INDIAN CASE-LAW

ON

TORTS.

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BY

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LATE OFFICIATING JUDGE, SMALL CAUSE COURT, ALLAHABAD.

FOURTH EDITION

BY

P. L. BUCKLAND, B.A.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

Calcutta:

THACKER, SPINK AND CO.,

Law Publishers.

1900.

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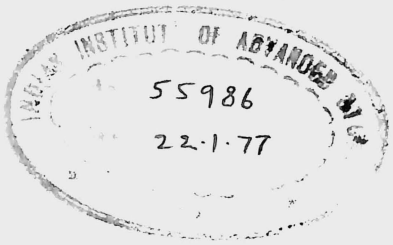

PREFACE TO THE FOURTH EDITION.

In this edition every endeavour has been made to bring the work up-to-date by incorporating the decisions since 1891 without interfering more than necessary with the plan of the author as modified by the Editor of the third edition.

P. L. B.

Bar Library,
Calcutta, 1900.

PREFACE TO THE THIRD EDITION.

THE first edition of this work was published in 1881. The second was published in 1884, but it was merely a reprint of the first edition. It has now been out of print for several years. Owing to the death of the author, I have been asked to revise the present edition.

The amount of Case-Law on Torts, which has emanated from the Courts of this country during the ten years which have elapsed since the first appearance of this book, hasbeen very great. It has therefore been necessary to make very extensive alterations in, and additions to, the text of the work. The passing of the Indian Easements Act (V of 1882) has necessitated very considerable modifications in Chapter III. The plan of the original work and as much of the original text as possible, however, have been preserved, and every endeavour has been made to bring the book up to date and make it practically useful.

R. F. R.

Calcutta, June 1st, 1891.

PREFACE TO THE FIRST EDITION.

THIS book contains the majority of the Indian rulings on Torts by the Privy Council and the four High Courts, as reported in Sutherland's Weekly Reporter, the Bengal Law Reports, the High Court Reports for Madras, Bombay, Allahabad, and the Indian Law Reports (Calcutta, Bombay, Madras, and Allahabad Series). I have also cited some English cases, mostly those quoted in the Privy Council and High Court decisions, and have introduced here and there extracts from Addison on Torts, 4th edition; Underhill on Torts, 2nd edition; Goddard on the Law of Easements, 2nd edition; and Manly Smith's Law of Master and Servant. The book does not, in any way, pretend to be an exhaustive treatise on the almost unfathomable subject of Torts, but I thought that, by collecting together the Indian rulings on Torts for the last 18 or 20 years, and arranging them under appropriate heads, I might be rendering some little assistance both to local tribunals and to law-students and members of the legal profession throughout India. Should this anticipation be realized, my object will have been gained.

R. D. ALEXANDER.

Allahabad, Nov. 1881.

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INDIAN CASE-LAW

ON

TORTS.

CHAPTER I.

GENERAL PRINCIPLES IN TORTS.

Definition of Tort—The legally wrongful act will be presumed to be intentional—Damage in legal contemplation—Slander—Imported damage—Cases—Special damage must be proved in case of infringement of right common to public—Cases—Concatenation of legally wrongful act and damage in legal contemplation—Remoteness of damage—Contribution to damage—Acts of State—Cases—Sanction to tort by operation of Statute-law—Statutory powers to do a particular thing—Cases—General statutory powers—Cases—Judicial Officers protected by Act XVIII of 1850—Cases—Sanction to tort by act being done involuntarily—Malice in fact and malice in law—Good faith—Without reasonable and probable cause—Cases—Negligence—Contributory negligence—Cases—Fraud or falsehood—Acquiescence, express or implied—Effect in actions in tort—Cases—Liability for torts done by third persons—Ratification of tort—Cases—Liability owing to relation of master and servant—Cases—Compulsory servant—Case—Independent contractors—Cases—Injury to fellow-servant—Liability of master—Case—Guardians—Joint and several liability in tort—Cases—Variation of strict rule—Cases—Separate actions in tort—Cases—Rights of defendants in actions in tort—Cases—Contribution between joint wrong-doers—Strict rule—Case—Variation—Cases—Merger of trespass in felony—Effect of death of injured person on action for tort.

Definition of Tort.

TORTS are such actionable wrongs as are independent of contract. To constitute a tort two things must concur: (*a*) A legally wrongful act or omission on the part of one person, causing (*b*) damage, in legal contemplation, to

another person. Thus, in their judgment in *Rogers* v. *Rajendro Dutta and others*,[1] the Privy Council, on appeal from the Supreme Court at Calcutta, said : "Where there is a legally wrongful act, if any damage in legal contemplation is the consequence, an action will lie." This act the Privy Council in the same judgment defined as "an act prejudicially affecting the person complaining in some legal right."

The legal rights with which we are almost entirely concerned in torts are those of personal liberty, personal security, and private property ; and it may be laid down, as a general rule, that any act or omission which prejudicially affects the personal liberty, personal security, or private property of another, is a legally wrongful act or omission. Important exceptions to this general rule are to be found in acts done by Government as acts of State, and in acts done under the authority of Statute-law, which, though their nature may be wrongful, are not legally wrongful owing to their being sanctioned by Statute-law. Again an act done involuntarily, or under the influence of pressing danger, which the law presumes to be done involuntarily, is not legally wrongful. But with these and a few similar exceptions the above rule will hold good, and the crucial test of a legally wrongful act or omission is its prejudicial effect to the legal right of another. Thus, the Privy Council, in the same judgment, said : "It is essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining,—that is, must prejudicially affect him in some legal right ; merely that it will, however directly, do him harm in his interest, is not enough."

The legally wrongful act will be presumed to be intentional.

In considering the legally wrongful act or omission, it must be borne in mind that every person is presumed

[1] 2 W. R., P. C., 51 ; 8 Moo. I. A., 103.

to intend the probable consequence of every voluntary act or omission of his not authorised by law, and that it is no defence to an action in tort for the wrong-doer to plead that he did not intend to cause damage, if damage has resulted owing to an act or omission on his part which is actively or passively the effect of his volition. Whether the damage caused is the probable or natural effect of the act or omission will have to be determined in each case. If it is not, then, no action will lie, because the damage is what is known as "too remote."

The principle of the common law was stated by Pollock, C. B., in *Greenland* v. *Chaplin*,[1] as follows:—"I am inclined to consider the rule of law to be this, that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur."

Damage in legal contemplation.

Damage in legal contemplation is not necessarily identical with actual damage, for though, mostly, wherever there is a legally wrongful act followed by actual damage, there is an actionable wrong, still there are cases where, though actual damage follows, the law will not import damage; and, on the other hand, there are cases where, though no actual damage follows, the law will import damage, and there will be an actionable wrong. The word 'damage,' which the Roman law called 'damnum,' signifies loss in its widest sense. It may be actual pecuniary damage, or actual damage without being pecuniary, as where a person receives a blow which costs him nothing, not even "a little diachylon"—as Lord Holt said in *Ashby* v. *White*;[2] but it is still actual damage; or it may be a fiction of the law, as when a man trespasses on his neighbour's land and

[1] 5 Exch., 248.

[2] 1 Sm. L. C., 6th edit., 227.

does no damage, but thereby infringes on his neighbour's legal right, for which the law will import damage.

Slander.

The cases in which actual damage is not damage in legal contemplation appear to me to be an arbitrary, but often necessary, creation of the law; and it is curious to mark that while the faintest infringement of the right of private property is actionable according to English law, though no actual damage has been done, the right of personal security may be invaded without an action lying. I allude particularly to the case of slander. Slander is clearly an invasion of the right of personal security in another; but in England, as a general rule, unless special damage resulting from the slanderous words used is alleged, no action lies. The exceptions to this rule are pointed out in Chapter VI. On the other hand, to tread on another person's grassplot without his leave, is an actionable wrong. In India, the Courts appear to be more in favour of a remedy being given wherever actual damage, without being special damage, is alleged. With regard to slander, however, as shown in Chapter VI, it is now settled law in this country that a suit to recover damages for verbal abuse of a gross character will lie without proof of consequential damage.

Imported damage.

As to imported damage, the Calcutta High Court in some early cases, all decided by Jackson, J., have held that to entitle a plaintiff to a decree there must have been some actual infringement of his right and some actual loss resulting therefrom and not merely a denial or an infringement of his right—*Shama Charan Chatarji* v. *Boido Nath Banarji*;[1] *Naba Krishna Mukharji* v. *The Collector of Hooghly*;[2] *Sitaram* v. *Kamir Ali*.[3] Other Judges, however, have held differently. Thus, in

[1] 11 W. R., 2. [2] 2 B. L. R., A. C., 276. [3] 15 W. R., 250.

Parasnath Saha v. *Brajo Lal Gosain*,[1] it was said that when a cause of action was established, the plaintiff was entitled to some damages, whether large or small. Subsequently, in two cases, *Ram Chand Chakrabartti* v. *Nadiar Chand Ghosh*,[2] and *Ramphal Sahu* v. *Misri Lal*,[3] Mitter, J., expressed views exactly contrary to those of Jackson, J. In the former of these two cases, he said: "If there be a right, and if there be an infringement of that right, it is not necessary to maintain an action to show that there has been any subsequent injury consequent on such infringement." In the latter case, which was a suit to have a drain closed on the ground that it passed through the plaintiff's land, it was said:—"If it be the plaintiff's land upon which the drain has been constructed or through which the defendant drains the water of his premises, it is quite immaterial in this case to enquire what is the extent of the damage caused to the plaintiff by this unlawful act of the defendant. If the plaintiff's undoubted right has been invaded, he would be entitled to a remedy, whether any damage had accrued to him or not." So, in *Kalliappa Kaundan* v. *Vayapuri Kaundan and another*,[4] the Madras High Court ruled, that where the defendants had infringed the plaintiff's legal rights, and the lower Courts had dismissed the suit on the ground that the plaintiff had given no evidence that he had sustained substantial damage, the plaintiff was entitled at least to a decree without damages and costs.

