery. The real character of the criminal acts perpetrated by Cresswell differs in no respect from what it would have been had Hugh Cameron been a real person, whose name was put upon the register by him, and used by him in a forged deed creating an incumbrance.

"Although a forged transfer or mortgage, which is void at common law, will, when duly entered on the register, become the root of a valid title, in a *bonâ fide* purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgagee under a null deed. The McIntyres cannot bring themselves within the protection of the statute, because the mortgage which they put upon the register is a nullity. The result is unfortunate, but it is due to their having dealt, not with a registered proprietor, but with an agent and forger, whose name was not on the register, in reliance upon his honesty. In the opinion of their Lordships, the duty of ascertaining the identity of the principal for whom an agent professes to act with the person who stands on the register as proprietor, and of seeing that they get a genuine deed executed by that principal, rests with the mortgagees themselves; and if they accept a forgery they must bear the consequences." [This appeal was argued twice before their Lordships' Board.]

[(1891) *App. Cas.* 248; 60 *L. J. P. C.* 85.]

Peacock and Others *v.*
Byjnauth and Others; and
Graham and Co. *v.*
Byjnauth and Others.

Bengal. LORD HOBHOUSE. *Jan.* 24, 1891.

Suits relating to accounts between a Banian named Byjnauth, who was a man whose business was of large proportions, and a Calcutta firm, Paul Tambaci & Son. The principal question related to the claim by the Banian (the substantial plaintiff) for prior lien for an account, and for a right to merchandise in store in certain godowns, which the Banian claimed on the failure of Caralambus Tambaci, who carried on business under the style of Tambaci & Son. The details of the evidence bearing upon the enterprise shown and work done for several years, viz., from 1873 to 1882 forwards, by the Banian, and of that on the part of Tambaci and his manager, as to the nature of the joint transactions and of their separate responsibilities, are complicated. The suits were disposed of simultaneously upon evidence and arguments common to the whole. In effect, the appeals in both cases mainly related to the right to prior lien, whether on the part of the Banian or the appellants, who had forwarded goods, mostly from Manchester, to Tambaci's firm in India. The firm was admitted to have been largely indebted to Byjnauth, but there were doubts as to how far his lien ran—doubts caused by the uncertainty of agreements, and uncertainty over the amount of responsibility on his part with regard to bills of lading, policies of insurance, and custody of merchandise in godowns, also as to the extent to which the Banian's claims had been acknowledged. There was also the question whether the consideration for the Banian's large advances was a pledge on the goods transmitted from England to Calcutta, or the profit to be made by the sale of them in India, and the reimbursement of general debt by their price when sold. The Judicial Committee agreed to report that the decrees below should be affirmed, with variations in each case, not only on the

merits, but also as to various costs. Their Lordships concluded their judgment thus :—

"As in these appeals each party has succeeded and each failed on a substantial issue, their Lordships award no costs, except that, under the circumstance of the extreme bulkiness of the record, they direct the respondents to pay the appellants one moiety of the costs of it."

[*L. R.* 18 *Ind. App.* 78; *I. L. R.* 18 *Calc.* 573.]

Raja Har Narain Singh *v.*
Bhagwant Kuar and Another.

N. W. P. Bengal. LORD MORRIS. *Jan.* 27, 1891.

Suit to recover personal property, money and interest. Validity of an award. Civil Procedure Code Act XIV. of 1882, ss. 508, 514, 521. Decisions below reversed and award declared invalid. The suit is to proceed. Costs. Sect. 508 lays down the rule for dealing with arbitrations. The arbitrator is to "fix such time" as he thinks reasonable for the delivery of the award, and specify such time in the order. The Judicial Committee remark as to this section that it is not merely directory, but mandatory and imperative. Sect. 521 declares that no award shall be valid unless made within the period allowed by the Court. Sect. 514 enables the Court to enlarge the period fixed under sect. 508 for delivery of the award. In the proceedings in this case, the judge repeatedly made orders enlarging the time for delivery, and in these orders, but not, as has been said, in the original order, fixed a time within which the award was to be made. The last enlargement was to come to an end on the 20th March, 1885. On the 24th the award was delivered. The Judicial Committee in their judgment now say :—

"The first question which appears to their Lordships to arise is, whether it would have been competent for the Subordinate Judge to have extended the time after the award was made. Their Lordships are of opinion that it would not. When once

the award was made and delivered the power of the Court under sect. 514 was spent, and although the Court had the fullest power to enlarge the time under that section as long as the award was not completed, it no longer possessed any such power when once that time was passed. The Court did, however, receive the award delivered on the 24th of March, 1885, and a decree was made upon it by the Subordinate Judge, which was confirmed by the High Court. The objection now put forward for the appellant is that this award is not valid. That contention has to support it the express statutory enactment that no award shall be valid unless made within the period allowed by the Court. The utmost period allowed by the Court was until the 20th of March, 1885, and therefore the award delivered on the 24th of March, 1885, was so delivered by arbitrators who no longer had any lawful authority to make it. Again, as a matter of fact, there was no enlargement of the time made by the Court after the 20th March, 1885. This objection to the award was apparently not brought to the notice either of the Subordinate Judge or of the High Court. But the statute is there, and the Judges were bound to take judicial notice of it. In the case of *Chuha Mal* v. *Hari Ram* (I. L. R. 8 All. 548), Mr. Justice Oldfield lays down the law upon this subject very clearly. He says, 'The award in this case was not made within the period allowed by the Court, and consequently it must be held to be invalid; that is, there was no award on which the Court could make a decree.' That judgment appears quite in point in this case, and it is a judgment of which their Lordships entirely approve.

"Upon these grounds their Lordships will humbly advise her Majesty to reverse the judgments of the Subordinate Court and the High Court, to declare the award invalid, and to direct that the suit shall be proceeded with, and that neither party shall be entitled to costs in either Court below from and after the date of the first of the said judgments; and that the costs prior to that date shall await the issue of the case. The respondents must pay to the appellant the costs of this appeal. The reason for not giving the appellant the costs in the Courts below arises

from the fact that their Lordships are of opinion that the point upon which this award is now held to be invalid, was certainly not raised before the Subordinate Judge, nor, as far as appears, in the objections that were urged before the High Court."

[*L. R.* 18 *Ind. App.* 55.]

Plomley *v.* Shepherd.

New South Wales. LORD WATSON. *Jan.* 28, 1891.

The question raised here was, Whether the real estate of an intestate lady is divisible among next of kin, whose interests are represented by the respondent, or is to be made over to the assignee of the interest of the heir-at-law, *i.e.* the appellant? Construction of the Real Estates Intestates Distribution Act, 26 Vict. No. 20, sects. 1 and 2, which was an Act to alter the succession to real estate in cases of intestacy. The Judicial Committee affirmed the decision below as against the interest of the heir-at-law, and the appellant is directed to bear the costs of the appeal. The more important passages in their Lordships' judgment were the following:—

"Stripped of unnecessary details, the material facts are these. Ann Shepherd, or Goody, a married lady, died in 1866, possessed of a ninth share of a landed estate. She was survived by her husband, who, until his death in 1870, enjoyed a life rent tenancy by curtesy of his wife's ninth share. The proceeds of the estate, which has been converted, but not so as to affect in any way the rule of succession applicable to it, are claimed on the one side by the appellant, who is assignee of the heir-at-law of the lady, and on the other side by the administrator of her personal estate.

"Which of the two parties is entitled to the fund is a question depending entirely upon the construction of the Act. In considering the clauses which have a direct bearing on the question, it is proper to keep in view that the purpose of the Legislature, as explained in the preamble of the Act, was to alter the rule then in force, by which upon the death of an intestate

owner his land passed to his heir-at-law. The first section of the statute simply declares that 'all land which by the operation of the law relating to real property now in force would upon the death of the owner intestate in respect of such land pass to his heir-at-law, shall, instead thereof, pass to and become vested in his personal representatives.' It makes no provision with regard to the manner of administration. . . . The second clause of the Act is the important one. It provides in the first place that lands held in trust or by way of mortgage, passing to personal representatives, shall be subject to the trusts and equities which previously affected them, in the same manner as if they had descended to the heir, and then declares that 'all other lands so passing shall be included by the administrator in his inventory and account, and be disposable in like manner as other personal assets, without distinction as to order of application for payment of debts or otherwise.' That direction applies to all land vested by virtue of sect. 1 in the personal administrator other than land which was held by the deceased in trust or by way of mortgage; *and the combined effect of the two clauses is to give all land which previously descended to the heir to the next of kin of the predecessor.* But there follows a proviso which qualifies that enactment, and the appellant contends that the effect of the proviso is to restore to the heir-at-law the right of succession of which the enactment deprives him, whenever the intestate is a lady who, at the time of her death, was the wife of a living husband. Their Lordships are unable to accept that interpretation of the proviso. The proviso is in these terms: 'Provided that nothing herein contained shall give to any husband on the death of his wife intestate any greater interest in the real estate of his wife or in the produce thereof upon sale than a tenancy for life by the curtesy.' That proviso shows conclusively that the provisions of the Act which precede it were intended by the Legislature to apply in terms to the case of land left by an intestate married woman whose husband survives her. It recognizes the application of the statute, and its plain object was to prevent the husband taking a larger interest than would have fallen to him if the rule of succession had not been altered.

Had the proviso been omitted, the surviving husband would have taken, not a right of curtesy, which is a bare estate for life, but a right of fee in the land or its proceeds. To prevent that result, the Legislature has provided that his right shall be limited, but their Lordships find it impossible to infer from that limitation that the Legislature intended the remainder which is not given to the husband to lose its character of personal assets divisible among the next of kin, and to revert to the heir-at-law. There is not a single expression in the Act which lends plausibility to a suggestion of that kind. The proviso was introduced just because the effect of the enactment was to make land moveable for all purposes of intestate succession, and except in so far as the proviso enacts otherwise it must so remain. But the proviso does not deal at all with the character of land *quoad* succession. It simply limits the interest of the husband in that which has already been made distributable as personalty."

[(1891) *App. Cas.* 244; 60 *L. J. P. C.* 15.]

Sri Rajah Satrucharla Jajannatha Razu (Zemindar of Merangi) *v.*

Sri Rajah Satrucharla Ramabhadhra Razu and Others.

[*Ex parte.*]

Madras. Mr. Shand. *Jan.* 31, 1891.

The question raised was, whether the zemindari of Merangi, consisting of eighty-six villages with three hamlets, the present registered Zemindar of which is the appellant, is partible or impartible? The appellant maintained that the zemindari is impartible. The First Court at Ganjam, and subsequently the High Court at Madras, pronounced against the appellant's contention and decided to the effect that the zemindari was partible and consequently divisible between him and the respondents, who were his uncles. History of the zemindari for nearly a hundred years was gone into in the arguments, both parties agreeing to accept a passage from the "Vizagapatam Manual"

as summarizing the earlier information with regard to the basis of the possession. An important question was, whether at the beginning the zemindari was impartible, as being a military tenure, and also by family custom. A subsidiary question was as to the effect of a new grant replacing an older grant of 1803 by Government in 1835. The Judicial Committee affirm the decrees below in favour of the partibility of the estates and recommend her Majesty to dismiss the appeal. The judgment of the Judicial Committee in the main was as now given:—

"Their Lordships are of opinion that the judgments of the Courts of First and Second Instance are right. It is unnecessary to recapitulate the facts, which are fully stated in the judgments complained of. For the purpose of this decision it may be assumed, as it was by the Subordinate Judge—the High Court say there is no evidence of it—that the zemindari was at one time held under military tenure from the rajah of Jeypore, when it was granted to an ancestor of the present appellant. It may further be assumed, though there is little, if any, evidence to warrant the assumption, that the tenure continued to be the same after the estate had been taken by force and incorporated in Kurupam zemindari, and subsequently when by conquest it again became part of the Vizianagaram zemindari which was dismembered in 1795. Taking it, in accordance with the argument of the appellant's counsel, that impartibility was the rule then applicable to the estate, their Lordships are clearly of opinion that the subsequent dealings with the estate, the nature and terms of the grants under which it has been held throughout the present century, the absence of proof of any usage or practice of impartibility in the succession to the estate, contrary to the ordinary Hindu law of succession, and the character of the estate, which is in no way distinguishable from an ordinary zemindari subject to the payment of a fixed assessment of revenue, all clearly lead to the conclusion that the zemindari is now a partible estate in a question of succession.

"The grant of 1803 by the Government does not appear amongst the documents on the record; but it is clear from the kabuliat that the sannad-i-milkeat istimirar was in the ordinary

terms of such grants. There is nothing in the circumstances under which this grant was made to lead to the inference that the Government had in view, in making this new grant, the creation of an impartible zemindari, as an exception to the ordinary rule of succession of the Hindu law. The single circumstance that the property was given to a representative of an elder branch of the family formerly in possession, in preference to the representative of a younger branch who had been in arms against the Government, is of very little weight; and, accordingly, even at this early date, in the beginning of the century, it appears to their Lordships that the zemindari of Merangi, if impartible before, became partible in a question of succession, as it became also subject to the disposition of the zemindar by deed of transfer on sale or gift of the whole or part of the property. What occurred in 1835, however, makes the determination of the case perhaps even more clear. The estate had again come into the possession of the Government. It had been exposed to public sale for payment of debt due by the zemindar, and might have been bought by any third party as purchaser. The Government, however, bought it, and held it for some time. During this time the Dewan of the former zemindar, and certain of the Doratanams, performed an important service to the Government, who had offered a considerable pecuniary reward for the capture or putting down of certain rebels who had caused much disturbance in the district. They succeeded in putting down the rebellion. Instead of the pecuniary reward to which they became entitled, they begged that a new grant of the zemindari might be given to the son of the former zemindar (then still in life), who was a boy of only nine years of age, and the grant was accordingly made to this boy in the usual terms of a sannad-i-milkeat istimirar, and his heirs, with the ordinary power of sale or disposal of the property in whole or in part, and concluding with the words:—Art. 14. 'Continuing to perform the above stipulations, and to perform the duties of obedience to the British Government, its laws and regulations, you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns, at the

permanent assessment herein named the zemindari of Merangi.' It appears to their Lordships that here again, for a second time, there was such a dealing with the estate, as in the circumstances, and having regard to the terms of the grant, clearly shows that there was no intention to create an impartible estate, assuming there was power to do so, or to restore an estate previously impartible. The circumstances were entirely different from those which occurred in the *Hunsapore Case* (12 Moo. Ind. App. 1), where an estate, in itself an important raj or principality, was simply confiscated to the Government and again given out to the nearest heir of the next line. As was observed in the judgment, 'the transaction was not so much the creation of a new tenure as the change of the tenant.' In the present instance the grant followed on a purchase of the property by the Government; it was given, on the solicitation of persons who had a claim against the Government, to one who, though no doubt the son of the former zemindar, might have had no such grant but for the intervention of those persons who were attached to him; and there is nothing in the terms of the grant to support the contention of the appellant—on whom the onus lies of proving that this is the exceptional case of a zemindari impartible in its nature—and nothing to prove a usage or custom of succession, throughout the operation of the grants of 1803 or 1835, contrary to the ordinary rule of the Hindu law."

The costs of an application for leave to be heard, which was made, after the conclusion of the hearing of the appeal, by certain of the respondents, and which was opposed by the appellant, must be paid by those respondents. [*L. R.* 18 *Ind. App.* 45.]

Tanjore Ramachandra Row and Others *v.*
Vellayanadan Ponnusami and Others.

Madras. LORD WATSON. *Jan.* 31, 1891.

Alleged novation of debt. Rate of interest. Abkary contracts. This was a suit between two undivided Hindu families. It may be thus described, because, whilst some of the trans-

actions are denied by certain members of the families, it is not disputed that the individual members who entered into the transactions had authority which would have enabled them to bind their respective families. The appellants were the plaintiffs, and their plaint as originally framed sought for re-payment of specific advances with interest; but before the settlement of issues, it was amended so as to cover a claim for a partnership accounting in regard to a number of abkary contracts taken up by the plaintiffs and the respondents. The High Court at Madras reversed an order passed by the Chief Justice (Sir Charles Turner), sitting alone as a Court of Original Civil Jurisdiction, and the plaintiffs appealed so far only as the reversal concerns (1) the rate of interest payable by the defendants upon an admitted loan of Rs. 55,000, (2) the right of the plaintiffs to participate in certain abkary contracts effected in their own name by the defendants, and (3) the validity and effect of a writing bearing date the 16th September, 1880, signed by the managing member of the plaintiffs' family. On all three points the Judicial Committee pronounced against the plaintiffs, appellants, and they recommended her Majesty to dismiss the appeal with costs. Their Lordships' reasons included, *inter alia*, the following observations:—

"On the 23rd of April, 1877, the plaintiffs advanced in loan to the defendants the sum of Rs. 55,000, in Government bonds bearing 4½ per cent. interest, and received from them, of same date, a promissory note for the amount, payable on demand, with interest at 4½ per cent. per annum. The loan was not called up, and on the 19th April, 1880, the triennial period of limitation being about to expire, the plaintiffs wrote to the first defendant suggesting that, if they had no mind to renew the note, they should send a letter undertaking to pay the principal and interest within two months. The defendant replied by a letter dated the 20th April, 1880, admitting their liability under the promissory note, stating that the interest due upon the unpaid principal of Rs. 55,000 until the 22nd of the month was Rs. 7,425, and containing these obligatory words, 'With regard to these Rs. 62,425, I will settle the accounts, and pay

the amount which may be due within two months, though the note might be barred by the Statute of Limitations.' After the receipt of that letter, no demand for payment appears to have been made by the plaintiffs until the present suit was brought in March, 1881, when they claimed interest at the rate of 12 per cent. per annum.

"The plaintiffs now maintain that the undertaking given by the defendants operated a complete novation of the debt: that it transmuted the loan of Rs. 55,000 bearing 4½ per cent. interest into a legal claim for the principal sum of Rs. 62,425, upon which, in the absence of any stipulated rate, interest became due *ex lege* from the time of payment. That construction of the letter of the 20th April appears to their Lordships to ignore the express obligation which it imposes upon the defendants to 'settle accounts,' and to pay the amount 'which may be due' within the two months allowed for payment. These expressions plainly import that the sum specified in the letter merely represented the amount of their liability calculated to the 22nd April, and did not represent the sum payable by them at the date of actual settlement, which was to be ascertained . . . . The letter was applied for, and was given solely with the view of eluding the Statute of Limitations; and, in the opinion of their Lordships, it had as little effect in altering the quality of the debt constituted by the promissory note as would have been produced by a notice of the same date from the plaintiffs requiring payment within two months.

"The next point taken by the plaintiffs raises a question of fact. They allege that, on the 9th March, 1878, one of their number entered into a verbal contract with a representative of the defendant family, to the effect that all abkary contracts made by the plaintiffs or defendants within three years from that time, whether with or without previous consultation and arrangement, should be shared by both families, in the proportions of one quarter to the plaintiffs and three quarters to the defendants.

"The defendants do not dispute that certain abkary contracts taken by the plaintiffs in their own name during the period in

question were shared by the two families in these proportions; but they deny the existence of the antecedent general agreement alleged by the plaintiffs, and maintain that the subsequent participation of the two families in these contracts was due to special arrangements made at the time with reference to each contract. . . . . The evidence adduced by the plaintiffs is vague and unsatisfactory. It is the plain duty of every litigant who endeavours to set up a verbal contract to lay before the Court, not the impressions of the witnesses who heard the communings, but in so far as possible the particulars of what was said or done, so as to enable the Court to form its own conclusions upon the question whether these did or did not import a binding agreement in the terms alleged.

". . . Their Lordships have had no difficulty in coming to the conclusion that the parol proof which they" (the plaintiffs) "have adduced, fails to establish the partnership agreement which the plaintiffs allege. There are in evidence written and also verbal communications between the parties with respect to abkary contracts, taken by the plaintiffs during the currency of the alleged agreement, in which the defendants had admittedly a quarter share. But none of these communications countenance the suggestion that the defendants took their shares by virtue of an antecedent general agreement, or otherwise than by a specific agreement made with reference to each contract at the time when it was taken up by the plaintiffs; and, save in one instance (to be noticed presently), no allusion is made in them to abkary contracts taken up by the defendants. . . . In their argument upon this appeal, the plaintiffs for the first time maintained that, irrespective of the general agreement, there is evidence to show that they acquired right as partners to three quarters of an abkary contract for Salem taluk, which was obtained by the defendants in June, 1878, and that they ought accordingly to have an accounting for their share of profits. No such claim is made in their plaint; and it appears from a passage in the judgment of the High Court that it was repudiated by them, and that they only sought to use the evidence upon which it was preferred here as proof in aid of the exist-

ence of a general agreement of partnership. These facts would afford sufficient reason for refusing to entertain the claim now. But their Lordships think it right to observe that the fourth plaintiff's letter of the 25th August, 1878, and the second defendant's reply, dated the 27th August, when read together, do not necessarily imply that the plaintiffs were partners in the Salem contract. That part of the correspondence in which mention is made of Salem has exclusive reference to management; it does show that the parties were arranging that a certain individual should reside in Salem and superintend several abkary contracts, but it does not *per se* show that these contracts were all joint. . . .

"The last point submitted to their Lordships had reference to the validity, and also (assuming it to be valid) to the effect of a writing dated the 16th September, 1880, signed by the fourth plaintiff, which bears, *inter alia*, that he agreed, upon the conditions therein stated, to surrender the whole interest of the plaintiffs in the joint abkary contracts standing in their name to the defendants, who were to take over all profits and losses. The plaintiffs pleaded that the document was not a completed contract, and was never acted upon. A complete answer to the first part of the plea is to be found in the evidence of the fourth plaintiff, who states that it was written in his presence to the dictation of the defendants, and was then signed by him and delivered to the defendants; whilst the allegation that the writing was never acted upon is explained by the fact that the plaintiffs subsequently refused to settle accounts in accordance with its provisions. The question raised as to the legal effect of the document has ceased to be of practical importance, in consequence of the failure of the plaintiffs to prove any joint abkary contracts other than those standing in their own name. Their Lordships are of opinion . . . . that there never was any general agreement binding the defendants to give the plaintiffs an interest in their contracts." [*L. R.* 18 *Ind. App.* 37.]

Chundrabati and Another *v.* Harrington.

Bengal. Sir Richard Couch. *Feb.* 7, 1891.

Right of occupancy while holding cultivating possession is set up by respondent in answer to an action for ejectment. Although the appellants' title to possession of certain lands is decreed, the validity of the right of occupancy by the respondent to portions is upheld. The suit, however, must be remanded to India for further inquiry, so as to ascertain the situation and boundaries of all the lands. Law of landed tenure in Bengal, Act X. of 1859, sect. 6; Bengal Council Rent Act VIII. of 1869, sects. 6 and 7. The appellants, who were plaintiffs, were Zemindars of a separated one-third share of the mouza of Dahia in the Bhagulpore District. The suit was, in the first instance, filed in March, 1885, against a Mr. T. Poe, and was thereafter continued against Poe under the name of the respondent Harrington. Poe is the person who is stated in the plaint to be holding possession when the plaint was filed, and is described in the title of it as proprietor of the Bhugwanpore indigo factory. This is material as to the right of occupancy, which is one of the questions in the case. The plaintiffs, in their plaint, asked for recovery of possession and mesne profits, and alleged that a mostajiri settlement—a lease—of the mouza, except 3 bighas 14 cottahs of khodkasht land, dated the 3rd July, 1877, was made by the plaintiffs and the husband of the first plaintiff to the defendant Poe; that at the expiration of the lease the defendant did not give up possession of the leased share of the mouza, and was forcibly holding possession thereof. In the first written statement of Harrington, he contended that, being a tenant enjoying "a right of occupancy" of certain lands, he was not liable to ejectment. His counsel now described him as a tenant who himself took the profits of the cultivation carried on by those whom he employed. The defence set up is "that since a long time the defendant, as tenant, got possession of 85 bighas of land in mouza Dahia while the afore-

said mouza was joint. Before 1278 F."—1870—"the defendant acquired the right of possession in respect of the aforesaid land. Out of the aforesaid land 34 bighas 3 cottahs 8¾ dhoors has under the butwara"—partition—"fallen into the putti" —share—"of the plaintiffs, and it has been held by the defendant as tenant after the expiration of the term of lease. The defendant being a tenant enjoying the right of occupancy is not liable to ejectment." In another written statement of Harrington, filed on the 12th May, the same defence is set up as to the 34, &c., bighas, and it is said that the remaining land is not held by the defendant. Thus there were two questions before the lower Court:—1. Whether the defendant had acquired a right of occupancy in the 34, &c., bighas. 2. Whether the defendant was in possession of the remaining land. The lower Court decided both questions in the plaintiffs' favour. The High Court reversed the decree, and ordered the suit to be dismissed. The evidence appeared to show that the indigo factory and the portion of land of 34 bighas had, for thirty-four or thirty-five years before the trial, been in the hands of lessors or shareholding proprietors from whom the respondent derived title. Importance was attached to the rights (if any) gained before partition in 1874. The Judicial Committee, in the course of their judgment, said:—"Both the First Court and the High Court have found, what in their Lordships' opinion is proved by the evidence, that the defendant had possession of the land in the plaintiffs' putti (share), which he now states to be 34 bighas 3 cottahs 8¾ dhoors, from 1856. But the First Court held that the 'possession was all along under one or another mostajiri lease, and that therefore he did not acquire any right of occupancy.' The High Court held that there was a right of occupancy, but the grounds of their opinion do not appear to their Lordships to be clearly stated. It appears to their Lordships that the leases were for the purpose of cultivating the land as a raiyat, and were not ijaras; and that the decision of the full bench in *Sheo Prokash Misser* v. *Ram Sahoy Singh* (8 Beng. L. R. 165), is applicable to this case. *There it was held under Bengal Act VIII. of* 1869, *the law in force during part of the*

occupation in that case, and under Act X. of 1859 *previously in force, that a raiyat who has held or cultivated a piece of land continuously for more than twelve years, but under several written leases or pottahs each for a specific term of years, in which there is no express stipulation for re-entry, is entitled to claim a right of occupancy in that land.* Therefore, in the opinion of their Lordships, there is a good defence to the suit so far as regards the 34 bighas 3 cottahs $8\frac{3}{4}$ dhoors. . . .

"The plaint stated that the quantity of cultivated land in Dahia, except 3 bighas 14 cottahs, which were excluded from the pottah and kabuliyat, were 89 bighas 7 cottahs 7 dhoors 15 dhoorkis. The defendant in his written statement said this was not true, that, 'according to the measurement which took place in 1880, only 63 bighas 9 cottahs 13 dhoors 15 dhoorkis of land was found to comprise the entire putti of the plaintiffs which was held by the defendant.' As the suit was dismissed by the High Court, this question, of the quantity of the land included in the lease, has not been determined by that Court in this suit. In a suit for rent which by consent of the parties was tried together with this suit, the first Court decided this question against the defendant, and there does not appear to have been any appeal upon it."

"As to the second question—possession . . . . of the remaining land. . . . . The High Court found that the defendant was not in possession . . . that it was in the possession of the 'plaintiff's mother-in-law, as owner.' " . . . The finding of the First Court on this question of possession was in accordance with the evidence, and should not, in the opinion of the Judicial Committee, have been reversed by the High Court. "Their Lordships' attention has been called to the inquiry which took place for the purpose of ascertaining the lands in which the defendant claimed his right of occupancy. On the hearing of the appeal, the High Court rightly held that the onus lay on the defendant to point out these lands, and they referred it to the District Judge to depute an Amin to find out the 'lands covered by the khusra of the butwara.' That appears to be right in principle. The defendant was bound to

identify the 34 bighas 3 cottahs 8¾ dhoors, which he claims, and to show that they are in the khursa and in the putti of the plaintiffs, as he alleges in his written statement. But the finding of the Amin does not specify any such quantity of land. He finds that the lands now identified as the defendant's jote are 76 bighas and a fraction by one measure, and 36 bighas and a fraction by another, and that the indigo plantation land in the khusra is 49 bighas and a fraction. In dismissing the suit, the High Court say, 'We accept the report of the Amin, and we find that the District Judge has substantially carried out the remand order.' Perhaps, for the purpose of dismissing the suit, the Amin's findings were sufficient. But for the purpose of ascertaining the precise land claimed by the defendant, the findings are abortive and useless. And as their Lordships hold that the suit should not be dismissed, and that it is necessary to ascertain the lands claimed, there must be a fresh inquiry. The result is that the plaintiffs are entitled to a decree for possession of the land included in the lease of 1877, except the 34 bighas, 3 cottahs, 8¾ dhoors, in which the defendant should be declared to have a right of occupancy, and the decrees and order of the Courts below ought to be reversed and the suit remanded to the High Court to have an inquiry made as to the situation and boundaries of these last-mentioned lands, and also of the remaining lands included in the said lease, and thereupon to make a decree for possession to the plaintiffs of the remaining lands and mesne profits thereof, with costs to the parties in the Courts below in proportion to the result. Their Lordships will humbly advise her Majesty accordingly.

"In the special circumstances of this case, their Lordships are of opinion that the appellants should have the costs of this appeal." [*L. R.* 18 *Ind. App.* 27; *I. L. R.* 18 *Calc.* 349.]

Dosibai *v.*

Ishwardas Jagjiwandas and Another.

Bombay. Lord Hobhouse. *Feb.* 7, 1891.

Construction of grant of jaghiri land. Was the interest in the grantee for life only, or was it absolute? Validity of an order for sale of villages. Was a second attachment necessary by the respondents in a case where a previous attachment of theirs was still in existence for a portion of the same debt. Objection by appellant on one point (taken here on appeal for the first time) cannot be considered now without reluctance, even if it was important. The grant which had to be construed ran thus:—

"In consideration of the active and zealous performance of the duties entrusted to him by Government, the Honourable the Governor in Council hereby gives and bestows upon Ardesar Bahadoor, son of Dhunjeesha, and his heirs for ever, as jagheer, the following four villages: Bhestan and Sonaree in the Chowrasee Purgunna, Kumuara and Boreeach in the Chiklee Pergunnah, in the Zillah of Surat, with the jumma and moglaee of the same, now yielding an average net sum of rupees two thousand nine hundred and ninety-two, one quarter and ninety-six reas (2,992. 1. 96). The revenue of the said villages hereafter, whether more or less, to be collected by the said Ardesar Bahadoor and his heirs, from the 5th June, 1830, and such lawazims or huks as are at present settled on those villages are to be disbursed by the said Ardesar Bahadoor in the same manner as heretofore."

Ardesar, who is now represented by the appellant, a lady who is his present heir, contracted large debts with a creditor, now represented by the respondents. In 1833 and in 1847, Ardesar executed mortgage deeds giving to his creditor a charge on the villages. In 1856, Ardesar died. In 1861, the then mortgagee sued the then heirs of Ardesar, and obtained, in 1863, a decree to recover the debt then due, nearly two lacs of rupees, from the four villages and their income, and from whatever other properties Ardesar left.

The first attachment was on this occasion ordered, and the villages have ever since remained under such attachment. In 1866, the disputes of debtor and creditor were referred to a panch—a board of arbitration of five persons—and these persons gave an award declaring the amount due. Although lodged in Court, no decree was made upon this award until July, 1883, when a decree was made to the effect that the respondents (representing the creditor and mortgagee) should recover the amounts then mentioned from the villages and Ardesar's assets. Later in that month, the respondents applied for a sale under this last decree *without* having obtained an order for attachment, and they claimed therein to have the property sold with a reservation of their right under the first decree of 1863. It appeared that the sum still owing under the first decree was large; also that the four villages were still under attachment in execution of the first decree, and the appellant stated that she was taking steps to have it removed. The Court gave an order for sale, but directed that a previous notice of thirty days should be given and duly proclaimed. This order for sale is the one the appellant now asks for relief from. On her appeal, the High Court supported the lower Court in deciding against her, and she now appealed to her Majesty in Council, contending that both decrees below were erroneous. She rested her case on three grounds. The Judicial Committee reported to her Majesty that the appeal ought to be dismissed with costs, and *inter alia* made these observations in their judgment:—

"The first ground goes to the substance of the respondents' demand. The appellant contends that the grant of 1830 did not confer an absolute interest on Ardesar, but, being a grant of a jagheer, operated as giving a succession of life interests to him and his heirs for the time being. There is no principle or authority which gives any warrant for such a contention. It is true that when a jagheer is granted in indefinite terms, it is taken to be for the life only of the jagheerdar. But where there is a grant to a man and his heirs, and nothing to control the ordinary meaning of the words, the grantee takes an absolute interest. The principle that jagheers are to be considered

life tenures only 'unless otherwise expressed in the grant' is expressly laid down in the Bengal Regulations. See Reg. 37 of 1793, s. 15. It is the law also in Bombay and other parts of India. The second objection taken by the appellant is that the order for sale should have been preceded by an attachment. . . . The two Courts below held that, in the case of a decree to enforce a mortgage such as the present one, an attachment is not required, and that the practice is to make an order for sale without one. Their Lordships do not feel called on to go into that. In this case the four villages were under attachment at the suit of the same creditor, and to enforce a portion of the same debt which had accrued at an earlier period under the same instruments of mortgage. . . . A second order for attachment would be an empty formality, and there is no rule which requires it. The third objection of the appellant is that as the sale has been ordered, not of the whole property free from charge, but with a reservation of the respondents' claim under the first decree, she is damnified, because nobody but the respondents themselves would bid for a property so situated. This objection was not taken in either of the Courts below. The reason for the reservation is not apparent, nor indeed is the meaning or the effect of the order quite clear. If the objection had been taken in the first Court on the petition which the appellant presented to get the order discharged, very possibly it might have been complied with, and certainly its intention would have been placed beyond doubt. Their Lordships would be very reluctant to give effect to an objection of this kind, taken for the first time when the appellant's case is lodged here, even if it appeared to be of some importance. But it cannot be of any importance. The sale is ordered to realize more than 3½ lacs of rupees, which would exhaust the value of the four villages several times over. The debt is not the debt of the appellant, nor is she interested in its reduction except for the purpose of getting some surplus out of the villages. As it is practically impossible that there should be any such surplus, the question is wholly unsubstantial, and that may be the reason why it was never raised until the present stage of the proceedings." [*L. R.* 18 *Ind. App.* 22; *I. L. R.* 15 *Bom.* 222.]

The Owners of s.s. "Pleiades" and Freight, and Edward Page (Master of the said Steamship) *v.*

Joseph Page (Master of the s.s. "Jane"), **the Owners** of the said Steamship, and **F. J. Lesser.**

Gibraltar (*Vice-Admiralty*). LORD WATSON. *Feb.* 14, 1891.

Collision. Maritime Rules and Regulations. Culpability. New point not taken below is wrongly raised in the Privy Council. Judicial Committee cannot deal with it. Their Lordships advise dismissal of appeal. The details of the litigation are given in the judgment of the Committee, the main passages of which were as follows:—

"This is an appeal by the owners and master of the steamship 'Pleiades' from a judgment, ... in three consolidated suits, arising out of a collision between their vessel and the steamship 'Jane.' Two of these are cross actions of damage by the respective masters, and the third an action by the owner of the 'Jane's' cargo against the 'Pleiades' and freight. The learned judge . . . . found that the 'Pleiades' alone was to blame for the disaster; and he has disposed of each action in accordance with that finding. The collision occurred between 4.30 and 5 p.m. on the 3rd August, 1889, in broad daylight and in calm, fine weather, about a quarter of a mile to the southward of Europa Point Lighthouse. The vessels appear to have first sighted each other when they were from three to four miles apart. The 'Pleiades' was then entering the Mediterranean on an E. $\frac{1}{2}$ N. course, at a speed of 10 knots per hour. The 'Jane' was making for the port of Gibraltar, on a crossing course N.W. by W., at the rate of $7\frac{1}{2}$ knots. Each vessel kept its course, without alteration of speed, until they came within 400 or 500 yards of each other. . . . On reaching the point already indicated, the 'Pleiades' ported her helm, which carried her half a point to starboard before actual collision, and signalled the manœuvre by two blasts of her whistle; whilst the 'Jane'

ported, with the effect (due apparently to her having no keel) of bringing her head five points to starboard at the time of collision. When she altered her helm, the 'Pleiades' first stopped and shortly after reversed her engines; but there must have been considerable way upon her at the moment of collision, because her master states:—'It would take nine or ten minutes to stop way from full speed ahead.' When the 'Jane' ported, she first stopped and then went full speed ahead. The collision took place in a very short time, apparently not more than from one to two minutes after the first change of helm, the stem of the 'Pleiades' striking the port side of the 'Jane,' nearly at right angles, abaft her main rigging. The witnesses differ as to the sequence of these events. Those of the 'Pleiades' assert that her change of helm was not made until the 'Jane' had ported, and that it was necessitated by the action of the 'Jane.' Those examined for the 'Jane' state that she altered her course after, and in consequence of the 'Pleiades' having intimated that she was starboarding. The learned Judge of the Court below, before whom all the principal witnesses were examined, gave credit to the version told by the witnesses from the 'Jane,' and their Lordships see no reason to differ from his conclusion. . . .

"Their Lordships have no hesitation in holding that the decision of the Vice-Admiralty Court upon the issues submitted to it was fully justified by the evidence. They have, with the assistance of their assessors, formed a clear opinion (1) that, if both vessels had continued on their original courses, with unabated speed, to the point of intersection of these courses, there would have been imminent danger of collision; (2) that the attempt of the 'Pleiades' to pursue her original course was in plain violation of the 16th article of the Regulations; and that, having regard to the proximity of Europa Point on the one hand and the abundance of sea room on the other, an endeavour to pass ahead of the 'Jane' was an improper and unseamanlike manœuvre; and (3) that up to the time when she starboarded, the 'Pleiades' could, by porting and directing her course to starboard, have complied with the Regulations, and passed

astern of the 'Jane' without involving risk of collision. On the argument of this appeal, counsel for the 'Pleiades' maintained *for the first time* that, assuming her to have been culpable by reason of her failure to keep out of the way, the 'Jane' was also in fault, and ought to be jointly condemned in damages, in consequence of her failure to comply with the 18th article of the Regulations. If the argument were admissible at this stage of the proceedings, it would raise the very serious question whether the 'Jane' was justified in steaming ahead instead of reversing, when it became apparent that a collision was unavoidable; and the onus of showing that her action was justifiable would undoubtedly rest upon the 'Jane.' Upon the merits of the argument, their Lordships purposely refrain from expressing any opinion, in the present condition of the evidence. They did not call upon the respondents' counsel for a reply, because they were satisfied, upon the appellants' own showing, that they ought not to entertain the question. The point was not taken in the Court below, where no reference was made to the 18th article either in the preliminary acts, the pleadings, the evidence, or in the argument. . . . In these circumstances, their Lordships are not satisfied that they have before them—to use the language of Lord Herschell in *The Tasmania* (15 App. Cas. 225)—'all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity of explanation had been afforded them when in the witness box.'

"Their Lordships will therefore humbly advise her Majesty to affirm the judgment appealed from. The appellants must pay to the respondents, who have appeared, their costs of this appeal." [(1891) *App. Cas.* 259.]

De Mestre and Another *v.* West and Others.

New South Wales. THE EARL OF SELBORNE. *Feb.* 20, 1891.

Suit to establish alleged trusts of a marriage settlement. Consideration of the marriage. Was ultimate remainder in favour of unborn children of an illegitimate son voluntary, null and void, and barred by conveyance for value to another?

The facts as to the origin of the litigation arose thus:—Harriet Hanks engaged herself to marry Thomas Dean Rowe in March, 1838, *i.e.*, before the settlements for the marriage afterwards entered into (the lady at the time being possessed of means). At the time the marriage settlements were contemplated the lady had a son (George Taylor Rowe) aged fifteen or thereabouts. The settlements of 1838 recited that in consideration of the marriage with Thomas Dean Rowe it was agreed that certain landed estates should be held by trustees for the use of Harriet Hanks (afterwards Mrs. Rowe) for her life; after her the husband, Thomas Dean Rowe, and after the decease of the survivor of either for the use of George Taylor Rowe, and after his death for the use of all of George Taylor Rowe's children as tenants in common. Harriet Rowe, the widow of Thomas Dean Rowe, married again one William Sherwin in 1839. In the year 1848 an indenture reciting that Harriet Sherwin (late Rowe) was entitled in fee simple to the settled estates, and that George Taylor Rowe claimed to be entitled to an interest in the estates, was entered into, mortgaging the said estates to Catherine West (respondent) for 1,000*l.* The mortgagors named in the deed were William Sherwin, Harriet Sherwin, and George Taylor Rowe. The appellants, as issue of George Taylor Rowe, who was married in 1847 and died in 1859 leaving issue the appellants and others, claimed that the trusts of the marriage settlements of 1838 might be declared and established, and that the appellants be declared to be entitled to their respective shares under the indentures then made. The respondent Harriet Sherwin (late Rowe) was still living,

but put in no appearance to the action. The respondent who did appear, Catherine West, in her defence said that the indentures of settlement (in 1838) were voluntary as to the appellants, the issue of George Taylor Rowe, and were liable to be defeated by subsequent sales of the estates for value. In Australia the action came alone before the Primary Judge in Equity in accordance with statute, and he dismissed the action, holding that the ultimate remainders in favour of George Taylor Rowe's issue were voluntary and as such had been avoided by the conveyance to the respondent West for value.