In *Mohan Das* v. *Gokul Das*,[5] the Privy Council ruled that, in actions in tort, the plaintiff was never precluded from recovering ordinary damages by reason of his failing to prove the special damage laid, unless the special damage

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[1] 8 W. R., 44.
[2] 23 W. R., 230.
[3] 24 W. R., 97.
[4] 2 Mad. H. C. Rep., 442.
[5] 5 W. R., P. C., 91: 10 Moo. I.A., 563.

was the gist of the action ; and they gave slander as an instance where special damage was the gist of the action. From the instance given by their Lordships the principle of the ruling would appear to be that where an action is maintainable for either ordinary or special damages, or both, in respect of injury, failure to prove special damage does not preclude the plaintiff from obtaining a decree for ordinary damages. Following this decision in *Wilson* v. *Kanhya Sahu*,[1] which was a suit for damages for obtaining without reasonable and probable cause an injunction prohibiting the manufacture of indigo, it was held, that where special damage was the gist of the action, a plaintiff was precluded from recovering ordinary damages. In this case, however, ordinary damages were not claimed, and it appears doubtful if any claim could have been made for damages other than the special damage claimed. Similarly, in *Jagat Lal Chaudhri* v. *Tasadak Ali*,[2] in which damages were claimed for an act of trespass, but no specific injury was established, a decree was refused on the ground that the essence of the plaint was a demand for compensation for losses actually incurred, and no suggestion was made in it that there was malice in the alleged act of trespass.

The case of *Jadu Nath Mallik* v. *Kali Krishna Tagore*,[3] which ultimately came before the Privy Council,[4] is an instructive case in this connection. In this case the plaintiff and defendant were proprietors of opposite banks of a tidal but unnavigable *khal*, or water-channel, and the plaintiff sued the defendant for an injunction for the demolition of a wall, which the latter had built for the protection of his own land, but which encroached to the extent of about five feet on to the bed of the *khal*.

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[1] 11 W. R., 143.
[2] 25 W. R., 548.
[3] 22 W. R., 73 ; 25 W. R., 524.
[4] L. R., 6 I. A., 190 ; 5 C. L. R., 97.

The High Court at first held that though the plaintiff had not proved that any actual loss to him had occurred, or that there was any immediate prospect of damage, he was yet entitled to a decree, as he had succeeded in showing that some damage might hereafter arise from an encroachment. On the case going on appeal before the Privy Council,[1] however, their Lordships reversed the decision of the Calcutta High Court, and held that as the bed of the water-channel did not belong to the plaintiff but to Government, and that, as he had neither claimed nor proved that he was entitled to the flow of the water as it had been accustomed to flow, or that that flow was seriously and sensibly diverted so as to be an injury to his rights, he had failed to show either *damnum* or *injuria*, and therefore had no right of action. Their Lordships in the conclusion of their judgment observed:—"There may be, where a right is interfered with, *injuria sine damno* sufficient to found an action; but no action can be maintained where there is neither *damnum* nor *injuria*."

The question of imported damage appears to be of less importance now than formerly; for now declaratory decrees can be given under sec. 42 of the Specific Relief Act, and such decrees, which, of course, as a rule, carry costs with them, afford sufficient relief in most cases in which there has been merely an infringement of a legal right without actual consequential damage.

Special damage must be proved in case of infringement of right common to public.

The great class of cases in which special damage must be alleged, is that where a legally wrongful act has been done affecting the public at large, as well as causing inconvenience and damage to the individual. The rule of law in these cases is, that if the inconvenience and damage caused to the individual be the same as the

[1] L. R. 6 I. A., 190; 5 C. L. R., 97.

public at large are exposed to, the individual has no right of action, unless he can show that he has suffered some special and particular damage from the general inconvenience or damage caused. The following cases decided by the Calcutta, Bombay, Allahabad and Madras High Courts lay down this principle conclusively :—

Abdul Hai v. *Ram Charan Singh*,[1] *Baroda Prasad Mostafi* v. *Gora Chand Mostafi*,[2] *Piari Lal and others* v. *Rooke*,[3] *Hira Chand Banarji* v. *Shama Charan Chattarji*,[4] *Raj Lakhi Debi* v. *Chandra Kant Chaudhri and others*,[5] *Parbati Charan Mukhopadhya* v. *Kalinath Mukhopadhya*,[6] *Ram Tarak Karati* v. *Dinanath Mandal and others*,[7] *Bhagirath Rishi* v. *Gokul Chandra Mandal and others*,[8] *Bhagirath Das Kaibarto* v. *Chandi Charn Kaibarto*,[9] *Raj Kumar Singh* v. *Sahibzada Rai*,[10] *Chuni Lal* v. *Ram Krishna Sahu*,[11] *Gehanaji bin Kes Patil* v. *Ganpati bin Lakshuman and others*,[12] *Satku valad Kadir* v. *Ibrahim Aga valad Mirza*,[13] *Karim Baksh and another* v. *Budha*,[14] *Nathu* v. *Jagram Das*,[15] *Fazal Hak* v. *Maha Chand*,[16] *Adamson* v. *Aramugam*.[17]

In the Bombay case last cited, Westropp, C. J., quoted Lord Coke, as to the reason of this principle being enforced in respect of highways. Lord Coke says :[18]—" For if the way be a common way, if any man be disturbed to go that way, or, if a ditch be made overthwart the way so as he cannot go, yet shall he not have an action upon his case ; and this the law provided for avoiding of

[1] 11 W. R., 445.
[2] 3 B. L. R., 295 ; 12 W. R., 160.
[3] 3 B. L. R., A. C., 305 ; 12 W. R., 199.
[4] *Ibid*, 351 ; 12 W. R., 275.
[5] 14 W. R., 173.
[6] 6 B. L. R., App., 73.
[7] 7 B. L. R., 184.
[8] 18 W. R., 58.
[9] 22 W. R., 462.
[10] I. L. R., 3 Calc., 20.
[11] I. L. R., 15 Calc., 460.
[12] I. L. R., 2 Bom., 469.
[13] *Ibid*, 457.
[14] I. L. R., 1 All., 249.
[15] W. N., All., 4.
[16] I. L. R., 1 All., 557.
[17] I. L. R., 9 Mad., 463.
[18] Co. Lit. L. J., Ch. 8, secs. 68, 56 (*a*) Has. and But. edit.

multiplicity of suits, for if any one man might have an action, all men might have the like."

Remoteness of damage.

The legally wrongful act and the damage in legal contemplation must be inseparably connected as cause and effect, and it should be noted that while a wrong-doer is liable for all the consequences which flow in the natural course of things from his act, it is imperative that the consequences complained of should be the natural ones of the act, as otherwise the damage sustained would not be damage in legal contemplation owing to its being what is known as "too remote,"—that is, not consequent naturally on the wrongful act, but on some other cause which is really independent of the act, though it may not have come into being but for the act. The question of damage being or not being too remote will be a question best decided in every case by comparing the ordinary and well-known consequences of the act with the consequences alleged in the case to have occurred, having due regard to the attending circumstances. If, under these circumstances, the consequences which occurred were the ordinary and natural consequences, the damage is not too remote, and an action lies.

The case of *Ramessar Mukharji* v. *Ishan Chandra Mukharji*[1] is an instance of a case in which the damages claimed were held to be too remote. In this suit the plaintiffs sued for possession of certain idols and prayed for damages on the ground that they had been prevented from receiving certain sums, which they might have received if they had had the custody of the idols, but it was held that no suit would lie for damages based on such uncertain and merely voluntary payments. But the loss of rents to a landlord resulting from his raiyats crops being injured and destroyed owing to a neighbouring

[1] 10 W. R., 457.

landholder's stopping the outlets by which surface drainage water had from time immemorial flowed from the plaintiffs' land, in consequence of which stoppage the plaintiffs' land was flooded and the crops destroyed, has been held not to be too remote a damage: *Anando Mai Dasi* v. *Hamidunissa*,[1] *Ram Chandra Jana* v. *Jiban Chandra Jana*.[2] Similarly, when the plaintiff was a cultivator and his land was flooded owing to the cutting of the bank of a reservoir on his land, he was held entitled as damages to the profits which he would have realised, if he had cultivated the land: *Panan Singh* v. *Meher Ali*.[3] In another case, too, *Kumari Dasi* v. *Bama Sundari Dasi*,[4] in which the defendant had not only kept the plaintiff out of possession of certain land, but had cut down all the fruit-bearing and timber-trees, and carried away or destroyed by brick-making all the fertile soil, the High Court held that the plaintiff was entitled to damages for prospective loss in addition to that which had actually occurred.

Contributory negligence.

Another point must also be attended to in deciding as to damage, and that is, whether or not the sufferer, by his own act or conduct, contributed to the damage. This point constantly presents itself in cases where damage has been caused by negligence, the negligent wrong-doer pleading that the sufferer by his own negligence contributed to the accident, and that the damage was partly caused by his act. The rule of law on this point is, that the sufferer cannot recover if the negligence on his part has been an immediate co-operative cause of the injury of which he complains, notwithstanding negligence on the part of the wrong-doer, because a man cannot complain of that which he has himself helped to bring

[1] Marsh., 85.
[2] 1 B. L. R., A. C., 203.
[3] W. R., 1864, 365.
[4] 10 W. R., 202.

about. But the plaintiff will be entitled to recover if, notwithstanding his own contributory negligence, the defendant could by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff (Addison on Torts, 7th Edit., p. 24, *et seq.*). In the case of *Madhava Rau* v. *Fernandes*[1] it was held that an act of one party can only be contributory to the injury he complains of, if by the exercise of ordinary care the other party could not have avoided causing the injury.

To sum up, therefore, to constitute a perfect actionable wrong in the nature of a tort, there must be a legally wrongful act or omission, not an act of State, not excused by Statute-law, or by its being done involuntarily, followed by damage in legal contemplation, not too remote, and not contributed to by the person complaining.

I will now proceed to discuss what are acts of State, and how Statute-law, and the involuntary doing of the act, excuse an act which would otherwise be legally wrongful.

Acts of State not cognizable by the Courts.

An act of State has been defined to be (1) "an act done or adopted by the prince or rulers of a foreign independent State in their political and sovereign capacity, and within the limits of their *de facto* sovereignty: (2) an act injurious to the person or to the property of some person who is not at the time of that act a subject of Her Majesty; which act is done by any representative of Her Majesty's authority, civil or military, and is either previously sanctioned or subsequently ratified by Her Majesty" (Pollock on Torts, 2nd Edit., p. 98; Stephen's History of the Criminal Law, ii, 61). Such acts are not cognizable by courts of justice. "The transactions of Independent States between each other," it has been said

[1] I. L. R., 17 Mad., 368.

by their Lordships of the Privy Council in *The East India Company* v. *Kamachi Boye Sahiba*,[1] "are governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make." The seizure of the Raj of Tanjore with the property belonging thereto by the British Government was accordingly held in this case to be an act of State over which a municipal court had no jurisdiction. Similarly, in *The East India Company* v. *Syad Ali*,[2] the resumption by the Madras Government of a *jagir*, granted by a former Nawab of the Carnatic, whose rights became vested in the Madras Government by a treaty, and the re-grant of this *jagir* to another for a life estate only, was held to be such an act of sovereign power as precluded the Supreme Court of Madras from taking cognizance of it in a suit by the heirs of the original grantee in respect of such resumption. Then, in *The Inhabitants of Mahalingpore* v. *Anderson*,[3] which was a suit brought against the Political Agent at the court of the Native Chief of Modhul for prohibiting the *guru* of the plaintiff's sect from being conducted into the village of Mahalingpore and solemnizing marriages between members of the plaintiff's caste, it was held that the orders complained of had been passed by the defendant in his capacity of Political Agent, and that, therefore, there was no cause of action. Bayley, J., in this case said:—"It is quite settled that a Governor is not liable to a suit in a court of law or equity for an action done by him in his political capacity as an act of State." Another case is that of *Salig Ram* v. *The Secretary of State for India*,[4] in which the plaintiff sued to recover a sum alleged

[1] 4 W. R., P. C., 42; 7 Moo. I. A., 476.