The counsel for the appellants now said that they (the appellants) were *within the consideration of the settlement.* The property was settled subject to onerous conditions, and the performance of these was a good consideration for that settlement. *Per contrà*, counsel for the respondent (West) said that the appellants were volunteers, and were not within the consideration for which the settlement was executed. The Judicial Committee reported to Her Majesty that the order of the Primary Judge must be upheld, and that the appeal ought to be dismissed, the appellants to pay costs. This was their Lordships' judgment:—

"It is unnecessary to go into the history of the law upon this subject. The general rule has long been settled, that a voluntary conveyance, even though from the most honest motives and the most moral considerations, may be defeated, according to the construction which has been placed upon the statute of 27 Eliz. c. 4, by a subsequent conveyance to a purchaser for value such as was made in this case. It has also been determined, in a manner which it would be too late now to attempt to review—in the case, amongst others, of *Sutton* v. *Chetwynd* (3 Merivale, 249), and in the Irish case of *Cormick* v. *Trapaud* (6 Dow. 60), both decided by the House of Lords—that this rule is applicable to limitations in favour of volunteers under marriage settlements. Therefore, as the law is so settled, some special reason, consistent with the law, must be shown for taking any particular case out of the rule. Whether their Lordships would have established such a rule had the matter been new is not the question.

"The case which has been mainly relied upon as an authority for allowing this appeal is one in the Court of Exchequer, of *Dickenson* v. *Wright* (5 H. & N. 401), which was affirmed in the Court of Exchequer Chamber under the title of *Clarke* v. *Wright* (6 H. & N. 849). Their Lordships probably would agree that, if that case ought to be followed, it might be an authority in support of the present appeal. But they observe not only that Lord St. Leonards, in editions of his book on Vendors and Purchasers later than *Clarke* v. *Wright*, but subsequent judges—Vice-Chancellor Hall, a great judge in this branch of the law especially, and the present Lord Justice Kay—have unfavourably criticised that decision. And, when the reasons given for that decision, and the state of opinion apparent from the report of what took place in the Court of Exchequer Chamber, come to be examined, it seems to their Lordships impossible that it can be supported. In the Court of Exchequer, where the judgment was given by Baron Channell, it is apparent that the Court proceeded upon the view that the case of *Newstead* v. *Searles* (1 Atk. 264) was an authority for the proposition that a settlement by a widow about to marry upon her children by a former marriage is good against a subsequent mortgagee, putting it in that general way, without any reference to any more special reasons. And no doubt, if that had been so, it would have been difficult to resist the conclusion drawn by the Court of Exchequer, that by parity of reasoning the same rule would apply in favour of an illegitimate child. *Clayton* v. *Lord Wilton* (6 M. & S. 67) was also referred to by the same learned judge as having determined that a limitation in a marriage settlement to the children of a possible second marriage is good, without reference to special circumstances. Unless the view so taken of those previous authorities of *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton* was correct, the foundation of that judgment fails.

"In the Court of Exchequer Chamber their Lordships find a very great conflict of opinion among the judges, and plainly the majority of the judges would have been for reversing the judgment below if they had not taken the same view of *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton* which was taken by Baron Channell. No doubt two very learned judges in that

Court, Mr. Justice Blackburn and Mr. Justice Willes, put the case upon a different ground, and endeavoured to explain in a different way the decisions in *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton;* the ground taken by them being apparently this, that if it can be inferred from circumstances that the parties had specially in view, when they made their agreement, provision to be made for persons who would otherwise have been volunteers, they were no longer volunteers, because it was a matter of special bargain, although there might be no other valuable consideration for that agreement than the marriage. In other words, that, although *primâ facie* provisions in favour of collaterals in marriage settlements were not within the marriage consideration, yet they might always be brought within it if the parties so intended. No other authority was cited in favour of that proposition; and, if sound, it would go far to destroy the general rule; for it is recited in almost every marriage settlement that all the provisions made by it, whether for the parties themselves and the issue of the marriage, or for any one else, are made pursuant to agreement. And if, as Mr. Justice Blackburn appears to have thought, the acceptance by a husband of interests in his wife's property, different from those which the law would have given him if there had been a marriage without any settlement, would be a sufficient consideration to support limitations to collaterals against a purchaser for value, this, or something equivalent, may be said to occur in every case in which any property of the wife is brought into settlement. Nor do their Lordships think that the omission to provide in a marriage settlement for all or some of the issue of the marriage can operate as a consideration in favour of persons provided for by it who would otherwise be volunteers. The majority of the judges in *Clarke* v. *Wright* differed from Mr. Justice Blackburn on these points; and if *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton* had been understood as their Lordships understand those cases, *Clarke* v. *Wright* would not have been decided as it was.

"Under those circumstances, it appears to their Lordships to be their duty to advise her Majesty, in accordance with the

view which they themselves take of *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton*, and which was taken by the House of Lords in *Mackie* v. *Herbertson* (9 App. Cas. 303). The order of the limitations in both those cases was such, that the limitations which were not within the marriage consideration were covered by those which were, so that those which were within the marriage consideration could not take effect in the form and manner provided by the instrument, without also giving effect to the others. It was on that ground, and not from any special favour to provisions for the benefit of children who were not issue of the marriage, that their Lordships consider both those cases to have been determined. If similar circumstances should occur in any other case, it may be inferred from what was said in the House of Lords in *Mackie* v. *Herbertson*, that the same principle would be applied; and indeed the principle seems to be clear; for the settlement in any such case could not be defeated without defeating the interests of children unquestionably within the consideration of marriage. There is no authority for the proposition that under the statute a particular limitation can be picked out of the middle of a settlement, or the shares of some persons who would take *pari passu* with others according to the terms of the settlement picked out, in order to be destroyed, in favour of a subsequent purchaser; leaving subsequent or concurrent interests of persons who were within the consideration of marriage under the same settlement undisturbed.

"The only question in their Lordships' view which remains is, whether in this case there are special circumstances which bring it within the principle of *Newstead* v. *Searles* and *Clayton* v. *Lord Wilton*, so understood. The property settled was that of the wife only. No consideration, except that of marriage, proceeded from the husband. There is an ultimate limitation of the property which the wife is herself settling to her heirs, subject to a general power of appointment, not in favour of any particular persons within the marriage consideration, but in those general forms in which it may be said that in almost all settlements the ultimate undisposed of and unsettled interest is reserved back to the settlor, or subject to the appointment of

the settlor. It seems to their Lordships impossible to hold that this is enough to bring a case within the principle of *Newstead* v. *Searles*. Then does the interposed provision about raising money for the benefit of the illegitimate son of the wife during the lifetime of the husband and wife, or either of them, make any difference? However that provision ought to be construed, it was only a power to raise a sum not exceeding a certain amount, during a certain period of time, which is not alleged to have been, and which their Lordships must assume not to have been, executed. Their Lordships do not think it necessary to determine whether Mr. George Taylor Rowe, the illegitimate son, could have insisted on the exercise of that power, if he had claimed to have it executed in his favour, or not. He is dead, and the question is not with him, but it is with those who come last in the order of the settlement—his issue. It was not for them that this money was to have been raised, if it had been raised at all. No doubt if it had been raised they would have had an ultimate interest in it under the settlement; but in the present suit no claim is made on the footing that it ought to have been raised. Their Lordships think, therefore, that there are not in this settlement any special provisions, sufficient to bring it within *Newstead* v. *Searles;* and that the Court below was right in holding the case to fall within the general rule. The appeal must therefore be dismissed, and their Lordships will so advise her Majesty. The appellants will pay to the respondent West the costs of this appeal."

[(1891) *App. Cas.* 264; 60 *L. J. P. C.* 66.]

Mahabir Pershad Singh and Others *v.*
Raja Radha Pershad Singh.

(And Cross-Appeal.)

Bengal. Sir Richard Couch. *Feb.* 21, 1891.

Dispute as to what mesne profits are payable by the appellants in the principal appeal, as the result of a decision in boundary cases (*Pahalwan Singh* v. *Maharaja Muhessur Buksh;* and *Muhessur*

Buksh v. *Meghburn Singh*, 9 B. L. R. 150), approved by Order in Council of 29th June, 1871. Of the lands whereof mesne profits are claimed, how much is under cultivation and how much out of cultivation? Has there been over-estimation? Presumption of fact that the assessment should be taken as correct is to be deduced from the circumstance that the objectors did not produce zemindari serishta papers which it was alleged they could have produced showing the gradual increase of cultivated area. *Particular direction as to costs as if no cross-appeal lodged.* Shortly stated, the course of the litigation was as follows:—

The proceedings were taken for the determination of the mesne profits of two tracts of land situated in mouzas in the pergunnah of Bhojepore, for twelve years from 1269 (Fasli) to 1280 inclusive, under a decree of 1863, and for fourteen years from 1267 to 1280 inclusive, under a decree of 1865. The two decrees were made by the High Court, one on the 21st July, 1863, and the other on the 31st July, 1865, in favour of the father of Radha Pershad Singh (the respondent and cross-appellant), for possession of lands gained from the bed of the Ganges in the above-mentioned mouzahs, and for mesne profits. The former of these decrees was, on an application for review, confirmed by the High Court on the 29th April, 1864, and the latter was, on a like application, set aside on the 17th April, 1866. On appeal, her Majesty, by Order in Council (29th June, 1871), directed possession of a large portion of land together with mesne profits to be granted to the father of the respondent and cross-appellant (hereinafter called the respondent). *A map was annexed to the Order in Council*, whereon the Judicial Committee marked definitely the quantity of alluvial land to which title had been proved. As to the mesne profits, the Order in Council remitted the appeals to India for further enquiry. In 1878, the father of the respondent was put into possession, and in 1880, the respondent, having succeeded his father, instituted proceedings to have his claims for mesne profits finally determined.

The Court Amin having, by order of the Court, made a report

on the subject, the appellants in the principal appeal filed objections particularly alleging that the quantities of cultivated and uncultivated lands as estimated by the Amin were incorrect. As the periods for which mesne profits were awarded by the two decrees differed, it was necessary to determine what quantity of this land was covered by each decree. The Subordinate Judge having made his award with regard to both decrees, both parties appealed to the High Court, who considered that there should be a further enquiry as to what was the quantity of cultivated area decreed in the second suit, the cases were therefore remanded. On the 24th March, 1884, the Subordinate Judge, the successor of the judge who made the first order, varied the former ruling, finding that 1079 bighas were the area of the cultivated land in the first suit, and only 23 bighas 14 cottahs 8 dhoors the cultivated area in the second suit. When the case came again before the High Court, both parties again lodged objections. The result, which the High Court arrived at, the Judicial Committee now upheld, making the following observations at the close of their judgment:—"With regard to the quantity of cultivated land up to 1271 inclusive, the High Court differed from it (the Court of the last-mentioned Subordinate Judge), and upon the strength of the survey map held that in the first suit there were 544 bighas 12 cottahs, from the year 1267 to 1271. This is as regards the land in the first suit in the defendants' favour. Then, as regards the period 1272 to 1280, the High Court found that in 1281 the entire area of 1,079 bighas was under cultivation, and *as it was in the power of the defendants, by production of jumma-wasilbaki papers and other papers usually kept in the zemindar's serishta, to show the gradual increase in the cultivated area from* 1272 *to* 1280, *and they had not given any evidence on this point, they could not complain if it was presumed against them that the entire* 1,079 *came under cultivation from the beginning of* 1272. The High Court, therefore, accepted the finding of the Subordinate Judge as regards the quantity of cultivated land in the first suit from 1272 to 1280. Their Lordships think this presumption is a proper one, and, moreover, the findings of the two Courts being concurrent on a matter of fact they ought not

to be questioned. The non-production of papers by the defendants applied also to the land in the second suit. The High Court, on the evidence before them with regard to that, held that from 1272 the quantity of cultivated land in this suit was 293 bighas 6 cottahs. Their Lordships have seen no reason to think that this is not a proper finding. Certainly no ground has been shown for saying that it is wrong. The defendants appear to have endeavoured throughout the proceedings to defeat the execution of the decree for mesne profits, by not producing evidence which they had power to produce. The decree of the High Court ought to have put an end to protracted litigation.

"Their Lordships regard the present appeal as an abuse of the right to appeal to her Majesty in Council, and they will humbly advise her Majesty to dismiss it, and to affirm the decree of the High Court, which was made in accordance with the findings that have been stated. *It became unnecessary for the respondent to proceed with his cross-appeal, and their Lordships will humbly advise her Majesty that it should also be dismissed. It will be dismissed without costs, and the appellants in the principal appeal will pay the costs of that appeal, which are to be taxed and allowed as if there had been no cross-appeal.*" [*I. L. R.* 18 *Calc.* 540.]

Fuzul Karim and Another *v.*
Haji Mowla Buksh and Others.

[*Ex parte.*]

Bengal. Lord Hobhouse. *Feb.* 21, 1891.

Observance of ritual in a Mahomedan mosque. Alleged change of ritual by the celebrants. Right of other parties to carry on in the same building a somewhat different form of worship. Complaint that word "Amen" was spoken loudly instead of in a low tone; also, that the ceremonial gesture called *Rafadain, i.e.*, raising the hands to the ears at a particular point of the service, was practised. Mahomedan sects. "Second appeal"—Held that the observances were not in violation of

Sunni law or usage. High Court decision discharged, respondents to pay costs. The plaint was lodged by one Hafiz Mowla Buksh, the Imam (now deceased), and his two Mutwalis, all of them conductors of the ceremonies in a mosque. The appellants are the two Mutwalis, they sought to prohibit other persons (the respondents) from interfering with the services by having prayers themselves in the same mosque under an Imam appointed by themselves. The answer of the defendants, who originally were twelve in number, but now reduced by conversion to eight, while not denying that Hafiz Mowla had been Imam and Moazzin for twenty-five years, nor that the remaining appellants acted as Mutwalis, declared that the mosque was a Hanifi mosque, and had been so from time immemorial; that, formerly, the ceremonies in the mosque were carried on in the manner in which these ceremonies are performed by the followers of the Imam Abu Hanifa; and that, latterly, the plaintiffs refusing to follow that Imam became Wahabis and changed the ritual of the mosque. When the suit was first filed, it was dismissed on the ground that the dispute was not cognizable as a question of civil right. This finding was reversed by the Subordinate Judge, who remanded it back for trial. The remand was approved by the High Court. The suit was then tried *de novo* by the second Moonsiff of Mozufferpore, who found that the mosque was rebuilt twenty-five or thirty years ago by one Moulvi Abdool Wahab, by means of funds collected by the Mahomedans of that place, who were all Mahomedans of the Hanifa sect. He, further, held that no change in the ceremonial took place till seven or eight years ago, when certain young people who had been educated at Delhi began to preach a newer form of doctrine. The conclusion he arrived at was, that the plaintiffs had given up their old faith or creed, and that the defendants were at liberty to select an Imam of their own. On appeal, the Subordinate Judge reversed this finding, and on a question of fact his decision, being that of an appellate Court, ought, according to the Code of Civil Procedure, to be final. He was of opinion that the observances in ceremony of the plaintiffs were not acts that were forbidden, or that disqualified the plaintiff Imam from his office.

He granted the injunction to restrain the defendants (respondents) from causing interruption. The matter was then taken to the High Court, who set aside the decision of the lower appellate Court, and restored the decree of the second Moonsiff with costs. The Judicial Committee, having analysed the history of the mosque and its customary worship as well as the opinions of learned writers in Mahomedan law as to the legitimacy of certain ceremonial observances, considered the High Court ought not to have interfered with the finding of the first appellate Court. The more important passages in their Lordships' judgment were these:—

"All the parties are, or claim to be, Sunni Mahomedans. Hafiz Mowla Buksh says, 'I obey equally all the four Imams,' which is the mark of the Sunni school. . . . The High Court discharged the decree of the Subordinate Judge and restored that of the Moonsiff. They considered that the Subordinate Judge had addressed himself to matters which were altogether irrelevant, and had nothing to do with the suit, viz., whether it was lawful for Hanifis to pray behind Amil-bil-Hadis, whether Amil-bil-Hadis are respectable members of society, and whether it is lawful for them to perform the duties of an Imam. Their ground of decision is thus (*inter alia*) stated: . . . 'it appears to us that the Imam or Matwali should have performed his duties in the customary manner. It is for the plaintiffs to justify the change, and they have been unable to do so.'" The Judicial Committee proceed to say: "From that decree the present appeal is brought. . . . It is not apparent from the judgment of the High Court on what ground they considered that a second appeal was sustainable, or, in other words, what was the law, or usage having the force of law, which the Subordinate Judge had decided erroneously, or had failed to decide. The most obvious meaning of their brief judgment is that their decision is rested entirely on the peculiar constitution or trusts of the Tajpore mosque. But that is a question of pure fact, at least in this case where no written evidence is forthcoming; and the findings of the Subordinate Judge are conclusive in the High Court, and also in this tribunal. . . .

"Though it is not competent to their Lordships on this appeal to go behind the Subordinate Judge's findings of fact, they think it right to say that, for the purpose of examining the case from other points of view, it has been their duty to study the whole of the evidence, and that they entirely agree with the Subordinate Judge that there is no evidence whatever that the mosque was intended for Hanifis only, and not for all Sunnis or for all Mahomedans, or that an Amil-bil-Hadis (the particular school to which the plaintiffs were supposed by the Subordinate Judge to belong) is prohibited by its constitution from being its Imam.

"The judgment, however, may mean that there is some rule of law to the effect that when public worship has been performed in a certain way for twenty years, there cannot be any variance from that way, insomuch that the officiating minister who is guilty of a variance is *ipso facto* disqualified for his office. If that is the meaning of the judgment, their Lordships hold that it is not well founded in law. Indeed, it is not well founded in fact, because general uniformity of practice in the worship at this mosque is neither proved nor alleged, though the particular practices now objected to are comparatively recent. But passing that by, it cannot be that an Imam should be so bound by his own or his predecessor's previous practice in worship that he cannot make the slightest variation from it in gesture, intonation, or otherwise, without committing an offence. Even a code of ritual can hardly be so minute as absolutely to exclude all individual peculiarity or discretion. . . .

"Before quitting this point, mention should be made of a case cited from the Allahabad Reports, Vol. 12, p. 494, *Ata-Ullah* v. *Azim-Ullah*, in which the High Court of that province held that a mosque, being dedicated to God, is for the use of all Mahomedans, and cannot lawfully be appropriated to the use of any particular sect. The principle . . . has not been propounded by Mr. Doyne, nor do the facts of this case properly raise the question. . . . It does not appear that this mosque ever was intended to be appropriated to any particular sect. Their Lordships, therefore, express no opinion upon it.

"Turning to the question most discussed in the two lower Courts, it appears to be this—whether the introduction of the

loud Amen and Rafadain (which is the offence charged against Hafiz Mowla Buksh, and which is the reason why he calls himself Amil-bil-Hadis and his opponents call him Wahabi) shows such a change of tenets, or is in itself such an important departure from custom, as to disqualify the Imam from acting in a mosque where those ceremonies had not previously been used. If this question is to be answered in the affirmative, it must be on the ground either of general express rule of Mahomedan law, or of the growth of customs separating different schools in so marked a way that the followers of one school cannot properly worship with those of another.

"As regards general law their Lordships have not been referred to any authoritative code of ritual for Sunnis, such as is the statutory rubric of the Church of England. In the Hedaya there appears to be a long chapter or book on Prayer, which would probably expound the views of Abu Hanifa, and those of his two principal disciples Abu Yusuf and Abdoolla Mahommed, as they were understood in the sixth century of the Hegira. . . . So far as their Lordships have been informed there is no translation of it from the original Arabic; certainly there is none into English. Nor has any text been produced from any source to show that one who follows Abu Hanifa does any wrong in performing ceremonies recommended by the other Sunni Imams, or thereby cuts himself off from communion with other followers of Hanifa. There have been two cases in the High Court of Allahabad in which disputes have arisen about the intonation of the word Amen. One has already been referred to on another point. The other, in Vol. 7 of Allahabad Reports, p. 461, was a criminal case, the *Empress* v. *Ramzan*, and the decision turned on the question whether those who said Amen aloud said it in an indecent way, and with intention to annoy the others. In both cases Mr. Justice Mahmood entered at length into the question how Amen should be pronounced. He states that though Hanifa recommends a low tone, the other three Imams recommend a loud tone, and gives it as his opinion that though it is imperative to say Amen, there is no authority to regulate the tone of voice. In the later of the two cases the first Court treated both the loud Amen and Rafadain as open to all Sunnis

to practise. Their Lordships cannot find that there is any general law on the point for Mahomedans, or for Sunnis, and must hold that there is none. . . .

"The Sunnis follow the four Imams, who appear to agree in placing the sources of their law in the following order:—(1) *The Koran;* (2) *The Hadis*, or traditions handed down from the Prophet; (3) *Ijma*, or concordance among the followers; and (4) *Kias*, or private judgment. Beyond that the four differ in many details, including the loud Amen and Rafadain. No Imam can follow all four in everything. But the followers of any are equally orthodox Sunnis. . . ."

Their Lordships having enquired in detail into the evidence given below in this case thus conclude:—"It does not appear that a single one of the worshippers, except the defendants who appealed to the High Court, objects to the way in which Hafiz Mowla Buksh conducted the service. Against all this evidence of the opinions of learned and devout Mahomedans, and of the actual practice of Mahomedan worshippers, what is there on the other side? The evidence is an absolute blank. No book, no opinion, no practice of any community of worshippers is cited. There is no ground given to dissent from the findings of the Subordinate Judge, nor from his conclusion that the plaintiffs were entitled to relief. In one point he has followed too closely the prayer of the plaint. Paragraph (*d*) asks for a declaration that the plaintiffs have the authority to turn out the defendants when they interfere. *The Court ought not to make such a declaration. The plaintiffs must rely on the prohibitory order or injunction for which they pray, and must enforce it, as they may be advised, in each case that arises.* The High Court should have varied the Subordinate Judge's decree by refusing to grant the declaration asked by paragraph (*d*), and subject to that should have dismissed the defendants' appeal, with costs. That is the decree which their Lordships will humbly advise her Majesty to make now, in lieu of the decree of the High Court, which should be discharged. The respondents must pay the costs of this appeal."

[*L. R.* 18 *Ind. App.* 59; *I. L. R.* 18 *Calc.* 302.]

Muhammad Nawaz Khan and Another *v.* Alam Khan.

[*Ex parte.*]

Punjaub. LORD MORRIS. *Feb.* 28, 1891.

Dispute in a Mahomedan family with respect to their shares in immoveable property. Validity of an award. Was there *res judicata* by reason of the early proceedings of the litigation? Was there "same cause of action"? Judgment of the chief Court declaring against *res judicata* and upholding the award, affirmed.

The plaintiffs (appellants) are two of the sons of one Maddat Khan, who died in 1883, leaving four sons and the children of a fifth son him surviving. The defendant (respondent), Alam Khan, is one of the sons. The plaintiffs claim two-fifths of their father's property, moveable and immoveable. The moveable inheritance is not in dispute, the plaintiffs being clearly entitled to two-fifths thereof. They would be also *primâ facie* entitled to the same proportion of the immoveable property. After the death of Maddat Khan, the plaintiffs, for themselves and purporting to be guardians of the sons of their deceased brother, entered into an agreement, dated September, 1883, with the defendant, who also purported to be the guardian of his younger brother, Fatteh Khan, whereby it was agreed to appoint a private arbitrator for a decision of the dispute relating to their father's lands and the office of lambardar, and that Mian Sultan Ali, who was intimately connected with the circumstances of the family and was their pir, should act as the arbitrator, and they agreed to accept whatever the said Mian Sultan Ali might decide in respect of the dispute between them. The said arbitrator soon after made his award, whereby he found in effect that the plaintiffs were not to get any land of the deceased, except the portion given to them by him in his lifetime, and that the defendant, Alam Khan, should remain the owner of the whole of the remaining landed property. He also awarded to Alam Khan the office of lambardar.

The facts showed that Alam Khan applied to the extra-Assistant Commissioner, Mr. Homan, to have the award filed pursuant to sect. 525 of the Civil Procedure Code (Act XIV. of 1882). That official decreed that the award be filed. Against that decision the appellants appealed on several grounds: that Mr. Homan had no jurisdiction; that the award disposed of the lambardari, over which the arbitrator could have no jurisdiction; that there was misconduct on the part of the arbitrator. The Civil Judge held that the award could not be filed, by reason of the pecuniary limit of the lower Court's jurisdiction, and by reason of the lower Court having no jurisdiction to deal with the lambardari, and remanded the case to the Court of the Deputy Commissioner, Colonel Connolly, who transferred the case to the Subordinate Judge, Nawab Alladad Khan, who by his order of the 15th of December, 1885, decreed that the claim of the defendant, Alam Khan, to file the award should be dismissed. This Judge's grounds for his decree set forth that, in his opinion, the arbitrator had misconducted himself, inasmuch as the award was contrary to the custom of the parties and the Mahomedan law, and moreover, that he, the Judge, knew the arbitrator was an intimate friend of Alam Khan's, and that he had consequently made his award in Alam Khan's favour. When the plaintiffs (appellants) filed their plaint in the present suit, Alam Khan put in his written statement relying on the award. The Subordinate Judge re-affirmed his former judgment refusing to file the award, it being to his mind invalid. The respondent appealed to the chief Court of the Punjaub, and that tribunal reversed the previous findings, and declared the award valid. In supporting that judgment now, the Judicial Committee *inter alia* observed:—

"The first contention on the part of the appellants before their Lordships has been that the decree of the Subordinate Judge, dismissing the claim of Alam Khan to file the award, pursuant to sect. 525 of the Civil Procedure Code, has the effect, under sect. 13 of the same code, of a *res judicata*. It has been most strenuously urged before their Lordships, who cannot accede to it. Though the application under sect. 525 was

refused, that merely left the award to have its ordinary legal validity. . . . Can then the refusal to file, or of an application made to do so, have the effect that the award can never be relied upon in any suit relating to the subject matter dealt with by it? Their Lordships are of opinion that sect. 13 has not that effect. It enacts that 'no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.' Sect. 525 says that the application to file the award is to be registered as a suit. Assuming for the purposes of this argument that such an application is a suit such as is contemplated in sect. 13, what is decided in it? Only that the award ought not to be filed. That question is not raised in this suit, so that their Lordships have not to discuss how far the refusal is conclusive on that point, or how far the circumstance that one of the two matters referred was beyond the control of the arbitrator constitutes an objection to filing the award. In order to make the refusal to file an award a binding judgment against its validity on the ground of the partiality of the arbitrator, it would be at least necessary to show that the point was definitely raised and put in issue and made the subject of trial. The validity of the award as an award was never directly and substantially at issue in that application. In this action respecting the land alone, the award can be separated as to it from the office of lambardar. Consequently, their Lordships are of opinion that the contention of *res judicata* is unsustainable. The plaintiffs then rely on misconduct of the arbitrator. . . . . That contention seems to be mainly founded on an entire misconception of the agreement to arbitrate. It was not an agreement that the arbitrator was to be controlled in his decision by any custom or Mahomedan law or otherwise. It was an agreement to refer the matter in dispute generally to his decision. He appears to

have decided according to what he conceived was the wish and intention of the deceased Maddat Khan. He was within his right in so doing. Some criticisms have been offered on some of the reasons assigned by the arbitrator for arriving at his decision. These criticisms, even if justified, could not amount to any proof of misconduct. The arbitrator appears to have acted on the broad view of giving effect to the deceased's intentions. He was selected by reason of his knowledge of the circumstances of the family. Their Lordships see no ground for imputing misconduct to him."

[*I. L. R.* 18 *Calc.* 414; *L. R.* 18 *Ind. App.* 73.]

Maharani Surnamoyi *v.*

Maharaja Nripendra Narain Bhoop Bahadoor and Another.

Bengal. Sir Richard Couch. *March* 11, 1891.

Boundary case. Suit by respondents for possession of lands and mesne profits. Title to lands adjoining contiguous estates. History of previous disputes culminating in suits at law gone into and effect considered of a thak Amin's map. Effect also considered of recent diluviations in the course of the Dhulla river. The predecessor of the respondent was plaintiff and the defendant was the present appellant. Judgment of the High Court in favour of the respondents is affirmed by the Judicial Committee. The appellant to pay the costs of the appeal. *Inter alia* the Committee in their judgment say :—

"The present suit was brought to recover possession of the land which had been recovered in the suits Nos. 24 and 25 of 1859, and, except the time of dispossession, the only question now in the case is what are the boundaries of that land. There were two other suits brought also by Anundmoyi Debi (now represented by the respondents) against other defendants, and before the hearing the Civil Court Amin was ordered to report upon the boundaries of the disputed lands, and to prepare a

map of the locality. The Amin, on the 7th April, 1885, made a full report, accompanied by a map, in which two boundaries of mouza Subharkuti Kantagarha (the respondent's zemindari estate) were laid down, one marked by a dark red line, and called in the index the thak line, 'on the basis of the map of the decreed land and the line of the land decreed in cases Nos. 24 and 25 of 1859,' and the other marked by a light red line, and called the thak line, 'on the basis of the survey chunda of Keorpore.' The difference in them was mainly caused by a difference in the point which was the basis of the demarcation. . . . The Subordinate Judge, in his judgment on this branch of the case, appears to have thought both lines to be incorrect, but the light red the least so, and that it substantially agreed with the boundaries of Subharkuti, which are found from the decrees of Moulvi Itrat Hossein. He gave the plaintiff a decree for the three plots, and laid down the boundaries of them, saying that in doing so he was guided more by the decrees than the map. The boundaries laid down agree generally with the light red line. The defendant appealed to the High Court, and the plaintiff filed objections to the decree. The High Court in their judgment said that the main contention of the defendant was that the lower Court was wrong in rejecting the outline of mouza Subharkuti, as traced by the Amin in light red, and that the suit should have been decided on the basis of that outline; and for the reasons they stated they were not satisfied as to the correctness of the point on which the demarcation shown by the light red line was based. They were of opinion that the lower Court should have accepted the dark red line as practically correct, and decided the case with reference to it. They therefore discharged the decree of the lower Court, and made a decree awarding to the plaintiff so much of the disputed lands coloured yellow on the map as fall within the thak boundary of the mouza as shown by the dark red line. On the argument before their Lordships it was said by both the learned counsel for the appellant that the dark red line is the right one, except in plot No. 3, part of which, lying to the north, it was alleged had been rightly excluded by the Subordinate Judge from his decree.

Their Lordships have not seen any ground for this exception. In their opinion the dark red line was properly taken as the boundary of the three plots. They will therefore humbly advise her Majesty to affirm the decree of the High Court, and dismiss the appeal. The costs will be paid by the appellant."

[*P. C. Ar.*]

Musgrove *v.*
Chun Teong Toy.

Victoria. THE LORD CHANCELLOR (LORD HALSBURY).
March 18, 1891.

Constitutional law. Powers under the Victorian Chinese Acts of 1865 and 1881, to prevent the undue immigration of Chinese. "Act of State." The Judicial Committee reverse the judgment of the Full Court of the Supreme Court and pronounce a decision in favour of the Colonial Government, holding that the appellant, the Collector of Customs, had power, under the circumstances of this case, to prevent a Chinaman, the respondent, from landing in Victoria. The facts of the case, briefly stated, were as follows: A British steamer, the "Afghan," arrived in the port of Melbourne on 27th April, 1888, with 268 Chinese immigrants on board, being 254 more than the number which by statute could lawfully be brought in one vessel into Melbourne. The 2nd section of the Victorian Chinese Act of 1881 imposes a penalty on any owner, captain, or charterer of a vessel arriving with a greater number of immigrants than the law allowed, of 100*l.* a head for each Chinaman beyond the number. Sect. 3 prohibited any Chinaman from landing until 10*l.* had been paid to the customs officer in respect of him. When the "Afghan" reached Hobson's Bay, the captain "offered to pay, and was always ready and willing to pay" 10*l.* in respect of the respondent (the plaintiff) to the Custom House officer. That official refused to accept the 10*l.*, and the suit was then brought by the respondent, his plaint stating that the defendant refused to allow the plaintiff to land, and "hindered

and prevented him" from doing so. To quote from the judgment of the Judicial Committee: "The allegation of the tender of the 10*l.* is somewhat ambiguously worded. It may mean that 10*l.* was tendered separately for the plaintiff, which would seem to be its natural meaning; or it may mean that a gross sum was tendered for all the immigrants on board, including therefore the 10*l.* for the plaintiff; but it can make no difference, for reasons to be presently stated, in which sense the allegation is to be understood. With respect to the concluding allegation that the defendant hindered and prevented the plaintiff from landing, it seems to imply a duty in the Collector of Customs to receive the 10*l.* under the circumstances stated and described, and to allege as one of the consequences of a breach of that duty, that the plaintiff was thereby prevented and hindered from landing. It certainly does not seem to suggest any other hindering and preventing than that which was involved in refusing to receive the 10*l.*"

The statement of defence was what would have been described under a former system of pleading as a plea of confession and avoidance, and the demurrer admits every material allegation which is necessary for the determination of either of the separate defences which the statement of defence set up. That statement, in effect, was that the plaintiff was an alien, a subject of the Emperor of China, that he had arrived in a vessel conveying more than the regulation number of immigrants. The defendant (appellant) pleaded a justification under the orders of a Colonial minister claiming to exercise an alleged prerogative of the Crown to exclude aliens, and he denied the right of a Court of law to examine his action, on the ground that what he had done was a so-called act of state. By an order made in the action by consent, the action was to be determined by the decision of the Full Court on the argument of the questions of law raised in the pleadings. The majority of the Full Court gave judgment in favour of the plaintiff, although some of the Judges differed as to the invalidity of certain of the defences, all agreed that there was no question of an act of state. The Judicial Committee, as had been said, reversed the judg-

ment of the Supreme Court, holding that the Chinese Act of 1881 had been contravened. *Inter alia*, their Lordships observed:—

"It was urged on behalf of the plaintiff that the payment of 10*l.* provided for is made in each case on behalf of the immigrant, and that whatever may be the position of a master who has brought himself within the penal provisions of the second section of the statute, each immigrant is entitled to require that the Collector shall receive the payment made by or for him. Their Lordships are unable to adopt this construction of the statute, or to hold that its effect is to confer any such right as that suggested, where the act of bringing the intending immigrants into port by the vessel is a contravention of the law.

"Their Lordships have so far dealt with the case, having in view only the enactments of the Legislature of Victoria, and it appears to them manifest that upon the true construction of these enactments no cause of action is disclosed on the record. This is sufficient to determine the appeal against the plaintiff, but their Lordships would observe that the facts appearing on the record raise, quite apart from the statutes referred to, a grave question as to the plaintiff's right to maintain the action. He can only do so if he can establish that an alien has a legal right, enforceable by action, to enter British territory. No authority exists for the proposition that an alien has any such right. Circumstances may occur in which the refusal to permit an alien to land might be such an interference with international comity as would properly give rise to diplomatic remonstrance from the country of which he is a native, but it is quite another thing to assert that an alien, excluded from any part of her Majesty's dominions by the executive Government there, can maintain an action in a British Court, and raise such questions as were argued before their Lordships on the present appeal—whether the proper officer for giving or refusing access to the country has been duly authorized by his own Colonial Government, whether the Colonial Government has received sufficient delegated authority from the Crown to exercise the authority which the Crown had a right to exercise through the Colonial

Government if properly communicated to it, and whether the Crown has the right, without Parliamentary authority, to exclude an alien. Their Lordships cannot assent to the proposition that an alien refused permission to enter British territory can, in an action in a British Court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of this country to her self-governing colonies. When once it is admitted that there is no absolute and unqualified right of action on behalf of an alien refused admission to British territory, their Lordships are of opinion that it would be impossible upon the facts which the demurrer admits for an alien to maintain an action. Their Lordships, therefore, do not think it would be right on the present appeal to express any opinion upon the question which was elaborately discussed in the very learned judgments delivered in the Court below, viz., what rights the executive Government of Victoria has, under the constitution conferred upon it, derived from the Crown. It involves important considerations and points of nicety which could only be properly discussed when the several interests concerned were represented. For the reasons which have been submitted, and which are indeed involved in the very able judgment of Mr. Justice Kerferd, with which their Lordships gather that the Chief Justice concurred" (six judges formed the bench), "their Lordships will humbly recommend her Majesty that the judgment of the Court below be reversed, and judgment entered for the defendant in the terms of the consent order. There will be no costs of this appeal."

[(1891) *App. Cas.* 272; 60 *L. J. P. C.* 28.]

Tooth *v.*
Power.

New South Wales. Lord Watson. *May* 2, 1891.

Purchase of Crown lands in the name of an infant. Did the circumstances of the purchase create a trust in the infant for the

benefit of the purchaser? Claim by the purchaser for transfer. Construction of the conditional purchase clauses of the Crown Lands Alienation Act, 1861, 25 Vict. No. 1. Held that neither the appellant (the purchaser) nor the respondent (defendant in the suit) were statutory purchasers, and that no valid resulting trust had been created. Judgment below allowed to stand. No costs. *Barton* v. *Muir* (L. R. 6 P. C. 134), and *O'Shanassy* v. *Joachim* (1 App. Cas. 82) distinguished.

The facts of the case may be summarized thus. The appellant (plaintiff) is the occupant of a run in the county of Auckland, parts of which were liable to be taken up by selectors under the Crown Lands Alienation Act, 1861, and the Lands Acts Amendment Act, 1875 (39 Vict. No. 13). On the 17th November, 1871, he entered the name of the respondent, then an infant of six years, in the Land Agent's register as the conditional purchaser of 100 acres of land forming part of his own run, and on the 15th August, 1873, he added to the purchase previously made by him in the defendant's name sixty-four adjoining acres of the same run under the provisions of sect. 21 of the Act of 1861. The plaintiff paid the deposit money for both parcels and made the requisite statutory improvements at his own expense. Certain leading provisions of the 1861 Act were:—(1) any person (sect. 13) could tender for the conditional purchase of not less than forty or more than 320 acres of land at the price of 20*s*. an acre, along with a deposit of twenty-five per cent. of the purchase money; (2) sect. 18 lays down that on the expiry of three years from entry or within three months thereafter the balance of the purchase money shall be tendered at the office of the Colonial Treasurer, together with a declaration "that such land has been from the date of occupation the *bonâ fide* residence, either continuously of the original purchaser or of some alienee . . . . of his whole estate and interest therein," and that no alienation has been made until after the *bonâ fide* residence thereon of such holder for one year at the least. When all these requirements are completed a fee simple is granted. (3) By sect. 16 the occupation of the conditional purchaser must commence within one month from the purchase.

The respondent at the time of purchase lived with parents

who were servants in the employ of the appellant. To quote from the judgment of the Judicial Committee:—

"This appeal . . . . involves the consideration of the conditional purchase clauses of the Crown Lands Alienation Act of 1861 . . . . and the question which it raises would have been one of general importance had the leading enactments of these clauses not been in effect superseded by the provisions of the Lands Acts Amendment Act, 1875 (39 Vict. No. 13). . . . It appears to be the fact that, for at least three years following November, 1871, the defendant was taken by his mother from his father's house to a dwelling of some kind on the selected land belonging to the plaintiff, and there resided with her. The plaintiff alleges that the defendant was taken there at his request, which seems probable; and the defendant, whilst not admitting the allegation, gives no explanation of how he came to be there. The defendant attained majority in 1885, but does not appear to have asserted that he had any personal interest in the selection until March, 1888, when he tendered payment of interest upon the balance of purchase-money, and was informed by the Land Agent that it had already been paid by the plaintiff. He then attempted to sell his interest as selector, whereupon the plaintiff brought this action, in which he claims to have the defendant declared to be trustee for him of both conditional purchases, and ordered to transfer to him; or, otherwise, to have the defendant restrained from alienating except to the plaintiff.

"The Primary Judge in Equity gave the plaintiff a decree in terms of the first alternative of his claim; but his decision was reversed on appeal by the Full Court, consisting of his Honour the Chief Justice, with Stephen and Windeyer, JJ., who dismissed the action, with costs. The learned Judge in Equity, and in the Appeal Court the Chief Justice, were of opinion that there was a resulting trust in the defendant for behoof of the plaintiff. The majority of the Full Court held that the transactions of the plaintiff with regard to the conditional purchase of the land in question did not comply with, but were a mere attempt to evade, the conditions of the Act of 1861, and could not therefore raise any statutory right either in the plaintiff or in the defendant."

The Judicial Committee endorsed the decision below, and in doing so made the following remarks:—"The Act of 1861 gives the privilege of conditional purchase to 'any person,' and the amending Act of 1875 (sect. 6) declares that these words shall, 'in respect to conditional purchases applied for and made previous to the passing of this Act, be held to mean and include any person, whether under or over the age of twenty-one years.' Their Lordships do not doubt that, under these enactments, an infant of maturer years might personally apply for and complete a conditional purchase of Crown land. Nor do they question the authority of the Colonial cases which were before this Board in *O'Shanassy* v. *Joachim* (1 App. Cas. 82), in which very young children were held to have become purchasers, they residing with their parent upon the selection, and the parent making improvements and paying the purchase money by way of advancement to them. It is quite consonant with legal principle that what is done in the name and in the interest of an infant by one who stands *in loco parentis* shall be held to have been done by the infant himself, so as to constitute compliance with the Act sufficient to create a valid interest in him; but it does not follow that what is done by a stranger, in name of an infant, for his own behoof, and with no intention of benefiting the infant, can be regarded as fulfilment by the latter of the statutory conditions.

"Upon the facts of this case, their Lordships have come to the conclusion that the proceedings taken by the plaintiff with the view of creating a right of conditional purchase in the infant defendant as trustee for him were simply a colourable attempt to comply with the provisions of the Act. There does not appear to them to have been substantial compliance with any one of the conditions which the Act prescribes. The deposit was neither paid by the defendant nor on his account. The statutory improvements were not made by the defendant nor for his benefit. And, in these circumstances, their Lordships are unable to hold that the three years' residence of the defendant upon the selection before he was ten years of age, whether that residence was at the instigation of the plaintiff or not, could constitute the

bonâ fide residence of a selector within the meaning of sect. 18 of the Act."

The Committee then made the following important observations with respect to the judgment given in *Barton* v. *Muir* by their Lordships' Board many years back. The observations appeared all the more necessary as certain of the Judges below considered that the decision therein governed this case.

"It appears from the judgment delivered by the learned Chief Justice that he and the Primary Judge in Equity would have agreed with the majority of the Full Court, had they not been constrained to decide otherwise by the authority of *Barton* v. *Muir*. The circumstances of the present case differ so widely from the facts with which this Board had to deal in *Barton* v. *Muir* as to render it unnecessary for their Lordships to enter upon a critical examination of the reasons assigned for its decision. In that case the defendant was of full age, and all the conditions prescribed by the Act were performed by him voluntarily and personally, and not by another individual under cover of his name. Their Lordships think it right to add that, although, for obvious reasons, the case of *Barton* v. *Muir* was relied on as an authority absolutely binding upon them by both parties at the bar, yet it would have been their duty, had the necessity arisen, to consider for themselves whether the decision is one which they ought to follow. It was given *ex parte;* and that being the case, although great weight is due to the decision of this Board, their Lordships are 'at liberty to examine the reasons upon which that decision was arrived at, and if they should find themselves forced to dissent from these reasons, to decide upon their own view of the law.' These are the words used by Earl Cairns when delivering the judgment of the Board in *Ridsdale* v. *Clifton* (L. R. 2 P. D. 306), which contains a full exposition of the law upon this point.

"Their Lordships will humbly advise her Majesty that the judgment appealed from ought to be affirmed. The defence set up by the respondent has not been meritorious. He attempted but has failed to show that any right of conditional purchase vested in him, and if he had succeeded in establishing that pro-

position he would not have been in a position to resist the claim of the appellant. Some costs ought to be allowed to a party who has been compelled to oppose an improper decree being made against him. Possibly the more logical course would be to deprive the defendant of costs in the Court below, and give him costs here, but it appears to their Lordships that justice will be done by permitting the decree of the Full Court to stand, and allowing no costs of this appeal."

[(1891) *App. Cas.* 284; 60 *L. J. P. C.* 39.]

Wagid Khan *v.*
Ruju Ewaz Ali Khan.

Oudh. LORD MORRIS. *May* 5, 1891.

Deed of gift and endowment. Alleged undue influence in obtaining it from an aged Purda Nashin lady. Revocation. Judgment of the Court below affirmed with costs. The facts of the case were as follows. The suit was brought by the appellant Wajid Khan, the son of one Dalmir Khan, seeking to have a declaration of right to possession of villages under a deed or will of 21st June, 1865, purporting to have been executed by Rani Sadha Bibi, widow of Raja Ali Baksh, in favour of the said Dalmir Khan. The two Courts below, before whom the case came, decided that the document was executed under circumstances in which it could not be supported. Dalmir Khan, the record showed, held a highly fiduciary position in regard to the Rani, who was sixty-five years of age and comparatively illiterate. Dalmir was her counsellor, and had great influence over her, for one of the exhibits in the case is a will made by her in his favour in 1862, only three years before the execution of the document now in question. The Judicial Committee in their judgment said that Dalmir Khan filled such a position towards the lady "to render it incumbent upon him to show that he had made a proper use of the confidence reposed in him by her, and that the execution of the document, granted without any valuable consideration and from which he obtained

important pecuniary benefit, was free from all attempt at undue influence. In the opinion of their Lordships the onus lay upon him to do so; because although the deed of 1865 at first provides that this lady sets apart twenty-nine villages of her patrimony, producing a rental of Rs. 9,993 a year, to defray the expenses of her tomb and that of her deceased husband, it goes on to say that Dalmir Khan, her managing agent, shall have the management of the endowment in perpetuity, generations after generations, and that under every circumstance he shall have full power for good or for evil. Dalmir Khan thus became the person substantially interested, because, looking at the facts of the case, it would appear that a comparatively small portion of this large fund could be annually allocated to the expenses of the tomb, and that a large surplus would each year remain in his hands. . . . Their Lordships are clearly of opinion that this instrument is one that cannot be sustained; that it is not a *boná fide* instrument. . . . Then it is said that although Rani Sadha Bibi revoked this deed in 1872 by a registered petition, it was a deed *in præsenti* which could not be revoked, at all events in so far as the endowment was in the nature of a dedication of her property to the expenses of her husband's and her own tomb, and that the petition itself recognized at that time the continuing existence and validity of the endowment. But if the instrument was bad in the beginning, at all events as regards the benefit which Dalmir Khan took under it, it is difficult to see how his representative is prejudiced by its revocation in 1872, which if valid puts an end to the instrument, and if invalid could not set up an instrument that was bad in itself. Their Lordships are clearly of opinion that the instrument was bad *ab initio;* that it was improperly obtained by a person in a fiduciary character; and that even if there were no onus on Dalmir Khan's representative to prove the honesty of the transaction, all the facts of the case go to show that there was active undue influence." Appeal dismissed, with costs.

[*L. R.* 18 *Ind. App.* 144; *I. L. R.* 18 *Calc.* 545.]

Bucknell *v.* Vickery.

New South Wales. Lord Hobhouse. *May* 9, 1891.

Mortgagor and mortgagee. Dispute over the settlement of accounts on redemption of mortgaged property. Ought commission to be charged by the mortgagee in possession? Effect of an agreement. The appellant, who represents the plaintiff below, is entitled to the equity of redemption. The respondent, defendant below, was mortgagee as transferee of two mortgages of the plaintiff's property. The question in this appeal had its origin in respect to the second of these mortgages. The deed, which was made on March 26, 1868, stated that the mortgagor had borrowed 14,251*l.*, and had given the mortgagee a promissory note for 15,500*l.*, payable six months after date. It contains a proviso for redemption if the mortgagor shall pay the promissory note at maturity, and any further advances, "together with interest and commission at the rate hereinafter mentioned," and also if he shall duly observe the other conditions of the deed. Amongst other things, it is agreed that the promissory note when due, and all other moneys due on the mortgage, shall carry compound interest at 10 per cent., with half-yearly rests; "and that the said mortgagor will pay to the said mortgagee a commission of two pounds ten shillings per centum per annum upon any renewal or renewals of the said promissory note which the mortgagee may accept, and an equal commission" upon further advances.

The plaintiff did not pay off the mortgages; and either by reason of default in payment or of some other default, the defendant entered into possession of the mortgaged property on the 17th March, 1869. On the 31st July, 1869, an agreement was entered into between the parties that the amount due on the two mortgages on the 31st March, 1869, should be taken as 33,000*l.* It has been ascertained in the present litigation that of this 33,000*l.* the sum of 25,500*l.* is to be apportioned to the

second mortgage. In February, 1873, the plaintiff brought a suit for redemption of his mortgages which the defendant opposed on the ground that his possession was that of an owner and not of a mortgagee. The Primary Judge decided in favour of the plaintiff, and on the 26th February, 1875, made the decree under which the mortgage accounts are now being taken. The defendant appealed to the Full Court, who dismissed his appeal, and then to her Majesty in Council, who also dismissed his appeal on the 26th July, 1877.

The Judicial Committee in their judgment given now point out that there would seem to have been some miscarriage over the taking of the accounts, for in March, 1882, the Court ordered that the consideration of the debtor and creditor account should be re-opened, and declared that it ought to commence with the debit item of 33,000*l.* on the 1st March, 1869; and it was referred to a Mr. Littlejohn to take the accounts directed by the decree of 1875. On the 13th April, 1882, Mr. Littlejohn reported that the plaintiff had propounded certain queries which he had answered. One of them was whether Mr. Vickery was entitled to charge any commission at all, and if so, what. On which Mr. Littlejohn found that he was entitled to charge 2½ per cent. upon any renewal or renewals of promissory note by the plaintiff under the second mortgage. Afterwards Mr. Littlejohn made a further report on the 21st August, 1882. He stated that the plaintiff's solicitor had put a further question as to commission, in answer to which he found that the defendant was entitled to charge commission at the rate of 2½ per cent., at intervals of six months, from the 1st March, 1869, upon the account beginning with 20,500*l.* on that date. This answer appears to be founded on a statement made by the defendant on the 18th April, 1882, for the first time alleging an oral agreement that commission should be so charged. This question of commission was so important that it was thought better not to proceed with the accounts till it should be finally determined by the Court. The matter was at once taken before the Primary Judge, who thought the defendant was not entitled to commission, and ordered accordingly. The defendant appealed to the

Full Court, who by a majority confirmed Mr. Littlejohn's finding. On appeal now the Judicial Committee held that the decision of the Primary Judge was the more correct one.

"It seems to have been one of the main arguments for the plaintiff in the lower Court that commission could not be claimed by a mortgagee in possession, or under the usual mortgage accounts. The learned Judges (of the Full Court) rejected this contention, and their Lordships concur with them. If the contract between the parties entitles the mortgagee to commission on any ground, he can claim it, either in taking the account of what is due on his mortgage, or under the head of just allowances. But here the mortgagee is seeking to charge commission by setting up a new and separate contract, which though now alleged to be made long before the suit, was not proved or alleged when the decree was made. Nothing was referred to Mr. Littlejohn but to take the accounts directed by the decree. . . . The material terms of the mortgage have been stated already. They do not entitle the mortgagee to any commission except the commission of 2½ per cent. upon any renewal of the mortgagor's promissory note which the mortgagee may accept, and upon further advances. Nothing is said in these proceedings as to further advances. There was no renewal of the promissory note subsequent to the agreement of July, 1869, when the parties stated an account and ascertained the balance due. The main reason which led the learned Judges of the Full Court to decide in favour of the commission was that, as long as the defendant did not demand payment, the plaintiff was placed in as beneficial a position as if the note had been actually renewed. But their Lordships find themselves unable to concur in that view. As long as the note was running there could be no default in payment, and the mortgagee could not take possession on the ground of such default, nor put in force any other remedy for his debt. Moreover, if he had renewed the note, he could not possibly have claimed any other title than that of mortgagee. Now not only did he take possession, for what precise cause does not appear, but he claimed to have that possession as absolute owner, and it was only after a long

litigation that the plaintiff was able effectually to assert his right to redeem. It is quite true, as the learned Chief Justice says, that the fact of the mortgagee taking possession does not deprive him of any of his rights under his mortgage. But he is contending that he did, not what the mortgage says shall shall entitle him to commission, but something equivalent. And the fact of his taking possession and alleging that he held it as owner is destructive of his present contention, because it shows that what he did was something quite different from, and indeed inconsistent with, the renewal of the note. Their Lordships must hold that, as there has been no renewal in fact since the settled account, and nothing equivalent to a renewal, the defendant's contract does not entitle him to the commission which he claims."

Order of the Full Court discharged, appeal to that tribunal dismissed with costs, and order of the Primary Judge restored. Respondent to pay costs of the appeal. [*P. C. Ar.*]

Mootiah Chetty and Others *v.* **A. V. Soobramonian Chetty** and Others.

Rangoon. MR. SHAND [LORD SHAND]. *June* 9, 1891.

Disputes over partnership shares. Effect of new agreement.

The parties were all members of the Madura (Madras) family of the Chettys, who were engaged in banking business carried on in Rangoon. The litigants were heirs and representatives of the earlier partners. The three respondents (as plaintiffs) filed the suit in December, 1882, for a declaration of partnership accounts with interest, they being the representatives of one Subramaniem Chetty, who died in 1864, against the defendants (appellants) representing Peria Curpen Chetty and his son-in-law, Sethumbram Chetty, who had carried on the bank from 1863 to 1869. The principal appellant (on behalf of himself and his brothers) admitted the earlier partnership and the execution of an adjustment of liabilities and engage-

ments in 1869, but denied that there had been created a new partnership, or an alteration in shares affecting the participators relatively. They contended that the old business and the same shares had been carried on until the death of Sethumbram Chetty in 1877, and that no interest should have been awarded to the plaintiffs by the Recorder, as it had been. The first decree below declared that a new arrangement had been established in 1869, and shares under that new arrangement were described—a certain amount to be apportioned to charity. The second decree endorsed the finding of the lower Court for an account, and in addition awarded interest at 12½ per cent. to the respondents, upon the amounts found to be due upon the shares from the closing of the business. The Judicial Committee reported to her Majesty that the decrees below ought to be affirmed with costs, including the award of interest to the plaintiffs, and in their report observed as follows:—

"*The appeal raises no point of law.* The question is one of fact to be determined entirely on the evidence written and parole adduced before the Court in Rangoon. Their Lordships having heard a full argument and considered that evidence, have found no reason for holding that the judgment of the Court of Rangoon, in favour of the plaintiffs, ought to be set aside. They are further of opinion that the judgment is sound, and in accordance with the great preponderance of the evidence. This being so, it is unnecessary to go over in detail the matters on the proof bearing on the question of the alleged new arrangement in 1869, for a modification of the shares of the partners in the future capital and profits of the business. Their Lordships are satisfied that the Recorder was right in finding it to have been proved that there was such a new arrangement in that year, and that to the effect alleged by the plaintiffs. . . . .

"Their Lordships are also of opinion that it has been proved that the deed making the new or modified arrangement was acted on by the parties, first, by the withdrawal by Sethumbram Chetty of the surplus capital beyond 16,000 rupees, representing his four shares in the business after 1869, or at least of the greater part of that surplus, and by the other partners making

up and putting into the business the sums required to complete their shares; and, secondly, by the partnership accounts made up seven years after the new arrangement was made, in accordance with which the profits were ascertained and divided. It may be added that the new arrangement appears to have been only a natural and reasonable one; . . . and it is difficult, if indeed possible, to reconcile the actings of the partners in their dealings with their accounts after 1869,—the withdrawal by Sethumbram Chetty of 7,000 rupees from the business, and the payment in of sums by the other partners to make up their capital,—with the view maintained by the defendants that the interests of the partners were not to undergo any change."

Appeal dismissed, with costs *to be paid to the respondents who have appeared.* [*I. L. R.* 18 *Calc.* 616.]

Lall Chand and Others *v.*
The Agra Bank, Limited.

Bengal. SIR RICHARD COUCH. *June* 13, 1891.

Cheque handed in to bank for payment by the servant of a trading company, who were customers. Was payment for the cheque paid to the servant or not? Opposing decisions below. The question was one of fact only depending wholly upon evidence, viz., Whether a cheque drawn by a firm of MacNeill & Co. upon the respondent bank, payable to the appellants or their order, for Rs. 15,000, was paid to one Sewlall, the servant of the appellants? The cheque was received by the appellants on the 14th August, 1888, and on the following day they indorsed it in blank, and delivered it to Sewlall, who presented it at the bank for payment. The bank admitted that the cheque was presented, and they further, in their written statement, said that the money was paid to Sewlall. Much depended upon the evidence given by the various witnesses called, viz., servants of the bank on the one side, and a Mr. Leslie (the attorney representing the appellants) and Sewlall himself on the other. The Judicial Committee, having considered carefully the whole of the evidence forthcoming, reversed the decision of the High

Court, which was in favour of the bank, and affirmed that of Mr. Justice Norris, before whom the case first came, and who had decided that the money had not been paid to Sewlall. The Judicial Committee, in the course of their judgment, refer to the findings of the First Judge, particularly animadverting on the reasons for his decision.

"As regards the demeanour of the witnesses," Mr. Justice Norris (after saying that he believed Mr. Leslie implicitly) says of Sewlall, "He gave his evidence in a manner which impressed me most favourably, his answers were straightforward and to the point, he showed no sign of prevarication, he was unshaken in cross-examination." Of Mohendro, one of the bank's servants, he says, "I do not believe this witness. He appears to me to have got up his story, to have rehearsed his part. The same observations apply to the evidence of Grees Chunder Paul. I do not believe him; I think he was swearing by the card."

The Judicial Committee cannot agree with the learned Judges who heard the case on appeal that the alternative was simply whether servants of the bank misappropriated the money, or Sewlall made a misstatement when he said he was not paid. "There was another possible alternative, viz., that by mistake or inadvertence" (in the plenitude and hurry of business) "one of the poddars had paid the wrong person. . . .

"Their Lordships are of opinion, upon a full consideration of the evidence, that the decree of Mr. Justice Norris should not have been reversed, and they will humbly advise her Majesty to reverse the decree of the Appellate Court, to dismiss the appeal to that Court, with costs, and to affirm Mr. Justice Norris's decree. The respondents will pay the costs of this appeal.

[*L. R.* 18 *Ind. App.* 111.]

Pollard *v.*
Harragin.

Trinidad and Tobago. SIR RICHARD COUCH. *June* 13, 1891.

This appeal (brought by special leave) related to an action by a member of the Bar practising in the Colony, against an acting

stipendiary magistrate for alleged assault and battery and false imprisonment, and claiming 600*l.* as damages. Were there irregularities in the judicial procedure which followed the issue of the writ? *Per contra*, was a discontinuance of the action at a certain stage valid? Construction of the Rules under the Trinidad Judicature Ordinance, No. 28 of 1879. Order and proceedings below, except so far as a demurrer was overruled, set aside and a new declaration made. Particular direction as to costs.

The material facts are dwelt upon in the judgment of the Judicial Committee. The writ was issued by Mr. Pollard on the 28th of October, and the statement of claim on the 31st of October, 1889. On the 8th of November the defendant, Mr. Harragin, in his statement of defence, pleaded not guilty by statute. On the 25th of November the plaintiff demurred to the defence, on the ground that the section or sections of the Ordinance referred to in it had not been inserted in the margin, and on other grounds, and gave notice to the defendant that the demurrer was set down for argument on the 27th of November. The demurrer came on for argument on the 29th of November before Mr. Justice Lumb, who made the following order :—" Upon hearing what was alleged on both sides, the Court doth order that the said demurrer be overruled, with costs to be paid by the said plaintiff to the said defendant; and doth further order that the said plaintiff do deliver to the defendant, before 4 o'clock p.m. this day, a reply to his statement of defence; that the case be set down for trial on Monday, the 2nd day of December, 1889, and that the said defendant do accept short notice of trial."

The Judicial Committee in their judgment make the following among other observations :—

"The rule under which this order was made is rule 12 of Order XXVIII., which is :—' Where a demurrer is overruled the Court may make such order and upon such terms as to the Court shall seem right for allowing the demurring party to raise by pleading any case he may be desirous to set up in opposition to the matter demurred to.' The 29th of November

was Friday, the following day was a half holiday, then came Sunday, and thus the plaintiff had no time to prepare for the trial. And it is to be observed that by Order XXIV. r. 1, the plaintiff had three weeks after the defence had been delivered to deliver his reply, and the 29th of November was the last day of the three weeks. The defendant was therefore not in a worse position than if the plaintiff instead of demurring had delivered the reply on the last day allowed to him for it. The meaning of rule 12 appears to be that where the real merits of the controversy have not been disposed of on the demurrer, the Court should make such an order as would allow them to be properly tried. The order for trial on the Monday went very far, if not entirely, to prevent this, as far as the plaintiff was concerned. And it does not appear that the learned Judge had before him any ground for making so peremptory an order. By Order XXXVI. rr. 3, 4, actions are to be tried and heard either before a Judge or Judges, or before a Judge and jury, and the plaintiff may with his reply, or at any time after the close of the pleadings, give notice of trial of the action, and thereby specify one of those modes of trial. By rule 6 a party to whom notice of trial is given may move the Court to appoint a different mode of trial from that specified in the notice of trial, upon giving notice of motion within four days from the time of the service of the notice of trial. If the case was to be heard on the Monday these rules could not be followed, and the effect of the order was practically to deprive the plaintiff of having a trial by jury, apparently without any argument upon that matter.

"The plaintiff on the day on which the order was made gave notice to the defendant that he discontinued the action. This he was not at that stage of the action at liberty to do, and the discontinuance was altogether invalid.

"On the 2nd of December the case came on for hearing before Mr. Justice Lumb. The defendant appeared by counsel; the plaintiff did not appear. Order XXXVI. r. 18, says, 'If when an action is called on for trial the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action.'

There was no counter-claim here, and it appears from the Judge's notes that the defendant's counsel claimed that the defendant was entitled to judgment under that rule. The learned Judge, instead of dismissing the action, took the evidence of the defendant and his witnesses, and then gave judgment for the defendant, with costs. No reason appears in the Judge's notes for this very irregular proceeding. Their Lordships will only observe that the evidence taken appears to them to be such as it would be proper to submit to a jury, and the plaintiff might be seriously prejudiced by not having a trial by a Judge and jury. On the 13th of December the plaintiff made an affidavit that the trial of the action was fixed for the 2nd of December without his consent, and on the 17th of December he moved the Court, consisting of the Chief Justice and another Judge and Mr. Justice Lumb, by counsel, for an order to set aside the judgment as irregular. The defendant's counsel objected that the motion was really an appeal from a judgment, and that notice of appeal had not been properly given. The Court, after hearing arguments, allowed the appellant to put his motion in form as an appeal, by affixing the stamp fee for appeals, and the case to be heard as an appeal, the respondent not further objecting. After hearing the appellant's counsel the Court held that the order of the 29th of November was a proper order under Order XXVIII., r. 12; and as to the objection that judgment was entered up before the time for setting the action down for trial had elapsed and without any notice of trial, the Court held that the Judge had ample discretion under Order LVII., r. 6. That rule is, 'A Court or a Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging or abridging time for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require.' Their Lordships doubt whether this rule is applicable where a demurrer is overruled and an order made for allowing the demurring party to plead. If it is, and assuming that it gives the fullest discretion to the Judge, they are of opinion that the discretion was in this instance improperly exercised, so as to constitute a

substantial denial of justice. The intention of rule 6 appears to their Lordships to be that the demurring party shall not be concluded by a judgment on demurrer, which does not decide the case on the merits. The plea of the defendant did not state any facts, and none were admitted by the demurrer. The plaintiff ought to have been allowed to raise by pleading his case on the facts, and to have had a reasonable time for proceeding to trial. By Order XXXVI., r. 5, the plaintiff is allowed six weeks to give notice of trial, and that is a ten days' notice. If short notice of trial may be given that is a four days' notice. These provisions, as well as those in the rules, as to the mode of trial appear to have been entirely disregarded in the order of the 29th of November, 1889. Their Lordships are of opinion that this order, except so far as it overruled the demurrer with costs, should be set aside, that the judgment of the 2nd of December, 1889, and subsequent proceedings should also be set aside, and that the defendant should pay to the plaintiff his costs incurred in the Court below subsequently to the order of the 29th of November, 1889. The plaintiff should have leave to reply to the defendant's plea within three months from the date of her Majesty's Order in Council upon this appeal, and to proceed to trial according to the practice of the Supreme Court. Their Lordships will humbly advise her Majesty accordingly. The respondent will pay to the appellant his costs of this appeal, but from the date on which the appellant was permitted to proceed with his appeal *in formâ pauperis* his costs will only be allowed on that footing." In this case after the special leave to appeal had been granted in the ordinary way, a fresh application was made that the appeal might proceed *in formâ pauperis*, and this was permitted.

[(1891) *App. Cas.* 450; 60 *L. J. P. C.* 63.]

The Irrawaddy Flotilla Company, Limited *v.* Bugwandass.

Rangoon. LORD MACNAGHTEN. *July* 4, 1891.

Action to recover the value of cotton destroyed by a fire on board a steam-ship. Were the shippers of the goods bailees under the Indian Contract Act IX. of 1872, or carriers under the Indian Carriers Act III. of 1865? Was there negligence? In December, 1888, the respondent delivered to the appellants at Myingyan, 195 bales of cotton for carriage by the appellants' steamer to Rangoon. The goods were totally destroyed by fire on board the vessel. In March, 1889, the respondent brought his suit alleging negligence and carelessness on the part of the appellants' servants. The defence was that the appellants only undertook to take such care of the goods bailed to them as is defined by sect. 151 of the Indian Contract Act; that by sect. 152 they were not liable for the loss of goods so bailed, and denied negligence. The Court of the Recorder pronounced a decree in favour of the respondent for Rs. 3,315 as damages.

The question raised in this appeal was whether common carriers were, by reason of the provisions of the Indian Contract Act, relieved from the liability of insurers answerable for the goods entrusted to them for loss not caused by the act of God or the Queen's enemies. Considerable argument was necessary because the same point was brought before the High Court of Calcutta in *Moothoora Kant Shaw* v. *The India General Steam Navigation Co.* (I. L. R. 10 Calc. 166), and the Court came to the conclusion that the liability of common carriers was not affected by the Act of 1872, and the Recorder below considered he was bound by that finding. The point had also been taken in a Bombay case, *Kuverji Tulsidass* v. *The Great Indian Peninsular Railway* (I. L. R. 3 Bomb. 109), but the Judges there took a view contrary to the Calcutta decision. The Judicial Committee now endorsed the view of the High Court, Calcutta, approved by the Court of the Recorder, and dismissed the appeal, with costs. Appellants to pay costs. Their

Lordships came to the conclusion that in India the duties and liabilities of carriers were governed on the principles of the English law which had been introduced into that country and were recognized in the Indian Carriers Act of 1865; that the responsibility of the carrier did not originate in contract, but is cast upon him by reason of his public employment for reward; and that the law of carriers partly written and partly unwritten remained as it was before the passing of the Contract Act. The Judicial Committee *inter alia* observed: "Had it been intended to codify the law of common carriers by the Act of 1872, the more usual course would have been to have repealed the Act of 1865 and to re-enact its provisions, with such alterations or modifications as the case might seem to require. It is scarcely conceivable that it could have been intended to sweep away the common law by a side wind, and by way of codifying the law to leave the law to be gathered from two Acts, which proceed on different principles, and approach the subject, if the subject be the same, from different points of view." In the course of their judgment, their Lordships cited the words of Dallas, C. J., in the case of *Bretherton* v. *Wood* (3 B. & B. 62), "A breach of this duty (the carrier's duty) is a breach of the law, and for this breach an action lies founded on the common law, which action wants not the aid of a contract to support it."

[*L. R.* 18 *Ind. App.* 121; *I. L. R.* 18 *Calc.* 620.]

Donnelly and Others *v.*
Broughton.

New Zealand. Lord Watson. *July* 4, 1891.

Two wills of a Maori chief. Was the last alleged will, which was of an informal character and signed with a mark only, genuine? Laws of evidence applicable to the case. The first Court, that of the Probate Judge, declared that the last will of the Maori purporting to be made on the Maori's death-bed, which ran thus, "The persons for my will are Airini and her younger brothers and sisters and their children. Renata X Kawepo," was duly executed. The Court of Appeal reversed

that finding and granted probate of another will, dated more than a year before, to the respondent. The Judicial Committee now affirmed the judgment of the Court of Appeal and dismissed the appeal, with costs. The controversy over the two wills, to quote from their Lordships' judgment, had its origin thus:—The Maori chief, who left estates real and personal, died childless at an advanced age in April, 1888. "The appellants, defendants in the original suit, are Mrs. Airini Donnelly, who is of pure Maori blood, her infant daughter Maud Donnelly, her two Maori brothers and their infant children, and her two sisters. Mrs. Donnelly is the grand-niece of the deceased, by descent from his sister-uterine; and, according to native custom, is the legal successor to his property and tribal position. She was brought up by him in a manner befitting her rank, and had the management of his household until the year 1878, when she was married to her present husband, George Prior Donnelly. Her intermarriage with a foreigner gave great offence to the old chief, and led to an estrangement, which was aggravated by Mrs. Donnelly appearing in the Land Court as a rival claimant of unsettled territory which Renata was desirous of having adjudged to himself. In the beginning of the year 1888 Mrs. Donnelly consented to withdraw her opposition to her grand-uncle's claim; and, in consequence of that concession, a reconciliation took place, about a month before his death. The respondent, William Muhunga Broughton, plaintiff in the Court below, is a distant relation of the deceased, being the half-caste son of Te Oiroa, the great-grand-daughter of the sister of Renata's maternal great-grandfather. After the marriage of Mrs. Donnelly he lived with the chief until his decease, and took an active part in the management of his property and affairs.

"The respondent, on the 24th April, 1888, filed a summons in the Supreme Court of New Zealand, in order to obtain probate of a will executed by Renata on the 12th January, 1887. By the terms of that instrument the deceased appointed the respondent to be his sole executor, and declared that all his property, real and personal, should absolutely belong to the respondent, subject always to the trusts and directions therein expressed."

Certain of these provided for the maintenance, &c., of two wives left by the testator, and the welfare of other persons, his "Hapus and his people." The application for probate was resisted by the appellants, who, by their counterclaim, propounded as the last will and testament of the Maori chief the above-mentioned informal will bearing date 12th April, 1888, two days before death. The First Judge, the Chief Justice, who sat alone without a jury, in delivering judgment for the appellants, observed that had it not been for the evidence of one witness, Archdeacon Williams, he would "have found much difficulty in arriving at a conclusion that Renata had executed the will propounded by Mrs. Donnelly." On appeal, the decision of the Chief Justice was unanimously reversed by a Court consisting of four Puisne Judges.

As regards the evidence generally which their Lordships deal with first, afterwards considering that of Archdeacon Williams, the Committee say :—

"The account given by Mrs. Donnelly is, that on the Thursday morning, some time between 10 a.m. and 12 noon, she went into Renata's apartment, when she found him in bed attended by his two wives, of whom one in a little while went to sleep, and the other shortly after followed her example. So early as the Tuesday morning Mrs. Donnelly, in the expectation of Renata being informed of his condition and thereupon resolving to make a new will, provided herself with paper, pen, and ink, which she carried in her pocket in readiness for the emergency. When both wives had fallen asleep, Renata asked her, 'Have you made my will?' To which she answered, 'No.' He said, 'Why not?' She said, 'Because I was waiting for you to tell me to do it.' He said, 'Well, do it now.' She then said, 'What am I to say?' He said, 'My will to you and your teina (*i. e.*, younger brothers and sisters) and your children.' She then wrote the body of the will, to Renata's dictation, upon one of the sheets of paper which she had in her pocket; and, having done so, proposed to wake up one of his wives to fan him, whilst she went out in search of her uncle Te Teira. Renata said, 'Never mind,' so she went out and found Te Teira

at the gate, and having told him to bring Te Roera with him returned to Renata's apartment. . . . . The will was read aloud by Mrs. Donnelly, and Renata asked for a pen, but found that he was unable to sign his name, owing to physical weakness, and an injury to his right hand, which it is proved *aliunde* that he had actually suffered. He then, at her suggestion, made the mark with his own hand, and she afterwards wrote his name on either side of the mark. Renata, addressing Te Teira and Te Roera, said, 'Friends, will you come and write your names to my will?' and they accordingly did so, and took their departure. The attesting witnesses give substantially the same account with Mrs. Donnelly of their being called in, and of the reading and signing of the will in their presence. Their story is so far supported by the evidence of John Sturm, who says that on the Thursday forenoon he saw Te Teira standing in the vicinity of Renata's house, and by that of Mrs. Harper, an English nurse employed by Mrs. Donnelly, who states that, on the same forenoon, she carried a cup of beef tea into Renata's room, where she found Mrs. Donnelly attending to his wants, whilst both his wives were fast asleep. On the other hand, the account given by Mrs. Donnelly and these witnesses is absolutely inconsistent with the evidence of the two wives of Renata, as well as that of the respondent and others, who say that they were in the house, and had opportunity of seeing what was done there, at the time when the will is alleged to have been made.

"To return to the history of the document in dispute. Mrs. Donnelly took and retained possession of it, and its existence did not become known to the respondent until after the death of Renata upon the Saturday. . . .

"The principles applied by the Probate Court in England to a will obtained in circumstances similar to those which occur in the present case were explained by Sir John Nicholl in *Paske* v. *Ollat* (2 Phill. 323). After stating that, when the person who prepares the instrument, and conducts the execution of it, is himself an interested person, his conduct must be watched as that of an interested person, the learned Judge goes on to say,— 'The presumption and *onus probandi* are against the instrument;

but as the law does not render such an act invalid, the Court has only to require strict proof, and the onus of proof may be increased by circumstances, such as unbounded confidence in the drawer of the will, extreme debility in the testator, clandestinity, and other circumstances which may increase the presumption even so much as to be conclusive against the instrument.'

"Having regard to the painful conflict of the evidence adduced by the parties in regard to matters about which there could be no difference between witnesses who were disposed to tell the truth, and to the observations upon native testimony given after a lapse of time, which were made in almost the same terms by the Chief Justice and by the Appeal Court, their Lordships entirely concur in the opinion expressed by Mr. Justice Richmond, to the effect that 'the rules which govern Courts of Probate should by no means be relaxed in the case of alleged testamentary papers executed by Maoris on their deathbeds.' . . .

"First of all, it is a singular thing that Renata, who, even in the opinion of Mrs. Donnelly, was not likely to make a new will unless he was prompted to it, should on the Thursday morning have conceived the idea that he had already instructed Mrs. Donnelly to prepare a will for him, and had told her the terms in which it was to be made. It is not less singular, if he had resolved to make a new testamentary disposition of his affairs, that he should have entrusted the duty of preparing a proper document for that purpose to Mrs. Donnelly, instead of one or other of the agents whom he was in the habit of employing for business purposes. . . . If the will-making scene really began with the question, 'Have you made my will?' that would suggest some doubts as to the mental condition of Renata, induced by physical weakness. He certainly was not in a good state for executing a settlement without the deliberate aid of some unprejudiced person. Dr. Spencer, who saw him just after the hour fixed by Mrs. Donnelly for the execution of the document, says that he was then weak and 'sinking,' and that on the Friday, the day to which the evidence of Archdeacon Williams applies, he was drowsy and 'sinking fast.'

"Then the circumstance that Mrs. Donnelly was carrying

about with her materials for writing out a will on the shortest notice is not calculated to beget any inference in favour of the appellants' case. Not less unfavourable to such an inference are the facts, that she undertook the task of writing the will herself, when Dr. Spencer (who had offered to do so) and so many others were at hand, who could have performed it without the imputation of interest, and that she called in her uncle and another relative, when it would have been so easy to obtain the attestation of witnesses above all suspicion.

"Last of all, the transaction, according to Mrs. Donnelly's own narrative of it, was characterized by what Sir John Nicholl terms 'clandestinity.' Assuming the will to have been made as Mrs. Donnelly alleges, the fact that no outsider was present at its execution did not afford a legitimate reason for keeping its existence secret.

"Their Lordships now proceed to consider the evidence of Archdeacon Williams, which the learned Chief Justice accepted as sufficient to rebut all legal presumptions against the validity of the document of the 12th April, 1887.

"The reverend gentleman saw Renata three times on Friday, the 13th, in the morning, in the course of the day, and again at night. Before the first of these interviews took place he had been informed by Mrs. Donnelly, and had obviously a firm belief, that Renata had executed a will in her favour upon the day preceding. On the first occasion, he put the question to Renata, 'I suppose you have made your will to your satisfaction?' and Renata replied, 'Yes, it is done,' an answer which might refer with as much propriety to the will of 1887 as to the writing upon which the appellants rely. Upon the second, and the important occasion, Renata woke out of a sleep, and addressing the Archdeacon said, 'You were asking me about my will.' Renata, who spoke in the Maori language, then, pointing to Mrs. Donnelly, went on to say either '*It is in her favour*,' or '*She has it.*' The witness is uncertain which of these expressions was used by the deceased. According to the evidence of the Archdeacon, Renata next referred to the withdrawal of Mrs. Donnelly's claims in the Land Court, which

'was exceedingly gratifying to him, and *that now under existing circumstances I leave everything to her*.' Shortly afterwards, the deceased, closing his fist, said, 'Yes, the question is in my hands —here it is,' and then, opening his hand towards Mrs. Donnelly, said, 'to that woman.' . . .

"Although the honesty of the witness may be beyond question, it does appear to their Lordships that the testimony of one person, however honest, which depends to a large extent not only upon the accuracy of his hearing, but upon his previous belief as influencing the construction he was likely to put upon the language which he heard, is a somewhat narrow ground for setting aside the pregnant presumptions arising in this case from facts either admitted or proved beyond doubt. But they do not find it necessary to dispose of the evidence of Archdeacon Williams upon that consideration. The statements by Renata to which he speaks do not square with the terms of the instrument which is propounded and impeached in this suit. They mean that Renata had made a will leaving the whole of his property to the appellant Mrs. Donnelly, and can mean nothing else. But the writing of the 12th April gives Mrs. Donnelly only one-fifth of his succession, and gives the remaining four-fifths to persons for whom he had never expressed any predilection, and to whom he never referred as the objects of his bounty. The natural inferences suggested by these facts are either that Renata, if he did execute a document purporting to be a will on the 12th April, did not understand its contents, or that the will in question is of domestic manufacture for the purpose of defeating the respondent's rights under the undoubted will of January, 1887. . . . The decision of the Court of Appeal is in accordance with law." Appeal dismissed, with costs.

[(1891) *App. Cas.* 435; 60 *L. J. P. C.* 68.]

Davies and Another *v.*
The National Fire and Marine Insurance Company of New Zealand; and
The National Fire and Marine Insurance Company of New Zealand *v.*
Davies and Another.

New South Wales. LORD HOBHOUSE. *July* 4, 1891.

Action on policies of insurance. Alleged misrepresentation. *Onus probandi.* Necessity for declarations in open policy. Davies and another were plaintiffs in the Court below, and were now appellants in the chief appeal and respondents in the cross appeal. The action was brought on two policies of insurance, the second of which was what is called an open policy, to recover a loss by fire of buildings, plant, &c., and a quantity of butterine; and the question was whether the contracts were rendered invalid by alleged misrepresentation in answering questions or by a failure to make declarations—whether the terms thereof could be qualified by evidence of an alleged oral contract made prior to the contract. There was also a subsidiary question whether due notice and other information was given by the plaintiffs after the fire. The plaintiffs were manufacturers of butterine, and had factories both at Melbourne and Sydney, selling retail in Sydney and exporting wholesale to London. The first policy was for security of the buildings, &c., against loss by fire. The second was an open marine policy on goods, "covering risk while in factory, declarations to be made forty-eight hours after departure of steamer from Sydney." Both policies were made in the summer of 1887. The fire occurred in October, 1887.