[2] 7 Moo. I. A., 555.

[3] 7 B. L. R., 452.

[4] 12 B. L. R., 167; 18 W. R., 389; L. R., I. A. Sup. Vol. 119.

to be due for principal and interest on certain mortgage bonds executed by the late king of Delhi, whose landed estate had owing to the mutiny been confiscated by the British Government. In this case it was said that "municipal courts have no jurisdiction to enforce engagements between sovereigns founded on treaties. The Government, when they deposed and confiscated the property of the late king, as between them and the king, did not affect to do so under any legal right. Their acts can be judged of only by the law of nations ; nor is it open to any other person to question the rightfulness of the deposition or of the confiscation of the king's property." The most recent case on the subject is that of *Bhagwan Singh* v. *The Secretary of State for India*,[1] which was a suit for the recovery of certain land of which the British Government on the annexation of the Punjab took absolute possession. It was held the land had been seized by the Crown by its right of conquest and not by virtue of any legal title, and therefore such seizure was an act of State, which was not liable to be questioned in a municipal court.

No acts of State between a sovereign and his own subjects.

But "as between the sovereign and his own subjects there can be no such thing as an act of State" (Stephen's History of the Criminal Law, ii, 64). Hence the legality of the sovereign's acts towards his own subjects can as a general rule be questioned in the courts of the country. On this principle were decided the cases of *In re Amir Khan*[2] and *Forester* v. *The Secretary of State for India*.[3] In the first of these cases a Mahomedan subject of the Crown was arrested in Calcutta, taken into the interior, and there detained in jail under a warrant of the Governor-General of Council in the form prescribed by Regulation III of 1818 ; and it was

[1] L. R., 2 I. A., 38.
[2] 6 B. L. R., 392.
[3] 12 B. L. R., 120 ; 18 W. R., 349 ; L. R., I. A., Sup. Vol. 10.

held that such arrest and detainer were not acts of State, but matters cognizable by a municipal court. The arrest was, however, held to be legal under Regulation III of 1818, and Act III of 1858. In the second case, the British Government had resumed a certain estate which had been granted to the Begam Samru by Scindia, whose territories subsequently passed to the British Government, and a suit was brought to recover possession of it with mesne profits, and for a declaration of a right to hold it free from assessment to Government revenue. It was held that the suit would lie, because "the act of Government in this case was not the seizure by arbitrary power of territories which up to that time had belonged to another sovereign State; it was the resumption of lands previously held from the Government under a particular tenure upon the alleged determination of that tenure. The possession was taken under a legal title, that title being the undoubted right of the sovereign power to resume, and retain or assess to the public revenue all lands within its territories upon the determination of the tenure, under which they may have been exceptionally held rent-free. If by means of the continuance of the tenure or for other cause, a right be claimed in derogation of this title of the Government, that claim, like any other arising between Government and its subjects, would *primâ facie* be cognizable by the municipal courts of India." So, too, when the wrongful act is the act of an individual and not of the State, *Mills* v. *Moodee Pestonji Khursedji*,[1] or when neither ratified by, nor in conformity with, the will of the supreme authority of a State, and in contravention of the royal mandate, *The Bombay-Burmah Trading Corporation* v. *Mahomed*

[1] 2 Moo. I. A., 37.

Ali Sherazi[1] a suit for damages will lie in the Civil Court. In one case, *Nobin Chundra De* v. *The Secretary of State for India*,[2] the Calcutta High Court held the refusal of certain excise authorities to grant licenses to the plaintiff for shops or to return a deposit which he had made in respect thereof was an act done by the Government in the exercise of its sovereign power, and that, consequently, a suit for damages would not lie. This decision was, however, dissented from by the Madras High Court in *The Secretary of State for India in Council* v. *Hari Bhanji*,[3] in which the plaintiff sued for the return of a certain sum of money alleged to have been illegally exacted from him as import duty on salt. In this case it was pointed out that the acts of State of which the municipal courts in India are debarred from taking cognizance are acts done in the exercise of sovereign powers, which do not profess to be justified by municipal law, and it was held that when an act is professedly done under the sanction of municipal law, and in the exercise of powers conferred by that law, the fact that it is done by sovereign power, and is not an act which could possibly be done by a private individual does not oust the jurisdiction of the Civil Court. This was followed in *Vigaya Ragava* v. *The Secretary of State for India in Council*,[4] which was a suit for damages brought against the Secretary of State by a Municipal Commissioner for wrongful removal from office, and it was held that under the Towns Improvement Act (III of 1871), the Governor in Council could only remove an elected Municipal Commissioner for misconduct, and the defendant not having proved misconduct, the plaintiff was entitled to damages.

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[1] 10 B. L. R., 345; 19 W. R., 123.

[2] I. L. R., 1 Calc., 11; 24 W. R., 309.

[3] I. L. R., 5 Mad., 273.

[4] I. L. R., 7 Mad., 466.

Sanction to torts by operation of Statute-law.

As to how far Statute-law protects from an action in tort, it may be broadly laid down that an action will not lie on behalf of a plaintiff who has sustained injury from the exercise of powers and authorities given by an act of the Legislature, those powers being exercised with judgment and caution (Addison on Torts, 5th Edition, p. 33). In India, the principal cases with respect to injuries caused by the exercise of statutory powers are found in relation to acts done by Municipal Commissioners, Railway Companies, Judges, Magistrates, Police, and ministerial officers. With reference to acts done by officers acting judicially, the matter will be separately considered, as those officers are protected by a special Legislative enactment, *viz.*, Act XVIII of 1850, as also are the subordinate officers carrying out their orders.

Statutory powers to do a particular act.

As regards statutory powers in general, the law appears to be, that all who have powers under a Statute are protected only by the Statute which gives them the powers; and that the Statute will be construed strictly, and in cases of doubt in favour of the subject, and against the persons invested with the powers. When, by a Statute, a particular power is given to do a particular act in a particular manner, the procedure laid down must be adhered to most rigidly, otherwise the protection of the Statute cannot be claimed. These seem to be the conclusions come to in *Chabildas Lallubhai* v. *The Municipal Commissioners of Bombay*,[1] and on this principle the important cases of *Sinclair* v. *Broughton*[2] was decided. In this case, an officer commanding in cantonments, acting *bonâ fide* in the discharge of his public duty, and under the belief that a person was dangerous by reason of insanity, had caused him to be arrested and detained in order that he might be examined by medical

[1] 8 Bom. H. C. Rep., 85.

[2] I. L. R., 9 Calc., 341; 13 C. L. R., 195; L. R., 9 I. A.,152.

officers. It, however, afterwards appeared that he was not a lunatic. The Privy Council in this case said that the belief that the plaintiff was dangerous by reason of lunacy, might have justified the defendant, who, as commanding officer of the cantonment, had the control and direction of the police, in directing proceedings to be taken by the police under the 4th section of Act XXXVI of 1858 (The Lunatic Asylums Act), but it was clear that he did not proceed or intend to proceed under that Act. The plaintiff was, therefore, held to be entitled to a decree for damages. Similarly, in *Ashburner* v. *Keshab Valad Tuku Patil*,[1] it was held that a Magistrate who makes an illegal order, which purports to be made under sec. 308 of Act XXV of 1861, but is not made in accordance with the provisions of that section, is liable to be sued in the Civil Court in respect of such order and to be restrained by injunction from carrying it into effect.

General statutory powers.

When the Statute gives a general power, the *bonâ fide* and prudent exercise of that power can be called in question in the Civil Courts: *Brindaban Chandra Rai and others* v. *The Municipal Chairman and Vice-Chairman of Serampore*.[2] In this case the decision of Lord Justice Turner in *Biddulph* v. *The St. George's Vestry*[3] was quoted, where he said: "Now I am very far from thinking that this Court has not power to interfere with public bodies in the exercise of powers which are conferred on them by Act of Parliament. I take it, it would be within the power and duty of this Court so to interfere in cases where there is not a *bonâ fide* exercise of the power given by the Act of Parliament, and I should be very sorry to be supposed to entertain the notion that public bodies under the general powers given them

[1] 4 Bom., A. C., 150. [2] 19 W. R., 309. [3] 33 L. J., Chan., 417.

by Act of Parliament can do whatever they think right." On this authority, Markby, J., ruled that it should always be presumed, till the contrary was shown, that a public body acting on behalf of the public were acting *bonâ fide*, and that their whole conduct must be looked to to see whether they have substantially complied with the powers conferred on them by the Legislature. But some control was necessary, and their conduct was liable to be investigated both as to its good faith and as to its being within the limits of their power.

In a recent case decided by the Bombay High Court, *Nagar Valab Narsi* v. *The Municipality of Dhandhuka*,[1] West, J., said that public authorities even acting within the defined limits of their powers must not conduct themselves arbitrarily or tyrannically, and cited a *dictum* of the late Sir G. Jessel, M.R., in the *Duke of Bedford* v. *Dawson*,[2] that "the public body are to be the judges, subject to this, that if they are manifestly abusing their powers, the Court will say that it is not a fair and honest judgment and will not allow it."

Negligence must be proved if injury results from exercise of statutory powers.