The declaration, which was filed on the 7th March, 1888, comprises three counts. The first is on the fire policy. The second is on the marine policy, alleging that the goods insured were destroyed by fire when in the factory. The third alleges a parol agreement for a policy to the same effect with the marine

policy, but with a special term imported into it. The verdict by a jury in the trial was given for 887*l.* on the first count, and for 2,134*l.* on the second and third counts, in favour of the plaintiffs. The Judges of the Supreme Court allowed the finding on the first count to stand, but set aside the verdict on the second and third counts. The defendants, the insurance company, then obtained a rule absolute to set aside the verdict in favour of the plaintiffs, and the matters in dispute now came before their Lordships of the Judicial Committee by way of appeal and cross-appeal. The Judicial Committee now recommended that both appeal and cross-appeal should be dismissed, each party bearing their own costs.

The Judicial Committee in their judgment deal first with the fire policy, the subject of the cross-appeal, and after an analysis of the evidence agree to report that misrepresentation in answering certain questions when the application for a policy was first made was not proved, and that the *onus probandi* lay with the insurance company. The two decisions below respecting damages on the first count were therefore upheld and the cross-appeal dismissed. The Supreme Court's decision setting aside the verdict on the second and third counts, was declared by their Lordships to be correct. In their opinion (as regards the second count) declarations had not been duly made by the plaintiffs. One declaration incident to an open policy should have been so as to earmark the goods shipped at Melbourne. This the plaintiffs seemed erroneously to consider was waived, but it was necessary in law to make the policy operative. The other necessary declaration, with a view of distinguishing the butterine which it was intended to export to London from that butterine which was sold retail in Sydney. Their Lordships, in dealing with the necessity for such declaration in an open policy, approved of Lord Blackburn's ruling in *Ionides* v. *Pacific Insurance Co.* (L. R. 6 Q. B. 682). In the course of their judgment the Judicial Committee further say:—

"It was stated at the bar that the bulk of the plaintiffs' business consisted of export to London, and that in fact the sales in Sydney were quite insignificant, so much so as to be left out of

account in considering the contract of insurance. But there is nothing in the evidence to show in what proportions the product was sold from the factory, or was made up into pats and sold from the retail shop, or was shipped for London. The only tangible evidence on this point relates to three shipments from Melbourne to Sydney. . . . .

"All the other shipments from Melbourne . . . . were in the factory at the time of the fire and were capable of export to London. But they were also capable of sale in Sydney. No declaration about them had been made to the defendants, no premium had been paid, no act had been done to earmark or identify any portion of them as goods to which the insured had elected to apply the policy; even now the plaintiffs cannot show that they had done anything in their own business to appropriate any part of the destroyed goods to the London market. Their first answer to this difficulty is, that by the express terms of their written contract they were to make no declarations until forty-eight hours after the departure of each steamer from Sydney. But it is obvious that such declarations would not meet the requirements of the case. The risk insured against is from Melbourne to London, *viâ* Sydney, by certain ships, and including detention and transhipment at Sydney. But, as we have seen, any part of the goods might be detained in Sydney. If, then, no declaration is to be made of the election of the insured to apply the policy to goods shipped at Melbourne, and if loss occurs on the voyage to Sydney or in Sydney itself, what security have the insurers that they may not be charged with the value of goods never intended for London at all? . . .

"The declaration expressed in the policy could not by any possibility be made if a loss happened between the shipment at Melbourne and that at Sydney, probably the most perilous part of the whole risk. It seems an absurd thing to stipulate only for such declarations as in half the cases of loss or more could not be made. On the other hand, in such a case as this, it is quite reasonable to require two declarations. One, far the most important one, would earmark the shipments at Melbourne to which the policy was to attach, and would be accompanied by

payment of a premium. This is the ordinary declaration incident to the ordinary contract of an open policy, and necessary to make it operative. The other would enable the insurers to know how much of the goods was actually shipped for London, that they travelled by the stipulated class of ship, with the names of the ships and other particulars which, for the purpose of re-insurance or otherwise, would be valuable to them. Such a declaration would not be required by law as the ordinary incident of the contract, and would be the proper subject of an express stipulation. Such a stipulation, their Lordships think, is made; in very curt and imperfect terms it is true, but such as are not uncommon in mercantile contracts. They find nothing in the letter of the contract to dispense with declarations on the Melbourne shipments; and the spirit of the contract, in their judgment, requires that such declarations should be made to support a claim under the policy. The further declarations after the departure of steamers from Sydney are to be made in the cases where they can be made, viz., where goods already brought within the policy are actually shipped for London."

Their Lordships then proceed to examine the case made by the plaintiffs on the third count, by which they sought to establish a parol contract, and in the result the Committee say:—"The learned Judges considered that, though there is no positive law in New South Wales requiring contracts of marine insurance to be in writing, the general authority given to the agent of an insurance corporation must be to make contracts in the ordinary way, and that is by writing. Their Lordships do not dissent from this view, but they consider that the plaintiffs' theory of an entirely separate parol contract fails because of the fact that the parol contract alleged is prior in date to the written contract actually made; and they prefer to rest their judgment on the ground that the parties intended only one contract, which was written." Both appeals dismissed; each party to bear their own costs. [(1891) *App. Cas.* 485; 60 *L. J. P. C.* 73.]

Callender, Sykes and Co. *v.*
The Colonial Secretary of Lagos and J. P. L. Davies; and
Z. A. Williams *v.*
J. P. L. Davies.

(Consolidated Appeals.)

Lagos. LORD HOBHOUSE. *July* 11, 1891.

Laws of Lagos. Is there local jurisdiction in bankruptcy? If not, does the Imperial Bankruptcy Act of 1869 apply to all Her Majesty's dominions, and is it and the subsequent Act of 1883 (46 & 47 Vict. c. 52) binding on the colony, so as to vest in a trustee in bankruptcy real property of a bankrupt situate in Lagos? Costs against the Crown. The main question in these appeals was whether land situated in Lagos belonging to Davies, who was adjudicated a bankrupt, passed to James Halliday, the trustee of Davies' property in bankruptcy. Davies was adjudicated a bankrupt on 9th August, 1876. On the 12th January, 1877, the County Court of Lancashire in England made an order under sect. 74 of the Bankruptcy Act of 1869, for the purpose of seeking the aid of the Court in Lagos as an auxiliary to the Bankruptcy Court in England in the administration of the bankrupt's estate.

The facts of the respective suits and the proceedings therein are given in the judgment of the Judicial Committee, the more material portions of which are now appended.

"In pursuance of that order (the Lancashire Court order), inquiries were made in the Supreme Court of the Gold Coast Colony, to which Lagos then belonged, which resulted in the discovery of property which the bankrupt had concealed. So far the facts are common to both suits. It will now be convenient to follow the history of the property called the Broad Street property, which is the subject of the suit brought by Davies against the appellant Williams. That property was

purchased by Davies on the 31st January, 1871. On the 30th October, 1878, Davies and his wife made an attempt to include it among certain properties settled on his wife, himself, and their children in the year 1864, by inserting it in a schedule of trust property appended to an appointment of new trustees of the settlement. . . . .

"On the 11th November, 1881, Halliday agreed to sell the property to Williams for the sum of 400*l.* then paid by him. Immediate possession was given to Williams, who retained it up to the commencement of the action against him which was brought in the Supreme Court of the Colony of Lagos on the 26th January, 1889. Davies had procured his discharge in the year 1884. In the year 1886, Lagos was made a separate Colony, with a Supreme Court of its own.

"The writ of summons was headed 'J. P. L. Davies, Agent, Trustees of the Marriage Settlement of Sarah Forbes Bonella Davies, deceased.' What exactly was intended by this ambiguous heading was not made clear; but the Court, finding that in point of fact the trustees were not taking any action, caused the heading to be amended by striking out all reference to them. The suit therefore remained, and is, that of Davies alone. Mr. Justice Smalman Smith, who heard the case in the first instance, gave judgment for the defendant Williams, apparently against his own opinion, and because he did not think it right to decide against the opinion of Mr. Justice Macleod. Davies appealed to the Full Court, consisting of three Judges, of whom Mr. Justice Smalman Smith was one; and that Court was unanimous in reversing the judgment below, and entered judgment for Davies. It is against that judgment that the present appeal of Williams is brought.

"The reasons for the judgment are very clearly stated by the three learned Judges. First they hold, in accordance with the opinion expressed by the Supreme Court of the Gold Coast Colony in 1881, and on grounds which appear to their Lordships to be quite sound, that that Court had no bankruptcy jurisdiction in Lagos. That being so, it could not be auxiliary to the English Court under the Act of 1869. That leads them

to the inference that the order of Mr. Justice Macleod was a mere nullity. Their Lordships do not stop to discuss the precise effect of an order made by a Court having jurisdiction to deal with the property in a suit properly constituted, and having before it the parties interested in the dispute, but purporting to act in the exercise of a jurisdiction it did not possess. That discussion is unnecessary, because the Court did not treat the nullity of Mr. Justice Macleod's order as conclusive against Williams, but only as leaving open the fundamental question whether the Act of 1869, under which the bankruptcy took place, did, or did not, confer title on Halliday. . . . There are . . . . sections in the Act—such as 73, 74, and 76—which show that it is to have operation in the whole of the British Empire. But the sections relating to property do not in express terms specify property in the colonies, and those which expressly extend beyond England do not in express terms specify land. The Supreme Court lay down the principle that an Imperial Act does not apply to a colony, unless it be expressly so stated or necessarily implied; they point out that there is no case deciding that land in a colony passes under sect. 17; and they dwell on the inconvenience which would arise from conflicts of law if an English statute were to transfer land beyond the limits of the United Kingdom. On these grounds, they hold that under the word 'property,' land in Lagos does not pass. Upon this reasoning, their Lordships first have to remark that there is no question here of any conflict between English and foreign law. Lagos was not in the year 1869, and is not, a foreign country. How far the Imperial Parliament should pass laws framed to operate directly in the colonies, is a question of policy, more or less delicate according to circumstances. . . . But the general law of Lagos is English law, and it does not appear that in 1877 there had been, or, indeed, that there ever has been, any local legislation which would prevent land being transferred in Lagos as freely as it may be in England. . . . It has been pointed out . . . that some sections of the statute clearly bind the colonies in words which do not necessarily, but which may, apply to land. But the policy of the legislature is clearly

shown by reference to other statutes. By the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106, s. 142) all lands of the bankrupt 'in England, Scotland, Ireland, or in any of the dominions, plantations, or colonies belonging to Her Majesty, are to vest in his assignees.' By the Bankruptcy Act of 1883 (46 & 47 Vict. c. 52, s. 168), the property which is passed to the trustee includes 'land, whether situate in England *or elsewhere.*' The Scotch Act of Bankruptcy, passed in 1856 (19 & 20 Vict. c. 72, s. 102), vests in the trustee the bankrupt's 'real estate situate in England, Ireland, or in any of Her Majesty's dominions.' The Irish Act of Bankruptcy passed in 1857 (20 & 21 Vict. c. 60, s. 268), vests in the bankrupt's assignees all his land 'wheresoever situate.' No reason can be assigned why the English Act of 1869 should be governed by a different policy from that which was directly expressed in the Scotch and Irish Acts, and in the English Acts immediately preceding and immediately succeeding. . . . . Their Lordships hold that there is no good reason why the literal construction of the words should be cut down so as to make them inapplicable to a colony. It is true that no judicial decision to this effect can be found. But it has been the prevailing opinion among lawyers. . . . (*Vide* dictum of Sir George Jessel in *Ex parte Rogers*, 16 Ch.Div. at p. 666; also Mr. Justice Vaughan Williams' Treatise on Bankruptcy, 5th ed. p. 181.) No opinion to the contrary has been brought to their Lordships' attention except the decision under appeal.

"Their Lordships therefore hold that on the appointment of Halliday in January, 1877, the Broad Street property vested in him, and that Davies had no interest in it subsequent to the adjudication in August, 1876. His action should have been dismissed with costs. A decree to that effect should now be made in lieu of the decrees of the Courts below, which should be discharged, and Davies should also be ordered to pay the costs of the appeal to the Full Court.

"The other appeal (*Callender, Sykes & Co.* v. *The Colonial Secretary of Lagos and Davies*) relates to a property called the Oil Mills, which was one of those which Davies did not disclose

to his trustee, and which he endeavoured to include in his post-nuptial settlement. The whole of the disclosed properties were purchased in the year 1877 by Messrs. Sykes and Mather, partners in the firm of Callender, Sykes & Co., from the trustee Halliday. Afterwards came the inquiry by Mr. Justice Macleod, who held that the Oil Mills property was vested in Davies at the date of his bankruptcy, and that his claim to have it included in the settlement was a fraudulent claim. On the 19th April, 1880, Mr. Justice Macleod made an order for delivery of this property among others to Halliday, who was placed in possession on the 28th June, 1880. The trustees of the settlement were represented throughout the whole of these proceedings. They have never made any attempt to disturb the possession given under Mr. Justice Macleod's order. . . . On the 3rd February, 1881, Messrs. Sykes and Mather agreed to purchase the Oil Mills property of Halliday, and paid the purchase-money. . . . Messrs. Callender, Sykes & Co. then brought an action for that purchase-money in the Supreme Court of Lagos against the Government, the Colonial Secretary being the formal defendant. It does not appear that Davies was made a party to the action, but he appeared in Court and cross-examined the plaintiffs' witnesses. . . . Their Lordships must take it, on the materials before them, that the Colonial Secretary as defendant on the record, and Davies in some less formal way, opposed the claim of the plaintiffs to have the purchase-money paid to them. Mr. Justice Smalman Smith, who tried the case, rejected the claim of the plaintiffs because, he said, it was founded on the order of Mr. Justice Macleod, which was a nullity. On appeal, all parties agreed that the case must be governed by the decision in *Davies* v. *Williams*. It must now be governed by the decision of Her Majesty in Council. Davies's interest in the Oil Mills property passed out of him on the adjudication, and vested in Halliday on his appointment. All Halliday's interest passed to the appellants, Callender, Sykes & Co. If any conflicting interest could exist, it would be that of the trustees of the settlement; and the existence of such an interest is suggested by Davies. But the trustees themselves have not

come forward to assert any interest. They have never disputed the possession given to Halliday under the order of the 4th June, 1880, irregular though it was. The appellants had been in undisturbed possession for nine years. . . . As between them and the Crown their title is clearly established. . . .

"The decrees of the lower Courts should be discharged, and in lieu thereof a decree should be made declaring that the appellants, Callender, Sykes & Co. were entitled to the Oil Mills property when taken by the Government of Lagos, and to the purchase-money thereof, and ordering payment accordingly.

"A considerable time after the argument was closed, the Colonial Secretary desired leave to appear by counsel at their Lordships' bar for the purpose of opposing any such alteration of the decrees below as might have the effect of charging him with the costs of the litigation. He has been allowed to do so, and he has contended, with respect to the litigation in the colony, that the Supreme Court has no jurisdiction to give such costs. It would certainly be a matter for regret if it were found that a person in quiet possession of land could be expropriated by the State, and could not get the price of his land except by taking legal proceedings and paying the costs. . . . Their Lordships are glad to find that the law of Lagos is not such as to prevent justice being done in this respect. By the Public Lands Ordinance, 1876, sect. vii. (1), the Supreme Court has complete jurisdiction over the matters in dispute. By sect. iii. of the Petitions of Right Ordinance, 1877, all claims against the Government, being of the same nature as claims preferred against the Crown in England by Petition of Right, may, with the consent of the Governor, be preferred in the Supreme Court by a suit instituted against the proper officer. And by sect. viii. of the same Ordinance costs may be awarded in suits against the Government in the same manner as in suits between private parties. . . .

"The Colonial Secretary should be charged with the costs of the action and appeal in the colony. But, considering the part played by Davies, their Lordships think that he also should be charged jointly with the Colonial Secretary. The respondents

must pay the costs of these appeals. Their Lordships will humbly advise her Majesty in accordance with this opinion."

[(1891) *App. Cas.* 460; 60 *L. J. P. C.* 33.]

McLeod *v.*
McNab and Others.

Nova Scotia. LORD HANNEN. *July* 17, 1891.

Revival of residuary bequest. Alleged revocation by one codicil. Was there revival by second codicil. Construction of cap. 89 of the 5th series of Revised Statutes of Nova Scotia.

The facts showed that a will was executed by one Alexander McLeod on July 17th, 1880. It contained a residuary bequest to Dalhousie College. The appellant is the executor of Archibald McLeod deceased, who was the only surviving brother and heir-at-law of the testator, and would be entitled to any estate not disposed of by the testator. He claims that the residuary bequest to Dalhousie College was revoked by a codicil of 17th June, 1882. On July 21st, 1882, the testator made another codicil, by which he *confirmed* the will of July 17th, 1880, in every other particular than as altered by that later codicil. The respondents were executors and others in whom the residuary bequest was entrusted for distribution. They claimed that the July codicil of 1882 reinstated the will, and rendered the codicil of June 17th, 1882, nugatory. The appellant, on the other hand, contended that the codicil of June 17th, 1882, had never been cancelled. The confirmation spoken of in the codicil of July, 1882, was a confirmation of a will consisting of two documents, the will proper and the codicil of June 17th, 1882. Read together there was no residuary bequest. The Surrogate Judge of probate confirmed the probate of the will and codicil of July, 1882, and also of a later codicil of 16th December, 1882, in favour of McNab and others. The Supreme Court dismissed the appeal of the appellant on his objection, which, as has been stated, set forth that there had been and still existed a revocation of the bequest by reason of the codicil of June 17th,

1882. The Judicial Committee, after a full examination of the testator's intentions, and stating incidentally that the terms of the alleged revocation were unknown, and that it did not appear whether any other gift had been substituted in place of the bequest, affirm the decree of the Supreme Court and dismissed the appeal with costs. Their Lordships made these observations upon the present appeal, citing with approval Sir James Wilde's exposition of the law as laid down in the case of *In the goods of Steele*, L. R. 1 P. & D. 579 :—

"Their Lordships are of opinion that when the codicil of the 21st July, 1882, is examined, with the assistance of those circumstances in which the testator was placed at the time, which they are entitled to consider, it does appear that this is not merely a reference to the document of the 17th July, 1880, by its date, but by other words, which appear clearly to indicate that it was that document by itself which was in the contemplation of the testator. . . .

"An argument has been addressed to their Lordships that the mere statement that the testator confirms the will of 1880 is not sufficient, without any express statement that the testator revokes the revocation of the residuary bequest. Their Lordships are of opinion that if the meaning be, as they consider it is, that he confirms the will of the 17th July, 1880, in its terms, that is in itself a restoration of the residuary bequest contained in it; and their Lordships are also of opinion that the word "confirm" is an apt word, and expresses the meaning, and has the operation of the word "revive," which is used in the statute." Appeal dismissed, with costs.

[(1891) *App. Cas.* 471; 60 *L. J. P. C.* 70.]

Harding *v.*
The Commissioners of Land Tax.

Victoria. Lord Morris. *July* 18, 1891.

Liability for the payment of land tax under the Land Tax Act of 1877, sect. 4, sub-sect. 3. Were certain alleged transfers of land made *bonâ fide* and for valuable consideration within the

meaning of the Act? The appellant, Silas Harding, had in September, 1886, *i.e.*, before the passing of the Act, sent in four applications to the Commissioners to be relieved from the payment of land tax in respect of certain lands. In support of these applications he declared that by several indentures he had conveyed these lands to others, and that these persons and not he were liable.

The several conveyances relied upon by the appellant as transferring the said several parcels of land were formally executed, and the sole question for decision is whether or not these conveyances were made *bonâ fide* for valuable consideration. On the 3rd December Harding obtained a rule *nisi*, calling on the Registrar of Land Tax to show cause why he should not remove the name of Silas Harding from the register. Mr. Justice Williams, on 12th September, 1887, dismissed the order for the rule *nisi*. This decision the Full Bench of the Supreme Court affirmed. Hence this appeal. The Judicial Committee recommended Her Majesty to affirm the judgment of the Supreme Court and to dismiss the appeal with costs. The Committee in the course of their judgment give the following reasons for their opinion:—

"Both Mr. Justice Williams, and on appeal the Full Court, have decided this question against the appellant, and have held that he did not part with the said lands by grants made *bonâ fide* for valuable consideration. Their Lordships entirely concur in these decisions. One of the objects of the Land Tax Act was to prevent sham sales for the purpose of evading the land tax, and the meaning of sub-sect. 3 of sect. 4 is, that as between transferor and transferee there must be the passing of the estate from the transferor and the passing of the consideration from the transferee, without any secret understanding or trust. It would be most difficult to track the appellant through the complicated series of sham dealings with his nephew and manager Silas George Tangye, and with his brother-in-law and overseer Richard Howell, the pretended transferees in the conveyances.

"The indentures of 1878 and 1879 present almost every badge of fraud. They were not accompanied by change of possession. The pretended considerations were bills of exchange, for which payment was not made, or asked, as they fell due. The appellant continued his dealing with the lands in a manner quite

irreconcilable with any *bonâ fide* transfer of them. The transferees were near relatives, and in his employment at small salaries. The contradictory and false statements made by him further lead to the conclusion that these conveyances were mere covers to enable him to escape the payment of land tax.

"With respect to the lands comprised in the 3rd and 4th applications to the Registrar of Land Tax, the appellant alleges that by an instrument of the 5th of December, 1885, he conveyed *bonâ fide* for valuable consideration the said lands to Silas George Tangye. It appears that he had previously in 1878 conveyed them to his wife. That conveyance was a voluntary one, but by means of it he succeeded for a time in getting his name removed from the register. His wife died in 1882, and in July, 1883, he purported to sell and convey the same lands to Silas George Tangye as a *bonâ fide* sale for value. The next of kin of the appellant's wife impeached the sale to Silas George Tangye, and on a trial before a jury in October, 1885, the sale to Silas George Tangye was found to be a sham sale. Very soon after the trial the appellant conveyed by an instrument of the 5th of December, 1885, the same lands to the same Silas George Tangye, and he now relies upon it. In the administration suit by the next of kin of Mrs. Harding, this Board, on appeal, held that the appellant, as administrator of his wife's estate, was not beneficially entitled to the estate, but was under obligation to realize it and distribute it according to law (*Harding* v. *Howell*, 14 App. Cas. 307). Now the indenture of the 5th of December, 1885, relied upon by the appellant as transferring the estate to Silas George Tangye, is made expressly 'in his own right, and not as administrator,' and the consideration is stated to be 8,475*l*. But the appellant had no title in his own right; he was only a trustee, and the consideration was raised on the same day by the grantee by mortgage. In fact, the appellant, by the conveyance to his wife, sought to evade the land tax; by the conveyance to Tangye in 1883 he sought to defraud the next of kin of his wife; and by the indenture of December, 1885, he appears to seek to defraud both." Appeal dismissed, with costs. [(1891) *App. Cas.* 446.]

Bama Soondari Debi *v.*
Tara Soondari Debi and Another.

Bengal. MR. SHAND. *July* 18, 1891.

Validity of a will. Act V. of 1881. Vigorous handwriting two days before death. Capacity of the testator. The whole question was whether a will executed by one Dwarka Nath Chuckerbutty, bearing date January 3, 1886, was genuine or a forgery. The District Judge of Mymensing, who tried the case, pronounced in favour of the will; but on appeal, this decision was reversed by the High Court, who rejected the application for probate. It had been presented by the father (Gourmohun) of the alleged testator, who was appointed executor, and who was also appointed manager of the estate during the minority of the testator's son. The High Court reversed the first finding, the Judges considering that the alleged testator was incapable, by reason of his illness, of signing so firmly, and found, not only that the signatures were not genuine, but that, by the medical evidence, it would seem the testator was incapable, mentally and physically, of executing the will. Gourmohun, after the filing in the High Court of the appeal to Her Majesty in Council, desired to withdraw as appellant, and by an Order in Council of 28th November, 1889, Bama Soondari Debi, the testator's eldest widow, was put upon the record in his stead. This lady appeared on behalf of the minor son of the deceased by another wife. This son is now dead, but under the terms of the will and an anumati patra, executed also on the death bed, a power of adoption was given to the present appellant. The Judicial Committee were of opinion that the judgment below should be reversed, and the will upheld. The evidence, in their opinion, pointed to rationality and capacity on the part of the testator, while the dispositions were in accordance with what might have been expected; furthermore, the evidence of one doctor as to capacity was qualified in an important manner, while another, who was a witness to the will, was

not called. Their Lordships used the following expressions in giving their reasons:—

"The will is one which not only complies with all requisites of formality, but which seems to be in all respects reasonable in its provisions, and such as might naturally be expected to be made, having regard to the deceased's circumstances and family relations."

"The genuineness of the will having been challenged, the petitioner, the father of the deceased, and six other witnesses were examined in support of it. Five of these had signed as testamentary witnesses to the document, and all of them deposed that they were present and saw it executed."

"The Judge" (of First Instance) "who saw and heard the witnesses, seems to have remarked nothing in their demeanour to induce him to think they were not speaking the truth, or to lead him to the conclusion that they were combined in a conspiracy fraudulently to set up a false deed."

"Their Lordships cannot regard the evidence of this witness" (the first medical witness) "as warranting the conclusion on which, to a great extent, the judgment of the High Court is founded, that on the Sunday when the will is said to have been executed the deceased was incapable, either mentally or physically, of executing the will. The witness Lalit Chunder Biswas, who was for a time, during the earlier part of the deceased's illness, present as medical attendant, but who says he visited the deceased, apparently as a friend, till he died, gives somewhat stronger evidence, but his statements seem to be exaggerated in material respects when tested by the other evidence in the case. The evidence of Tara Nath Bal is in its terms qualified throughout, and in their Lordships' opinion results in this, that although the deceased was in a weak condition, and his 'condition commenced to be worse' on the Sunday, he was nevertheless capable throughout that day of understanding and executing the will in dispute. Again, in regard to the ability of the deceased to write the signatures firmly, it does not appear to their Lordships that there is evidence to lead to the conclusion that he was unable to do so."

"According to the evidence, he had himself suggested that he would delay signing it till after taking food, and he did so; and, in the performance of so deliberate and solemn an act as signing his will, he would naturally make an effort such as might enable him, although in a weak state, to write his signatures with firmness."

"It would no doubt have been more satisfactory in the determination of the case if the testamentary witness, the doctor, Kali Chunder Acharji, and, indeed, also the mokhtar, Goluck Buttacharji, who, though not present at the signing of the will, had prepared the draft, had been examined as witnesses. The petitioner did endeavour to secure the attendance of Kali Chunder Acharji, and if it be the case that his evidence could have been obtained, and it would have been unfavourable to the will, the defendants might have examined him. As the case on the proof stands, the petitioner, in the opinion of their Lordships, adduced sufficient evidence to establish the genuineness of the will, and the capacity of the testator to make it, and the evidence for the defence was not sufficient to destroy the petitioner's case on either of these points. On the whole, their Lordships will humbly advise Her Majesty to reverse the judgment of the High Court, and to affirm the judgment of the District Judge, with costs in the High Court. The respondents must bear the costs of this appeal." [*L. R.* 18 *Ind. App.* 132.]

Macleod *v.*

Attorney-General for New South Wales.

New South Wales. THE LORD CHANCELLOR (LORD HALSBURY). *July* 23, 1891.

Appeal against a sentence for alleged bigamy. Jurisdiction. Locus of alleged crime. Law of a foreign place. "*Extra territorium jus dicenti impune non paretur.*" Criminal Law Amendment Act of New South Wales (46 Vict. No. 17), s. 54. Judgment below reversed and sentence set aside. Attorney-

General to pay costs. The appellant in this case obtained from Her Majesty in Council special leave to appeal from an order of the Supreme Court upholding a sentence passed upon him at the Court of Quarter Sessions at Sydney for alleged bigamy. The matter had gone up to the Supreme Court on certain points reserved at the trial, viz.: (1) whether documentary evidence as to appellant's second marriage was admissible; (2) whether there was misdirection in the chairman stating that it was incompetent for a Court at Missouri to grant a divorce in respect to the first marriage in New South Wales; and (3) on the due effect of absence of evidence as to the law of Missouri bearing upon the validity of the alleged second marriage. At the hearing of the appeal now, counsel for the appellant argued that there was no jurisdiction in the Courts in New South Wales to put the appellant on his trial. The Criminal Law Amendment Act applied only to offences committed within the jurisdiction of the local legislature by persons subject at the time of the offence to its jurisdiction. Counsel for the Attorney-General said that the point of jurisdiction had not been raised below; but that, in any case, the colony had full powers of legislation in the matter: *vide* Imperial statutes 9 Geo. IV. c. 83, s. 24; 24 & 25 Vict. c. 100, s. 57. The judgment of the Judicial Committee, which dealt with all the essential facts of the case, was as follows:—

"The facts upon which this appeal arises are very simple. The appellant was, on the 13th July, 1872, at Darling Point in the Colony of New South Wales, married to one Mary Manson, and in her lifetime, on the 8th May, 1889, he was married at St. Louis, in the State of Missouri, in the United States of America, to Mary Elizabeth Cameron. He was afterwards indicted, tried, and convicted, in the Colony of New South Wales, for the offence of bigamy, under the 54th section of the Criminal Law Amendment Act of 1883 (46 Vict. No. 17). That section, so far as it is material to this case, is in these words, 'Whosoever, being married, marries another person during the life of the former husband or wife—wheresoever such second marriage takes place —shall be liable to penal servitude for seven years.' In the first

place, it is necessary to construe the word 'whosoever'; and in its proper meaning, it comprehends all persons all over the world, natives of whatever country. The next word which has to be construed is, 'wheresoever.' There is no limit of person, according to one construction of 'whosoever,' and the word 'wheresoever' is equally universal in its application. Therefore, if their Lordships construe the statute as it stands, and upon the bare words, any person married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that Colony. That seems to their Lordships to be an impossible construction of the statute; the Colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a Colony, and, indeed, inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general; and their Lordships take it that the words 'whosoever being married' mean 'whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales.' The word 'wheresoever' is more difficult to construe; but when it is remembered that in the Colony, as appears from the statutes that have been quoted to their Lordships, there are subordinate jurisdictions, some of them extending over the whole Colony, and some of them, with respect to certain classes of offences, confined within local limits of venue, it is intelligible that the 54th section may be intended to make the offence of bigamy justiceable all over the Colony, and that no limits of local venue are to be observed in administering the criminal law in that respect. 'Wheresoever,' therefore, may be read 'wheresoever in this Colony the offence is committed.' It is to be remembered that the offence is the offence of marrying, the wife of the offender being then alive—going through, in fact, the ceremony of marriage with another person while he is a married man. That construction of the

statute receives support from the subordinate arrangements which the statute makes for the trial, the form of the indictment, the venue, and so forth. The venue is described as New South Wales, and sect. 309 of the statute provides that 'New South Wales shall be a sufficient venue for all places, whether the indictment is in the Supreme Court, or any other Court having criminal jurisdiction. Provided that some district, or place within, or at or near which, the offence is charged to have been committed, shall be mentioned in the body of the indictment. And every such district or place shall be deemed to be in New South Wales, and within the jurisdiction of the Court, unless the contrary be shown.' That, by plain implication, means that the venue shall be sufficient, and that the jurisdiction shall be sufficient, unless the contrary is shown. Upon the face of this record, the offence is charged to have been committed in Missouri, in the United States of America, and it therefore appears to their Lordships that it is manifestly shown, beyond all possibility of doubt, that the offence charged was an offence which, if committed at all, was committed in another country, beyond the jurisdiction of the Colony of New South Wales. The result, as it appears to their Lordships, must be that there was no jurisdiction to try the alleged offender for this offence, and that this conviction should be set aside. Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the Bar, it would have been beyond the jurisdiction of the Colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, '*Extra territorium jus dicenti impune non paretur*,' would be applicable to such a case. Lord Wensleydale, when Baron Parke, advising the House of Lords in *Jefferys* v. *Boosey* (4 H. L. R. 815), expresses the same proposition in very terse language. He says (4 H. L. R. 926), 'The Legislature has no power over any persons except its own subjects—that is, persons natural born subjects, or resident, or whilst they are within the limits of the kingdom. The

Legislature can impose no duties except on them; and when legislating for the benefit of persons, must, *primâ facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect.' All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever. It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well-known and well considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony." Conviction set aside with costs of the appeal.

[(1891) *App. Cas.* 455; 60 *L. J. P. C.* 55.]

The Commissioner of Stamps *v.* Hope.

New South Wales. Lord Field. *July* 25, 1891.

Levy of probate duty under the Stamps Duties Acts of New South Wales (Act of 1880, sect. 16, and the amending Act of 1886, sect. 5). Matter heard on a special case. "Specialty debt" on promissory notes. Were the notes *bona notabilia* for purposes of duty in Victoria or in New South Wales? Locality of debt. *Blackwood* v. *The Queen* (8 App. Cas. 82) approved.

Briefly stated, the particulars of this case were as follows:— The respondent was the executrix of the will of one George

Hope, who was resident and domiciled in Victoria at the time of his death. The deceased, besides possessing estate in Victoria, was also seised of property in New South Wales, and it therefore became necessary for the respondent to clothe herself with probate from that colony. Proceedings were taken under the Stamps Duties Acts for this purpose. The respondent, in accordance with the statutes, lodged an inventory in which she admitted assets within the colony to the value of 26,114*l.* The appellant, however, was dissatisfied with this account, and assessed the duty payable in New South Wales upon the footing of a new and much larger inventory. He claimed there was a figure of 75,727*l.* due to the testator at the time of his death in respect of certain promissory notes which ought to be included in the bulk of New South Wales assets liable to duty. The agreement for these promissory notes, which were in addition to a cash payment of 46,316*l.* 13*s.* 4*d.*, was executed in 1882 by one Kirkpatrick and other persons in favour of the testator as the balance of payment for certain property in New South Wales, and were to be paid in twelve gales at certain intervals. They were to represent a further amount of 92,633*l.* 6*s.* 8*d.* with interest. In 1883 the purchasers of the property, who had been granted possession of the station, executed a mortgage by deed under seal. By this deed the station and effects were assigned to the testator, and it contained a *proviso* for the execution of release by the testator if the mortgagors duly retired and paid the promissory notes at maturity; the usual power of entry and sale in case of default; and in particular an express covenant by the mortgagors with the deceased "to retire and pay the said several promissory notes as and when the said promissory notes respectively shall become due and payable according to the effect and tenor thereof respectively." The respondent paid the amount demanded of her as duty, viz. 4,114*l.*, under protest, and the question was whether that sum should not now be restored to her as having been erroneously assessed upon her. The Court below held that the debt was a "specialty" one, although represented by promissory notes, and that, as it was to be assumed that the mortgage deed was in the possession of George Hope

in Victoria at the time of his death the debt was *bona notabilia* in Victoria and not in New South Wales. The Court ordered the amount paid under protest to be returned to the respondent. Hence the appeal by the Commissioner. The counsel for the appellant now said the promissory notes were payable in New South Wales, and the debt was a simple contract one from persons resident in that colony; the mortgage was only a collateral security and was never acted upon. It did not create a specialty nor did it act as a merger of the debt due on the notes. It was not co-extensive with the prior contract. Counsel for respondent argued that by the Stamps Acts and the Charter of Justice (4 Geo. 4, c. 96) probate could only be granted in New South Wales for property located there. As regards merger that was not material. The Judicial Committee in the result agreed to report that the decision of the Supreme Court was correct in holding that the debt was a specialty one and that the *bona notabilia* rested in Victoria, and declared that the appeal ought to be dismissed. Costs to be paid by the appellant.

In their judgment their Lordships, *inter alia*, say that the mortgage deed "created a debt by 'specialty,' in which, under ordinary circumstances and without any expression or implication of a contrary intention, the simple contract debts created by the promissory notes would have been merged. But such was not the intention of the parties, and accordingly the deed contained a proviso of great importance, that 'no simple contract shall be considered as having merged in the specialty created by or contained in these presents, and that in any action upon any simple contract the defence that such simple contract was merged in or extinguished in any specialty created by or contained in these presents shall not be available or be used, and that no negotiable security or securities taken for or in respect of any moneys for the time being owing on the security of these presents shall in any way postpone or affect this security, or all or any of the powers or provisions hereof or hereby created.' . . . It was stated in the case, and apparently is the fact, that the respondent was assessed in the colony of Victoria, and paid duty upon this debt; but the appellant insisted upon his right to

charge the duty in New South Wales. . . . Upon the argument of the case it was correctly held by the Supreme Court, upon the authority of the case of *Blackwood* v. *Reg.* (8 App. Cas. 82), . . . that the general words in the statute, 'personal estate,' must be read as limited to such estate as the grant of probate confers jurisdiction to administer, and that the appellant, therefore, in order to establish the liability he alleged must make out that the asset is one existing within the local area of the limited jurisdiction created by the Act. Now a debt *per se*, although a chattel and part of the personal estate which the probate confers authority to administer, has, of course, no absolute local existence, but it has been long established in the Courts of this country, and is a well settled rule governing all questions as to which Court can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty. In the former case, the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held therefore to be *bona notabilia* within the area of the local jurisdiction within which he resided; but this residence is of course of a changeable and fleeting nature, and depending upon the movements of the debtor, and inasmuch as a debt under seal or specialty had a species of corporeal existence by which its locality might be reduced to a certainty, and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was *bona notabilia* where it was 'conspicuous,' *i.e.*, within the jurisdiction within which the specialty was found at the time of death (see Wentworth on the Office of Executors, ed. 1763, pp. 45, 47, 60). This rule received an apt illustration in the comparatively modern case of *Gurney* v. *Rawlins* (2 M. & W. 87). . . . The correctness and application of the rule were not disputed at their Lordships' Bar; but it was contended on the part of the appellant that under the circumstances of this case the debt was one by simple contract."

After considering the cases of *Gurney* v. *Rawlins* (2 M. & W. 87); *Price* v. *Moulton* (10 C. B. 561); *Twopenny* v. *Young* (3 B. & C. 208); and the remarks in the second volume of Fisher on Mortgages, sects. 1328 to 1334, the Judicial Committee further observe:—"If merger is an implication of law, so strong that it takes effect even against intention, then the simple contract in the present case was undoubtedly merged and extinguished, and the debt was no other than a debt by specialty. But, upon the contrary supposition, that the effect of the proviso was to preserve the remedies by simple contract to the extent stipulated for, it appears to their Lordships that the debt was still a specialty debt. The deed contains an express covenant to retire and pay the promissory notes; between the same parties it was an existing security under seal, at the time of the testator's death, for the balance then due; it would continue to be a security for a much longer period, and would be attended with advantages not belonging to debt by simple contract. Although it never became necessary to act upon the deed by taking possession or seeking any remedy under it, it was and remained a registered deed under the system of colonial registration, and of full force and validity. There is but one debt, whether in Victoria or New South Wales, and their Lordships fail to see how it can be said that that debt has not become a debt by specialty." [(1891) *App. Cas.* 476; 60 *L. J. P. C.* 44.]

The Stockton Coal Company, Limited *v.*
Fletcher and Others.

New South Wales. LORD MACNAGHTEN. *July* 25, 1891.

Title to land. Title to the minerals thereunder. Whether there was title to convey in equity by lease. Decision below declaring that the title of appellants was not established affirmed. Appellants to pay costs. *Important observations on prerogative rights of the Crown to minerals.*

The appellants were plaintiffs, and brought the action to

recover possession of coal under a plot of land situated at Stockton, in New South Wales, known by the name of "Macqueen's Grant." The land in question had been granted by the Crown to one Macqueen in 1843. The appellants said that the coal under this particular plot was demised to their predecessors in title by a lease, dated 10th June, 1882, the lessors thereof being the trustees of a Mrs. Quigley's settlement. The title of the said Quigley lessors, going further back, was traced by the appellants to one Mitchell, whose daughter and beneficiary under his will Mrs. Quigley was. Mitchell, it was contended, derived his title from the original owner, Macqueen, by possession beyond the statutory period of limitation. The respondents were in possession when the action was brought. In the Courts below, objections were urged by the respondents. It was contended that there was no evidence of such possession by Mitchell from Macqueen as would satisfy the statute. Assuming, however, that Mitchell did acquire a title to Macqueen's Grant, and that it passed under Mitchell's will to his trustees (the lessors to appellants), who took upon trust for his three children, of whom Mrs. Quigley was one, in equal shares, it was argued that Macqueen's Grant never became the property of Mrs. Quigley or her trustees, either at law or in equity, and that the lease to the appellants, which was dated 10th June, 1882, did not comprise the coal in dispute. The lease in question, it may be stated, recited Mitchell's will and Mrs. Quigley's settlement. It also recited a deed of partition whereby certain property, which admittedly did not include "Macqueen's Grant," was allotted in severalty as Mrs. Quigley's share in her father's real estate. Attached to the lease was a schedule containing the lands allotted in severalty to Mrs. Quigley, and in this Macqueen's Grant was not included, although it did appear that it was comprised in a description of Mrs. Quigley's share in an agreement dated 1872, which preceded the partition.