Where there are statutory powers, and injury has occurred from the exercise of them, the ordinary legal maxim *sic utere tuo ut alienum non laedas* does not apply, but negligence must be alleged and proved : *Halford* v. *The East Indian Railway Co.*[3] Thus, in *Vaughan* v. *The Taff Valley Railway Co.*,[4] Cockburn, C. J., said : "When the Legislature has sanctioned the use of a particular means for a given purpose, it appears to me that that sanction carries with it this consequence, that the use of the means itself for that purpose (provided every precaution which the nature of the case suggests has been observed), is not an act for which an action lies independently of negligence. But statutory powers will

[1] I. L. R., 12 Bom., 490.
[2] L. R., 20 Eq. Ca., at p. 358.
[3] 14 B. L. R., 1.
[4] 29 L. J., N. S. Exch., 247.

not enable persons to cause or continue a nuisance unless the creation of a nuisance was expressly contemplated by the Statute: *Rajmohan Basu and another* v. *The East Indian Railway Co.*[1]

The result of these cases seems to be, that a person claiming the protection of a Statute for an exercise of powers conferred by it, must, if the power be a particular one, have adhered rigidly to the letter of the Statute; or, if a general one, must have acted in its exercise with *bonâ fides* and prudence. If he have done this, the Statute will protect his acts, and the ordinary legal maxim *sic utere tuo ut alienum non laedas* will not apply.

Infringement of right or breach of duty created by Statute is ordinarily a tort.

When a Statute gives a right, or creates a duty, in favour of an individual or class of individuals, then, unless it enforces the duty by a penalty recoverable by the person aggrieved, any infringement of such right or breach of such duty will, if coupled with damage, be a tort remediable in the ordinary way. Thus, it has been held that where a Statute imposes a duty on a person, a suit will lie in the Civil Court to compel him to perform it, if he refuses to do so, *Ponnusamy Tevar* v. *The Collector of Madura*,[2] and for damages, if he fails to perform it, and the plaintiff has been injured in consequence: *The Corporation for the Town of Calcutta* v. *Anderson*.[3]

But where the Statute creating a new duty or obligation provides a mode for obtaining compensation for private special damage by means of a penalty recoverable by the party aggrieved, then, *primâ facie*, there is no other remedy than the remedy prescribed by the Act. It depends on the intention of the Legislature whether the party injured shall in addition be entitled to sue for damages: *Atkinson* v. *Newcastle Water Co.*[4] (Underhill on Torts, 3rd Edition, pp. 23—27). So, in *Ram Chand Bhadro and others*

[1] 10 B. L. R., O. C., 241.
[2] 3 Mad. H. C. Rep., 35.
[3] I. L. R., 10 Calc., 445.
[4] L. R. 2 Ex. D. (C. A.), 441.

v. *The Collector of Jessore and others*[1] it was held that no suit against the Government would lie for taking up land for public purposes under the Statute, because compensation for the special private damage must be claimed, if claimed at all, under the Statute under which the land was taken up, by the person aggrieved ; and on the same ground, in *Minto* v. *Kali Charan Das*[2] it was held, that a lessee could not sue his lessor for damages when land leased to him was taken up for public purposes, as the Act specially provided compensation for lessees.

The same principle was also followed in *Shakaram Shridar Gadkari* v. *The Chairman of the Municipality of Kalyan*,[3] *The Queen* v. *The Dean and Chapter of Rochester*,[4] *The Collector of Patna* v. *Romanath Tagore and others*,[5] *Stevens* v. *Jeacocke*,[6] and *Doe Dem the Bishop of Rochester* v. *Bridges*.[7]

But in *Satrughan Das Kumar* v. *Hokna Santal*[8] it has been held that a suit for compensation for wrongful seizure of cattle will lie in a Civil Court, the provisions of Act I of 1871 being no bar to such a suit ; for the peculiar remedy for wrongful seizure of cattle and the special limitation provided for it under Act I of 1871 do not exclude the ordinary remedy which a man possesses under the law. So, in some cases it has been held, as further explained in Chapter II, that a person illegally dispossessed from land, is not debarred by the provisions of sec. 9 of the Specific Relief Act, which provide that a summary suit for possession may be brought without proof of title within six months from the date of dispossession, from recovering in a regular suit for possession, not brought within six months' time,

[1] 3 W. R., 131.
[2] 8 W. R., 327.
[3] 7 Bom. H. C. Rep., 33 A. C.
[4] 20 L. J., Q. B., 467.
[5] 7 W. R., 191.
[6] 11 Q. B. R., 731.
[7] Burn & Adol., 847.
[8] I. L. R., 16 Calc., 159.

upon mere proof that he was in quiet possession at the time when he was dispossessed: *Inayatullah Chaudhri* v. *Krishna Sundar Sarmah*;[1] *Kawa Manjhi* v. *Khawaz Nashyo*;[2] *Mahabir Prasad Singh* v. *Mahabir Singh*.[3]

Judicial officers acting judicially, and officers of any Court or other persons bound to execute the lawful warrants or orders of judicial officers acting judicially, are specially protected by Statute-law, *viz.*, Act XVIII of 1850, sec. 1, which enacts as follows:—"No Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Court for any act done, or ordered to be done, by him in the discharge of his judicial functions, whether or not within the limits of his jurisdiction, provided that he, at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Civil Court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same." Police officers are further protected for an act done under the warrant of a Magistrate by the provisions of sec. 43, Act V of 1861. Act XVIII of 1850.

The officer must be acting judicially to claim the protection of Act XVIII of 1850, and the mere fact of his being a Judge, Magistrate, Collector or other judicial officer does not protect him, as he might be acting ministerially or privately. Thus, in *Chandra Narayan Singh, Deputy Magistrate of Katwa*, v. *Brajo Ballah Gui*[4] it was held, that the removal by a Magistrate of an obstruction in the exercise of powers conferred

[1] 8 W. R., 386. [2] 5 C. L. R., 278. [3] I. L. R., 7 Calc., 591.
[4] 14 B. L. R., 254: 21 W. R., 126, 391.

under sched. K, clause 1 of the Beng. Act VI of 1868, was not a judicial act, so the defendant was not protected by sec. 1, Act XVIII of 1850, from a suit in the Civil Court to try the question of the right of the person against whom the order was made, and to recover damages; for Magistrates, as Municipal Commissioners, might, for the purposes of conservancy, be invested with certain ministerial powers, but while exercising those powers they do not act judicially. See also *Inhabitants of Mahalingpore* v. *Anderson*,[1] *Sinclair* v. *Broughton*,[2] and *Cornell* v. *Udai Tara Chaudhurani*[3] So, in *Venkatu Shrinivas* v. *Armstrong*[4] it was held, that Act XVIII of 1850 did not protect judicial officers from being sued in a civil suit except in respect of acts done by them in good faith in the discharge of their judicial functions. When, therefore, a plaint was presented to a Judge against such an officer which complained of a wrongful act on the part of that officer, the Judge was bound to receive the plaint and to leave it to the defendant to plead Act XVIII of 1850.

If it be found that the judicial officer was acting judicially, the question arises whether he had jurisdiction, and, if he had, no action lies. Thus, in *Meghraj* v. *Zakir Hossein*[5] it was held, that, under the provisions of sec. 1, Act XVIII of 1850, no person acting judicially was liable for an act done, or ordered to be done, by him in the discharge of his judicial functions within the limits of his jurisdiction, and that in such a case the question whether he acted with good faith did not arise, and in *Parankusam* v. *Stuart*,[6]

[1] 7 B. L. R., 452 note.

[2] I. L. R., 9 Calc., 341 : 13 C. L. R., 185 ; L. R., 9 I. A., 152.

[3] 8 W. R., 372.

[4] 3 Bom. H. C. Rep., 47, A. C.

[5] I. L. R., 1 All., 280.

[6] 2 Mad. H. C. Rep., 396. See *contra*, *Queen* v. *Sibo*, 11 W. R., C. R., 19.

it was ruled that the refusing or accepting of bail is a judicial and not merely a ministerial duty, and a mistake in the performance of that duty by a Magistrate without malice will not be sufficient to maintain an action. The ruling in the case of *The Collector of Hooghly* v. *Taraknath Mukarji*[1] is to the same effect. In this case, the plaintiff sued a Magistrate for damages occasioned to him by the cutting of his "bund" at the Magistrate's order. The case was at first decided adversely to the Magistrate implicated, on the ground that he could not be said to have acted judicially in good faith, believing himself to have jurisdiction owing to the extreme irregularity of his procedure; but on review—*The Collector of Hooghly and others* v. *Taraknath Mukhopadhya*[2]—the above decision was set aside, on the ground that the Magistrate having acted judicially and with jurisdiction, the irregularity of the proceedings was irrelevant, being only material to show an absence of good faith if he had not had jurisdiction, and the protection of the Act was allowed. But wilful abuse of his authority by a Judge, that is, wilfully acting beyond his jurisdiction, is a good cause of action by the person who is thereby injured: *Ammiappa Mudali* v. *Mohamed Mustapha Saib, Acting District Munsiff of Madura.*[3]

Besides want of jurisdiction, the want of *bonâ fide* belief in jurisdiction must be alleged before an action of this kind will lie: *Prahlad Maharuda* v. *Watt*,[4] where it was held, that a plaint against a Judge averring that the Judge knowingly and maliciously issued an illegal order to the plaintiff's injury did not disclose a sufficient cause of action against the Judge, as it must not only aver that the Judge had no jurisdiction, but also that he had no

[1] 4 B. L. R., 37 A. C.: 13 W. R., 13.

[2] 7 B. L. R., 449 A. C.: S. C., 16 W. R., 63.

[3] 2 Mad. H. C. Rep., 443.

[4] 10 Bom. H. C. Rep., 346.

reasonable and probable cause for supposing that he had jurisdiction.

Where the judge or judicial officer has acted judicially but without jurisdiction, the case turns upon whether he in good faith believed himself to have jurisdiction ; and in the following cases this point has been very carefully and elaborately discussed.

Calder v. *Halket*,[1] *Halimuzumah* v. *The Chairman of Municipal Commissioners at Hooghly*,[2] *Sheis Nayyangar* v. *Raghonathu Rau and another*,[3] *Raghunada Rau* v. *Nathamuni Thathamayyangar*,[4] *The Collector of Sea Customs, Madras* v. *Punniar Chithambaram*,[5] *Spooner* v. *Juddow*,[6] *Reg.* v. *Dalsukram Haribhai*,[7] *Vithova Malhari* v. *Corfield*,[8] *Vinayak Divakar, Deputy Magistrate of Surat* v. *Bai Itcha*,[9] *Patton* v. *Hariram*,[10] The cases of *The Collector of Sea Customs, Madras* v. *Punniar Chithambaram*,[5] and *Raghunada Rau* v. *Nathamuni Thathamayyangar*,[4] are especially interesting on this point, so a brief abstract of each, as far as the point under discussion is concerned, will be in place here.