It was contended that, under these circumstances, Macqueen's Grant was in equity at the date of the lease the property of Mrs. Quigley's trustees, and therefore included in the words of

the demise, as other lands of the lessors adjoining or near to the scheduled lands. The Primary Judge decided in favour of the appellants. His decision was reversed by the Full Court. The judgment on appeal was given by Faucett, J. All the learned judges concurred in thinking that the coal in dispute was not comprised in the lease of the 10th of June, 1882, assuming that Mitchell's title was made out. Sir George Innes, J., added that, in his opinion, that assumption was not well founded. The Judicial Committee now, after a full analysis of the evidence, "had no hesitation in coming to the conclusion that the Full Court was right in holding that the coal in dispute was not comprised in the lease of the 10th of June, 1882. . . . . . . Their Lordships' attention has been called to the evidence given at the trial. Their Lordships are of opinion that the evidence is not sufficient to prove that Mitchell acquired a title to Macqueen's Grant. In fact, ... there is no evidence of such possession as is required to establish a title under the Statute of Limitations. . . .

"In the result, their Lordships are of opinion that the appellants' case wholly fails."

[The case above recited gains some additional importance by reason of the question of the *prerogative rights of the Crown* over minerals in our colonies having been touched upon in their Lordships' judgment. The following were the expressions made use of:—

"On referring to the Crown Grant of 1843, it appears that the Crown reserved 'all mines . . . of coal, with full and free liberty and power to search for, dig, and take away the same.' There is nothing before their Lordships to show at what time or by what means the mineral rights of the Crown passed, if indeed they did pass, to the grantee of the surface or his successors in title. In the arguments at the Bar, the title of the Crown was simply ignored. The reservation in Macqueen's Grant is not noticed in the judgment of the Court of Appeal, nor does it seem to have been referred to at the trial before the Primary Judge in Equity. And their Lordships have been given to understand that no explanation on the point can be

obtained in this country. Under these circumstances, having come to the conclusion that the appellants' case must fail in any event, their Lordships do not think it necessary to pursue the matter further. They assume that, for some good reason, the learned Judges in New South Wales, who are familiar with the title to lands in that colony, considered that the reservation had ceased to be operative. Otherwise all the proceedings would have been idle. Their Lordships, therefore, for the purpose of this judgment, propose to treat the Crown grant as if it contained no reservation. But at the same time they desire to guard themselves against being supposed to intimate any opinion as to the rights of the Crown. Those rights, if they exist, whatever they may be, are unaffected by the result of this trial, and will not be prejudiced by any expressions in this judgment."] [*P. C. Ar.*]

The South Melbourne and Albert Park Land Investment Company, Limited *v.* Peel.

Victoria. Lord Macnaghten. *July* 29, 1891.

Vendor and purchaser. Dispute between appellants (purchasers) and respondent (vendor) arising out of the sale of a piece of land adjoining the Yarra River, at Yarraville, near Melbourne. Action to rescind contract on account of delay in completing certificate of title. Amendment of certificate. The National Bank of Australasia were originally owners in fee of the land in question. In May, 1888, the bank agreed to sell the property to a person named Singleton for 23,000*l.* On the 19th of July following, Singleton agreed to sell it to the respondent for 30,000*l.* On the 28th July the respondent agreed to sell the land for 33,000*l.* to the appellants, a limited liability company. It will thus be seen that engagements to transfer the property into different hands were entered into

three different times within as many months. In each case part of the purchase money was payable in cash in two sums, one on signing the agreement, the other shortly afterwards; the balance was secured by promissory notes payable in 1889, 1890, and 1891. The purchase was to be completed when the last promissory note became due. At the date of the agreement of the 28th July, 1888, the property had not been brought under the Transfer of Land Statute. An application for this purpose was initiated by the bank in August of that year. Shortly after the agreement of 28th July, the appellants required, as they were entitled to do, a clear certificate of title. This was not immediately forthcoming, and as there had been a serious fall in the land market, they appear to have felt that the bargain with the respondent was a disadvantageous one for them. In May, 1889, the appellants issued a writ demanding a rescission of the contract, and for the return of money paid, on the ground that a certificate of title had not been produced within a reasonable time. The claim was met by the delivery of defence, with a counterclaim by the respondent asking, in effect, for *specific performance.* Meanwhile, proceedings under the Transfer of Land Statute were going on, but there was considerable delay owing to the complicated state of the title, particularly with regard to an easement—a right of way over a certain strip of land leading to a so-called pier, which pier, it would seem, was in actual user by neighbouring owners, Cuming, Smith & Co. A certificate of title, subject to a certain easement over a strip of land coloured yellow in the plan and fronting the river, was completed on the 11th July, 1889. The appellants objecting to the certificate, the pleadings and rejoinders in the action proceeded. The appellants declaring that the land marked yellow in the plan, which was alleged to be subject to an easement, was indispensable for the intended user by the plaintiffs, and the respondent contending that there were no easements over the land marked yellow, or in the alternative, that if there were any such easements, the appellants had bought with notice. It was also said that Messrs. Cuming, Smith & Co. made use of the pier situated at one end of the land by means of the diversion of a road. In the course of the proceedings,

the appellants were allowed to amend their claim by adding an allegation that the defendant had not, at the time he made the contract, and had not at the then present time, either by himself or by the person from whom he purchased, a title to the piece of land coloured yellow in the certificate of title, and that he had no present right to procure a title to such piece of land. The Primary Judge in the result ordered the contract to be rescinded, the plaintiffs being directed to pay costs up to such amendment, and subject thereto, judgment was entered for them on the claim and counterclaim. On an appeal by the respondent to the Full Court, that tribunal, on 13th March, 1890, through Higginbotham, C. J., pronounced the following decision:—

"Having regard to the time and the circumstances of the objection taken to the defendant's title, and the radical amendment of the statement of claim allowed, and properly allowed, to the plaintiff company at the last moment," the Court was of opinion "that the defendant should have been permitted, upon terms and within a time limited, an opportunity of removing, if he could, the objection taken to title." Accordingly, a reference was directed as to the title to the land coloured yellow, and two months was given for him to bring in proof of his title to the said land. On 21st March, eight days after the order, a memorandum was entered on the certificate of title to the effect that the encumbrance affecting the land coloured yellow had been removed. Against the judgment below, allowing the amendment of the certificate, the appeal was brought. The Judicial Committee now endorsed the ruling of the Full Court, and reported that the appeal ought to be dismissed with costs. Their Lordships in their judgment say:—

"On behalf of the appellants, authorities were cited in which it has been held that if a person contracts to sell land, having at the time no title, the purchaser on discovering the fact may rescind the contract, and the vendor is not to be allowed an opportunity of curing the defect. It was urged that the same rule ought to apply to the case of an easement substantially affecting the value of the property contracted to be sold; and it was argued that the purchaser's right to rescission could not

be intercepted by an action for specific performance. It appears to their Lordships that the authorities cited and the arguments founded upon them have no application to the facts of the present case. It was indeed argued that this Board was bound by the findings of fact pronounced by the learned Judge, though in their Lordships' opinion unsupported by evidence in the record, apparently on the ground that this Board ought to have inferred from the brevity of the learned Judge's notes that there was other and better evidence left unrecorded. That is an inference which their Lordships decline to draw. Then it was contended that, inasmuch as the respondent had not asked for a reference before the Judge of First Instance, it was not competent for a Court of Appeal to direct one. Their Lordships are unable to give any weight to this objection." [*P. C. Ar.*]

Hanuman Kamut *v.*
Hanuman Mandar and Others.

[*Ex parte.*]

Bengal. SIR RICHARD COUCH. *Nov.* 11, 1891.

Question of limitation. Sale of property for consideration in money not necessarily void, but voidable when objections were taken to such sale by other members of a joint family. Limitation ran from actual point of time when consideration failed. Article 97 Civil Procedure Code (Act XIV. of 1882). The facts were these:—One Dowlut Mandar, father of the respondents, in 1879, sold to the appellant $2\frac{1}{2}$ annas out of 8 annas of a certain property, and it appeared that, incident upon the sale, the consideration was paid by the appellant. In 1881, Dowlut Mandar being then dead, the appellant applied to the Collector for registration of his name in respect to the share of the property which had been sold to him. Two of the members of Dowlut Mandar's joint family objected. In consequence of that opposition, the litigation resulted in the appellant's petition for registration being rejected. Thereafter, renewed proceedings were instituted by the appellant for recovery of his purchase

money with interest. The second Subordinate Judge of Bhagulpore dismissed the suit on the ground that it was barred by section 43 of the Civil Procedure Code (Act XIV. of 1882). The High Court, on appeal, held the suit to be barred under the 62nd Article of the Second Schedule of the Limitation Act (XV. of 1877). The Judicial Committee, in deciding that the decree of the High Court dismissing the suit ought to be upheld, base their opinions rather more on Article 97 than Article 62. What follows gives the view their Lordships expressed in their judgment:—

"There are two articles in that schedule (the Second Schedule of the Limitation Act of 1877) which, it has been said, may be applicable to the present case. The 62nd Article provides that, in a suit for money had and received, the period of limitation runs from the time of the money being received. The 97th Article applies to a suit to recover money upon an existing consideration which afterwards fails, and it says that the period of limitation is to date from the time when the consideration failed. Their Lordships are of opinion that the case must fall either within Article 62 or Article 97. If there never was any consideration, then the price paid by the appellant was money had and received to his account by Dowlut Mandar. But their Lordships are inclined to think that the sale was not necessarily void, but was only voidable if objection were taken to it by the other members of the joint family. If so, the consideration did not fail at once, but only from the time when the appellant endeavoured to obtain possession of the property, and, being opposed, found himself unable to obtain possession. There was then, at all events, a failure of consideration, and he would have had a right to sue at that time, to recover back his purchase money upon a failure of consideration; and, therefore, the case appears to them to be within the enactments of Article 97. . . .

"Upon the question of limitation they are of opinion that the decree of the High Court ought to be affirmed, and the appeal dismissed; and they will humbly advise her Majesty to that effect." [*I. L. R.* 19 *Calc.* 123.]

Rajah Partab Bahadur Singh *v.*
Rajah Chitpal Singh and Others.
[*Ex parte.*]

Oudh. Mr. Shand. *Nov.* 11, 1891.

"*Legal necessity*" for loans. Prudent management of an estate. Onus of proof on creditor. Questions following the execution of an order of Her Majesty in Council. (*Vide* L. R. 11 Ind. App. 211.) There were two appeals and two cross appeals from two decrees. The appellant in the principal appeals and also the respondents are parties who by order of revivor represent the original plaintiff and defendant. As the cross-appellants did not appear the cross appeals were recommended to be dismissed by the Judicial Committee for *non-prosecution*. As regards the principal appeals, their Lordships having heard the arguments, reported that the decrees of the Judicial Commissioner (December 3, 1887) ought to be affirmed and the appeals dismissed. In their judgment the Committee point out that this litigation now is in reality a sequel, or more properly the second part, of the case which a few years back occupied their Lordships' attention, and which is reported as stated above. The creditor Rajah Agit, now represented by the appellant, sued his debtor, Rajah Bijai, now represented by Rajah Chitpal and others (respondents and cross-appellants) for payment of certain sums which were stated to be vouched by a number of different securities. In the prior proceedings the Court below had given Rajah Agit a decree for a very considerable amount. As the result of the argument before their Lordships in that prior litigation the case was remitted with directions to the Court below. The Judicial Committee in their judgment now refer back to an opinion given in the former appeal. "It is true that there is no direct evidence in the record of a conspiracy between Agit and Wahaj-ud-din; but they acted together against the interest of this unfortunate talookdar"—the talookdar being the defendant before the order of

revivor was made, *i.e.* Bijai, in this case. "His agent induced him to sign a number of bonds for sums of money which have been found not to be necessary for the purposes of the estate; and Agit, whose duty as a relative, a friend, and a neighbour of Bijai, a man of weak intellect, was to have warned Bijai against the proceedings which were going on to his own ruin, so far from doing this, acts in concert with the unfaithful steward, and not only does he act in concert with him, but he profits principally by their joint transactions." Their Lordships were unable, as will be seen by the report of the case in 11 Indian Appeals, to affirm the judgment giving a decree for the large sums to which reference was made, and a remit to the Court below to take accounts was ordered. It is upon the results of this taking of accounts that the matters now again came up. It would seem scarcely necessary to refer here to item after item, however large in amount, as to which recent disputes had arisen. With reference to such items, various problems were presented. The more important one no doubt being whether certain advances made to the debtor were so advanced to be used in payment of Government revenue, and, if so, whether proof was not required to show that the debtor's rents coming in were insufficient to meet that revenue. Other questions were, what borrowing on the part of Wahaj-ud-din had been received by Bijai personally; also, what sums, if any, had been improperly disallowed, and what advances the creditor was able to show Wahaj-ud-din had been justified in borrowing in the course of a prudent management of his principal's estate. In the result their Lordships said they were prepared to affirm the judgment of the Judicial Commissioner, which appeared to them to be sound. After taking notice of the fact that by the recent decisions below all the sums which had been paid to Bijai personally, with the exception of one item, had been allowed seriatim, and the claims mentioned in the principal appeals, and said by the principal appellants to have been improperly disallowed, they then proceed to discuss the items brought under notice in the cross suit. Their Lordships think that the first of these, "*b*,"

stands in the same position as items already referred to, having merely this to support it, that it is proved the money went in payment of Government revenue. "There is no proof whatever that it was required to be so used; or that there were not rents sufficient to have paid the whole of the Government revenue." With respect to the "*c*" item, Rs. 20,445, the munsarim before whom the accounts first came held, upon the evidence before him, having gone into the whole matter, that although no doubt Rs. 15,510-10 of this money found its way to the Treasury, yet it was all money that was not paid to Bijai personally, but to Wahaj-ud-din. "That report," to quote the judgment of the Judicial Committee, "of the munsarim was approved of by the Judge of First Instance, and by the Judicial Commissioner. There is, therefore, the concurrent finding of fact by those two judges, that this money was paid to Wahaj-ud-din, and it must come under the principles to be applied to money so paid. It has not been proved that any part of it was expended in a course of prudent management of the estate by him, and accordingly it has been properly disallowed. On these grounds their Lordships will humbly advise her Majesty to affirm the judgments of the Judicial Commissioner and dismiss the principal appeals." No order as to costs.

[*L. R.* 19 *Ind. App.* 33.]

Khoo Kwat Siew and Others *v.*
Wooi Taik Hwat and Others.

Rangoon. Lord Hobhouse. *Nov.* 13, 1891.

Bankruptcy law. Question whether a mortgage deed was void against creditors and an Official Assignee? Construction of the Act which extends bankruptcy law to Burmah (11 & 12 Vict. c. 21). Effect of re-constitution of partnership. Was the mortgage given to secure not only past, but also future advances? Mortgage pronounced valid. *Costs.* This was an appeal from the Court of the Recorder, which dismissed the suit brought by the appellants with costs. The

Judicial Committee reversed the decree of the Recorder, and ordered that the plaintiffs (appellants) should have a decree substantially in accordance with their plaint. The appellants were members of the firm of "Chin, Hoe & Co," and the object of their suit was to obtain possession of the stock-in-trade, book-debts, &c., of the respondents, who were, prior to and on 11th March, 1889, partners in the firm of "Pinthong and Friends" under a mortgage dated 11th March, 1889, and a subsequent agreement dated 29th May, 1889. The defence raised by the respondents was that the mortgage related to the effects of the firm as constituted at the date of the said mortgage, but did not extend to the assets of a newly constituted firm (May, 1889); also that there was no intention to give and take assistance in the further prosecution of the firm; that even if there had been an agreement at the date of the mortgage to make further advances, &c., still the effect of the arrangement when new partners were taken in was to rescind such agreement, and render the mortgage of 11th March, 1889, void as against creditors, and that the appellants were therefore not entitled to possession as prayed. The only question in this appeal was whether the mortgage deed of 11th March, 1889, either originally, or as modified in May, 1889, is valid against the Assignee in insolvency of the mortgagors. In this case there is no suggestion of there being anything dishonest in the transaction. The sole question was as to the validity of the mortgage. The Judicial Committee, after reviewing all the circumstances of the original arrangement, thought that the receiver's accounts showed that the respondents' firm, as late as 31st August, 1889, was a solvent one, doing a large business, and considered that it must have been the interest, and doubtless was the motive, of all parties to keep on its legs a firm that was doing a business bringing in a profit. They further held that the mortgage did operate with respect to the new stock-in-trade brought into the newly-constituted business of May, 1889. It was not true that substantial consideration did not pass to the incoming partners in the new arrangement. It was true that Rs. 15,000 of the debt was

then paid off, and that the obligation of the mortgagees to provide accommodation up to a lakh of rupees was then remitted; but there still remained their obligation to provide the Rs. 40,000 which was actually provided in the succeeding month of September. The incoming partners got the benefit of the suretyship into which the mortgagees had entered for the former partnership. The Judicial Committee, in summing up their report to her Majesty, said:—

"The result will be that the decree of the Recorder of Rangoon should be reversed, and that the plaintiffs should have a decree substantially in accordance with the plaint. Probably the property has undergone change during the progress of the suit in a way to vary the precise mode of relief. It will be right to declare that the indenture of the 11th March, 1889, is a lawful and valid instrument, and that by virtue thereof the plaintiffs were, at the date of the insolvency of Pinthong and Friends, mortgagees of all the stock-in-trade, fixtures, utensils, and effects thereupon, or in, or appertaining to their premises in Merchant Street, and of the goodwill of their business, with all book-debts and trade outstandings then payable to, or recoverable by, the said firm. There is some further care required in framing the decree, because the suit was originally brought, and this appeal is brought, against all of the seven persons who, between 11th March, 1889, and the date of suit, viz., 11th September, 1889, were partners in the firm of Pinthong and Friends. None of those persons have appeared here, and their Lordships must act in their absence. Three of these persons, Khoo Bean Poot, Khoo Hock Chie, and Khoo Jinn Inn, do not appear to have made any defence, or to have caused or incurred any costs. The effect of the arrangement of May, 1889, was to transfer the liability created by the mortgage of March from the then outgoing partners to the incoming ones. The outgoing partners are the three defendants in question. Against them there should be no costs. The other four, Wooi Taik Hwat, Khoo Cheng Choon, Saw Pang Lim, and Khoo Cheng Wah, put in a written statement denying the validity of the mortgage. In March, 1890, the Official Assignee under the insolvency was

added as a defendant, and though the individual has been changed, the Official Assignee is a party to this appeal, and has appeared to maintain the Recorder's decree. Whether a decree against the insolvents will be of any value to the plaintiffs, their Lordships cannot tell; but they think that the plaintiffs are entitled to it. All the remedies that the mortgage deed is calculated to give them they are entitled to against the person who undertook the obligations, and against the Official Assignee on whom the mortgaged property has devolved. The four defendants last mentioned, and the present Official Assignee, should be ordered to pay the costs of the suit and of this appeal."

[*L. R.* 19 *Ind. App.* 15.]

Motion *In re* Hunter and Others *v.* s.s. "Hesketh."

Vice-Admiralty, New South Wales. LORD HOBHOUSE. *Nov.* 14, 1891.

Sufficiency of security for costs of an appeal. Vice-Admiralty Court's Rules of 1865 and 1883. This was a motion by the appellants in which they petitioned to be excused from giving other security in lieu of the bail given below. In the Vice-Admiralty Court of the colony the appellants had, in accordance with the Rules, given bail by two securities to answer the costs of the appeal to an amount not exceeding 300*l.* The parties representing the s.s. "Hesketh," who now appeared, contended that under the Vice-Admiralty Rules of 1865 (r. 15) the appellants ought to be called on to deposit additional bail in the sum of 200*l.* The Judicial Committee said that it was in their power to dispense with such an obligation, and in their opinion the respondent was, under the arrangement entered into below, practically secure. Costs of the application would be costs in the cause.

McArthur & Co. *v.*
Cornwall and Manaema; and Cross-Appeal of
Cornwall and Manaema *v.*
McArthur & Co.

Fiji. Lord Hobhouse. *Nov.* 14, 1891.

Alleged dispossession in land. Claim for damages. Verdict. Were damages excessive? Order for new trial. Important explanation as to *British jurisdiction in Samoa and the Western Pacific.* Both appeals dismissed, thus leaving order for new trial on the question of damages to stand. Declarations made for the purpose of elucidating the principle on which such damages ought to be assessed. The matters at issue in the suit and the circumstances of the litigation are set forth in the judgment of the Judicial Committee, which, but slightly abbreviated, was as follows:—

"The suit in which these appeals are presented was brought in January, 1887, by Frank Cornwall and Manaema against the defendants in their partnership name of McArthur & Co. Cornwall is a British subject, and is described as a planter and trader of Samoa. Manaema, a native of Samoa, is the wife of Cornwall. . . . The defendants are British subjects, carrying on business in Samoa as traders and planters. The suit was brought in the High Commissioner's Court for the Western Pacific. The wrongs alleged are, first, that on the 27th March, 1882, the defendants dispossessed the plaintiffs of lands in Samoa which were specified in schedule A, and have since that time taken the produce and have neglected or injured the land; and, secondly, that on the same day the defendants dispossessed Cornwall of other lands in Samoa which are specified in schedule B, and have since that time taken the produce. The relief prayed is first (as to both plaintiffs and as to schedule A) 30,000*l.* damages for conversion of the produce, and 20,000*l.* for injury to the land; and, secondly (as to Cornwall and as to

schedule B), 10,000*l.* damages for conversion of the produce, and recovery of the land.

"The defendants filed statements of defence in the months of March and April, 1889. The effect of these . . . is to deny the title of the plaintiffs and to allege the lawful ownership and possession of the defendants. They set up a title under the bankruptcy of Cornwall and a sale to them by his trustee in the year 1888, but that title is not now relied on. As regards Manaema, they plead that she had previously brought an action in the High Commissioner's Court in respect of the same matters for which she now sues, that the Supreme Court of Fiji, sitting in appeal, made a decree dated the 25th September, 1886, awarding her 50*l.* damages and her costs, and that she cannot recover anything further. The action was tried in April and May, 1889, before the Deputy Commissioner, Mr. de Coëtlogon . . . and, on the 25th May, 1889, the Court pronounced a decree declaring that the plaintiffs were entitled to recover the sum of 41,276*l.* for damages, and the costs of suit, and that Cornwall was entitled to recover possession of the lands in schedule B. . . .

"The defendants appealed to the Supreme Court of Fiji, which, by a decree dated the 13th March, 1890, affirmed the decree below so far as it declared Cornwall entitled to recover possession of the lands in schedule B; but in other respects reversed it, adjudging that Manaema was not entitled to any damages, and that as between Cornwall and the defendants there must be a new trial on the question of damages.

"Both sides now appeal from the decree of the Supreme Court of Fiji, the plaintiffs contending that the decree of May, 1889, is right and should be restored; and the defendants contending that the action should be wholly dismissed for want of jurisdiction in the Court, and (as regards schedule A) for want of proof that Cornwall had possession at the time of the alleged trespass, and (as regards schedule B) for want of proof that Cornwall ever had any title to the lands, or that the defendants had ever entered upon them. As regards the possession and ownership of Cornwall and the possession of the defendants, it

may be at once stated that their present pleas are in contradiction to their previous contentions and conduct, and to the facts established in evidence; and that it is difficult to understand why such pleas were put upon record. Mr. (Mark) Napier (counsel for McArthur & Co.) has hardly endeavoured to support them at the bar, though they appear to have been seriously contested in the Court below. The questions for their Lordships to decide are, first, whether there is ground for any decree against the defendants; and, secondly, if there is, whether the decree of the High Commissioner's Court can be maintained. If there must be a decree, and the decree of the 25th May, 1889, cannot stand, the Chief Justice of Fiji is clearly right in directing a new trial. As regards procedure and the jurisdiction of Her Majesty in Council, the case stands in a singular position. In May, 1889, the ordinary course of appeal from the High Commissioner's Court was first to the Supreme Court of Fiji and then to Her Majesty in Council. But on the 14th June, 1889, a treaty was made between Her Majesty, the Emperor of Germany, and the President of the United States of America, by which it is provided that there shall be established in Samoa a Supreme Court, consisting of one Judge, who is to be named by the three signatory powers, or failing their agreement by the King of Sweden and Norway; and that his decision upon questions within his jurisdiction shall be final. Upon the organization of the Supreme Court all civil suits concerning real property situate in Samoa, and all rights affecting the same, are to be transferred to its exclusive jurisdiction. Their Lordships have been given to understand that the Supreme Court contemplated by the treaty is in working order, but they have no information as to the time when it was organized so as to take exclusive jurisdiction of all civil suits. The hearing in Fiji, though subsequent to the treaty, has been conducted without any reference to it. But then the ratifications of the treaty were not completed till the 12th April, 1890. Both parties have conducted this appeal as though the treaty would not affect the case until it had been disposed of by Her Majesty in Council. In some views of the case it would have been neces-

sary for their Lordships to pause until they were better informed as to the organization of the Court, for no provision is made by the treaty for cases under hearing or under appeal. But as they have come to the conclusion that both appeals should be dismissed, and that the existing decree should remain intact, there is nothing in the treaty which, in any state of the facts, can render it incompetent for Her Majesty in Council, acting on the advice of this Board, to pronounce such a decree as that, or which can make such a decree inconvenient or embarrassing to the new Court before which the case, if further prosecuted, must come. And their Lordships have thought it best to deliver reasons for their judgment exactly as they would if the case had to go back in the ordinary way to Courts subordinate to Her Majesty in Council. They think that such a course is the most respectful to the Supreme Court of Fiji, and also to the Supreme Court of Samoa, and also the most likely to be of use to the litigant parties. It may also possibly be of some use to the Supreme Court of Samoa, seeing that the litigants are British subjects; that their disputes have hitherto been tried according to English law and procedure; and that the treaty contemplates the use of English procedure until the Supreme Court sees fit to make new arrangements.

"The transactions of the parties prior to the present suit are numerous and complicated; but, in the view their Lordships take of the case, it is not necessary to state them in more detail than suffices to exhibit their bearing on the questions of jurisdiction, and of the plea of *res judicata* in bar to Manaema's claim, and of the principles on which damages should be estimated. It appears that in the year 1877 and afterwards Cornwall and the defendants were carrying on trade in Samoa. Cornwall was in possession of considerable tracts of land, and the defendants advanced him money to pay his labourers. On the 5th of February, 1879, Cornwall, who then owed the defendants 5,664*l.*, made a voluntary conveyance to Manaema of the lands comprised in schedule A; and on the next day he executed a mortgage of other lands to one Nelson, ostensibly to secure a debt of 16,000 dollars, but really without any con-

sideration at all. In the month of August, 1881, the defendants recovered judgment in the High Commissioner's Court against Cornwall for the sum of 5,500*l.* then owing by him. Upon this Cornwall left Samoa, as he says, to prosecute an appeal in Fiji against the defendants' judgment; and he did go to Fiji and prosecute his appeal, which was dismissed in January, 1882; but he left Samoa suddenly and clandestinely. He has never returned thither, nor did he prefer any claim in respect of his land till this action was brought.

"In the month of November, 1881, the labourers on Cornwall's land, being unpaid, sued Cornwall in the High Commissioner's Court, and obtained a decree for 900*l.*, in granting which the Court made severe remarks on the misconduct of Cornwall in leaving his labourers without supplies or provision for returning home.

"Under both these judgments writs of *fi. fa.* were issued. The goods and chattels of Cornwall were sold, but failed to satisfy the claim of the labourers, to which priority was accorded. Under the judgment obtained by the defendants the lands comprised in schedules A and B, or large parts of them, were put up to public auction, and were knocked down to the defendants for sums amounting to 8,565 dollars. It is not alleged that the defendants paid any of the purchase-money. It is not necessary to go into the details of these execution sales. It has been held by the Courts below, and is not now disputed by the defendants, that they were unauthorized, and could not confer any title. The defendants, however, took possession in pursuance of them, and that is the trespass complained of in the present action. In December, 1885, a document was executed by Cornwall, ostensibly as the attorney of Manaema, purporting to be a lease of the lands in schedule A to Sinclair and others for a term ending the 8th December, 1886. And in the month of March, 1886, Manaema and the lessees brought an action for the recovery of the same lands, and for damages amounting to 22,000*l.* The Court of the High Commissioner dismissed the action, on what ground does not appear. But on appeal the Supreme Court of Fiji decided that the lessees were entitled to

have possession of the lands, and to 50*l.* damages; and that Manaema was entitled to 50*l.* damages. The view of the Chief Justice was that Cornwall's conveyance to Manaema in 1881 was colourable and fraudulent, and that he remained the owner of the land; that Manaema was entitled to damages because she was in actual occupation of a house, and was illegally turned out by the defendants; and that the lease of December, 1885, was executed by Cornwall as principal and passed the property to the lessees for the term of the lease. This decree bears date the 25th September, 1886. It appears to their Lordships that, as between Manaema and the defendants, the present action raises precisely the same points as were tried and decided in the action of 1886, and therefore the Supreme Court of Fiji was quite right in holding, on this ground, that Manaema can recover nothing further in the present action. Of the transactions after the decree of September, 1886, very little need be said. The plaintiffs' writ of summons was issued and their statement of claim filed in June, 1887. The defendants did not file their defence till March, 1889. In the meantime they made an ineffectual attempt to appeal to her Majesty in Council from the decree of September, 1886. They illegally retained possession of the land against the lessees. In 1887 an attempt made by Sinclair to obtain a writ of possession was refused by the acting Deputy Commissioner. Some renewals of the lease to Sinclair and others were made. But (Cornwall's bankruptcy being placed out of the question) nothing occurred to alter the position of the parties before the trial, except the persistent refusal of the defendants to recognize the rights established by the suit of 1886. It has been stated above that the defences resting on the allegations that Cornwall has not any title, and that the defendants have not entered on the lands, are wholly unsubstantial. No defence remains, therefore, except that the High Commissioner's Court had no jurisdiction to entertain the suit. It is contended, first, that the defendants personally do not fall within the jurisdiction; and, secondly, that suits relating to land are not within it. The Court was created by an Order in Council (Western Pacific Order) dated the 13th August, 1877,

and made by virtue of the powers vested in Her Majesty by the Pacific Islanders Protection Acts, 1872 and 1875, and by the Foreign Jurisdiction Acts, 1843 to 1875; and by sect. 6 it is expressed to apply to 'all British subjects for the time being within the Western Pacific Islands, whether resident there or not.' . . . The persons over whom jurisdiction is given are described as 'the subjects within any islands and places in the Pacific Ocean, not being within her Majesty's dominions, nor within the jurisdiction of any civilized power.' There is no doubt that the islands of Samoa, then called the Navigators Islands, are among the places here mentioned. But it is contended that inasmuch as no one of the partners in the firm of McArthur & Co. has dwelt or is to be found within the bounds of the Islands, they are not 'within' them as required by the statute and the Order in Council. It certainly would be a very startling result if persons who had obtained the possession of lands through the processes of the High Commissioner's Court should be able to retain that possession and to prevent examination into the validity of those processes by alleging the incapacity of the Court to exercise jurisdiction over them. . . . The defendants had a store in Samoa in which they carried on business by servants and agents, and affixed to which was a signboard with the words 'Wm. McArthur & Co.' in large letters. And their Lordships agree with the Supreme Court, which in the suit of 1886 held that this circumstance clearly brought the defendants within the statute and the Order in Council. . . .

"It is true that the Pacific Islanders Protection Act does not and could not give jurisdiction to her Majesty over land in Samoa. But the Order in Council is clearly framed to give jurisdiction over British subjects in questions affecting land to the High Commissioner's Court, and must be held to do so in all those places in which her Majesty has been enabled to give it by the assent of the ruling power. So far as regards Samoa, the matter is provided for by a treaty dated the 28th August, 1879, between her Majesty and the King and Government of Samoa. In that treaty Article III. guarantees to British

subjects full liberty for the free pursuit of commerce, trade, and agriculture, and creates a special tribunal for deciding disputes respecting purchases of land from Samoans. . . . .

"The result so far is that though the defendants can plead successfully that Manaema's claims have been disposed of, that plea only leaves them answerable to Cornwall. Against him their pleas fail, and he must be treated, as the decree appealed from treats him, as entitled to recover possession of the lands, and damages for dispossession. Then comes the difficult question, What damages? The decree of the High Commissioner's Court, which Cornwall strives to retain, proceeds on the principle of ascertaining the number of cocoanut trees on the land, and assigning an average annual value per tree during seven years of illegal occupation. By this process the sum of 24,676*l.* is brought out as the value of the produce. Then sums amounting to 9,600*l.* are added for depreciation and neglect, and 7,000*l.* as 'penal damages for illegally holding possession of the lands.' These sums make up the total amount decreed, viz., 41,276*l.*

"Their Lordships concur with the Chief Justice of Fiji in thinking that such an amount is altogether disproportionate and excessive. The net profit of the estate is put at 3,500*l.* a year or thereabouts. This is the property for the labour on which Cornwall was unable to pay a sum of 900*l.* in the latter part of 1881, which he allowed to pass by an irregular process into the hands of his judgment creditors in 1882, without, apparently, any attempt to get it back, though he might have done so by raising some 6,000*l.*, less than two years' income at the supposed rate. The method which leads to this result is a very dangerous one. It affords the widest scope for conjectures, which it is impossible to bring to any sure test except by examining actual transactions with the property and its produce, or with other properties in exactly similar positions. No accounts have been produced, nor has any other evidence been tendered on Cornwall's part, to show what profit accrued during his possession. Cornwall himself has kept at a distance from Samoa. The leases to Sinclair and others are at a rent of 50*l.* only, and the sales upon the executions were for small sums,

and those upon the bankruptcy for still smaller; but all these transactions were unreal ones, and no reliance can be placed on them. . . . No doubt there has been great dearth of evidence, and it is the defendants who have been in possession who ought to produce the best evidence, and it is against them that presumptions must be made on points left in doubt. Still the presumptions must not be so incredible as those adopted by the First Court. It appears to their Lordships, indeed, that, even if the method were right, the evidence does not warrant the conclusions of the First Court as regards either the number or the yield of the trees. The Court seems to have applied to large areas statements made with reference to very small ones, favoured by position or by the attention of the cultivator. Notwithstanding some sanguine estimates of value, the impression made upon their Lordships by the whole evidence is that the property is one of very uncertain and fluctuating value, of very little value to one who cannot pay for labour; to one who can, dependent on the supply of labour from time to time; and that, during the period under review, there have been great difficulties in getting the desirable supply of labour. It is, probably, on this last ground that the Supreme Court of Fiji thought that the defendants ought not to be charged with the large sums awarded by the First Court for deterioration and neglect. The cultivation had gone back from the impossibility or extreme difficulty of getting labour. The learned Chief Justice says that the safest measure of damage seems to be the value of the produce which the plantations may upon the evidence be taken to have been capable of yielding at the time they were taken possession of. He considers that there is evidence to warrant him in taking that value at 1,200*l.* a year, and, for the purpose of making an offer to the parties, calculates that a fair sum for damages would be 15,000*l.*; this sum being made up of eight years of the value of 1,200*l.* without allowing any deduction for expenses, and with the addition of 5,400*l.* for penal damages. Cornwall, however, would not accept the reduced sum; and so there was no course left but to direct a new trial. Their Lordships also have tried to bring about a compromise between the

parties, but they have not been more successful than the Chief Justice of Fiji. Their Lordships cannot find any better principle than that of the Chief Justice for the first step in ascertaining the amount of pecuniary damage. But they cannot see why the defendants should not be allowed a proper sum for expenses, nor why they should be fined in a further sum for Cornwall's benefit under the name of penal damages. . . .

"What was the position of the parties when the trespass was first committed? The defendants were creditors of Cornwall; he was legally bound to pay them to the extent of his whole property; he was especially bound in honour to let them have value out of his plantations, because their money had gone to pay for the labour on those plantations. What he did was to execute a fraudulent conveyance to Manaema, and a fraudulent mortgage to Nelson; to leave the islands directly a judgment was obtained against him, suddenly, secretly, in violation, as the solicitor in the action states, of his pledged word, and leaving his labourers to shift for themselves in a way which was highly discreditable to himself, and which must have been injurious to the property. When out of the islands, he was busy in endeavouring to upset the judgment, apparently a perfectly just judgment, obtained against him by the defendants. It is not shown by anything in this record that the seizure and sale of the land effected by the defendants was more than a mistake of law. But even if the defendants did think that they could safely take a short cut to obtain one of their debtor's assets clearly available to make good their debt by some process, there was certainly much in Cornwall's conduct to provoke them to do so, and it is hardly for his sake that they should be visited with penalties greater than the loss which he has suffered.

"The conduct of the defendants after the decree of 1886, or at least after their failure to get leave to appeal from it, is less excusable. The illegality of their possession, though disputed before, was then made manifest. It is true that Cornwall has never offered to repay the judgment debt, and that, for aught that appears, the defendants may still be found creditors on an account taken between them, when the profits of the land have been fixed. But that did not justify their retention of the

land after a decree for its restoration. To say, however, that for such a piece of disobedience to the law they shall be disentitled to charge their expenses on the land against their receipts from it, and shall be fined into the bargain, and all for the benefit of Cornwall, is going beyond the point warranted by any principle or any decided case known to their Lordships. The defendants have been, at least, very imprudent in the first instance, and afterwards more than imprudent, have been wrong-headed and obstinate. For that they will suffer in at least part of the costs of this expensive and harassing litigation, and in all those reasonable presumptions which will be made against them in questions respecting their receipts and expenses which they ought to clear up and do not. The nature of the advice which their Lordships will humbly tender to Her Majesty has been before indicated. It is that both appeals should be dismissed, so that the decree will stand affirmed. There will be no costs of these appeals.

[*The above appeals are given at considerable length. They are the first appeals from the colony of Fiji to Her Majesty in Council.*]

[(1892) *App. Cas.* 75; 61 *L. J. P. C.* 1.]

Lachmi Parshad *v.*
Maharaja Narendro Kishore Singh Bahadoor.

N. W. P. Bengal. Lord Morris. *Nov.* 19, 1891.

Claim to recover alleged loan. Genuineness of a *parwana* and of a receipt. Proof of loan deficient.

"The action was brought," their Lordships say in their judgment, "by a banker, or money-lender, against the heir of a deceased Maharaja, Rajendro Kishore, for the recovery of a sum of Rs. 12,000, and interest, alleged to have been borrowed from him by the Maharaja shortly before his death. The transaction is said to have occurred on the 28th November, 1883, and the Maharaja died on the 27th December following. In an action brought to recover money against an executor, or, as in this case,

the heir, of a deceased person, it has always been considered necessary to establish as reasonably clear a case as the facts will admit of, to guard against the danger of false claims being brought against a person who is dead and thus is not able to come forward and give an account for himself. The present case depends upon the testimony of two persons, Beni Misr and Sukhdeo, who detail a transaction which is in many respects of an improbable character, and would in any event require corroboration. Beni Misr is the gomashta of the plaintiff. Sukhdeo appears to be a broker. He is described, in the judgment of the High Court, as a person who 'hangs about the Bazaar . . . a sort of tout, willing to mix himself up in any sort of transaction, out of which he can obtain some remuneration for his trouble.' He says that he was one day accosted by a servant of the Maharaja, named Dammal Pande, and requested to raise a loan for the Maharaja. He describes the conversation between himself and Dammal Pande, and his going to Beni Misr. He relates the terms upon which Beni Misr agreed to the loan for the Maharaja, namely . . . that the Maharaja should execute a document upon a *hundi* or stamped paper. . . . He says specifically that he purchased the *hundi* paper 'a day before that on which the Maharaja signed the *hundi*,' namely, on the 27th November, 1883. But the *hundi* paper has upon it the memorandum of the date of its sale, namely, the 28th November, 1883, the day upon which the Maharaja is alleged to have signed it. It is, therefore, in the absence of explanation, impossible that he could have bought it on the 27th. . . . The other witness, Beni Misr, deposes to the fact of his having accompanied Sukhdeo to the house of the Maharaja. There is some want of distinctness as to whether he alleges that he saw the maharaja sign the *parwana* or not. . . . Their Lordships would point to the difference between his having merely said that the thing was done, and his having said that he had seen it done. The case of the plaintiff, therefore, who appears to have had no personal dealing whatsoever with the Maharaja in this transaction, and who never saw him, depends altogether on the evidence of Beni Misr and Sukhdeo, and by

their evidence he must stand or fall. There has been no corroboration of any kind of the story of these two witnesses brought forward on the part of the plaintiff. . . . The Maharaja had persons who were acting for him in the management of his affairs of considerable importance in his household, and it seems unlikely that Dammal Pande would have been employed at all by him in the matter. Then there is the significant fact of this large sum of money being raised by him just a month before his death, and with nobody of his household, apparently, brought into privity with it, or knowing anything about it. The discrepancy of date has been already mentioned. There is also a certain degree of difficulty attending the fact that the *parwana* purports to be drawn at twelve months' date, whereas no application for the money appears to have been made for some months afterwards, at all events to Mr. Gibbon, the manager, to whom the plaintiff ultimately wrote. . . .

"The *parwana* purports to declare that a thing had been done which in reality was only going to be done; because it says, 'As you have paid Rs. 12,000 to Mussammat Sarab Mangla (the mistress of the Maharaja, for whom the money was alleged to have been required) according to my permission, this money is due to you from me; and so I declare it in writing that I shall pay to you the principal amount, together with interest at one per cent. per mensem, within a year, and take back this *parwana*,' whereas in any case the money had not been paid at that time. . . .

"In addition to her (Sarab Mangla) handing over the *parwana* the plaintiff appears to have required from her a receipt for the money, which has been relied upon by him as being a document of the last importance. . . . That document, as well as the *parwana* itself, is impeached as a forgery. As regards the *parwana* itself, there is the evidence in favour of it, as has been already observed, of Beni Misr and Sukhdeo. As against it there is the evidence of three witnesses on the question of handwriting, namely, Mr. Gibbon, an Englishman, who was the manager of the Maharaja; Madho Narain, his paymaster; and Har Pershad, his office-keeper. These three witnesses all depose that the signature to the *parwana* is not in the handwriting of

the Maharaja. Sarab Mangla deposes that she never got the Rs. 12,000, and that the receipt referred to does not bear her signature. If these documents were forgeries it does not follow that the plaintiff is involved in them. He may have given his money, and upon the evidence it would appear that he did give his money, to Beni Misr, to be handed over to the Maharaja. He may have been misled by Beni Misr, and Beni Misr and Sukhdeo may have been in a conspiracy to obtain the money for themselves, and the money may have gone from the coffers of the plaintiff, and still never have reached Sarab Mangla, whom the Maharaja is said to have expressly ordered to receive it. It therefore does not appear to their Lordships that it is at all necessary to hold, nor that there is evidence in the case which would lead to the conclusion that the plaintiff was in any way a party, or privy to such a transaction. It should never be forgotten that the onus of proof in this case lies upon the plaintiff. But he has failed to bring forward the evidence which he ought to have done, when he knew that this transaction was called in question, and that the *parwana* and the receipt were impeached as forgeries. There are no less than five persons who ought to have been called in support of his case, but were not. . . .

"Thus, all the probabilities of the case are against the plaintiff. The evidence of the handwriting is distinctly against him, and he has in no way corroborated, as he might have done, the testimony of Beni Misr and Sukhdeo. Neither has any trace been found in the books of the Maharaja of any loan of this sort." Decrees of the Subordinate Judge of Benares and of the High Court affirmed, and appeal dismissed with costs.

[*L. R.* 19 *Ind. App.* 9.]

The Secretary of State for India in Council *v.* Nellacutti Siva Subramania Tevar.

Madras. Lord Watson. *Nov.* 21, 1891.

Dispute between the Zemindar of Singampatti (the respondent and heretofore plaintiff) and the government respecting title to

three parcels or hill tracts of forest land, lying at the northern base of a mountain range in Madras, the crest or watershed of which, running due east and west, rises to an elevation varying from 3,850 to 4,900 feet above sea-level. The watershed is a well-defined natural line and forms the northern boundary of the territory of Travancore. Construction of a sunnud dated 1803. Effect of user and acts of possession in confirming title. Whether marginal note to sunnud is to affect the plain terms of the grant. The District Judge held it to be established that the Zemindars of Singampatti had, for very many years, exercised rights of grazing, cutting timber, &c., throughout the third or western tract; with respect to the eastern tract, he found that they had exercised similar rights, but not to the exclusion of a certain amount of user by inhabitants of contiguous government villages. The central tract appeared to the District Judge to be of comparatively little value. The result of his findings was that the possession of the western tract by the respondent and his predecessors ought not to be ascribed to a title of property, but that it was sufficient to give him right to exclusive easements of pasturage, cutting timber, and collecting mountain produce over its whole area. As to the western tract, he held that the respondent was entitled to easements over it, of the same character, but not exclusive. The High Court, on appeal, adopted the findings of the District Judge with respect to the Zemindar's exclusive possession of the western tract, but rejected his legal inference that the right thereby constituted was in the nature of easement, and held that it amounted to a full right of ownership. As to the eastern tract, the High Court found that the respondent had established a full proprietary title to it. They also held (differing from the District Judge) that the Zemindar had also proved title to the central tract. Thus, all the parcels claimed were accorded as possessions of the respondent by the High Court. The Judicial Committee now report to her Majesty that the decree of the High Court is correct, and recommend that the appeal of the Secretary of State should be dismissed with costs. *Inter alia*, their Lordships made the following observations:—"The respondent was a minor when

he succeeded to the zemindary, and did not attain majority until the year 1880. Until 1867 his estate was managed by his mother; and from that date until 1880 it was under the management of the Court of Wards.

"For a considerable period antecedent to the year 1865, it appears to have been well known to the government that the Zemindars of Singampatti claimed as their property the extensive hill tract lying between their cultivated lands and the Travancore boundary. In that year the government began, for the first time, to suggest doubts as to the validity of their right; and, in 1870, a demand was made for production of the evidence of their title. A report was thereafter made by Lieutenant Campbell Walker, which was submitted to the government pleader; but no further steps were taken in the matter until October, 1879, when an order was issued directing a survey officer, empowered under the Boundary Act, to take up the settlement of the case.

"That order was carried out by Mr. Baber, who, after making inquiries, and personally surveying the tract in dispute, issued his report and decision on the 6th April, 1880, with a relative plan prepared by him, which shows the whole area then claimed, and also that portion of it which he held to be part of the zemindary. The latter, roughly estimated, comprehends about one-half of the area claimed, and forms the north-western portion of that area. The lands which Mr. Baber held to be government property consisted of a tract varying in breadth lying outside the eastern and southern boundaries of the lands assigned by him to the Zemindar. In this suit, which was brought by the respondent in July, 1880, after he became of full age, the government concede, as they have all along done, his right to the land to which he was found to be entitled by the decision of their survey officer. . . .

"The title of the respondent is a sunnud, dated the 22nd of April, 1803, granted by Lord Clive to his ancestor, Nellacutti Teven, then Zemindar of Singamputti. The sunnud contains the usual recitals, one of these setting forth that the object of the grant was to confer upon the Zemindar, his heirs and

successors, 'a permanent property in their land in all time to come.' It contains no specification or description of the lands which it was intended to carry, but is a grant in general terms of the zemindary as then held and possessed by the grantee. There is a *marginal* note specifying the names of three villages then composing the zemindary; and it was suggested in the argument for the appellant that the effect of the note is to limit the grant to these three villages and a limited area in their immediate vicinity, and to exclude the claim of the respondent for any land beyond these limits which is not shown to have been subsequently acquired from the government by prescription. Their Lordships do not think that a marginal specification of the villages existing at its date can control the plain terms of the grant, or can be taken as definitive of the extent of land, cultivable or not, which was then held and possessed by the Zemindar of the villages enumerated. In their opinion, the respondent must prevail in this suit, if he has been able to show, either by direct evidence or as matter of reasonable inference, that the lands now in dispute were held and possessed by the Zemindar at the time when he obtained a permanent title from the government."

Their Lordships refer to the unanimity of the Courts below in their conclusions of fact. In their opinion, there was sufficient evidence tending to prove that the Zemindars had, for a period beyond living memory, or, at least, for fifty years, uniformly asserted their right to all the tracts now claimed, by including them in leases of their hill lands. Moreover, in 1843, 1857, and 1858, Government Collectors had dealt with the tracts in question in the matter of revenue, on the footing that they formed part of the zemindary. The Judicial Committee in the result, as has been said above, affirm the decree below, with costs.
In this case, special leave to appeal was granted to the Secretary of State in Council by her Majesty's Order in Council of 17*th March,* 1888. *Subsequently, the Secretary of State again applied to the Privy Council for stay of execution, and this request was granted, but subject to the right of the respondent to come in and object.*

[*L. R.* 18 *Ind. App.* 149.]

Maharajah Jagatjit Singh (a Minor, by his Guardian Koer Harman Singh) *v.*
Raja Sarabjit Singh.

[*Ex parte.*]

Oudh. LORD HOBHOUSE. *Nov.* 21, 1891.

Boundary. Title to respective lands. Was any issue in the present suit decided in previous litigation. Limitation. Mesne profits. Decrees below discharged. Held that subject matter of this suit was not dealt with before. Appellant to be put in possession and be paid *all* costs. The appellant (plaintiff) is the young Maharaja of Kapurthala, proprietor of estates on the banks of the Gogra river in Oudh. The respondent is the Raja or talookdar of Ramnagar, owner of estates on the other side of that river. Litigation has been going on between the two families for many years, sometimes initiated by agents and sometimes by principals, and the parties have interchanged places on the record so often that it is confusing to speak of them in the character of plaintiffs or defendants. In the judgment of the Judicial Committee the parties for convenience are styled simply Kapurthala and Ramnagar. Their Lordships revert at some length to the incidents of previous litigation from 1871, when the disputes of more recent date began. In February, 1873, there was a compromise, and a decree was directed to carry the terms of the compromise into effect. In 1876 the long dispute appeared for the moment to be finally decided. The decree then made by the Commissioner of Bari Banki was to this effect:—"The Court decides that the decree must be executed according to the map prepared by Colonel Chamier, dated 16th June, 1874, and the southern boundary of the disputed land will be that drawn in the above map. If either party consider that they have any claim to lands thrown up by the river, they have their remedy by a regular suit." During the proceedings just prior to the passing of the decree a statement was made by Kapurthala to the effect that certain alluvial Khasapur land

had been erroneously mixed up with Tappa Sipah land. Over this, probably in consequence of the Deputy Commissioner's remarks about the possibility of recourse in a fresh suit in the case of lands being thrown up by the river, controversy broke out again anew. Kapurthala, on the 16th January, 1877, brought such a regular suit. The claim was made for possession of 3,921 bighas 18 biswas in village Khasapur (on the basis of ancient possession), by cancelment of possession wrongfully taken by the defendant since June, 1876. In giving judgment in this suit the Deputy Commissioner of Bari Banki *inter alia* said:—

"The fact appears to be that there is some doubt as to the exact land decreed to Tappa Sipah, and therefore defendant applied for an Amin to point it out, but the plaintiff asked that it might be postponed until this suit might be determined. But be that as it may, plaintiff cannot complete his possession under the Tappa Sipah decree by tacking on land to Khasapur." In his findings the Deputy Commissioner said:—"Plaintiff should take steps to have the land defined which has been decreed to him under Tappa Sipah, and this judgment of course will not affect any of that land." The plaint was dismissed.

Kapurthala appealed to the Commissioner of Lucknow, Colonel Reid, who on the 20th June, 1878, dismissed the appeal, and in doing so said: "I am therefore of opinion that . . . the District Judge should proceed to the spot and satisfy himself by local inquiry, in presence of the parties, that his decree has been proper, land has been assigned to Tappa Sipah exactly in accordance with his decree." After this Kapurthala addressed himself to the task of executing the decree on compromise of the 3rd February, 1873. The next order on the record relates to this. It is a decision of Colonel Chamier, Deputy Commissioner, dated the 3rd March, 1879, and therein this Deputy Commissioner says:—"It seems to me that before the Raja of Kapurthala can expect the Court to ascertain whether or no a decree passed years ago was accurately executed or not, he should state the section of Act X. of 1877 (Limitation Act), under which he applies, and he should present an accurate map

of the land showing what he is entitled to under the decree, and what he does not hold." With reference to this order the Judicial Committee in their judgment now observe:—"Their Lordships cannot refrain from observing that this appears to them a very unsatisfactory way of dealing with such a business. The land to which Kapurthala was entitled under the compromise was not ascertained and put beyond reach and dispute till September, 1876. In the suit of 1877 there were still some doubts as to the exact land, and in the final judgment given in that suit, on the 20th June, 1878, it was intimated to Kapurthala by the Commissioner, Colonel Reid, that on his application the District Judge should proceed to the spot, and satisfy himself that the land had been assigned to Tappa Sipah in accordance with his decree."

After what the Judicial Committee designate this repulse in the Civil Court Kapurthala sought the aid of the Revenue Court. On the 28th January, 1880, he procured an order for the erection of boundary marks according to the decree of 1873. Ramnagar appealed, but though his appeal was dismissed nothing was done till February, 1881, when the then Deputy Commissioner visited the spot, ascertained the boundary line adjudged by the 1873 decree, and erected pillars to mark it. At the same time he found that the adjudged land, within certain lines which he laid down on a map, was in the possession of Ramnagar, who strongly urged his right to hold possession until ousted in due execution of the Civil Court decree, and denied the right of the Revenue authorities to lay down boundaries except on the basis of actual possession. Kapurthala's next step was to bring rent suits against tenants who paid their rent to Ramnagar. He obtained decrees from the extra Assistant Commissioner notwithstanding the intervention of Ramnagar, but on appeal these decrees were upset, on the ground that the Revenue Court was incompetent. The Judicial Commissioner holding that if Kapurthala had any claim he should sue Sarabjit Singh in the Civil Courts. These decisions the Judicial Committee thought were correct, although they had the effect of throwing Kapurthala back again on the Civil

Courts. Ultimately the plaint in the present suit was filed 5th February, 1886. It claimed 2,679 bighas 14 biswas of land under the decree of the 1st February, 1873. The first question in it was, *whether this suit was barred by time?* Both Courts below decided this point in Kapurthala's favour, and the Judicial Committee agree with them. "It is true that the compromise, which is the foundation of the claim, dates from February, 1873, but the land which accrued to Kapurthala under the compromise was not ascertained till the proceedings in 1876. . . . . June, 1876, is the very earliest time at which a right to recover the land in suit accrued to Kapurthala, and that is less than twelve years before the reception of the plaint.

"The Deputy Commissioner, Colonel Newberry, dismissed the suit with costs. As to 1,226 bighas 6 biswas, he considered that the dispute had been previously decided in the suit of 1877. As to the rest of the land claimed, he held that the case fell within the sections of Civil Procedure Code (42 and 43), which relate to the splitting of claims. On appeal by Kapurthala the Judicial Commissioner affirmed the decree, so far as it relates to the 1,226 bighas 6 biswas comprised in the suit of 1877. But with respect to the remainder of the claim he varied the decree, and decided for Kapurthala. In the latter part of the Judicial Commissioner's decree their Lordships entirely concur, and as there is no appeal from it by Ramnagar they need not further examine that part of the case. But Kapurthala now appeals from the other portion of the decree, and the question is whether the appeal can be maintained. Both the learned judges grounded their opinion on the fact that the tract of land claimed in 1877, being 3,921 bighas, included the 1,226 bighas belonging to Tappa Sipah, and that the claim was dismissed. That, they say, is conclusive. The Judicial Commissioner says the mere fact that Kapurthala claimed it as belonging to Khasapur is immaterial. And as to the direction given by the Courts to have the Tappa Sipah lands defined, the Deputy Commissioner says it is the decree which contains the formal adjudication, and it is not possible to amplify the decree from

the judgment." The Judicial Committee remark, in their judgment, that *when a decree dismisses a suit it is necessary to look at the pleadings and the judgment to see what were the points actually heard and decided.* In their Lordships' view, "sect. 13 of the Civil Procedure Code does not enact that no property comprised in a suit which is dismissed shall be the subject of further litigation between the parties. What it does enact is that no Court shall try any suit in which the matter directly and substantially in issue in a former suit has been heard and finally decided. Was, then, the title to Tappa Sipah lands put in issue by suit of 1887, and was it heard and finally decided against Kapurthala?" In closing their judgment the Judicial Committee recapitulated the proceedings of the litigation in the following words:—"Kapurthala claimed a large area as belonging to Khasapur. Whether land belonging to Tappa Sipah was included in that area by mistake or in the hope of getting some advantage in the other dispute, does not appear. It must be remembered that far the greater portion of these disputed lands is still uncultivated and jungle. Anyhow, the fact was discovered by a survey made in the suit of 1877. It appeared that doubts had been raised as to the position of the land decreed to Tappa Sipah: Ramnagar asked for an Amin to point it out, but Kapurthala preferred to have the suit decided first. The decision is that the land not belonging to Tappa Sipah belonged to two of Ramnagar's villages, rather more, apparently, than two-thirds of the whole. But it is clear that the moment land was shown to belong to Tappa Sipah, it was considered as out of the suit. Both Courts treat it so, and both Courts direct Kapurthala to get the Tappa Sipah land ascertained. Their Lordships cannot see what matter respecting Tappa Sipah was in issue between the parties, or what was heard or decided. It seems to have been the express intention of both Courts to decide nothing about Tappa Sipah. Yet, according to the view now put forward, the moment that this suit was dismissed Kapurthala was deprived of all right to recover those 1,226 bighas, and was incompetent to take the proceedings which the Courts contemplated. The only remaining point is that of *mesne profits.* The

Deputy Commissioner says there is no proof. There is some proof, because the rent suits show that Ramnagar was receiving rent for some of the land. But it is quite competent for the Court to direct an inquiry under sect. 212 of the Code. Ramnagar has for a number of years kept Kapurthala out of property which clearly belonged to him, and it would be a denial of justice not to make him account for the profits. The Judicial Commissioner says that Kapurthala ought not to have any mesne profits, because of his extraordinary supineness for years. To their Lordships it seems that Kapurthala has been constantly endeavouring, through great discouragements, and sometimes by mistaken proceedings, but with no great intervals of time, ever since February, 1873, to get the land which he was entitled to under that decree . . . even if supineness could be properly treated as equal to a bar by lapse of time, there is in this case no supineness which affords a reason for leaving Ramnagar to enjoy the fruits of his illegal and wilful holding on to land not his own. . . .

"Their Lordships are of opinion that both the decrees below should be discharged, and that a decree should be made for the plaintiff for possession, according to the prayer of his plaint, and for mesne profits, with an inquiry as to the amount. . . . The plaintiff should also have the costs of suit in the first Court, and of the appeal before the Judicial Commissioner, and the costs of this appeal." [*L. R.* 18 *Ind. App.* 165.]

Ramratan Sukal *v.*
Mussummat Nandu; and
Mussummat Sheo.

Court of the Judicial Commissioner, Central Provinces, India.
LORD WATSON. *Nov.* 24, 1891.

Validity of a bond alleged to have been entered into by the elder of three widows. Sect. 257A, Civil Procedure Code. Act XIV. of 1882. "Second appeal." Bond de-

clared invalid. Decree of the Judicial Commissioner refusing to re-open finding in previous Appeal Court on questions of fact upheld and appeal dismissed with costs. *The sections of the Code dealing with the non-disturbance of a finding of fact by a previous Appeal Court are numbered* 584 *and* 585. The Judicial Committee, in affirming the decree of the Judicial Commissioner, made these observations: "This is an action brought by the appellant in 1886, before the Court of the Deputy Commissioner, Hoshangabad, in which he has obtained decree against the respondents as widows and heirs of Khushal, a zemindar, who died in 1878. He was survived by three widows, Mussummat Deo, the senior, who died in January, 1881, and the respondents, Mussummat Nandu and Mussummat Sheo, who are defendants in the Court below. The action was laid upon a bond dated the 7th November, 1881, which bears to have been granted in favour of the appellant by Mussummat Deo, who at that time was the manager of the estate. Various defences were set up by the respondents, which it is unnecessary to notice in this appeal. . . .

"The Deputy Commissioner found in favour of the appellant on the third issue, viz., 'Are the two respondents liable for the money due upon the bond?' but the case was taken by appeal to the Court of the Commissioner, Narbada Division, who found on that issue for the respondents. He intimated an opinion, in his judgment, that the case made by the appellant to the effect that the widow executed the bond with her own hand did not stand the test of probability, when the evidence was examined, but he did not embody that view in his finding, which was in these terms:—'I hold, therefore, that the bond was not executed by Mt. Deo with a full knowledge of all the circumstances of the case, and that there was no *bonâ fide* execution as far as Mt. Deo is concerned.' It appears to their Lordships that the *onus* of proving due execution lay upon the plaintiff, who relies upon the signature of a Hindu widow as binding the estate which she represented. That point was made the subject of comment by this Committee in the year 1880, in the case of *Baboo Kameswar Pershad* v. *Run Bahadoor Singh* (L. R. 8 I. A. 8).

The case was appealed to the Judicial Commissioner, who expressed an opinion—their Lordships do not think he meant to pronounce any finding—upon this point. He said:—"I may add, however, that it appears to me very probable, not only that Mt. Deo did put her seal to this bond, but also quite understood what she was about." Their Lordships, in concluding their judgment, say:—"It has now been conclusively settled that the third Court, which was in this case the Court of the Judicial Commissioner, cannot entertain an appeal upon any question as to the soundness of findings of fact by the second Court; if there is evidence to be considered, the decision of the second Court, however unsatisfactory it might be if examined, must stand final. If, therefore, the finding of the Commissioner upon the third issue cannot be successfully impeached by the appellant his case must necessarily fail. The argument of the appellant's counsel satisfied their lordships that the decision of the third issue one way or another mainly depended upon the credit which ought to be given to oral testimony of a conflicting character; and that the finding of the Commissioner upon the evidence was substantially a finding of fact."

[*L. R.* 19 *Ind. App.* 1].

Hurrichurn Bose *v.*
Monindra Nath Ghose.

Bengal. Lord Morris. *Dec.* 3, 1891.

Claim for money alleged to be due under a promissory note. Validity of note not proved.

The respondent, when a minor, visited Calcutta, and obtained an introduction to the appellant for the purpose of obtaining a loan. At that time, 6th January, 1882, a promissory note was executed to a payee, not the appellant, but his nominee. The note was for Rs. 5,000 with interest at 36 per cent. That note was part of a larger transaction. There was to have been a mortgage to get a loan of Rs. 15,000, but the mortgage was not

executed. Two Courts below agreed that all the money the respondent received on the promissory note above-named was Rs. 1,500, and the Judicial Committee, applying the ordinary rule of concurrent findings, approach the question regarding a larger claim on the second alleged promissory note with the facts bearing on the first one assumed. This second promissory note, the appellant alleges, was executed on 27th September, 1883, at which period the respondent had come of age. By it the respondent, it was stated, promised to pay to the appellant or order the sum of Rs. 7,200 with interest at 18 per cent. The appellant's story was that as he was pressing for his money, a mukhtar and a person named Russick attended at his office the day before the execution of the bond; that they came on the part of the respondent, took an account of what was due; that the respondent himself, in pursuance of their arrangement, attended next day and executed the note. The District Judge gave the appellant a partial decree. The High Court, on the other hand, gave a decree for the respondent, and considering the improbabilities of the alleged incidents of the transaction, dismissed the suit. The Judicial Committee report that the decree of the High Court is correct, and that the appeal ought to be dismissed with costs. *Inter alia* they point out that although the appellant said six witnesses, one of whom was himself, were present at the execution of the note, only two, apart from the respondent, were called, and that one of these differed from the appellant in his story. The two persons who arranged for the making of the note were absent. It was also worthy of notice that the respondent was a minor at the time of the execution of the first note, and he, therefore, was not liable upon it unless he chose, having come of age in 1883, to voluntarily incur a new liability. Further, it was a strange fact that while in the case of the first note every precaution was taken to insure its *bonâ fide* character—it was drawn by a solicitor and was registered, and the borrower was identified by a public officer—none of these precautions were taken with regard to the second note.

[*L. R.* 19 *Ind. App.* 4.]

Aga Ahmed Ispahany *v.*
Judith Emma Crisp.

Rangoon. SIR RICHARD COUCH. *Dec.* 5, 1891.

Action to recover money advanced or for other relief granted by a mother to her son. Alleged lien on securities therefor. Power of attorney. Construction of the power. Effect of words "and generally to act for me," &c. Authority to pledge title deeds. Whether action which succeeded against the son could now be enforced as against the mother?

The parties to this appeal were Aga Ahmed Ispahany, the appellant, and Judith Emma Crisp. The action was brought by the appellant, and in the preliminary proceedings not only the respondent but also her son, James F. Crisp, were made defendants. It was brought to recover Rs. 15,000 and Rs. 108.12 interest thereon, and for a declaration that the plaintiff was entitled to a charge or lien upon the property mentioned in the plaint, and also for a sale of certain premises equitably mortgaged in the event of the defendants failing to pay off the amount mentioned. The litigation rose out of the following circumstances. Mrs. Crisp, in 1888, appointed her son her attorney, "to buy, sell, mortgage . . . any houses or lands, and to borrow and take loans in my name, . . . and, generally, to act for me." Mrs. Crisp, it was in evidence, had on two or three occasions before April, 1889, lent her son money on his promissory note.

About the end of April, 1889, J. F. Crisp asked the manager of the National Bank of India if he would advance money on his property. Crisp said it was his mother's, and that he had power to deal with it. The manager said he would make the advance if Crisp would give him a good name. Crisp then brought to the manager two joint and several promissory notes, one for Rs. 10,000 and the other for Rs. 5,000, both dated the 30th April, 1889, payable three months after date to the appellant or order, signed "J. F. Crisp" and "p. p. J. E. Crisp, J. F.

Crisp." The manager said he must have the title deeds as well, and J. F. Crisp on the same day deposited with the manager the title deeds of landed property in Phayre Street, Rangoon, belonging to Mrs. Crisp, being the property mentioned in the plaint, and the notes were discounted. In the course of the judgment of the Judicial Committee their Lordships point out that although J. F. Crisp had not asked his mother's consent to the deposit, in the evidence she gave in the suit it appeared that, about the time of the loan, he told her that he had signed two promissory notes for his own use in her name, and that to secure the amount borrowed he had pledged her deeds to the bank.

"To that she made no objection; and it is clear that she assented to the deposit with the bank, but she said she objected to her son pledging the deeds with the appellant." The notes became due on the 2nd August, and on that day J. F. Crisp wrote to the appellant a letter: "In consideration of your paying this day the Rs. 15,000 due to the National Bank of India, Limited, I hereby agree to your keeping the papers of the Phayre Street property with you as security, and that I will have the same settled within three months from this date, and pay you interest at 9 per cent. per annum." The appellant thereupon wrote a cheque which J. F. Crisp paid into the bank. On the 3rd August the title deeds were delivered by the bank to Crisp's man. The head clerk of the bank said in his evidence that he thought the man was the appellant, and it may be inferred that it was intended to deliver the deeds to him. Later on the appellant's application to the bank for delivery of the deeds to him was met by the information that they had already been delivered to Crisp's man. On 5th August J. F. Crisp wrote to the appellant the following: "I am sorry to say that my mother objects to keep her papers with you pending the settlement of accounts existing between you and me," and the deeds remained in Crisp's hands. Subsequently the appellant instituted his action. The Recorder of Rangoon gave a decree for the amount claimed against the son, but dismissed the suit against the mother, on the ground that though Mrs. Crisp assented to the pledge to the bank she did not assent to the

pledge to the appellant. The Judicial Committee considered that the decree was erroneous in dismissing the suit against the mother, observing in their judgment: "It is a rule of equity that if the indorser of a bill of exchange pays the holder of it, he is entitled to the benefit of the securities given by the acceptor, which the holder has in his hands at the time of the payment, and upon which he has no claim except for the bill itself (*Duncan, Fox and Co.* v. *North and South Wales Bank*, 6 App. Cas. 1). The same rule is applicable to the indorser of a promissory note. It is possible that there may be circumstances which would create an exception to this rule, but this case is not one. . . . The appellant, when he paid the Rs. 15,000 to the bank, became entitled to the benefit of the deposit of the title deeds. No further assent by Mrs. Crisp was necessary to entitle him to it. But although, in his plaint, he stated the fact of the deposit with the bank as a security for the repayment of the loan he did not rest his claim upon this equity. He founded it upon the letter of the 2nd August. . . . In their Lordships' opinion Mrs. Crisp was bound by that letter, although she did not personally assent to the appellant keeping the title deeds as security. When the notes became due the bank might have sued her upon them, and have also taken proceedings to have the mortgaged property sold. The letter of the 2nd August was intended to prevent this, and the arrangement for continuing the security in consideration of getting three months' additional credit was, in the opinion of their Lordships, within the general authority given to J. F. Crisp by the words of the power of attorney before quoted, 'and generally to act for me,' &c. Their Lordships are therefore of opinion that on both grounds the decree is erroneous in dismissing the suit as against Mrs. Crisp, and they will humbly advise Her Majesty to reverse it, and to make a decree against both defendants according to the prayer in the plaint, with costs. The respondent will pay the costs of this appeal."

[*L. R.* 19 *Ind. App.* 24.]

Haggard *v.*
Pélicier Frères.

[*Ex parte.*]

Mauritius. LORD WATSON. *Dec.* 5, 1891.

Powers of a British consul in Madagascar sitting as a Judge of a Consular Court. Is he vested with the privileges and immunities of a Judge of a superior Court of Record? Appeal brought by the British Consul for Madagascar by special leave. Held that under the Order in Council of 4th February, 1869, special jurisdiction of an important character was given to the Consular Court in question, and that, although it was not in the sense of English law a Court of Record, the Judge was entitled to the same protection accorded to the Judge of a Court of Record in England. Decision below reversed with costs. In this case, Pélicier Frères felt aggrieved against the Consul for dismissing an action against one Louis Mairs against whom they had prayed for judgment for the sum of $35, being the price of ten bags of rice delivered to him by the said Pélicier Frères. The origin of the complaint against the Consul may be briefly stated. On 9th May, 1887, the respondents took out a summons against Mairs requiring him to attend the Consular Court at Tamatave on 15th August, and, as before stated, prayed judgment against him. The parties appeared, Messrs. Pélicier by their attorney, and Mairs by his employer, a Mr. Proctor, and in their presence the appellant, to cite the judgment of the Judicial Committee, "stated that he had private information that the debt sued for had been paid, and a receipt granted by the respondents. At that moment Mr. Proctor produced the receipt and handed it to the appellant, who then went on to say that he considered the case to be a vexatious one, and that he would dismiss it on that ground. The respondents' attorney admitted that the receipt had been signed by them, but explained that it had been obtained by fraud, whereupon the appellant adjourned the case until Thursday, the 25th August. With the

view of establishing their assertion that the receipt had not been legitimately obtained by the defendant Mairs, the respondents, between the 15th and the 25th of August, made application to the appellant for a summons citing the defendant, who resided about 100 miles from Tamatave, to appear personally and give evidence, but the application was refused. The respondents then offered to make affidavit, explaining the necessity for examining the defendant, and that the sum necessary to cover his travelling expenses would be tendered, but the appellant persisted in his refusal, on the ground that the case was a vexatious one, and that the citation of the defendant would cause unnecessary injury to his employer's business. The cause came before the Court again on the 25th August, the day to which it stood adjourned. It is nowhere averred, nor does it appear, that, on the 25th August, the respondents produced or tendered any evidence, oral or documentary; and the appellant, adhering to the opinion previously expressed by him, and without further hearing, gave judgment for the defendant, with costs."

On the 7th October, the respondents filed a declaration against the appellant, the Consul, in the Supreme Court of Mauritius, praying that Court to condemn him in damages to the amount of Rs. 1,200 with costs, because, as they then said, there had been a flagrant abuse of judicial powers. The Consul's defence, raised in a preliminary plea, was that the Supreme Court of Mauritius was not competent to take cognizance of the case, because (1) that Court, as to civil suits arising in Madagascar, only possessed an original jurisdiction concurrent with that of the Consular Judge; (2) that it had no authority to entertain a suit for acts done by the Consul in his judicial capacity; and (3) that it could not, in any form of process, review his decisions in the suit between Pélicier Frères and Mairs, inasmuch as the sum sued for was below appealable value. The judges rejected the appellant's plea in so far as it struck at their jurisdiction to entertain the suit.

With regard to that part of the plea which related to the immunity of the appellant for acts done by him in his judicial capacity, they came to the conclusion,—

"That the common law of privilege accorded to English judges of Courts of Record may be held to follow them to a Consular Court of Record, where English law is administered."

And they gave leave to both parties, if they so desired, to amend their pleadings in the light of that decision. Both parties availed themselves of the leave thus given. The respondents struck out of their declaration the averment, already quoted, as to the 'flagrant abuse' of the appellant's judicial powers, and substituted an allegation declaring that by refusing, as he did, to allow the plaintiffs to prove their case, and to summon the said Mairs as a witness for that purpose, the said defendant exceeded the jurisdiction vested in him by the Order in Council of (4th) February, 1869, or, in other words, acted beyond the limits of his authority and actually abused such authority.

The appellant, in order to meet the respondents' amendment, deleted one of his pleas on the merits, substituting for it these words:—

"That the defendant acted as a Consular Judge within his jurisdiction and within the limits of his authority, and did not abuse the authority vested in him, &c."

The Supreme Court, in the result, gave a decision in favour of the respondents for Rs. 200 and costs. Hence the present appeal. The more material expressions used by the Judicial Committee in their judgment were the following:—

"After hearing argument, their Lordships are satisfied that, in the year 1887, the Consular Court of Madagascar was not, in the sense of English law, a Court of Record, and that it did not become so before the date of 'The Africa Order in Council, 1889.' But in 1887, the Court, under an Order in Council dated the 4th February, 1869, exercised jurisdiction of a very important character. Established by the Queen in virtue of power derived from a treaty with the sovereign of Madagascar, it was the only British tribunal in the island, and was vested with plenary civil jurisdiction over all British subjects within its limits. The Supreme Court of Mauritius had only a concurrent original jurisdiction, with authority to review the deci-

sions of the Consular Court upon an appeal duly taken, in causes exceeding Rs. 200 in value. In these circumstances, it does not appear to their Lordships to admit of doubt that the appellant, whilst sitting and acting as Judge of the Consular Court, was entitled to the same degree of protection which is accorded by the law of England to the judge of a Court of Record." (*Kemp* v. *Neville*, 10 C. B. N. S. 549, and *Hamilton* v. *Anderson*, 3 Macq. H. of L. 378, quoted.)

"Their Lordships do not think that the declaration, as originally framed, disclosed any cause of action against the appellant. The Court below was evidently of the same opinion, and on that account allowed an opportunity of amendment. The only case presented in the declaration was, that the acts of which the respondents complain constituted a flagrant abuse of the judicial powers vested in the appellant, an allegation which implies that, although flagrantly wrong, they were the acts of a Judge exercising proper judicial functions.

"The amendment discloses an entirely new ground of action, namely, that the acts complained of were done by the appellant in excess of the jurisdiction vested in him by the Order in Council of 1869; or, in other words, that he was acting beyond the limits of his judicial authority. Now, a Judge may commit an excess of his jurisdiction in many ways; but the kind of excess which the respondents impute to the appellant is, in their Lordships' opinion, obvious. He was admittedly sitting in Court as Judge in an action which he was competent to try; both parties to the suit were before him, and the acts complained of related to the cause before him, and were embodied in formal orders of the Court, authenticated by his signature. In that admitted state of the facts, their Lordships are unable to attribute to the respondent's averments any other meaning than this, that the appellant, although he was sitting to try the case in presence of the parties, and was competent to try and decide it, had nevertheless no jurisdiction, at that stage of the proceedings, to dismiss the suit as a vexatious one. After amendment of the pleadings, the present case was argued on its merits. . . . . Their Honours delivered their judgment on the 11th December,

1888, from the tenor of which it plainly appears that they, as well as the respondents themselves, put the same construction upon the amended declaration which their Lordships have done. Their Honours said—'That this decision to reject a plaint without having evidence or argument in support of it was the assumption of a power to decide a case without hearing it, which power the defendant did not possess, was the argument submitted to us by counsel for the plaintiffs; and we have come to the conclusion that the plaintiffs are entitled to a verdict.'"

The Judicial Committee, animadverting on the conclusion below, proceed to observe:—"If according to law, it was, as the learned judges have held, beyond the scope and limits of the judicial discretion of a Judge in the position of the appellant to refuse the plaintiff a proof, and to dismiss his action as vexatious, their decree or verdict might be unassailable. But the proposition which they have affirmed, and which lies at the very foundation of their judgment, appears to be founded upon a misapprehension of the law.

"Their Lordships hold it to be settled that a Court of competent jurisdiction has inherent power to prevent abuse of its process, by staying or dismissing, without proof, actions which it holds to be vexatious. In *Metropolitan Bank* v. *Pooley* (10 App. Cas. 214), the Lord Chancellor (the Earl of Selborne), speaking with reference to the dismissal of an action on that ground, said that—

"'The power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its own procedure.'

"The same principle was again laid down by the House of Lords in *Lawrance* v. *Norreys* (15 App. Cas. 210). In that case the Appeal Court had refused to allow proof, and dismissed the action; and Lord Herschell observed (p. 219):—

"'It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases.'

"In the remarks made by Lord Herschell, as to the caution

with which the power of summary dismissal on such grounds ought to be exercised, their Lordships unhesitatingly concur. It is, in their opinion, matter of regret that the appellant should have acted so hastily, instead of permitting the respondents to adduce proof of their assertion that their receipt had been fraudulently obtained by the defendant Mairs. But the insufficiency, or even the utter inadequacy, of his reasons for dismissing the suit cannot affect his jurisdiction to dismiss it. He was competent to entertain the question whether the suit ought to be dismissed as vexatious, and equally competent to decide that question one way or another. It is due to the appellant to state that the respondents, in their pleadings, make no imputation of dishonesty; although their Lordships do not mean to suggest that such an imputation, if it had been made and proved, would have deprived him of the immunity which the law accords to a Judge in his position. The remedy, when such a case does occur, does not lie in an action of damages against the offending Judge, but by making a representation to the authorities whose duty it is to see that justice is administered with due care and attention." Judgment below reversed with costs, and suit dismissed with costs.

[(1892) *App. Cas.* 61.]

Baron Sceberras Trigona *v.*
The Baroness Sceberras D'Amico (now McKean).

Malta. THE EARL OF SELBORNE. *Dec.* 11, 1891.

Right of succession to estates under a *primogenitura.* Is it a strictly "regular" one, or is it to be implied by the terms of the deed that the appellant, as brother of the last holder, would be entitled to take in preference to the daughter of the last holder? Construction of the deed. Law of Malta. Held by both Courts below, and now by the Judicial Committee, that, in the absence of proof that the founder intended otherwise, the presumptions founded on the law and also upon the construction of the instru-

ment were in favour of the *primogenitura* being a "regular" one, so as in each line of descent to admit a female inheritor, when there was no male issue of the last holder, in preference to a male collateral. Respondent's counsel not called upon. Appellant to pay the costs of the appeal.