In the first case, the Collector of Sea Customs, Madras, had fined the plaintiff, Punniar Chithambaram, for an alleged breach of the customs laws, having no jurisdiction over him, he being a resident of Ceylon, and in Ceylon at the time. To realize the fine, he seized certain vessels (*Palmyras*), the property of the plaintiff at Madras. The plaintiff sued for damages in consequence, and as it was clear that the defendant had acted judicially without jurisdiction, what had to be decided was, whether in good faith he believed himself to have jurisdiction, because, if

[1] 2 Moo. I. A., 293.
[2] 13 W. R., 340.
[3] 5 Mad. H. C. Rep., 345.
[4] 6 Mad. H. C. Rep., 423.
[5] I. L. R., 1 Mad., 89.
[6] 4 Moo. I. A., 353.
[7] 2 Bom. H. C. Rep., 407 : 2nd Edit., 384.
[8] 3 Bom. H. C. Rep., App. 1.
[9] *Ibid*, 36, A. C.
[10] 3 Agra, 409.

so, he was protected by sec. 1, Act XVIII of 1850. On appeal, this point was decided unanimously against him. It was shown that he had taken no legal advice and had held no formal trial whatever, merely telegraphing to the plaintiff, that he had been fined Rs. 50,000 for smuggling opium fifteen months after the date of the alleged offence. This was followed by the almost immediate seizure of the plaintiff's vessels at Madras, the plaintiff himself being absent in Ceylon. Under these circumstances, it was held, that though the defendant might have believed himself to have jurisdiction, such belief was not a belief in good faith, which must be a belief resting on reasonable and probable grounds for action such as would act on any man with ordinary capacities, and that a reasonable amount of care and attention in the performance of official duties on the part of the person doing or ordering the act complained of was always required before the protection of the Act could be claimed.

In the second case, the defendant (appellant), the Deputy Magistrate of Trichinopoly, had ordered the demolition of the plaintiff's house, on the ground that it was a public nuisance, being an obstruction to the public thoroughfare. This in law it most certainly was not; so the entire absence of jurisdiction to make the order was clearly shown, and this case too turned on the belief in good faith of the defendant in his having jurisdiction to make the order complained of. It was held, that, owing to the wording of the provisions of the Criminal Procedure Code, under which the defendant had acted, those provisions were open to a misunderstanding and misapplication by a Magistrate of ordinary qualifications in the way the defendant had misunderstood and misapplied them; and that, consequently, he must be held to have believed in good faith that he had jurisdiction, and not to be liable to the action. What made the

defendant act as he had done was apparently the objectionableness of the house standing where it did, to large numbers of persons who assembled there at the Pagoda festivals, and he construed this to be equivalent to an annoyance to people generally, and hence to amount to a common nuisance. This misapplication and misunderstanding of the law were ruled not to be so gross as to constitute *lata culpa*, a negligence so gross as *non intelligere quod intelligunt omnes*, and consequently not to destroy the presumption of good faith.

A very recent case under Act XVIII of 1850 is *Teyen* v. *Ram Lal*,[1] in which the law on the subject was summed up as laid down in these pages. In this case the defendant was a Deputy Magistrate, who had convicted the plaintiff of theft and the dishonest retention of stolen property, and had sentenced him to two years' rigorous imprisonment and to pay a fine of Rs. 500. The conviction and sentence were set aside on appeal, but in the meantime the Magistrate attached and sold certain moveable property belonging to the plaintiff. In doing so, he did not make use of the form of notification of sale prescribed by the Criminal Procedure Code, and he further held the sale before the date fixed by the notification, as the property attached consisted of live stock, and it was necessary to sell it so as to avoid the cost of its maintenance. It was held in this case that the defendant was protected by the provisions of Act XVIII of 1850, and the Court laid down, first, as pointed out above, that under this Act, where an act done or ordered to be done by a judicial officer in the discharge of his judicial duties is within the limits of his jurisdiction, he is protected, whether or not he has discharged those duties erroneously, irregularly or even illegally, or without believing in good faith that he had jurisdiction to do the

[1] I. L. R., 12 All., 115.

act complained of, and where the act done or ordered to be done in the discharge of judicial duties is without the limits of the officer's jurisdiction, he is protected, if at the time of doing or ordering it, he in good faith believed himself to have jurisdiction to do or order it. The Court in this case further pointed out that the word "jurisdiction," as used in Act XVIII of 1850, means authority to act in a matter, and not authority or power to do an act in a particular manner or form.

Sanction to tort by act being done involuntarily.

As to wrongful acts done involuntarily, and the presumption of law as to acts done under the influence of pressing danger, it may be stated that acts done by reason of *vis major*, or the act of God, are held to be involuntary. Thus, in *Ram Lal Singh and others* v. *Lil Dhari Muhton*,[1] where the defendant had a prescriptive right to maintain a 'bund' and all reasonable and proper precautions had been taken, but owing to a severe and unaccustomed inundation the 'bund' broke and the water escaped and did damage, the defendant was held not liable, on the ground that the damage was caused not by his own act or omission, but by *vis major*, or the act of God; and the *Madras Railway Company* v. *The Zemindar of Carvatenagarum*[2] *and Nichols* v. *Marsland*[3] were quoted as authorities for this ruling. When we come to consider, in the next chapter, the maxim *sic utere tuo ut alienum non laedas*, we shall point out the variation, that the damage being due to *vis major*, or the act of God, makes in the interpretation of the above maxim.

The right of self-preservation, as far as it consists in the right of private defence, has its limits clearly defined in secs. 96 to 106 (inclusive), Indian Penal Code, where the right is stated as a right to defend not only a man's own body and property, whether moveable or immoveable,

[1] I. L. R., 3 Calc., 776.
[2] L. R., 1 I. A., 364; 14 B. L. R., 209; 22 W. R., 279.
[3] L. R., Ex. D. 1.

but the body and property of another, against any offence affecting the human body, and certain offences and attempts at the same affecting property,—*viz.*, theft, robbery, mischief, and criminal trespass.

But as this would be the interposition of Statute-law to prevent the act being legally wrongful, and not an instance of the presumption of the act being involuntary, which the law draws from the existence of pressing danger, I would give as an instance of this : a man being pursued by a dangerous animal, and taking refuge on another's property or in his house ; this would be no trespass.

I shall now proceed to discuss the subjects of 'malice in law,' 'want of reasonable and probable cause,' 'good faith,' 'negligence,' and 'fraud and falsehood.'

Express malice and malice in law.

There are acts in the doing of which the law requires the ingredient of malice before it pronounces them to be actionable. Malice is of two kinds, 'express malice' and 'malice in law.' Now, 'express malice' need not necessarily be 'malice in law,' nor need 'malice in law' be 'express malice.' 'Express malice,' too, is what is popularly known as malice, and 'malice in law' is 'implied malice' as well as 'express malice,'—*i.e.*, where, from the circumstances of the case, the law will infer malice. The general presumption of law is in favour of innocence, but the law presumes every act in itself unlawful to have been wrongfully intended till the contrary appears. Lord Mansfield, in *Rex.* v. *Woodfall*,[1] laid down very clearly the distinction between those cases where a criminal intent must be proved and those where it will be presumed :— "Where an act in itself indifferent, if done with a particular intent, becomes criminal, the intent must be proved and found ; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant, and

[1] 5 Burn, 2667.

on failure thereof the law implies a criminal intent." The same presumption arises in civil actions, where the act complained of is unlawful. This means, that when the act complained of is in itself unlawful, the law will infer malice ; when lawful, malice will have to be proved. In the leading case of *Bromage* v. *Prosser*,[1] Bayley, J., said : " Malice, in the common acceptation, means ill-will against a person ; but, in its legal sense, it means a wrongful act done intentionally without just cause or excuse. . . . . If I traduce a man whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I mean to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces and I apprehend that the law recognizes the distinction between these two descriptions of malice—malice in fact, and malice in law—in actions of slander." In *Goutière* v. *Robert Charriol and others*,[2] the Court said : " Malice, in its legal sense, is something less than malevolence or vindictive feeling. Acts done wrongfully and without reasonable and probable cause, and acts done vexatiously and for the purpose of annoyance, have been held by the law to be malicious." And they added, that the act must be done wrongfully, for if done in good faith, though a cautious person would have abstained from doing it, it is not malicious ; but in the absence of such causes as would influence a man of ordinary caution, malice may be presumed at the option of the Court, the inference of malice not being compulsory upon the Court to draw, and being capable of being rebutted by good faith being shown.

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[1] 4 B. & C., 247 ; S. C., 6 D. & R., 296.

[2] All. H. C. Rep., 1870, p. 353.

In *The Collector of Sea Customs, Madras*, v. *Punniar Chithambharam*,[1] before quoted, Kindersley, J., following Bayley, J., in *Bromage* v. *Prosser*,[2] drew a distinction between 'express malice' and 'malice in law,' defining the former as an act done with ill-will towards an individual, and the latter as a wrongful act done intentionally without just cause or excuse. It may be laid down, therefore, that when an act unlawful in itself is done intentionally without just cause or excuse, the law will infer malice. Practically speaking, in most cases when the law requires malice to be shown, there will be abundant evidence of express malice; but the High Court, Allahabad, no doubt, laid down, that where express malice did not exist, the Court was not bound to infer malice from want of reasonable and probable cause. And this view is shared in by the Madras High Court in *Raghunada Rau* v. *Nathamuni Thathamayyangar*,[3] where they said: "The inference of malice in civil cases is a matter of fact, and the mere absence of reasonable and probable cause for an act does not justify the concluding as matter of law that the act is malicious." This shows that absence of reasonable and probable cause is not to be taken as identical with malice, though malice may, having regard to the circumstances of the case, be inferred from it. Circumstances may, no doubt, exist, where, though the act was done without reasonable and probable cause, a Court would be justified in not inferring malice; though these cases would be comparatively rare. Between individuals express malice will ordinarily be found to exist; but when it does not exist, or when the actions of public bodies or officers, especially judicial officers are in question, very nice points may arise as to whether, under the circumstances, malice should be inferred from want of reasonable and probable cause or not. In most of these

[1] I. L. R., 1 Mad., 89. [2] 4 B. & C., 247. [3] 6 Mad. H. C. Rep., 42.

cases, the whole question will turn, as the Madras High Court said in *Goday Narayan Gajpati* v. *Sri Ankitam Venkata Garu*,[1] "on the cogency of the inference to be derived from the absence of reasonable and probable cause, the best test for which is partly abstract and partly concrete. Was it reasonable or probable cause for any discreet man? Was it so to the doer of the act? If these questions are answered in the negative, the inference of malice would appear to be irresistible."

The case of *Jagat Lal Chaudhuri and others* v. *Tasadak Ali*[2] is an instance of a case in which malice in law was held not to justify the inference of express malice. In this case the plaintiffs sought to recover damages for an injury done to their property by an embankment raised by the defendant on their property, which had the effect of causing it to be flooded and preventing their cultivation of paddy, and they pleaded that on a former occasion, on which they had sued the same defendant for a similar act of trespass, they had obtained a decree. But the continuance of the trespass was held not to be evidence of malice, and as the suit was brought to recover actual loss alleged to have been sustained, but which the plaintiffs failed to establish, their claim was rejected.

In libel, if the fact of publishing the libel is proved, the law infers malice from such publication. Should the defendant then succeed in proving the publication to be privileged, he has a good answer to the action, unless express malice is alleged and proved; but if express malice is proved, the publication cannot be deemed to be privileged. See *Shepherd* v. *The Trustees of the Port of Bombay*,[3] *Peter* v. *Dufour*.[4]

Express malice is not necessarily malice in law: for instance, a prosecution set on foot with the most express

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[1] 6 Mad. H. C. Rep., 85.
[2] 25 W. R., 547.
[3] I.L.R., 1 Bom., 477, *per* Green, J.
[4] 6 W. R., 92.

malice, but with reasonable and probable cause, would give no ground for an action to recover damages for malicious prosecution.

Good faith.

Where the inference of malice is to be drawn from the want of reasonable and probable cause, there must be an utter absence of good faith.' In *The Collector of Sea Customs, Madras*, v. *Punniar Chithambharam*[1] before quoted, Sir Walter Morgan, the Chief Justice, said : "A belief on no probable or plausible ground, and arrived at inconsiderately and without due enquiry, cannot be considered a belief 'in good faith ; '" and he added, that, in several cases, the words 'good faith,' used in Act XVIII of 1850, sec. 1, had been construed to require reasonable care and attention in the performance of his official duties on the part of him who orders the act, for the error, whether of law or fact must, to be protected or excused, be shown to rest on some foundation of reason.

In *Raghunada Rau* v. *Nathamuni Thathamayyangar*,[2] the Court, following *Pease* v. *Chaytor*,[3] and *Douglas* v. *Corbet*,[4] defined a belief in 'good faith' to be an honest persuasion, founded after fair enquiry and consideration, upon what might be mistakenly, either in law or fact, considered a reasonable and probable ground by a person possessing the ordinary qualifications for the office held by the Magistrate sought to be made liable ; and in *Radha Prasad Singh* v. *Ram Jewan Singh and another*[5] the legal meaning of 'good faith' (*bonâ fides*) was declared to be 'with due care and after due enquiry.' What is done in 'good faith' therefore is, as a rule, done with 'reasonable and probable cause,' and what is done without 'reasonable and probable cause' can hardly ever be said to be done in 'good faith.' Where that can be said, it is because under the peculiar circumstances of the

[1] I. L. R., 1 Mad., 89.
[2] 6 Mad. H. C. Rep., 423.
[3] 3 B. and S., 620.
[4] 6 El. and Bl., 514.
[5] 11 W. R., 389.

case, the Court will not be justified in drawing the inference of malice in law. The best test, therefore, for implied malice lies in the presence or absence of those circumstances which would constitute reasonable or probable cause in each particular case : and as Morgan, C. J., said in *The Collector of Sea Customs, Madras,* v. *Punniar Chithambharam*[1] :—" Each case of the kind must be judged according to its own set of circumstances ; " and this too is the principle advocated in *Goday Narayan Gajpati* v. *Sri Ankitam Venkata Garu.*[2] Honesty and *bona-fides* are to be invariably presumed till the contrary is shown : *Lutf Ali and others* v. *Abu.*[3]

Negligence.

' Negligence ' was defined by Alderson, B., in *Blyth* v. *The Birmingham Waterworks Co.*[4] as follows :—" Negligence consists in the omitting to do something a reasonable man would do, or in doing something that a reasonable man would not do, in either case unintentionally causing mischief to another." The action in tort founded on negligence is based either (*a*) upon a duty imposed by Statute-law on the wrong-doer, and a breach of it to the injury of the person complaining ; or (*b*) on the idea of an obligation on the part of the wrong-doer towards the sufferer, and a breach of that obligation to the injury of the latter. On this point, Underhill, in his Law of Torts, p. 163 (3rd Edition), remarks : " It is a public duty incumbent upon every one to exercise due care in his daily life, and any damage resulting from his negligence is a tort." Where by Statute-law a duty is imposed upon a person, neglect on his part to perform that duty subjects him to an action, without express words to that effect in the Statute. This we have seen before in the case of *Ponnusamy Tevar* v. *The Collector of Madura.*[5] In that case the action was

[1] 1 L. R., 1 Mad., 89.
[2] 6 Mad. H. C. Rep., 85.
[3] 15 W. R., 263.
[4] 25 L. J., Exch., 212.
[5] 3 Mad. H. C. Rep., 35.

brought to compel the defendant to perform the official duty of registering and sub-assessing a zemindari transferred in accordance with Reg. XXV of 1802, and it was held that the action would lie. Duties are imposed by Statute on Railway Companies, Municipal Commissioners, and other public bodies ; and failure to perform, or neglect in performing, those duties render the defendants liable to an action, both to compel them to perform those duties and to recover damages as compensation for any injury that has been sustained by reason of their neglect or omission. But apart from duties imposed by Statute-law, in all cases where the obligation of care towards the interests of another is held to exist, an action for the breach of that obligation by negligence will lie, if injury occurs therefrom. Thus, in *Svami Nayuda* v. *Subramanya Mudali*,[1] it was held, that, to sustain an action for negligence, there must be an obligation on the part of the defendant to use care and a breach of it to plaintiff's injury.

Illustrations of this principle are to be found in the cases of *The Corporation of the Town of Calcutta* v. *Anderson*,[2] and of *Evans* v. *The Trustees of the Port of Bombay and Diler Daulat Bahadur*.[3] In the former case, the Commissioners for the town of Calcutta had allowed an Executive Engineer of the Government of Bengal to open a road for the purpose of carrying off the surplus water of a tank, subject to the condition that a contractor licensed to do such works for the Municipality should be employed to do the work. The road was opened, but was left unfenced and insufficiently lighted at night, and the plaintiff, Anderson, driving along the road after dusk drove into the hole in the road and was badly injured. He accordingly sued the Corporation, the contractor and

[1] 2 Mad. H. C. Rep., 158. [2] I. L. R., 10 Calc., 445.
[3] I. L. R., 11 Bom., 329.

the Secretary of State for damages. It was held that there had been negligence in leaving the hole in the road unfenced and unlighted, for which the first and second defendants were liable. The facts of the second case are similar. In this case the plaintiff sued for damages sustained by him in consequence of his having fallen into a hole dug on the land of the first defendants by an *employé*, named Hewson, of the second defendant. The plaintiff occupied a house near the land of the first defendants, and had been in the habit of crossing this land daily in going to and from his place of business. On the morning of the day on which he was injured he had crossed the land and gone to his place of business as usual. On returning at night he fell into a hole which had been dug during the day across the path over the land by Hewson, who had been permitted to make borings in the land, for the purpose of ascertaining the suitability of the soil for building purposes, for which purposes the second defendant had obtained an agreement to lease the land from the first defendants. The hole was proved to be several feet deep, and to have been dug right across the pathway. It was unfenced and unlighted. It was therefore held that there had been negligence on the part of Hewson, for which the person who employed him, *viz.*, the second defendant, was liable.

In actions for negligence, the negligence must either be clearly proved to be that of the defendant, or be such that, under the circumstances, his negligence is to be presumed. Where the evidence leaves it uncertain whether the negligence arose from the defendant's or the plaintiff's fault, the action will fail. Thus, in *Koegler and Co.* v. *A. Yule and Co.*,[1] it was held, that the burden of proving negligence lay on the plaintiffs, and that if the negligence was doubtful, they could not

[1] 5 B. L., 401, C. C.; 11 W. R., C. C., 45.

recover ; and that it was not necessary for the defendants to show that there had been none. And in all cases where it can be shown that the plaintiff contributed to the accident by negligence on his own part, he cannot recover, because a man cannot complain of that which he has himself helped to bring about (Addison on Torts, 5th Edit., p. 23). The case of *Woodhouse* v. *The Calcutta and S. E. Railway Co.*[1] was a case in which the plaintiff, who was travelling on the defendants' railway, sustained severe injuries from a fall he received in stepping on to the platform when the train stopped. The defendants pleaded contributory negligence on the part of the plaintiff in getting out of the train when he did ; but the evidence affording a presumption of negligence on their part and showing no contributory negligence on that of the plaintiff, he was successful. The Court quoted Erle, C. J., in *Scott* v. *The London Dock Co.*,[2] where he said : "There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or of his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." In *Halford* v. *The East Indian Railway Co.*,[3] which was a suit brought against the defendants for negligence in that a spark from one of their engines set fire to dry grass at the edge of the line, which spread and destroyed the plaintiff's property, on the grounds (*a*) that they should not have allowed the dry grass to remain where it was, and (*b*) that they should not have driven their engines without due precautions to prevent the expulsion of sparks, it was held, that neither in the state of the banks, nor in the construction

[1] 9 W. R., 73. [2] 34 L J., Exch., 220.
[3] 14 B. L. R., 1, O. C.

of their engines, was any negligence shown on the part of the defendant company. As to negligence, Williams, J., in *Fremantle* v. *The L. N. W. R. Co.*,[1] was quoted. He said: "As to negligence, the company, in the construction of their engines, are not only bound to employ all due care and all due skill for the prevention of mischief accruing to the property of others by the emission of sparks or any other cause, but they are bound to avail themselves of all the discoveries which science has put within their reach for that purpose, provided that they are such as, under the circumstances, it is reasonable to require the company to adopt" Also Sir William Erle, C. J., in *Ford* v. *L. and S. W. R. Co.*,[2] where he said: "A railway company is bound to use the best precautions in known practical use to secure the safety of their passengers, but not every possible precaution which the highest scientific skill might have suggested." And again, *Dimmock* v. *North Staffordshire Railway Co.*,[3] where, at the direction of Keating, J., the jury found no negligence on the part of the company for omitting means to prevent the emission of sparks from their engines, the means suggested being such as practical men stated would impede the engines and would not be effectual for the object.