The *primogenitura* was created on the occasion of a marriage in 1702. The appellant, *inter alia*, contended that the interpretation to be put upon certain clauses of the deed was that the founders of the *primogenitura* intended to deviate from the regular order, so as to give male collaterals of a younger line the preference over daughters of any holder in an elder line dying without male issue. In default of such male line the estates would go to a female, and thenceforward the line would go on of males from males from such female. The more material portions of the judgment of the Judicial Committee are here given :—

" As to the general rules and principles of law which regulate the course of succession to such a *primogenitura*, the authorities appear to their Lordships to be agreed. Torre (cited by the appellant) says that 'each son, with his descendants in order of primogeniture, makes a distinct line ;' and again, that he who is first called to the succession is '*tanquam stirps et caput primogenituræ designatæ, et successive ejus filii et descendentes ordine primogeniali, eaque linea extincta, secundogenitus cum sua linea, eodem ordine primogeniali.*' (Pars I., p. 26, and p. 80, No. 15.) Carl Antonio de Luca, another of the appellant's authorities, says:— '*Filius primogenitus efficit primum caput in linea descendentium, et filius secundogenitus secundum, ac tertius tertium, et hoc ordine ad majoratus successionem admittuntur : et filius secundogenitus nunquam dicitur primogenitus dum aliquis filius aut descendens a primogenito superest*' (p. 155, No. 46). Or, as the law is stated in the judgment of the Court of appeal, line is first to be considered, then degree; and, among several competitors in the same line, the male is to be preferred, unless the founder of the *primogenitura* has otherwise disposed; every holder of the *primogenitura* forms a line, which includes all his male and female descendants, to the exclusion of his brothers, sisters, or other

collaterals; and, consequently, a brother who, as a male, claims to succeed in preference to the daughter of the deceased last holder, is bound to show, 'in such a way as to remove all reasonable doubt,' that such was the will of the founder. The founder might, if he pleased, establish a special order of succession deviating from this 'regular' order; but the presumption of Maltese law, when a contrary intention is not reasonably clear, is in favour of the regular order."

Their Lordships, after fully considering the argument addressed to them, are unable to accept the conclusion contended for by the appellant. "They think the natural construction of the written instrument in this case, even if it were not aided by the ordinary presumption of law, would be in the respondent's favour.

"Under the Notarial Act of the 26th August, 1702 (which created this *primogenitura*, upon the occasion of the marriage of Salvatore Dorell and Teresa Falzon Navarra, from whom both parties to the present contest are descended), the husband, Salvatore, took the lands in question for his life. The material words, providing for the succession after his death, are these:—

"'*Et post ejus obitum succedat et succedere debeat . . . filius primogenitus ipsius Domini sponsi, et post mortem dicti filii primogeniti ejusdem filius primogenitus, nepos, pronepos primogenitus, aliique descendentes primogeniti, unus post alium, de primogenito in primogenitum, servato semper gradu primogenituræ in perpetuum et perpetuis temporibus; ita ut, durante hac linea masculina dicti filii primogeniti dicti Domini sponsi de primogenito in primogenitum, ille qui primogenitus erit succedat, et primogenitus intelligatur etiam si unus esset; ita quod, si ex primogenito masculo, vel primogenitis masculis, non superessent filii masculi, eo in casu ad primogenituram prædictam censeatur et sit vocata fœmina primogenita*,' &c.

"It is not necessary to say more of the rest of the deed, than that the succession which it establishes from a female holder of the *primogenitura* is beyond question regular. . . .

"It was admitted that the earlier words down to '*perpetuis temporibus*' (if not controlled by any subsequent context), would have created a *primogenitura* of the regular kind; but it was

said that the effect of the next words, '*ita ut, durante hac linea masculina,*' &c., is to place upon those which came before, '*filius primogenitus, nepos, pronepos primogenitus, aliique descendentes primogeniti,*' &c., a strictly masculine interpretation; as was held by this tribunal in the case of *D'Amico* v. *Trigona* (13 App. Cas. 806). Their Lordships, for the present purpose, assume that this would be so. But this does not determine *what* the male line is, which must fail before any female can be called to the succession. The argument for the appellant seems to depend upon the assumption that, for this purpose, all males descended through males from Salvatore and Teresa ought to be reckoned as one line. That assumption appears to their Lordships to be at variance with the general rules and principles applicable to questions of this kind, to which reference has been made, and opposed to the natural sense of the express words. The context, both that which precedes and that which follows, describes, not a line of which Salvatore is the *stirps* or *caput;* but one derived from his *filius primogenitus*—'*ejusdem filius,*' &c.; and '*hac linea masculina dicti filii primogeniti dicti Domini sponsi.*' On failure of males of that line, the female issue of the last holder are called to the succession, in preference to his brothers, or male issue of brothers. The words '*vel primogenitis masculis*' (superadded to '*ex primogenito masculo*') are quite capable of the meaning, that the same course of succession is to take place *toties quoties* in every line of descent; and their Lordships so understand them. If there had been two sons of Salvatore and Teresa, and the eldest, succeeding after his father's death to the *primogenitura,* and dying without male issue, had left a daughter, that daughter, according to the natural meaning of the words, would have been expressly called to the succession; as is rightly said by the Court of Appeal. The division of lines did not, in fact, take place till several generations afterwards; but it does not appear to their Lordships to admit of doubt, that the same course and rule of succession was intended to be observed throughout. . . .

"The appellant's contention, that the words '*ita ut durante hac linea masculina*' ought not to be referred to the line of the

eldest-born son, but must receive a wider application, was founded upon the supposed necessity of such a wider construction, in order to admit the lines which might descend from younger sons, in their proper order, to the succession. Their Lordships do not doubt that those younger lines would be entitled to succeed, in their proper order, under this *primogenitura*. . . . Full effect may be given to the intention in favour of younger lines, whether implied from the nature of a *primogenitura* of this kind, from the general scheme or particular provisions of the instrument, or from the technical significance of some of its phrases, without imposing upon plain words a sense which they do not naturally bear, and which is not favoured by the general presumption of the law governing the case." [(1892) *App. Cas.* 69; 61 *L. J. P. C.* 8.]

Behari Lal (since his death, Maina Dai Gyawalin) *v.*
Madho Lal Ahir Gyawal and Another.

Bengal. LORD MORRIS. *Dec.* 12, 1891.

Effect of ikrarnama by a Hindu widow with life estate. Is it to have any effect in handing over immoveable property descending from her husband to a grandson, who was the present reversionary heir at the time of its execution to the prejudice of another grandson, also a reversionary heir, who was born afterwards. The High Court, reversing decision of the Subordinate Judge, held that the ikrarnama was invalid, the widow *not having abandoned absolutely* her life estate. The Judicial Committee affirmed the decree of the High Court, the appellant (now representing Behari Lal, the grandson mentioned in the ikrarnama) to pay the costs of the appeal.

Briefly stated, the facts are these. One Damodhur Mahton, owner of considerable property, died in 1845, leaving a widow, one Lacho Dai, and two daughters. Behari Lal, the plaintiff, and now represented by Maina Dai Gyawalin as appellant, was

the son of one daughter. At Damodhur's death, Lacho Dai succeeded, as holder of a widow's estate for life, to Damodhur's immoveable properties. In 1849, Lacho executed the ikrarnama, nominating Behari Lal heir of her husband and herself, and appointing him manager of the estates. She, however, inserted in the ikrarnama a clause declaring that, notwithstanding these declarations with regard to her successor, she herself, till the end of her life, was to hold possession "without the partnership and possession of any other individual." These stipulations the High Court, and now the Judicial Committee, render the ikrarnama invalid according to Hindu law. It appeared that, after the execution of the ikrarnama, the second daughter of Damodhur and Lacho Dai had a son, Madho Lal, the respondent in this appeal. The question was, whether, under the ikrarnama, the widow lawfully gave preference to Lacho Dai's grandson to possession in preference and to the prejudice of the other residuary heir, the respondent. In endorsing the decree of the High Court against Behari Lal's claims, the Judicial Committee observe:—

"It may be accepted that, according to Hindu law, the widow can accelerate the estate of the heir, by conveying absolutely and destroying her life estate.

"It was essentially necessary to withdraw her own life estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such conveyances. Now, in the ikrarnama in question, Lacho Dai, so far from destroying her life estate, expressly says, 'I shall, till the end of my life, hold possession, as I have heretofore done, without the partnership and possession of any other individual,' and again she says, 'after my death, Behari Lal Meherwar shall enter into possession, &c.' The object of Lacho Dai was to declare the rights of Behari Lal, who was performing the Gyawal ceremonies, and obtaining the fees for her; she wished to leave the management in his hands, but not to surrender her life estate. As to an alleged custom among Gyawals, that the widow could, overriding Hindu Law, have an absolute and entire power over the

immoveable estate of her husband; it is sufficient to say that no such custom has been proved. Their Lordships will therefore humbly advise her Majesty to affirm the judgment of the High Court, and dismiss the appeal with costs."

[*L. R.* 19 *Ind. App.* 30.]

Ramchandra Narsingrav *v.*
Trimbak Narayan Ekbote.

[*Ex parte.*]

Bombay. LORD HERSCHELL. *Dec.* 17, 1891.

Right of a hereditary deshmukh to obtain a perpetual injunction restraining the respondent, his gumasta or agent, from receiving fees and emoluments of the said deshmukhi office, and to dismiss him. Is the office of gumasta subordinate and the holder removeable, or is the office hereditary, or the holder independent and irremoveable? Alleged grant in Inam by Government.

This was an appeal by the deshmukh against a decree of the High Court of Bombay, which reversed the decision of the Subordinate Judge of Poona. The Judicial Committee affirmed the decree of the High Court of Bombay, which pronounced in favour of the respondent, holding that the Ekbote family had held the office of gumasta hereditarily, and the appeal was dismissed. The whole question turned upon the point whether the ancestors of the present gumasta had title to act as such, and receive payments by sanction of Government, and whether the office had been enjoyed hereditarily, so that the respondent, the present gumasta, could not be dismissed. Both Courts below agreed that the office had been held by the respondent's ancestors. The first Court, however, thought that it was one thing to hold the office from generation to generation, and another to be entitled to hold it hereditarily in the future, so as to prevent the dismissal of the holder on good cause shown. To the High Court it appeared impossible to come to any other

conclusion than that the gumasta-ship, or the agency of the family of the defendant, was a distinct creation on the part of the Government, which for some reason of its own determined that the deshmukhi allowances, which it had granted in Inam to the family of the plaintiff, should be paid to it only through the intervention of the family of the defendant. The Judicial Committee, in their judgment, deal with the history of the appointment of the office of gumasta in this particular case, the earliest document produced in support of such appointment being by a sanad bearing date 1741, 1742. After reviewing the whole of the evidence producible on both sides, their Lordships upon the whole "see no ground for dissenting from the judgment of the Court below, that the right of the gumasta to act as such, and receive the payments, has been either granted, or else so recognized and confirmed by an authority binding on the appellant that he cannot oust the defendant, and deprive him of an office and function which the Government has conferred upon him, and still allows him to enjoy; and, this being so, has not the right as against him to collect the allowance himself directly, either from the village officers or from the treasury. Their Lordships will therefore humbly advise her Majesty that the judgment appealed from be affirmed, and the appeal dismissed." [*L. R.* 19 *Ind. App.* 39.]

Neikram Dobay *v.*
The Bank of Bengal.

Bengal. Sir Richard Couch. *Dec.* 18, 1891.

Banker and customer. Bank pledgee of securities with a right to sell on due notice. Whether sale of certain securities to themselves is void. Whether, also, liability attaches for re-sale. Claim by pledgor for an account and indemnity. Whether he is damnified at all by the proceedings of the bank. Decree of the High Court dismissing the pledgor's suit is upheld.

The facts of the case are set forth in the judgment of the Judicial Committee, which was to the following effect:—

"The action was brought by the plaintiff (appellant), a dealer in Government securities, against the bank. . . . The plaint alleged that on 19th July, 1883, the plaintiff entered into an arrangement with the bank as to his future dealings, it being agreed that in all future loans by him the bank should charge 1 per cent. less than the usual bank rate of interest, and should call for prompt or heavy margins in respect of Government promissory notes deposited for the purpose of securing loans; that under this agreement the plaintiff took extensive loans from the bank, giving promissory notes, and depositing Government paper as security; that, notwithstanding the agreement, the bank called for prompt and heavy margins, and between the 3rd October, 1883, and the 31st January, 1884, notwithstanding a tender of seven lakhs of rupees and an offer of four lakhs more, wrongfully and without due and reasonable notice to the plaintiff, sold off at a great loss to him all the Government promissory notes in their possession deposited by the plaintiff as security for the loans, and from the proceeds paid off the loans. The questions raised at the trial were, first, what were the terms of the arrangement, and, secondly, had they been broken by the bank? The following are the facts proved. The bank, through Mr. Gordon, its chief accountant and Deputy Secretary in Calcutta, agreed to grant the plaintiff loans at the special loan rate on their usual conditions of business, one of which was 'The bank reserves to itself the option of selling securities that have been deposited against loans at any time after the issue of notice of demand,' and another, 'Interest on securities in deposit against loans or overdrawn accounts will be realized by the bank on receipt of written instruction from the borrower.' Immediately upon the making of the agreement the plaintiff began to take loans to large amounts from the bank upon the security of the deposit of Government notes. Some of these loans were consolidated and renewed, the last renewal being under the date of the 21st December, 1883. At that time the market for these securities was falling, and on the 28th December, 1883, Mr.

Gordon wrote to the plaintiff, requesting that he would at once either pay off his demand loan or deposit the additional margin of Rs. 24,300, failing which he said the securities deposited against the loans would be sold. Nothing was done on this letter. On the 2nd January, 1884, Mr. Gordon again wrote to the plaintiff," and again on January 12th. In the last-named communication Mr. Gordon wrote "that unless the margin on the loan account and interest to the 31st December, 1883, was adjusted on the 14th January, the bank would at once proceed to sell his securities as advised in the letter of the 2nd. Nothing having been done by the plaintiff the bank, on the 15th January, commenced to sell his securities, crediting the proceeds to the plaintiff's account, and informing him by letter that they had done so. The sales continued during the month of January. On the 30th January the plaintiff paid to the bank the sum of Rs. 6,74,467, and received from it Government notes of the nominal value of Rs. 7,17,500, which the bank represented as being, and the plaintiff believed to be, the whole of his securities remaining unsold in the bank's hands. On the 31st January Mr. Gordon sent the plaintiff an account showing a balance in the plaintiff's favour of Rs. 326,7,4, which the plaintiff refused to accept, and the bank paid it into Court. Previous to the trial it appeared, by the answer of the bank to interrogatories, that of the securities stated in the account to have been sold Rs. 4,55,500 had not been in fact sold, but were taken over by the bank in their books at the market price of the day, Rs. 4,00,000 to the bank itself, and Rs. 55,000 to the depositors' department. It appeared at the trial that the bank had re-sold nearly all, if not all, of these Government notes, and when the case came before the High Court on appeal further evidence was taken before it as to the dealings of the bank with the plaintiff's securities. It was then proved that the whole of the securities taken over by the bank were disposed of by them between the 17th January and the 8th February, 1884, either by sale or in exchange for other securities, and that the amounts realized were in every instance less than the prices for which credit had been given for them to the plaintiff.

"The learned judge (a Divisional Judge of the High Court) who tried the suit made a decree dismissing the claims of the plaintiff so far as they were included in the plaint, but declaring that the sales by the bank to itself were null and void against the plaintiff, and that the plaintiff was entitled to recover the value of the Government promissory notes so sold at the market rate on the date when the suit was instituted, or, at the option of the plaintiff, on the date of the hearing, with interest at 4 per cent. on their par value from the respective dates of the sales, and that the bank was entitled to credit for the advances to the plaintiff, with interest at the rates claimed by the bank up to the dates when the bank closed the several loans. In his judgment he said interest could not run as to the sum of money which the amount of the pretended sales purported to wipe off after the dates of them, and an account was ordered to be taken on that footing. The bank appealed, and the High Court in its appellate jurisdiction allowed the appeal and dismissed the suit. Their Lordships are of opinion that this decision should be affirmed. The sales by the bank to itself, though unauthorized, did not put an end to the contract of pledge, so as to entitle the plaintiff to have back the Government notes without payment of the loans for which they were security, and until the delivery of the account on the 31st January, the loans being unpaid after demand, the bank was entitled to sell the notes and credit the plaintiff with the proceeds. The plaintiff did not sustain any damage by the sale to the bank of the notes which were re-sold by it before the 31st January. As to the notes which were re-sold by the bank after the 30th January, the position of the bank was different. It was represented to the plaintiff by the bank and believed by him that the Government notes which he received on the 30th January were the whole of his securities remaining unsold in the hands of the bank. He paid the Rs. 6,74,467 in order, as he believed, to redeem the whole of his securities. It would be inequitable to allow the bank, after this transaction, to treat the securities, which it had sold to itself, and then had in its hands, as still subject to the pledge. In their Lordship's opinion, the bank should be held to be no longer a pledgee of

these notes, and to have converted them to its own use, and to be liable in damages for the value of them including the interest thereon. But if the bank is so liable, the plaintiff cannot have credit in the loan account for the proceeds of these notes. He cannot both affirm and disaffirm the sales to the bank. It appears from the account of the dealings of the bank with the plaintiff's securities, referred to in the judgment on appeal, that the rate of interest on the loan from the 1st to the 5th January, 1884, was 7 per cent., from the 5th to the 20th 8 per cent., and from the 20th to the 30th 9 per cent. The rate of interest on the Government notes was 4 per cent., and it is obvious that the longer the account was kept open the more the balance would be against the plaintiff. If the plaintiff has sustained any special damage by the conduct of the bank the evidence of it is not before this Board. Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal. The appellant will pay the costs of it."

[*L. R.* 19 *Ind. App.* 60].

Maharaja Sir Luchmeswar Sing Bahadoor, K.C.I.E. *v.* **Sheik Manowar Hossein** and Others.

[*Ex parte.*]

Bengal. LORD HOBHOUSE. *Dec.* 18, 1891.

Claim to part profits of a ferry. Question of presumptive right to a monopoly. Co-owners. Is a question of adverse possession competent for "second appeal" under the terms of the Civil Code? All decrees below discharged and the suit dismissed. No costs.

The respondents instituted this suit against the appellant in respect of a ferry worked by him across the river Bagmati at a point where it flows through the mouza Baigra. It appeared that this mouza was partly owned by the appellant (defendant) and partly by the respondents. The respondent had the largest

share (14 annas), whereas the appellant had a 2-annas share. The whole of the river bed and the landings have never been divided and are still ijmali lands of the mouza. The Maharaja on his share of the land had a factory called the Kamtowl Factory. It was shown that during the rainy season the river was impassable without bridge or boat, and that formerly, on a bridge coming down owing to decay, a boat was kept on the river and was managed on behalf of all the then proprietors by a Mr. Anderson. Of recent years the appellant, so the plaint alleged, had started a ferry on his own account, and had let it out to Ticcadars and appropriated the profits thereof. The plaintiffs (respondents) prayed that a decree might be passed declaring that the Maharaja should be entitled to hold possession and take the profits in proportion to his proprietary share in the mouza and not otherwise, and that the plaintiffs may be declared entitled to profits to the extent of their share. They also prayed that the appellant be restrained from offering opposition to the possession of the plaintiffs. The appellant in his written statement of defence alleged that "the plaintiffs had been out of possession of the ferry for twelve years, and that he and his predecessors in title had held possession for upwards of twenty years. . . ." He alleged that the bridge and the boat were maintained at the sole expense of the proprietor of the Kamtowl Factory, and the tolls taken by him.

The case was tried first by the Moonsiff, who, on 30th March, 1887, dismissed the suit. "His reason was that the defendant had established exclusive use and possession by himself and his predecessors in title at least since the year 1856; and that it was adverse to the plaintiffs and their predecessors. . . ." Both parties appealed to the Subordinate Judge, and both appeals were dismissed with costs. On "second appeal" the High Court differed from the Subordinate Judge. The grounds for doing so are thus stated by the Judicial Committee:—

"The first (ground) was that the defendant had only run the ferry since 1881, and therefore could not plead any bar by time against the plaintiffs. On this point their Lordships are clear that the facts found show a continuity of enjoyment by the

owners of the Kamtowl Factory and of the 2-anna share in Baigra, which was not broken by the defendant's purchase from the former owners. The plea of limitation or prescription therefore is just as available for the defendant as it would have been for his vendors had their possession continued unchanged. The second ground taken by the High Court is, that the owners of Kamtowl never had exclusive possession, because there was an arrangement that the maliks of Baigra and their men should be carried across free of charge, and they had a right to go across 'as a right, and free of toll.'

"The High Court discharged the decree of the lower Court, and pronounced the following decree:—

"'That it should be declared . . . that the defendant's first party are only entitled to hold possession and appropriate the profits of the said ferry in proportion to their proprietary right in the said mouza Baigra. We further direct, that the said defendant's first party do account for the profits of that ferry from date of suit to the present date.'"

In the course of their judgment the Judicial Committee animadvert on the fact that they are now sitting on a regular "second appeal" from that of the Subordinate Judge under sect. 584 of the Code, and convey that such second appeal is competent on a question of adverse possession when questions of law depend upon the conclusion to be deduced from a finding on mere fact. The effect of the actual use of the ferry remains to be considered. Their Lordships observe:—"Whatever the defendant may think himself entitled to, he has not in this suit claimed to possess a ferry in any such sense as would entitle him to restrain competition. It is recognized law in India that a man may set up a ferry on his own property, and take toll from strangers for carrying them across, and may acquire such a right by grant or by user over the property of others; and, except as affecting the proof of his acquisition of title, it can make no difference whether he is a co-sharer with those others or not. That is common ground to the Moonsiff, the Subordinate Judge, and the High Court in this case. But the defendant is not using his own property, except that he

owns it jointly with the plaintiffs; and, as no grant ever was made to him, he can only set up exclusive right against the plaintiffs by showing either that he has dispossessed them for twelve years, or that he has held possession adversely to them for twelve years, or that he has enjoyed what he claims for twenty years as an easement and as of right. . . . . The Subordinate Judge finds that the defendant's possession for twenty years was adverse to the plaintiffs. . . . . he does not say that the defendant enjoyed the ferry as an easement, and as of right, which is what the statute requires. For these reasons their Lordships think that the High Court were at liberty to come to conclusions different from those of the Subordinate Judge on this point. . . . The Subordinate Judge quotes a passage from a decision in the Law Rep. 9 Calcutta, p. 744 (*Mahomed Ali Khan* v. *Khajah Abdul Gunny*), in which Mr. Justice Wilson points out that many acts which would be clearly adverse and might amount to dispossession as between a stranger and the true owner of land, would between joint owners naturally bear a different construction. . . . The parties are co-owners, and the defendant has made use of the joint property in a way quite consistent with the continuance of the joint ownership and possession. He has not excluded any co-sharer. . . . It is not alleged that the defendant's proceedings have prevented anyone else from setting up a boat for himself or his men, or even from carrying strangers for payment. So far from inflicting any damage upon the joint owners, the defendant has supplied them gratuitously with accommodation for passage. . . .

"Their Lordships then agree with the High Court in thinking that the defendant has not acquired any easement or any title by adverse possession. But inasmuch as their conclusion is founded on the view that the joint possession has been continuously maintained, they cannot concur in the decree appealed from. . . . The case of *Watson & Co.* v. *Ram Chand Dutt and Others*, reported in L. R. 17 Ind. App. 110, is that which throws the most light on the subject.

"In that case Messrs. Watson & Co. were co-owners of a joint

estate. They had procured leases of a plot of land from the others, had built a factory, and had produced indigo. After the expiry of their leases they went on in the same way. The other co-owners wished to grow oil-seeds, and they sued for an injunction to restrain the Watsons from growing indigo on ijmali land. The District Judge granted the injunction prayed for. On appeal, the High Court varied the form of the injunction by restraining the Watsons from excluding the plaintiffs from the enjoyment of ijmali land." On appeal to her Majesty in Council this Committee made this observation among others:—

"'In Bengal the courts of justice, in cases where no specific rule exists, are to act according to justice, equity, and good conscience; and if in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule . . . to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital.'

"The decrees below were discharged, and the decree made in lieu thereof gave the plaintiffs compensation for the exclusive use of the joint land by the Watsons.

"Their Lordships have not referred to the case of the Watsons in order to follow the decision, for the facts of that case and of this are very different; but for the purpose of showing authority for the position that the Courts should be very cautious of interfering with the enjoyment of joint estates as between their co-owners, though they will do so in proper cases."

In the result in the present case the Judicial Committee say:—

"Now in this case the High Court has not granted any injunction, but it has made a declaration with respect to the possession and profits of the ferry, and has directed an account of the profits accordingly. . . . If the defendant's use of the landing places . . . . is consistent with joint possession, why should the plaintiffs have any of the profits? . . . By the defendant's acts they have lost nothing, and have received some

substantial convenience. It will be time enough to give them remedies against him when he encroaches on their enjoyment.

"But then they ask to have it declared that the river and the ferry are within mouza Baigra, and that the defendant may be restrained from offering opposition to their possession. If the defendant had not denied their title it would clearly not have been proper to give them any such relief. Should it make any difference in this respect that when asked to account for the profits of the ferry the defendant has sought to protect himself by setting up a title in himself to the profits of the ferry and the landing places? With some doubt their Lordships think not . . . Though they (the plaintiffs) now ask for removal of opposition to their possession, they themselves state, and their Lordships now hold, that all the co-sharers have been in possession all along. No such decree is therefore needed. But the costs of the suit have been seriously aggravated by the defendant's claim of exclusive ownership. . . . There should be no costs in any of the Courts nor of this appeal. The proper course will be to discharge all the decrees below and to dismiss the suit."

[*L. R.* 19 *Ind. App.* 48.]

Part II.

PETITIONS AND APPEALS

FROM THE

SUPREME COURT OF THE DOMINION OF CANADA.

INTRODUCTION.

THE Act which establishes the Supreme Court of the Dominion of Canada, 38 Vict. c. 11 (Dominion Statute), contains the following important section (sect. 47):—

"The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of appeal established by the Parliament of Great Britain and Ireland by which appeals or petitions to Her Majesty in Council may be ordered to be heard. Saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her royal prerogative."

The cases which follow are those in which application has been made for the exercise of Her Majesty's prerogative during the period from the creation of the Supreme Court in 1875 down to the present time.

Before dealing with these petitions and appeals seriatim it seems well to state that the establishment of a Supreme Court in the Dominion to which appeals from all the Provinces forming that Dominion may be brought does not abrogate the direct right to appeal to her Majesty in Council (without going to the

Supreme Court) which the said several Provinces still respectively enjoy:

Lower Canada (Quebec) still has the right of appeal to her Majesty in Council direct under the 52nd and three following sections of chap. 77 of the Consolidated Statutes for Lower Canada, which is a repetition of an older Act (34 Geo. 3, c. 6) granting the privilege.

Upper Canada (Ontario) possesses the direct right of appeal by reason of chap. 41 of the Revised Statutes of Ontario, an Act which, in the clause promulgating that right, simply repeats the older Upper Canada Statute (34 Geo. 3, c. 2).

Nova Scotia holds the right under Order in Council, March 20, 1863.

New Brunswick, under Order in Council, November 27, 1852.

British Columbia, under Order in Council, July 12, 1887.

North West Territories, under Order in Council, July 30, 1891; and

Manitoba, under Order in Council, Nov. 26, 1892.

The cases from the Supreme Court of the Dominion in which special leave to appeal has been applied for, by the exercise of the royal prerogative, and the cases in which that leave has been granted, and the appeals heard in England thereon, are now given.

PETITIONS AND APPEALS FROM THE SUPREME COURT OF CANADA.

The Minister and Trustees of St. Andrew's Church, Montreal *v.*
James Johnston.

THE LORD CHANCELLOR (LORD CAIRNS). *Dec.* 10, 1877.

Petition for special leave to appeal. Royal prerogative to admit appeal. Pewholders in a church. Disturbance. Byelaws of the trustees are declared sufficient to provide a remedy for the grievance of the minister. No grounds (no general principle involved) for the especial exercise of Her Majesty's prerogative in allowing this case to come to appeal under sect. 47 of the Supreme Court Act of the Dominion (38 Vict. c. 11).
[3 *App. Cas.* 159.]

Valin *v.*
Langlois.

LORD SELBORNE. *Dec.* 13, 1879.

Petition for special leave to appeal from the Supreme Court of Canada. Leave is refused: 1st, as no serious and substantial question is required to be determined; 2nd, as their Lordships agree that the lower Courts have decided the matter in dispute correctly and in accordance with constitutional law. The subject-matter of this cause related to the power of the Canadian Legislature to provide a means, and the mode in which it did provide, for deciding the validity of returns of members to the parliament. Organization of Provincial Courts of Canada. Obligation of the judges of these Courts to follow the ruling of the Supreme Court, unless it has been reversed by Her Majesty in Council. [5 *App. Cas.* 115.]

Lawless (Manager of the Bank of British North America) *v.*

Sullivan and Others (Assessors of Taxes for the City of St. John).

SIR MONTAGUE SMITH. *March* 22, 1881.

Appeal by special leave. Assessment Act of Canada, 31 Vict. c. 36, s. 4. Income. Balance of gain. Losses. *Assessment of a bank by assessors of taxes* for the city of St. John. The bank in question was established outside the Province of New Brunswick, and had a branch only at St. John. The question was, whether this bank, being a "foreign" company or trader, was liable to be assessed in any year in which they made no profits, but a loss. Acts relating to the levying of taxes in St. John's—22 Vict. c. 37 (1859); 31 Vict. c. 36 (1868); and 34 Vict. c. 18 (1871). Definitions of "income" and "gain." Real meaning of "income," as resulting from commercial business, is the balance of gain over loss. The Committee report that where on the accounts it appears that no gain has been made in a fiscal year, there is no income or fund capable of being assessed. Several writers and leading cases on *taxation* quoted during the hearing. Judgments appealed from reversed. Respondents to pay costs of appeal. [6 *App. Cas.* 373.]

The Connecticut Mutual Life Insurance Company of Hartford, Connecticut *v.*

Moore.

SIR ROBERT COLLIER. *July* 7, 1881.

Appeal by special leave. Fractured skull case. Law of Canada. 38 Vict. c. 11, s. 22. Suit by Moore's child on a policy of insurance on the life of Moore. When insuring his life, Moore was obliged to answer certain questions as to his previous illnesses, accidents, &c. Moore's death was accelerated,

if not caused, by the blow of a bolt, but, on the doctors trephining the wound, they discovered that a piece of skull was missing. This was supposed to have been absent some years, and the contention of the insurance company, in refusing to pay the policy, was that Moore had not told them the truth in the before-mentioned answers. Analysis of questions and answers, and evidence showing that, although Moore had been thrown from his horse some years before, and received contusions, there was no direct proof that he had been surgically treated for fractured skull, whereas it was possible that malformation was congenital. Evidence favourable to the view that he had never in earlier years suffered from "serious or severe personal injury"; and their Lordships report that the appeal from the decision of the Supreme Court, which refused an order for a new trial, should be dismissed, with costs, and the claim of Moore's child upheld. In the course of their judgment the Judicial Committee said :—"*Undoubtedly the verdict is not altogether satisfactory. . . . In order to be justified, however, in granting a new trial, they must be satisfied that the evidence so strongly preponderates in favour of one party as to lead to the conclusion that the jury, in finding for the other party, have either wilfully disregarded the evidence or failed to understand and appreciate it.*"

[6 *App. Cas.* 644.]

Citizens Insurance Company of Canada *v.*
Parsons, and
Queen Insurance Company *v.*
Parsons.

SIR MONTAGUE SMITH. *November* 26, 1881.

Appeals by special leave. Powers of Parliament. Trade and commerce. Provincial legislation. Actions on contracts of insurance in the Province of Ontario. The important question in both appeals has arisen upon the provisions of the British North America Act of 1867 (30 & 31 Vict. c. 3, ss. 91 and 92), and re-

lates to the *distribution of Legislative Powers between the Parliament of Canada and the Legislatures of the Provinces.* Citizens Insurance Company was incorporated by an Act of the late Province of Canada (19 & 20 Vict. c. 124). By Canadian Act 27 & 28 Vict. c. 98, further powers were given to it. Finally, by an Act of the Dominion Parliament, its title was altered, and it was declared to be entitled to all the privileges, &c., it had of old enjoyed. The statute impeached by the appellants as being an excess of Legislative Power, is an Act of the Legislature of Ontario (39 Vict. c. 24), called "An Act to secure uniform conditions in policies of fire insurance." It was contended that the provisions of the Ontario Act were a direct breach of sections of the British North America Act. The British North America Act gave to the Provinces Legislative powers in local and private affairs only, and gave the Dominion Legislative power to make Acts for the good government of Canada generally. Dissertation as to the cases in which there might arise a conflict of powers between the Local and Dominion Legislatures. Are there instances where the general power cannot be allowed to override the particular one? "Property and civil rights" in a Province. Regulation of trade and commerce. It was the opinion of this Board that the authority of the Dominion Parliament to legislate for the regulation of trade and commerce did not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as that of fire insurance, in a single Province, and therefore its legislative authority does not, in the present case, conflict or compete with the power over property and civil rights assigned to the Legislature of Ontario by the British North America Act. The contention of the Citizens Company that they, having been incorporated by Canada, and having the incorporation confirmed by Dominion Parliament, could remain unaffected by an Ontario Act, in their Lordships' view must fail. Other Acts are quoted by counsel, viz., 38 Vict. c. 20 (Canada), and 31 Vict. c. 48 (Canada), in support of the contention as to probable clashing between the Provinces and the Dominion. Their Lordships' opinion, however, is clear as to the validity of the Ontario Act. In the case

of the Citizens Company, the appellants sought to prove that their policy was not subject to the statutory conditions, and that the respondent, having broken their own rules, could not recover. Their Lordships reported that the company were subject to the statute. That (Ontario) statute, however, made it just as imperative on the respondent to abstain from the particular irregularity or breach of which he was guilty, and he being thus negligent could not recover. The respondent disclaimed that he was bound by any conditions, either those of the company or the statutory ones. The company, on the other hand, said, "We are not bound by Ontario statute, but you are bound by our conditions." The appeal is recommended to be allowed; but seeing that the company failed on main contention as to non-subserviency to the Ontario Act, it is without costs. In Queen Insurance case a minor question arose as to whether an "interim note" was to be considered a "policy" under Ontario Act. Reported that it was not.

[7 *App. Cas.* 96; 51 *L. J. P. C.* 11.]

The Queen *v.*
Belleau and Others.

(And Cross Appeal.)

SIR JAMES HANNEN. *June* 20, 1882.

Appeals by special leave. *Petition of Right* against the Crown by the holders of debentures issued by the trustees of the Quebec turnpike roads for payment of the principal and interest of their debentures. The cause of action arose out of the transfer of the late Province of Canada to the Dominion by the British North America Act of 1867. The debentures were issued under an Act of the Province of Canada (16 Vict. c. 235). The Crown now concedes that if the debentures created a debt on the part of the Province, the terms of the British North America Act make it incumbent that the Dominion should meet the same. The arguments upon the construction of the Act (16 Vict. c. 235) resulted in showing that

the debenture holders lent their money on the security of the tolls, and their claims were *not* to be paid out of or chargeable against the revenues of the Province. Judgment is therefore given for the Crown in both the appeal and cross appeal. The principal appeal is allowed, and the cross appeal dismissed. (In the latter, Belleau and others asserted the liability of the Crown to pay interest on the debentures from the date of their falling due.) Belleau and others have to pay costs of appeal and cross appeal. A special argument was raised on behalf of Belleau and others, in which it was contended that inasmuch as the Province had on a former occasion redeemed certain debentures under an Ordinance, the holders who took these new debentures under the Province of Canada Act had therefore hopes, when lending their money, that a similar security was implied. The Committee, though declining to decide anything only the legal point of liability, did not desire to diminish the force of this contention. It might be that the Province or the Dominion, if addressed, might see reason to relieve the suppliants of some of their loss, but this was not a matter for a decision from this Board.

[7 *App. Cas.* 473.]

Prince *v.*
Gagnon.

LORD FITZGERALD. *Nov.* 25, 1882.

Petition for special leave. In this judgment, applying the principles first expressed in *Johnston* v. *The Minister of St. Andrew's* (3 App. Cas. 159), and in *Valin* v. *Langlois* (5 App. Cas. 115), as to the considerations which would warrant the Committee in advising Her Majesty to exercise Her prerogative, it is now even more positively laid down that no advice in favour of admitting an appeal from the Supreme Court will be given save "when the case is of gravity, involving matter of public interest or affecting property of considerable amount, or where the case is otherwise of some public importance, or of a very

substantial character." The subject-matter of this petition not, in their Lordships' view, coming under these definitions, it is recommended to be dismissed. [8 *App. Cas.* 103.]

Caldwell and Another *v.*
McLaren.

SIR BARNES PEACOCK. *March* 6, 1883.

Petition for special leave to appeal from the Supreme Court. In this case, the Lords recommend the exercise of the Queen's prerogative on the grounds of the subject-matter of the case being of a "substantial character," and of the great public interest of the questions involved. Owing to the bulky nature of the papers, the large sum of 500*l.* is ordered to be lodged as security for the costs of the respondent. [*P. C. Ar.*]

[For final judgment on this appeal, *vide infra*, and 9 App. Cas. 392.]

The Canada Central Rail. Co. *v.*
Murray et al.

LORD WATSON. *June* 30, 1883.

Petition for special leave to appeal dismissed on ground that their Lordships did not consider that there was any sufficient reason for admitting an appeal, having regard to the terms now regulating the exercise of Her Majesty's prerogative in causes from the Supreme Court of the Dominion. The questions raised seem to involve an issue of fact only. *Observations made as to the manner in which petitions ought to be presented in future.* Parties are to confine themselves to the petition, and must not wander into extraneous matter, such as the record and proceedings, over which this Board, until an appeal is permitted and the papers

are sent to England by the proper authorities, have no control, and which they cannot accept on an *ex parte* statement.

[8 *App. Cas.* 574.]

The Attorney-General of Ontario *v.* **Mercer.**

LORD CHANCELLOR (THE EARL OF SELBORNE). *July* 18, 1883.

Appeal by special leave. *Escheats Case.* The question in this case was whether lands in the Province of Ontario escheated to the Crown for defect of heirs belong (since the Union of the Provinces) to the Province of Ontario or to the Dominion. Historical sketch of legislation on escheats. Lands in Ontario are held in free and common socage in like manner as in England. *Vide* 31 Geo. 3, c. 31, s. 43. Their Lordships, reversing the decree of the Supreme Court, hold that sects. 102 and 109 of British North America Act, 1867, illustrated by other sections, clearly betoken that property in escheats in the Province is still left to it, and is not left for the benefit of the Dominion. Special senses of the words "*royalty*" and "*reddenda*." The word royalties in British North America Act includes royalties in respect of lands such as escheats. *Dyke* v. *Walford*, 5 Moo. P. C. 634, cited. *This being a question of a public nature does not appear to their Lordships to be one for costs.* [8 *App. Cas.* 767; 52 *L. J. P. C.* 884.]

Ducondu and Others *v.* **Dupuy.**

SIR ARTHUR HOBHOUSE. *Nov.* 27, 1883.

Appeal by special leave. Timber limits case. Action to recover damages for alleged breach of a covenant for title. Appellants were heirs of a licensee (one Scallon) of certain areas of land for timber cutting under a grant from the Commissioner of Crown Lands (Consolidated Statutes of Canada, cap. 23). The

Act specifically provides that whenever a licence is found to comprise lands included in a licence of a prior date, the licence granted shall be void in so far as it interferes with the one previously issued. In this case it appeared that Scallon, in 1858, sold his right and title in the timber limits to one Peck, who, in turn, parted with his interest to Cushing, whose assignee in bankruptcy the respondent now is. In 1866 it was found that certain of the licences sold by Scallon had not passed to the purchasers, and his heirs made the deficiency good by allotting to the purchasers under deed fifty more miles of limits also held by licence. At the time all parties were apparently satisfied. Subsequently, however, a person named Hall claimed to be a prior holder of a licence for some of the lands in the fifty miles area. Hence the action by the respondent. The Judicial Committee, affirming the Court of Queen's Bench but reversing the decree of the Supreme Court, held that the appellants were not liable for a breach of covenant. The licences were conveyed over with the proviso always evident. They were parted with subject to the condition that the licences were not to interfere with limits previously granted, and which might be proved to exist. The licences conveyed in 1866 were to be taken exactly on the same terms as the licences deficient in 1858, as importing in their assignment only such right, title, and interest as the vendors had obtained from the Crown. Respondent to pay costs of appeal. [9 *App. Cas.* 150; 53 *L. J. P. C.* 12].

Caldwell and Another *v.*

McLaren.

LORD BLACKBURN. *April* 7, 1884.