In cases where the accident would not, in all probability, have happened but for the want of care on the part of the defendant, the plaintiff should be held to have made out a *primâ facie* case of negligence; and it will lie on the defendant to rebut it. And in cases where contributory negligence is pleaded, it must be shown that such negligence was co-operative in causing the accident, for mere negligence will not disentitle a sufferer to relief, unless by the exercise of ordinary care he might have avoided the consequences of the wrong-

[1] 31 L. J., N. S., C. P., 12. [2] 2 F. & F., 730. [3] 4 F. & F., 1058.

doer's negligence. Similarly, if the wrong-doer, by exercise of ordinary caution, might have avoided the consequences of negligence on the part of the sufferer, he will be held liable if he do not exercise such caution (Addison on Torts, 5th Edit., pp. 23 *et seq.*). The reports of our Indian High Courts contain but few cases of torts resulting from negligence. I have quoted the cases I have found, and for the propositions I have laid down am mainly indebted to Addison on Torts, 5th Edit., Chap. I. There is a case—*Mohamed Yusuf* v. *The P. and O. Steam Navigation Company*[1]—but the question of negligence was there discussed chiefly in order to ascertain if the defendant company were liable for the negligence of a servant (pilot) they were compulsorily obliged to employ. This case will be referred to later on when I speak of the liablity of third parties for torts done by others.

Fraud.

Where, owing to fraud, any person has sustained any injury, he can maintain an action to recover compensation on account of such injury. In *Wharton* v. *Muna Lal and others*,[2] where the plaintiff's property had been fraudulently transferred, it was held that he was entitled to recover damages on such account from the actual transferor and from the person who was found to be the prime-mover and instigator of the transaction as well as from his own agent who had consented to such transfer, and from the purchaser who, being aware of circumstances sufficient to create suspicions, dealt with person who had no authority to sell. Thus, all who profit more or less by a fraud, and all who aid and abet it, as well as those who directly commit it, are all liable in damages.

But if the plaintiff's own conduct has been fraudulent, he may not be entitled to recover. Thus, in *Bhupnarain Chobe and another* v. *Raghunath Gobind Rai*,[3]

[1] 6 Bom. H. C. Rep., 98, O. C. [2] All. H. C. Rep., 1866, p. 96.
[3] 18 W. R., 230.

in which two brothers had sold, as their own, property belonging to themselves and to three minor brothers, and the minors on coming of age had sued for and recovered their property from the purchasers, it was held that the latter could not recover damages from their vendors, as they had been aware from the first that they were dealing with the property of infants, and that they were obtaining possession of it in a manner calculated to injure the infants.

Acquiescence, either express or implied, in a wrong takes away the right of action ; hence, the maxims *consensus tollit injuriam* and *volenti non fit injuria*. Such acquiescence may be presumed from the plaintiff's slumbering on his rights. The following are cases where direct acquiescence was held to take away the right of suit :—*Madan Gopal Mukharji and others* v. *Nilmani Banarji and others*,[1] *Safru and another* v. *Futteh and others*,[2] *Bhairo Datta* v. *Lekhrani Koer*,[3] and *Jamsetji Burjorji Bahaduriji* v. *Ebrahim Vydina*.[4] Acquiescence.

In the first case, a dispute having been taken before a Magistrate, and he having visited the spot and having, with the consent of all, altered an existing pathway into another more convenient to the parties generally, the plaintiffs were held bound by the act they had consented to, and were held to have no right of adverse action. In the second case, a proprietor having consented to the use of a house of his as a house of prayer, his heirs were held debarred from claiming the house for private purposes after his decease. In the third case, as the plaintiff had countenanced the acts complained of, the Court was held bound to refuse redress. In the fourth case, the plaintiff had obtained a decree against the defendant for possession of a cotton press, but

[1] 11 W. R., 304.
[2] 15 W. R., 505.
[3] 16 W. R., 123.
[4] I. L. R., 13 Bom., 183.

had not executed his decree, and the defendant remained in possession and worked the press. A fire then broke out and much damage was done, and the plaintiff sued the defendant for damages. It was held, however, that independently of negligence, the defendant was not liable to the plaintiff for the loss occasioned by the fire. Down to the date of the first decree, the defendant in keeping possession of the press and working it was no doubt a trespasser; but subsequently to that decree he remained in possession and worked the press with the consent of the plaintiff. Hence the maxim *volenti non fit injuria* applied to the circumstances of the case.

The following cases relate to indirect or presumed acquiescence: *Beni Madhab Das* v. *Ram Jai Rokh*,[1] *Radha Nath Banarji* v. *Jaikrishna Mukharji and others*,[2] *Shibdas Banarji* v. *Baman Das Mukharji*,[3] *Hira Lal Koer* v. *Parmessar Koer and others*,[4] *Brahmo Mai Chaudhurani and others* v. *Kumudini Kant Banarji and others*,[5] and *Gopi Chand* v. *Liakat Hossein*.[6]

In the first case, the plaintiff having a right of way allowed the defendant to build a house on the pathway and enjoy it for seven years. He then sued to open up the right of way by demolishing the house; but his acquiescence in its building being presumed, his claim for the demolition of the house was refused. In the second, the plaintiff not having opposed the making of a new road on his land till it was completed, his claim was held barred. In the third, the defendant, a tenant, having built a house on his land, and the plaintiff, his landlord, remaining passive, and allowing the building to go on, he was not allowed to say that the defendant

[1] 1 B. L. R., 213, A. C.; 10 W. R., 316.
[2] 1 W. R., 288
[3] 15 W. R., 360; 8 B. L. R., 237.
[4] 15 W. R., 401.
[5] 17 W. R., 466.
[6] 25 W. R, 211.

had done wrong, In the fourth, it was ruled that acquiescence in the interruption of an easement might safely be presumed if steps were not taken for a long time after the interruption to assert the right. In the fifth, it was held, that the plaintiff having been aware of the erection of a privy by the defendant on his (the plaintiff's) land seven years before, his consent to the erection should be presumed, and his suit for the demolition of the privy not allowed. In the sixth case, in which the defendants pleaded that they had purchased a building right from a third party with whom the plaintiffs had settled the land, and that the plaintiffs had seen them building the house in question without offering any objections, it was held that in the circumstances the plaintiffs could not have the house removed.

Another leading case on this subject is that of *Nicholl* v. *Tarini Charan Basu*,[1] in which the plaintiff sued for an injunction restraining the defendants from making bricks, which they were making on land they had taken on temporary leases from their co-defendants, who were holders of small holdings within the plaintiff's zamindari, and the suit was dismissed on the ground that the evidence showed such a continued use of the land for twenty-five years as raised a strong presumption of acquiescence on the part of the landlord.

In *Nil Kant Sahai* v. *Jaju Sahu*,[2] in which the plaintiff claimed a right of easement in the shape of a drain passing over the land of the defendant, it was said that he could not be allowed, in equity, to stand by and see his rights infringed by the building of a house without complaining in any way of such infringement; but was bound at once to do his best to prevent a permanent obstacle being put in the way of the enjoyment of the right. The same was also held in *Beni Madhab Banarji* v. *Jai*

[1] 23 W. R., 298. [2] 20 W. R., 328.

Krishna Mukharji,[1] *Kedarnath Nag* v. *Khettro Pal Shibratna*,[2] and *Naina Misra* v. *Rupikan*.[3]

But there are cases—notably, where one person has built by mistake on the land of another, and that other has not set him right—where the acquiescence has not been held to take away all right of action :—*Hara Chandra Mukharji* v. *Halodhar Mukharji* and *Rani Rama* v. *Jan Mahomed*.[5]

In the first case, the plaintiff had slumbered on his rights and allowed the defendant to erect a 'pucka' building on his land. Acquiescence on his part was presumed, but he was referred to a suit for damages, or for rent of the land on which the house stood. In the second, the defendant having built on the plaintiff's land, believing it to be his own, and the plaintiff not setting him right, it was held, that the plaintiff could not assert his legal right against the defendant without making him full compensation. In this case, the rule of equity on which the Court acted was, as stated by Lord Eldon in *Dann* v. *Spurrier*,[6] that "the Court will not permit a man knowingly, though passively, to encourage another to lay out money under an erroneous opinion of title ; and the circumstance of looking on is in many cases as strong as using terms of encouragement. When a man builds a house on land, supposing it to be his own or believing he has a good title, and the real owner perceiving his mistake abstains from setting him right, and leaves him to persevere in his error, a Court of equity will not allow the real owner to assert his legal rights against the other, without at least making full compensation for the monies he has expended."

In a subsequent case, *Langlois* v. *Rattray*,[7] it was explained that in order to prevent the owner of land,—

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[1] 7 B. L. R., 153 ; 12 W. R., 495.

[2] I. L. R., 6 Calc., 34 ; 6 C. L. R., 569.

[3] I. L. R., 9 Calc., 609 ; 12 C. L. R., 300.

[4] W. R., 1864, 166.

[5] 3 B. L. R., 18 A. C., 11 W. R., 574.

[6] 7 Vesey, 6.

[7] 3 C. L. R., 1.

who is charged with standing by and allowing another person who believes he has a good title thereto, to enter on the land and spend money in improving it,—from recovering possession thereof, fraud and deceit on the part of the owner must be clearly proved.

In one case—*Safdar Ali Khan and others* v. *Jeo Narayan Singh*[1]—the removal of a building, which the defendant had erected while the plaintiff stood by and looked on, was allowed, because it was not substantial, cost little, and the materials could be easily removed. In another case—*Haro Sundari Debi and others* v. *Ramdhan Bhattacharji*[2]—it was held, that if the plaintiff brought his suit within the ordinary period of limitation, his consent to the act complained of could not be inferred merely because he did not bring his suit immediately or soon after the commission of the act. This was also held in *Ramphal Sahu* v. *Misri Lal*[3] and in *Uda Begam* v. *Imamudin*.[4] In this latter case, the Allahabad High Court said they approved of the *dictum* of the Madras High Court in *Pedda Muthulaty* v. *Timma Reddy*[5] to the effect that on the whole it may be taken as the law both of Courts of law and equity that mere *laches*, short of the period prescribed by the statute of limitation, is no bar whatever to the enforcement of a right absolutely vested in the plaintiffs at the period of the suit. "But where there is more than mere *laches*," the Allahabad High Court go on to say, "where there is conduct or language inducing a reasonable belief that a right is foregone, the party who acts upon the belief so induced, and whose position is altered by this belief is entitled in this country as in other countries to plead acquiescence, and the plea, if sufficiently proved, ought

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[1] 16 W. R., 161.
[2] 7 W. R., 276.
[3] 24 W. R., 97.
[4] I. L. R., 1 All., 82.
[5] 2 Mad. H. C. Rep., 270.

to be held to be a good answer to an action, although the plaintiff may have brought suit within the period prescribed by the law of limitation." In a subsequent case, *Fatehyab Kahn* v. *Mahammad Yusuf*,[1] in which the plaintiffs sued for the removal of building which the defendants had erected, and which was an obstruction to the plaintiffs' right to use a court-yard adjoining their residences, it was held that as the only evidence of acquiescence on the part of the plaintiffs was that they did not immediately protest, they had not acquiesced in the construction of the building, and so were entitled to have it demolished.