Appeal by special leave. *Watercourse case.* Rights over the streams of Upper Canada which flow down to the Ottawa River. The title to the lands along the waters in question is granted by the Crown. Rival saw-mill owners. Right of users (appellants) (but only during freshets) to float or drive logs

and rafts of timber over streams which flow through another's lands. Construction of Canadian Act, 12 Vict. c. 87, s. 5. Improvements on the river by the objector. Offer of compensation for such improvements by the user. Effect of Canadian legislation in enlarging common law rights so as to encourage the development of the country. Effect of the statutes cited was to confer a right on every one to float logs down the stream. Statutes of Upper Canada bearing upon the subject. Cases of *Boale* v. *Dickson* (13 Court of Common Pleas, Upper Canada (1863), p. 337, which is overruled by this decision of the Committee), and *Doe and Otley* v. *Manning* (Lord Ellenborough's judgment, 9 East, 71), discussed. Their Lordships recommended that the private right by respondent to monopolize all passage of another along the watercourse could not be sustained. "It does not seem to their Lordships that the private right which the owner of this spot claims to monopolize all passage there, is one which the legislature were likely to regard with favour," and they proceed to say that no provision has been inserted in the Act for compensation. Decision of Supreme Court reversed, with costs, and that of the Court of Appeal of Ontario affirmed. [9 *App. Cas.* 392; 53 *L. J. P. C.* 33.]

The Queen *v.*
Doutre.

LORD WATSON. *July* 12, 1884.

Appeal by special leave. Barrister's fees. Suit by the respondent, a barrister, and one of Her Majesty's counsel in Lower Canada to recover his fees incurred while carrying on the duties of his profession in connection with the Fishery Commission at Halifax under the Treaty of Washington. The action was brought under the Petition of Right (Canada) Act (39 Vict. c. 27), against the Government, the retainer. Incorporation of the Bar of Lower Canada by c. 72 of the Consolidated Statutes. Law of Ontario with respect to lawyers different from the law of Quebec. Is law of England ap-

plicable, seeing that Canadian lawyers are solicitors as well as barristers? Regulations as to petitions of right in England under imperial statute 23 & 24 Vict. c. 34. Difference in the profession of the Bar in England and Canada. Mr. Doutre's right to sue for his fees on a *quantum meruit* is established under Quebec law. The Judicial Committee therefore affirm the decree below, with costs, and also decide that the Petition of Right Act (Canadian), viz., 39 Vict. c. 27 (1876), s. 19, sub-s. 3, does not preclude a remedy against the Crown.
[9 *App. Cas.* 745; 53 *L. J. P. C.* 85.]

The Attorney-General for Quebec *v.* Reed.

[*Ex parte.*]

THE LORD CHANCELLOR (THE EARL OF SELBORNE).
Nov. 26, 1884.

Appeal heard on special leave. "Direct" or "indirect" taxes. Tax upon exhibits used in a Court of justice in the Province of Quebec under Quebec Act 43 & 44 Vict. c. 9, which amended 39 Vict. c. 8, ss. 1 and 2. Can the tax be justified under sect. 65, or under sub-sects. 2 and 14 of sect. 92 of the British North America Act (30 & 31 Vict. c. 3)? and was the provincial Act *intra* or *ultra vires* of the Quebec Legislature? A leading question was whether the levy afforded a case of *direct* taxation within the province "in order to the raising of a revenue for provincial purposes." What was the meaning of the words "direct taxation"? Views of Mill, McCulloch, and Littré on the question. Their Lordships agree with the Supreme Court in the view that the tax cannot be justified. It would appear to their Lordships upon the authorities that the best general guide as to what is direct taxation is to look to the time of payment. If at the time of demand it is paid by the very persons who it is intended should pay it, then the tax is direct; but if at the time the ultimate incidence is uncertain, then it is not direct, but indirect. In this

case, none could foretell the result of the trial, or on whom the incidence would ultimately fall. Agreeing with the Supreme Court, the Judicial Committee held that the tax was not direct, and that therefore the provincial Act was *ultra vires*. Appeal dismissed. [10 *App. Cas.* 141.]

The Attorney-General of Nova Scotia *v.*
Gregory.

LORD HOBHOUSE. *April* 3, 1886.

Petition for special leave to appeal from decree of Supreme Court of Canada (counter-petition lodged). Pursuant to agreement, the order of the Supreme Court, partaking as it did of the character of an arbitration, was to be a *final* disposition of all contentions between the parties. Their Lordships, considering that the Supreme Court was acting not in its ordinary jurisdiction as a Court of Appeal, but under the *special reference* made to it under the agreement, refuse to recommend that leave to appeal should be granted.

[11 *App. Cas.* 229; 55 *L. J. P. C.* 40.]

Lewin and Another *v.*
Wilson and Others.

LORD HOBHOUSE. *June* 25, 1886.

Appeal heard on special leave. Law of limitation in New Brunswick with respect to mortgages. Consolidated statutes of New Brunswick, c. 84, ss. 29 and 30. Chapter headed "Limitation of Real Actions." These sections, though placed together in this statute, are reproductions of sections in the English Act of 1837 (*vide* 7 Will. 4 & 1 Vict. c. 28, s. 29), and the earlier Act of 1833 (*vide* 3 & 4 Will 4, c. 27, s. 40). The suit was instituted by the appellants, representatives of the lady who advanced the money, the security for which was the mortgage,

for foreclosure of mortgage. The respondents were the representatives in title of one of the mortgagors (White), and they plead the Statute of Limitations. The other mortgagor was a person named Howe. These two had executed the joint bond, and both were principal debtors to the obligee, but White by its terms was surety only. White never made any payment, but Howe up to March, 1879, paid interest regularly on the debt, after which all payments ceased. The question in the appeal was, whether the payments of interest made by Howe prevent time from running in favour of White. Their Lordships reversed the decision of the Supreme Court of Canada, which had affirmed the decision of the Supreme Court of New Brunswick, which went upon the point of limitation, and dismissed the appeal, with costs. They upheld the contention of the appellants that a proviso in White's mortgage made it clear that Howe was entitled to pay, and the mortgagee was bound to receive from him, the interest accruing on the mortgage. Cases discussed included *Chinnery* v. *Evans* (11 H. L. C. 129); *Harlock* v. *Ashberry* (19 Ch. Div. 539); *Bolding* v. *Lane* (1 D. J. & S. 122); *Toft* v. *Stephenson* (1 De G. M. & G. 28). Effect of "acknowledgment" as compared with "payment." Their Lordships held that the running of the statute commenced when Howe paid the last interest (and Howe under the terms of the contract was a person clearly entitled to pay), and therefore that the appellants were not barred by the statute in their action in relation to White's mortgage (no question now arose on Howe's mortgage). Their Lordships are of opinion that the Supreme Court of Canada should have reversed the decision which was appealed from, and have granted to the appellants the relief prayed by them in respect of the property included in White's mortgage. There was a subsidiary argument in regard to one particular parcel of the mortgaged property which it was alleged was subject to a lease. As regards this the ruling would be the same, though the relief would be postponed subject to the outstanding interest. The appellants are to have costs of the appeal to the Supreme Court, and the costs of appeal to England.

[11 *App. Cas.* 639; 55 *L. J. P. C.* 75.]

The Windsor and Annapolis Railway Company *v.* The Queen and The Western Counties Railway Company.

And on the Cross Appeal of **The Queen *v.* The Windsor and Annapolis Railway Company.**

LORD WATSON. *June* 25, 1886.

Appeal by special leave. Petition of right. Previous litigation in an equity suit in the Privy Council. *Vide* 7 App. Cas. 178. Agreement by the Crown to give the appellants in the principal appeal the use of a certain railway. Damages against the Canadian Government for deprivation of possession of the railway. The Government of Canada had, by an agreement dated September 8, 1871, undertaken to give the appellant company the exclusive use of the Windsor Branch Railway, and also running powers from a junction over the Trunk line for twenty-one years from the 1st of January, 1872. The appellant company worked the line until August 1, 1877, when, under a mistaken view of their powers, the Government, through the Government Superintendent of Railways, took possession, and put an end to the occupation of the company. On the 24th September, 1877, the same official gave possession of the line to the Western Counties Railway Company, under Schedules A. and B. of the Dominion Act, 37 Vict. c. 16. Thereupon the action was instituted by the appellant company by a petition of right, praying that the agreement of 1871 should be specifically performed, and also claiming damages. The Supreme Court had decided that only a portion of the damages claimed—those incurred in the brief time which elapsed before the restoration of the line to the appellant company—for it was restored in 1879—were leviable. The Judicial Committee affirmed that portion of the Supreme Court decree which declared that an action did lie against the Crown. *Thomas* v. *The Queen*, L. R. 10 Q. B. 31; *vide* also *Feather* v. *The Queen*, 6 B. & S. 293. Settled law that whenever a valid contract has been made between a subject and the

Crown, a petition of right will lie for damages for a breach of that contract. Authorities discussed. Extent of the liability of the Crown. Their Lordships, upon a review of the claims of the appellant company for the alleged breach, for an account of profits, &c., decide that the full compensation demanded should be paid, and themselves assess those damages at 115,000 dollars, as against 9,589·07 dollars granted below. In this respect the judgment below would be reversed, and *quoad ultra* it would be affirmed. The cross appeal would be dismissed, and the costs of both appeals would be given to the appellant company. Principal appeal reversed. [11 *App. Cas.* 607; 55 *L. J. P. C.* 41.]

Dumoulin *v.*
Langtrey and Others.

(And Counter Petition.)

Lord Watson. *June* 18, 1887.

Petition for special leave to appeal. Unanimity of nine judges below in the decision arrived at. Remarks made as to the petitioners having gone *per saltum* to the Supreme Court. Determination of the matter one way or the other "will not affect other interests than those of the parties to the action." Petition dismissed with costs. The judgment of their Lordships' Board ran thus:—

"In disposing of this petition their Lordships do not think it necessary to raise any question regarding the interest and right of the petitioners to institute the action. They will assume that the petitioners have a *locus standi*, and that the point was rightly decided by the Judges of the Supreme Court of Canada. The questions of law involved in the action are, no doubt, of considerable importance to the litigants who are represented at the Bar; and are also calculated to attract the attention of the public. At the same time their Lordships cannot regard these questions as being of *general importance* in the strict and proper sense of that term. Their determination, one way or another,

will not affect other interests than those of the parties to the action. It will not be decisive of any general principle of law.

"In these circumstances the question which their Lordships have to consider is this: whether the case is in itself of such importance, or of such nicety, as to require that this Board, in the interests of justice, should review the unanimous determination of nine judges of the Canadian Courts. The petitioners themselves resorted *per saltum* to the Supreme Court of Appeal in Canada, and accordingly their Lordships must deal with the petition on the footing that they have exhausted the Courts of that country. The case has been decided carefully, after full hearing, by nine judges, five of them members of the Supreme Court of Canada; and in these circumstances their Lordships do not think they would be warranted under the provisions of the Act of 1875 (38 Vict. c. 11, s. 47), in recognizing this as a proper case for the exercise of Her Majesty's prerogative. Their Lordships therefore dismiss the petition with costs." [*P. C. Ar.*]

The Bank of Montreal *v.* Sweeny.

THE LORD CHANCELLOR (LORD HALSBURY). *June* 25, 1887.

Appeal by special leave. Is a holder of shares "in trust" a *mandataire prête-nom*, or is he holder subject to prior title? Interpretation of "*mandataire prête-nom*" according to the Civil Code of Lower Canada. Duty of transferee from such holder to inquire whether the transfer is authorized by the terms of the trust.

The appeal to Her Majesty in Council was from a decree of the Supreme Court of the Dominion, which reversed a decision of the Court of Queen's Bench at Quebec, confirming a decree of the Superior Court of that province. That first decree in the case, viz., of the Superior Court, dismissed the respondent's (plaintiff's) action as far as the appellant was concerned, with costs. The action was instituted by Mrs. Sweeny, the respondent, against W. J. Buchanan, manager of the Bank of Montreal,

the bank itself, a person called James Rose, and the Montreal Rolling Mills Company. In her declaration the plaintiff stated that in 1871 she had handed Rose $3,000 to purchase three shares for her of the Montreal Rolling Mills Company, and that Rose, acting as her agent, purchased the shares; that thereupon the company issued a certificate which certified that Rose was holder of three shares in that company "in trust"; and that Rose duly delivered to her the certificate, which she still held. The declaration further averred that in 1876 Rose, without the consent of the respondent, transferred the shares to Buchanan in trust for the bank, and that the fact of the shares being held by Rose in trust was known to the appellants, and she prayed for a transfer of the shares to herself. The bank in answer pleaded that Rose being indebted to them transferred 250 shares of the Rolling Mills Company to them as security for such debt; that they were ignorant whether the shares claimed by Mrs. Sweeny were part of the said 250 shares, and that no trust was disclosed.

Having heard elaborate arguments on both sides, the Judicial Committee agreed to report to Her Majesty that the decision of the Supreme Court, which ordered the appellants to transfer the three shares to the respondent, and in default to pay her $3,900, the value of the said shares with interest and costs, should be upheld.

The details of the case are fully stated in the judgment of the Judicial Committee which, for the most part, was as follows:—

"Their Lordships consider it to be proved in this case that Rose held the disputed shares upon a trust not disclosed by the entry in the company's books; that he transferred them to the bank in breach of his trust; that at the time of the transfer the bank knew of Rose's position; and that the plaintiff turns out to be the person in whose favour the trust existed. It has been argued for the appellants that these things are not proved, because they require a written *commencement de preuve*, and have not got it. But on this point their Lordships stopped the respondent's counsel. They are quite clear that if a written *commencement* is needed, it is to be found in the letters of

Crawford and Lockhart (the gentlemen who remitted through the appellants' bank by direction of Mrs. Sweeny to Rose the amount required for the purchase of the shares) coupled with the books of the Rolling Mills Company, and in the transfer executed by Rose to Buchanan on the 3rd June, 1876. Under these circumstances the question arises whether the bank must not be in the same position as if they had known that the plaintiff was interested in the shares, and that the transfer by Rose was in violation of his duty to the plaintiff. Their Lordships do not impute moral blame to Mr. Buchanan or to any agent of the bank, for those gentlemen may be guilty of nothing more than a mistake of law. . . . The bank had express notice that as regards the property transferred to them Rose stood to some person in the relation expressed by the words 'in trust,' and the only question is what duty was cast upon the bank by that knowledge. Their Lordships think it wrong to say that any less duty was cast upon them than the duty of declining to take the property until they had ascertained that Rose's transfer was authorized by the nature of his trust. In fact they made no inquiry at all about the matter, following, as Mr. Buchanan says, the usual practice. So acting, they took the chance of finding that there was somebody with a prior title to demand a transfer from Rose, and as the plaintiff is such a person they cannot retain the shares against her claim. Their Lordships are led to this conclusion by the ordinary rules of justice as between man and man, and the ordinary expectations of mankind in transacting their affairs. If indeed they found any principle of Quebec law which absolutely forbad that property should be placed in the name of a person, with a simultaneous notice providing that his power over it should not be absolute but restricted, that would control their decision. That view has been pressed upon them from the bar with great ability and force, but, as they hold, without authority to support it. The authorities cited relate to *mandataires prête-noms*, and are to the effect that, when once property has been placed under the dominion of such an agent, third parties may safely deal with him alone, even though notice is given to them that his

principal is not assenting to his acts. Their Lordships think it unnecessary to examine this statement of the powers of a *mandataire prête-nom*, for they find no definition or description of such an agent which does not require that he should have a *titre apparent*, which they understand to mean that he must be ostensible owner, made to appear to the world as absolute owner. They asked whether there was any text or case to show that an agent can be a *mandataire prête-nom* when the instrument conferring the property on him carried upon its face a declaration that his property is qualified. No such authority could be found. In this case Rose was never for an instant held out to the world as absolute owner, and therefore he never could have given a good title to a third party by his own sole authority. Then it was argued that the words 'in trust' do not show a title in any other person, and that they might be merely a mode of distinguishing one account from another in the company's books. Their Lordships think that they do import an interest in some other person, though not in any specified person. But whatever they mean, they clearly show the infirmity or insufficiency of Rose's title; and those who choose to rely on such a title cannot complain when the true owner comes forward to claim his own. It is worthy of remark that, in their plea, the appellants claim to be the true owners of the shares upon the very same principle upon which the plaintiff's claim is founded. Rose did not transfer them to the bank by name, but to Buchanan 'in trust.' The appellants aver that this transfer was made as security for a debt due from Rose to them, and that the shares 'are now legally held for the said bank.'

"If that is the essential truth of the transaction as between Buchanan and the bank, why should it be otherwise as between Rose and the plaintiff? The result is that their Lordships agree in all material points with the Supreme Court of Canada. They will humbly advise Her Majesty to affirm the decree of that Court, and dismiss the appeal. The appellants must pay the costs." [12 *App. Cas.* 617; 56 *L. J. P. C.* 79.]

The North West Transportation Company and **James Hughes Beatty** *v.* **Henry Beatty** (on behalf of himself and others).

SIR RICHARD BAGGALLAY. *July* 21, 1887.

Appeal by special leave. Action to set aside a sale of a steamer to a company, in which company the vendor was a director and shareholder. Personal interest of shareholder as distinct from the general or particular interests of the company. Shareholders' meetings. Bye-law. Balance of power in voting at a company's meeting for the purchase of the steamer not improperly used. Director. Vendor within his rights in voting for the bye-law. The main question was whether a director and a shareholder in a company, a Mr. James Hughes Beatty, was entitled to vote at a meeting of the company on a question in which he was personally interested. The action was instituted by Henry Beatty, the respondent, on behalf of himself and other shareholders in the company, to set aside a sale made to it by the said James Hughes Beatty of a steamer called the "United Empire," of which, previously to such sale, he was sole owner.

The facts preceding the transaction appeared to show that the company had lost one of its steamers, the "Asia," and another, the "Sovereign," was deemed unsuitable for the company's business. At this time the steamer "United Empire" was nearly completed.

It is proved by uncontradicted evidence, and is indeed now substantially admitted, that, at the date of the purchase, the acquisition of another steamer to supply the place of the "Asia" was essential to the efficient conduct of the company's business; that the "United Empire" was well adapted for that purpose; that it was not within the power of the company to acquire any other steamer equally well adapted for its business; and that the price agreed to be paid for the steamer was not excessive or unreasonable.

The action first came on to be heard before the Chancellor of Ontario, who ordered the sale to be set aside, with the usual consequential directions. All charges of fraud and collusion being discarded, the Chancellor treated the question as one of "purely equitable law," and held that the three-fold character of director, shareholder, and vendor, sustained by the defendant J. H. Beatty, involved a conflict between duty and interest, and that, being so circumstanced, he could not be permitted, in the conduct of the company's affairs, to exercise the balance of power which he possessed, to the possible prejudice of the other shareholders.

The defendants appealed against the order of the Chancellor, and the Court of Appeal of Ontario allowed the appeal, and ordered that the plaintiff's (the respondent's) bill should be dismissed with costs. In the opinion of the members of that Court, the resolution to purchase the steamer was a pure question of internal management, and the shareholders had a perfect right, either to ratify the act of the directors, or to treat the matter as an original offer to themselves, and to assent to and complete the purchase.

From the order of the Court of Appeal the plaintiff appealed to the Supreme Court of Canada, and the Supreme Court reversed the order of the Court of Appeal, and affirmed that of the Chancellor. It appears to have been the opinion of the Judges of the Supreme Court that the case turned entirely on the fiduciary character of the defendant J. H. Beatty, as a director; that, if the acts or transactions of a director were to be confirmed by the shareholders, it should be by an exercise of the impartial, independent, and intelligent judgment of disinterested shareholders, and not by the votes of the director, who ought never to have departed from his duty; that the course pursued by the defendant J. H. Beatty was an oppressive proceeding on his part; and that, consequently, the vote of the shareholders, at the particular meeting which authorized the purchase, was ineffectual to confirm the bye-law which had been enacted by the directors. The nature

of the transaction itself does not appear to have been taken into consideration by the Judges in their decision of the case.

In the opinion of the Judicial Committee the constitution of the company enabled the defendant J. H. Beatty to acquire this voting power: there was no limit upon the number of shares which a shareholder might hold, and for every share so held he was entitled to a vote; the charter itself recognized the defendant as a holder of 200 shares, one-third of the aggregate number; he had a perfect right to acquire further shares, and to exercise his voting power in such a manner as to secure the election of directors whose views upon policy agreed with his own, and to support those views at any shareholders' meeting; the acquisition of the vessel was a pure question of policy, as to which it might be expected that there would be differences of opinion, and upon which the voice of the majority ought to prevail; to reject the votes of the defendant upon the question of the adoption of the bye-law would be to give effect to the views of the minority, and to disregard those of the majority.

The Judges of the Supreme Court appear to have regarded the exercise by the defendant J. H. Beatty of his voting power as of so oppressive a character as to invalidate the adoption of the bye-law; their Lordships are unable to adopt this view; in their opinion, the defendant was acting within his rights in voting as he did, though they agree with the Chief Justice in the views, expressed by him in the Court of Appeal, that the matter might have been conducted in a manner less likely to give rise to objection.

Their Lordships advised Her Majesty to allow the appeal; to discharge the order of the Supreme Court of Canada; and to dismiss the appeal to that Court with costs; the respondent to pay the costs of the present appeal.

[12 *App. Cas.* 589; 56 *L. J. P. C.* 102.]

The Corporation of Parkdale *v.* West and Others.

(Two Appeals consolidated.)

LORD MACNAGHTEN. *July* 27, 1887.

Appeal by special leave. Railway construction. Private rights interfered with. Necessity for compensation as a condition precedent. Authority of railway companies. Question turned upon the construction of the Dominion statute 46 Vict. c. 24, s. 4 (1883). References also made to the Railway Clauses Consolidation Act of Canada, 14 & 15 Vict. c. 51. The English Lands Clauses Consolidation Act, 1845. The Dominion Act, 42 Vict. c. 9 (Consolidated Railway Act, 1879), &c. Powers of the Railway Committee of the Privy Council of Canada subservient to the provisions of the Acts (*Jones* v. *Stanstead Railroad Co.*, L. R. 4 P. C. 98, compared). Regret is expressed that the railway companies were not made parties to the action. Their Lordships held that the judgment of the Supreme Court was right, and should be affirmed. They were of opinion that the railway companies were bound to make compensation under the Act of 1879 before interfering with the respondents' rights, and on this ground, as well as on the ground of non-compliance with the provisions of the Act as to plans and surveys, they hold that the appellants cannot justify their acts by pleading the statutory authority of the railway companies. In the course of their judgment, the Judicial Committee made some important remarks on the subject of "injunction" (a proceeding in law which was not pressed for below):—

"If a person whose rights are injuriously affected is refused compensation, he may be compelled to bring an action for injunction. But, even in that case, the Court would probably not interfere with the construction of the works by an interlocutory injunction if the railway company acted reasonably, and were willing to put the matter in train for the assessment of compensation. As Lord Romilly pointed out in *Wood* v. *The*

Charing Cross Rail. Co. (33 Beav. 290), the granting an injunction which stops the works of a railway company is not merely a question between the plaintiff and the company. The public have an interest in the matter. As a general rule, it would only be right to grant an injunction where the company was acting in a high-handed and oppressive manner, or guilty of some other misconduct."

Their Lordships were asked by the appellants to express an opinion as to the measure of damages in case the appeal should be dismissed. It appears to their Lordships that, as the injury committed is complete and of a permanent character, the respondents are entitled to compensation to the full extent of the injury inflicted.

Their Lordships express no opinion as to the rights of the appellants to recover over again against the railway companies, either under the general law of principal and agent, or under the express provisions of their agreement with those companies. Whatever those rights may be, they are untouched by their Lordships' judgment. Affirmed with costs.

[12 *App. Cas.* 602; 56 *L. J. P. C.* 66.]

The St. Catherine's Milling and Lumber Co. *v.* The Queen (on the information of the Attorney-General of Ontario).

LORD WATSON. *Dec.* 12, 1888.

Appeal heard by special leave. The Indian reserve lands in Ontario. Is the beneficial interest of them vested in the Dominion of Canada or in the Government of the Province of Ontario? Cession of Canada to Great Britain in 1763. Character of English proclamation, October, 1763, and the provisions therein contained respecting the Indians. Effect of Imperial Statute of 1840 (3 & 4 Vict. c. 35). Consideration for a civil list. By this Imperial Act all the beneficial interest of its own revenues passed to each of the Provinces named. Importance of sect. 109 of the British North America Act of

1867. *Attorney-General of Ontario* v. *Mercer* (8 App. Cas. 767). Character of the interest of the Indians. Their Lordships hold that the contention of the Province is the correct one, and that although legislation for the Indians remains in the Dominion the distribution of revenues and assets appertains to the Province of Ontario. Appeal dismissed, but without costs.

[14 *App. Cas.* 46; 58 *L. J. P. C.* 54.]

The Attorney-General of British Columbia *v.* The Attorney-General of Canada.

Lord Watson. *April* 3, 1889.

Appeal by special leave. Question arising out of the arrangements *pro* and *con.* between British Columbia and Canada in consequence of British Columbia entering the Union. The question was, whether gold and silver minerals in, upon, and under a certain tract of country in British Columbia called the "Railway Belt" are *vested in the Crown as represented by the Government of the Dominion of Canada, or in the Crown as represented by the Government of British Columbia.* Special case. Terms of English Law Ordinance (1867) of British Columbia. Sect. 109 of the British North America Act of 1867. Gold and silver not *partes soli.* Prerogative remains in the Crown. The Crown assigned the beneficial interest in precious metals to British Columbia. The Judicial Committee, reversing the judgment of the Supreme Court of Canada, decide that the beneficial interest of the Crown in precious metals is still vested in British Columbia for the benefit of that Province. Conveyance of lands did not transfer an interest in revenues arising from the prerogative of the Crown. There will be no order as to costs. [14 *App. Cas.* 295; 58 *L. J. P. C.* 88.]

Macmillan *v.*
The Grand Trunk Railway Co. of Canada.

Lord Watson. *May* 17, 1889.

Application for special leave to appeal to Her Majesty in Council. Liability of consignors and carriers of goods on railways. Rules already laid down by the Privy Council with reference to such petitions are again discussed. Application refused. The Judicial Committee in their judgment said:—

"With regard to applications like the present, the following rules were laid down by this Board in the case of *Prince* v. *Gagnon* (8 App. Cas. 103), 'Their Lordships are not prepared to advise Her Majesty to exercise her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of the Dominion, save where the case is of gravity, involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance of a very substantial character.' This case admittedly does not affect property of considerable amount, nor can it well be described as being of a very substantial character, because after giving credit for the sum already paid by the Canadian Pacific Railway on account of the petitioner's claims, the sum at stake is reduced to something under 250*l.* sterling. It is therefore necessary to consider whether the judgment of the Supreme Court of Canada, against which leave is sought to appeal, involves and determines matter of public interest or an important question of law. It appears to their Lordships that it does neither. The settlement made between the petitioner and the Canadian Pacific Railway, taking the account given of it in the petition, makes it exceedingly doubtful whether it would be open to this Board to decide the legal question upon which four of the learned Judges of the Supreme Court of Canada entertained different opinions.

"In the next place, if the question which the petitioner desires to raise had related to the usual practice of the Grand Trunk Railway in making contracts with consignors of goods,

there might have been some room for admitting the appeal, if the Court had put an authoritative construction upon the ordinary form of contract. But that is not the fact. This is an exceptional case; the jury, according to the statement of the petitioner, having found that the respondents' usual form of contract was not adopted when they undertook to carry the petitioner's goods.

"Then it is said that the judgment of the Supreme Court establishes an important precedent. If it had done so, as their Lordships have already indicated, there might have been some reason for entertaining this application. But again, on examining the judgment as set forth in these papers, it turns out that upon the question of law the learned Judges were two to two, and the decision went upon the ground that a fifth Judge, the learned Chief Justice, was of opinion that the point upon which the other Judges had differed did not arise in the case. It is quite impossible that a judgment attained by such division of opinion can bind the Supreme Court of Canada, or the Courts of Appeal in the Provinces, and therefore it appears to their Lordships that, upon all points requisite in order to warrant their advising Her Majesty to exercise her prerogative, the petitioner's case, upon his own statement, fails." [*P. C. Ar.*]

The Corporation of St. John's and Another *v.* The Central Vermont Railway Co.

LORD WATSON. *July* 25, 1889.

Appeal by special leave. Liability of a railway company for municipal taxes. Claim for assessment of railway track and bridge. The Judicial Committee, agreeing with Supreme Court, advise Her Majesty that the land on which the superstructure of the railway runs is *alone* taxable as land, and that the *superstructure of the railway* is not taxable. *Observations made on the duty of parties who have obtained special leave to appeal on a question of "general importance" to avoid arguing (when the case comes to appeal) on a question of fact.*

[14 *App. Cas.* 590; 59 *L. J. P. C.* 15.]

La Cité de Montréal v.
Les Ecclésiastiques du Seminaire de St Sulpice.

LORD WATSON. *July* 27, 1889.

Petition for special leave to appeal. Petition dismissed. Opinions expressed at length as to the considerations which should have weight with the Judicial Committee in advising the exercise of Her Majesty's prerogative to grant leave to appeal. *Prince* v. *Gagnon* (8 App. Cas. 103) considered. The judgment of the Judicial Committee was as follows:—

"This is a petition at the instance of the Municipal Corporation of the City of Montreal, for leave to appeal from a judgment of the Supreme Court of Canada, by which the Seminary of St. Sulpice, which is within the boundaries of the city, has been exempted from payment of a sum of $361.90, about 70*l*. sterling, being the proportion charged upon it, by the petitioners, of a special assessment made by them for the cost of constructing a main drain which runs in front of its premises. The Supreme Court, by a majority of four to one (Ritchie, C. J., being the dissentient Judge), reversed the decision of the Queen's Bench for Lower Canada, which was also pronounced by a majority of four to one, and restored the judgment of Loranger, J., the Judge of First Instance.

"In considering applications of this kind, it is necessary to keep in view that the Statute of Canada, 38 Vict. c. 11, which established the Supreme Court of the Dominion, does not give to unsuccessful litigants a direct right, either absolute or conditional, to appeal from the decisions of that tribunal. Sect. 47 expressly declares that no appeal shall be brought from any judgment or order of the Supreme Court to any Court established by the Parliament of Great Britain and Ireland by which appeals or petitions to Her Majesty in Council may be ordered to be heard; but saves any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal prerogative.

"It is the duty of their Lordships to advise Her Majesty in the exercise of Her prerogative, and in the discharge of that duty they are bound to apply their judicial discretion to the particular facts and circumstances of each case as presented to them. In forming an opinion as to the propriety of allowing an appeal, they must necessarily rely to a very great extent upon the statements contained in the petition with regard to the import and effect of the judgment complained of, and the reasons therein alleged for treating it as an exceptional one, and permitting it to be brought under review. Experience has shown that great caution is required in accepting these reasons when they are not fully substantiated, or do not appear to be *primâ facie* established by reference to the petitioner's statement of the main facts of the case, and the questions of law to which these give rise. Cases vary so widely in their circumstances that the principles upon which an appeal ought to be allowed do not admit of anything approaching to exhaustive definition. No rule can be laid down which would not necessarily be subject to future qualification, and an attempt to formulate any such rule might therefore prove misleading. In some cases, as in *Prince* v. *Gagnon* (8 App. Cas. 103), their Lordships have had occasion to indicate certain particulars, the absence of which will have a strong influence in inducing them to advise that leave should not be given, but it by no means follows that leave will be recommended in all cases in which these features occur. A case may be of a substantial character, may involve matter of great public interest, and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right, or at least to be unattended with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal.

"The exemption which the Supreme Court has sustained in the present instance is a statutory one. The petitioners narrate the 77th section of the Consolidated Statutes of Lower Canada, cap. 15, and then proceed to allege that the effect of the judgment will be 'to determine the future liability (meaning apparently non-liability) of buildings set apart for purposes of

education, or of religious worship, parsonage houses, and charitable and educational institutions and hospitals, to contribute to local improvements carried out in their interests and for the benefit of their properties.' Had that statement been well founded, it might have been an important element in considering whether leave ought to be given. But it is plainly erroneous. The statute in question, which relates to 'public education,' exempts the properties above enumerated from educational rates levied for the purposes of the Act, and from no other rates.

"The clause upon which the judgment of the Supreme Court proceeded is sect. 26 of the statutes of the Province of Quebec, 41 Vict. c. 6, which is an Act to amend the laws respecting public instruction. It enacts that 'Every educational institution receiving no grant from the corporation or municipality in which they are situated, and the land on which they are erected, and its dependencies, shall be exempt from municipal and school taxes, whatever may be the Act or charter under which such taxes are imposed, notwithstanding all provisions to the contrary.'

"The Seminary of St. Sulpice admittedly does not receive any grant from the Corporation of the City of Montreal, and is therefore within the benefit of the exemption created by sect. 6, and the only issue raised between the parties is, Whether a district rate for drainage improvements, levied from that portion of the municipal area which directly benefits by its expenditure, is or is not a municipal tax within the meaning of the clause.

"The petition does not set forth the source from which the petitioners derive their authority to execute such improvements as drainage, and to assess for their cost. Powers of that description are entrusted to municipal bodies, presumably in the interest of the public, and not for the interest of private owners, although the latter may be benefited by their exercise. *Primâ facie*, their Lordships see no reason to suppose that rates levied for improvements of that kind are not municipal taxes, and at the hearing of the petition their impression was confirmed by a reference to the general Municipal Acts for Lower Canada. The counsel who appeared for the petitioners stated, however,

that their powers are derived, not from the general Acts, but from a charter, the terms of which were neither referred to nor explained. If the terms of the charter materially differ from those of the general Acts, that deprives the case of any general importance. But it is quite possible that the concluding words of sect. 6 may have been purposely introduced by the Legislature in order to secure uniformity of exemption, whatever might be the terms in which the power to assess was conferred; and that, consequently, in construing the clause, the expression 'municipal taxes' ought to be interpreted according to its general acceptation, and not according to the meaning which it might be held to bear in some charter or statutes applicable to particular municipalities.

"In these circumstances their Lordships are not prepared to advise Her Majesty that the petitioners ought to have leave to appeal. If such questions are, as they say, of frequent occurrence in the City of Montreal they may have the opportunity of obtaining the decision of this Board in another case, upon appeal from the Court of Queen's Bench for the Province. The petition must therefore be dismissed."

[14 *App. Cas.* 660; 59 *L. J. P. C.* 20.]

McMullen *v.*
Wadsworth.

SIR BARNES PEACOCK. *July* 27, 1889.

Acte de mariage. Construction of Civil Code of Lower Canada, Articles 6, 63, and 1260. Domicile. Law of community of goods (*commune en biens*). Question whether the provisions of the Code can affect or alter the international law of domicile, or whether the true interpretation of the word domicile in Article 63 only meant residence (six months) in Quebec for the purposes of marriage.

Appeal brought by special leave. The circumstances of the litigation may be thus stated:—In the year 1828, an Irish emigrant, James Wadsworth, married one Margaret McMullen,

then a widow with a daughter by her first husband. This daughter is the present appellant. At the time of the marriage, James Wadsworth and Margaret McMullen were signatories to what is called an *acte de mariage* under the Code. Margaret Wadsworth, the wife, died in 1872, and, at the end of the same year, James Wadsworth was married for the second time to the present respondent, Dame Jane Wadsworth, and to her he bequeathed, at his death, the whole of his estate. The contention raised by the appellant Susan McMullen is that the effect of the *acte de mariage* entered into by James Wadsworth and his first wife (appellant's mother) was to establish what is described in the Code, sect. 1260, as a "legal community of goods" between the consorts. In the document in question, James Wadsworth described himself as a *journalier* (or labourer) "de cette ville" (Quebec), and it was to be presumed, the appellant said, that both consorts were domiciled in Quebec. If these contentions were correct, the appellant was entitled to a fourth share of all the property (acquired since 1828) which James Wadsworth bequeathed to his second wife, the respondent. If, on the other hand, the international law of domicile was not affected by the Code, the appellant's claim must fail. The argument of the respondent was that the domicile of Wadsworth at the time of his marriage with Margaret McMullen was not in Quebec, and that neither by the laws of Upper Canada nor Ireland by which the said marriage was governed did the alleged community of property arise. The reference to Upper Canada was made with respect to the allegation that Wadsworth had been a lumberer on the Bonnechère River in that Province; and it was said that though he was at Quebec and was married there in 1828, he went back again and stayed in Upper Canada till 1836. He eventually died in Lower Canada. The value of the property at issue in this litigation was said to be not less than 6,000*l.* The plaintiffs in the suit sued as grandchildren of Margaret Wadsworth. The appellant joined them as an intervener, and she now alone has prosecuted the appeal. The Superior Court made a decree in favour of the views contended for by the appellant, and this decision was upheld by the Court

of Queen's Bench. On appeal by the respondent, the Supreme Court of the Dominion reversed the previous findings, and the Judicial Committee now report to Her Majesty that the decision arrived at by the Supreme Court ought to be affirmed. The appellant to pay the costs of the appeal. Their Lordships, in giving judgment, said:—

"It is clear that the question of international domicile is one of general law, and that the doctrine of the Roman law still holds good, that 'it is not by naked assertion but by deeds and acts that a domicile is established.' It certainly cannot be said that the case involves an intricate question of international law (to use the words of Mr. Justice Taschereau) if it depends upon whether Wadsworth contracted with his wife or was guilty of a fraudulent misrepresentation.

"Their Lordships are of opinion that the word domicile in Article 63 was used in the sense of residence, and did not refer to international domicile. They are of opinion that a person having resided temporarily six months in Quebec would be entitled to have his marriage solemnized in that city, although he might be internationally domiciled elsewhere and might refuse to change that domicile. It would be monstrous to suppose that an Englishman, Frenchman, or American travelling in Lower Canada, and retaining his domicile in his own country, could not be married in Quebec after a temporary residence there for six months without abandoning his international domicile in his own country, and altering his status and civil rights. For the above reasons their Lordships are of opinion that the decision of the majority of the Judges of the Supreme Court is correct."

[14 *App. Cas.* 631; 59 *L. J. P. C.* 7.]

The North Shore Railway Company *v.*
Pion and Others.

THE EARL OF SELBORNE. *August* 1, 1889.

Appeal by special leave. Riparian rights case (*accès et sortie*). Interference by a railway company with the access to a

tidal navigable river. 1. Is there right to indemnity? English law on the subject; Canadian law. 2. Was the action properly brought? Construction of the provisions of the Quebec Railway Consolidation Act of 1880, giving powers to construct a railway and laying down conditions for compensation. Their Lordships agree to report that as the railway company did not take the due steps necessary, under the 1880 Act, to vest in themselves the right to make the railway, the action was properly brought against them. They also hold that a permanent injury was done to the respondents' property without the condition precedent of offering compensation, and that they were entitled to damages. *Lyon* v. *Fishmongers' Company* (1 App. Cas. 662) and *Corporation of Parkdale* v. *West* (12 App. Cas. 602) followed. Affirmed, with costs.

[14 *App. Cas.* 612; 59 *L. J. P. C.* 25.]

The Liquidators of the Maritime Bank of the Dominion of Canada *v.*
The Receiver-General of New Brunswick.

LORD HOBHOUSE. *Dec.* 19, 1890.

Petition for special leave to appeal on the ground of the importance of the question at issue, viz., whether the Provincial Government of New Brunswick was entitled to payment in full in priority over the other depositors and simple contract creditors of the Maritime Bank, which was a Dominion bank.

The Supreme Court of Canada decided by a majority of four judges to one in favour of the Provincial Government, and dismissed the appeal, holding in effect that the prerogative rights of the Crown could be invoked and exercised by and on behalf of such Provincial Government, which was therefore entitled to the priority claimed.

The applicants for the special leave submitted that since the confederation of the Provinces brought about by the British North America Act, 1867, no such prerogative right as is claimed can exist in favour of the Provincial Governments:

that their powers are statutory, and, being statutory, cannot be prerogative; and that a debt due to a Provincial Government is not a debt due to the Crown. Special leave granted.

[*P. C. Ar.*]

Robinson *v.*

The Canadian Pacific Railway.

LORD WATSON. *July* 25, 1891.

Petition for special leave to appeal. Question, Whether a right of action to sue for damages now remained to the widow of a person injured, or whether the right of action was extinguished by prescription during the lifetime of the person injured. The Judicial Committee, having regard to the general importance of the questions raised in the petition upon sects. 1056 and 2262 of the Civil Code of Lower Canada, and also to the difference of judicial opinion in the Courts below, think it right to advise Her Majesty to admit the appeal. [*P. C. Ar.*]

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