The legal effect of delay and of lapse of time leading to the inference of acquiescence is thus admirably put in *The Lindsay Petroleum Co.* v. *Hurd*,[2] quoted in *Jamna Das Shankar Lal and another* v. *Atmaram Harjivan*.[3] Their Lordships said :—" Where it would be practically unjust to give a remedy, either because the party has by his own conduct done that which might fairly be regarded as equivalent to a waiver of it ; or where, by his conduct or neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy was afterwards to be asserted, lapse of time and delay are most material. But in every case, if an argument against relief which otherwise would be just, is founded on mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable." In *Narayan bin Rughoji* v. *Bholajir Guru Manjir*[4] and two other appeals, it was held, that where the defendant, knowing plaintiff to lay claim to certain land which the plaintiff knew

[1] I. L. R., 9 All., 434.
[2] L. R., 5 P. C., 239.
[3] I. L. R., 2 Bom., 133.
[4] Bom. H. C. Rep., 1869, p. 80, A. C.

to be his own, purchased the land from a third party, and built a house on it, the plaintiff looking on, the latter was not entitled to recover the land with the house on it, but the defendant might remove the house.

Liability of wrong-doers.

I shall now proceed to discuss the liability of the wrong-doer in torts. This liability may either arise *directly*, as when the wrong-doer himself inflicts the wrong; or *owing to abetment*, as when the wrong-doer abets or procures the wrong-doing; or *owing to ratification*, as when the principal ratifies the wrong done by his agent; or *owing to relation*, as when the master is held liable for the wrong done by his servant, or an innkeeper, when his guest's goods are stolen from his inn.

I shall also consider, premising that the liability in tort is joint and several, whether this joint and several liability may be varied on occasions, and whether there is a right as between the wrong-doers themselves of contribution.

On direct liability I need say little, as it is manifest that the actual doer of the wrong will always be liable if the plaintiff chooses.

Abetment

As to abetment, in the case of *Kashinath Koer* v. *Deb Kristo Ramanuj and others*,[1] it was held, that, in actions of wrong, those who abetted the tortious acts were equally liable with those who committed the wrong. This was a case in which the defendants were sued for non-delivery of possession of some boats. So, too, in *Golab Chand Naulakhya* v. *Jiban Kumari*,[2] which was the case of a suit brought without any reasonable and probable cause, and in which a third party came into the suit and carried it on from the very first, the intervenor's conduct was held to amount to causing the suit to be instituted as well as to carrying it on,—and he was found liable in damages to the plaintiff. See also *Wharton* v.

[1] 16 W. R., 240.

[2] 24 W. R., 437

Muna Lal, previously cited, and *Mahammad Ibrahim* v. *Ghulam Ahmad*,[2] in which certain persons who had persuaded and procured the wife of a Musulman, one being the father, and another, an alleged husband of the girl, to remain absent from him and to live separately, were all found liable in damages.

Ratification.

As to ratification, according to the English law the wrong must have been done by the agent for the principal's use and benefit, and the principal's agreement subsequent thereto will then amount to "a precedent commandment" (Lord Coke), for *omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (Addison on Torts, 5th Edit., p. 87). One of the leading cases in India is *Shamsundari Debi* v. *Dukhu Mandal and others*.[3] In this case the appellant (defendant), having obtained a decree for khas possession of a share in a zamindari, had refused to recognize the raiyats whom the farmers under her co-sharers had settled in the estate, and her agents had cut and carried off the crops of those raiyats. Loch, J., held, that those acts were beyond the ordinary scope of her agent's duty, and that, unless it could be shown that the appellant ordered or ratified the acts, she was not liable. As, however, in the present case, the circumstances gave rise to a strong presumption that the acts were done with her knowledge, which presumption was not rebutted, she was held liable. Glover, J., held, that the appellant was liable for the acts of her agents which were done in furtherance of her known wishes and for her benefit. Loch, J., quoted Addison on Torts, 2nd Edit., p. 831 (5th Edit., pp. 87-88), as to ratification; and held, that, as it was very difficult in this country to get evidence of the authorization or ratification by a principal of acts such as the above, a strong presumption, which required rebut-

[1] 1 Agra, 96.
[2] 1 Bom., 236.
[3] 2 B. L. R. A. C., 227; 11 W. R., 101.

ting, was always raised if the acts were for the principal's benefit, and if the acts were done with the principal's knowledge. In the case of *Grish Chandra Das* v. *Gillanders, Arbuthnot and Co.*,[1] the converse was held. Here the plaintiff had let a cargo boat to one U. C., who was the agent of the defendants for the landing of some goods. A dispute arose between U. C. and the plaintiff about the terms of the hiring, and the latter refused to allow him to land 53 bales of goods still on board. Whereupon U. C. and an assistant of the defendants forcibly took the goods without discharging the plaintiff's lien on them and landed them, and the defendants received them into their godowns. As it was proved that U. C. and the assistant acted without the knowledge or authority of the defendants, and that the defendants had received the goods into their godowns without knowing how they had been obtained, it was held that, in the absence of such knowledge and authority, the mere receipt of the goods did not amount to a ratification on the defendants' part of the tortious acts of their agents so as to render them liable to the plaintiff's action.

It may be noted that a ratification of a tort by a principal will not free the agent from his responsibility to third persons.

Master and servant.

As to liability by relation, this arises chiefly in the case of master and servant, and the liability of the master for the torts of the servant may be summed up briefly as follows :—

The master is liable for the tortious acts of his servant, if those acts are done in the course of his employment in his master's service, on the maxims *respondeat superior* and *qui facit per alium facit per se.*

This rule is of almost universal application, and it makes no difference that the master did not actually authorize or even know of his servant's act or neglect, for even if he

[1] 2 B. L. R., 140, O. C.

disapproved of it or forbade it, he is equally liable if the act be done in the course of the servant's employment. (Manley Smith's Law of Master and Servant's, 3rd Edit, pp. 260, &c.)

The important point to remember is, that the act must be done in the course of, or within the scope of, the employment; beyond that course or scope the servant is as much a stranger to his master as any third person. For the act of the servant to be the act of the master, it must be done in the execution of the authority given by the master. (*Ibid*, p. 275.)

Thus, in a case, *Grish Chandra Banarji* v. *Collins*,[1] in which the defendant contracted with the plaintiff for the hire of certain cargo boats, and while being towed by a steamer which the defendant according to agreement had chartered, the boats sustained damage by reason of gross negligence on the part of a servant of the defendant whom the defendant had placed in charge, it was held that the defendant was responsible to the plaintiff for the negligence of his servant.

In a case decided by the Bombay High Court, *The Bombay Tramway Company* v. *Khairaj Tejpall*,[2]—in which the plaintiffs sued the proprietor of a buggy for damages sustained by them by reason of the negligence of the driver of the buggy who had run against and killed one of the plaintiffs' horses, it was held, on certain English authorities as well as under Bombay Act VI of 1863, that the relation between the proprietor and driver of the buggy was that of master and servant, and, therefore, that the proprietor was liable for the driver's negligence.

Compulsory servants.

A nice point of law has arisen out of the compulsory employment of servants, such as pilots, and that is how far a master, who has been forced by law to employ a particular person as his servant, and thus has had all

[1] 2 Hyde, 79. [2] I. L. R., 7 Bom., 119.

power of selection taken away from him, is responsible for the wrongful acts of the latter. The case of *Mohamed Yusuf* v. *The P. and O. Steam Navigation Co.*[1] contains the law applicable to such cases. In this case, a steamer of the defendant company, while under the charge of a pilot, whose employment was compulsory, ran down a native vessel belonging to the plaintiff. The Court held, that where the employment of a pilot was compulsory, and an accident happened (the pilot being on board), through negligence in the management of the vessel, the owners of the vessel would not be exempted from liability in law, unless they could show that the negligence was that of the pilot alone. If such negligence was partly that of the pilot and partly that of the master and crew of the vessel, the owners would not be exempted from liability. If it was proved on the part of the owners of the vessel that the pilot was in fault, and there was no sufficient proof that the master or crew were also in fault in any particular which contributed to the accident, the owners would have relieved themselves of the burden of proof which the law had cast on them.

Independent Contractors.

An independent contractor, however, is not to be regarded as the servant of the person who employs him, and if a person has to do a lawful act, and he employs a competent person to do that lawful act and damage occurs, the original employer is not liable. In *Ullman* v. *The Justices of the Peace for the Town of Calcutta*,[2] it was pointed out by Paul, J., that in respect of work improperly done and negligently executed, the contractor would be liable and not his employer. "But if the original design be faulty, and cause an obstruction when completed," it was said, "it is obvious that the obstruction is caused by the person who ordered and authorized the original design to be carried into effect." In *Evans* v. *The*

[1] 6 Bom. H. C. Rep., 98, O. C.

[2] 8 B. L. R., 265.

Trustees of the Port of Bombay and Diler Daulat Bahadur,[1] it is said that, "the general rule is that when one has contracted with a competent and fit person, exercising an independent employment, to do a piece of work, free from the control of the employer and according to his own methods, he will not be liable for the torts of such contractor, his sub-contractors and his servants : *Steele* v. *S. E. Railway Company*,[2] *Brown* v. *Accrington Spinning and Manufacturing Company*,[3] *Murray* v. *Currie*,[4] *Quarman* v. *Burnett*,[5] *Laugher* v. *Pointer*.[6] *Daniel* v. *Metropolitan Railway Company*[7] is an authority for holding that the employer is not bound to assume and provide against the possible negligence of a competent contractor. . . . . The test in some of the cases is whether the employer retained the powers of controlling the work, and whether he personally interfered : *Sadler* v. *Henlock*,[8] *Peachey* v. *Rowland* ;[9] Story on Agency, s. 454." In the case of *The Corporation of the Town of Calcutta* v. *Anderson*[10] the facts of which have been already stated, the Secretary of State for India was on this principle held not to be liable to the plaintiff. It was said by Pigot, J., that he came "within the established rule that one who employs a contractor to do what is perfectly legal must be presumed to employ the contractor to do this in a perfectly legal way." The Corporation were, however, held liable, for they were found to have been guilty of a statutory breach of duty.

Injury to fellow-servant.

A noteworthy exception to the general rule of the liability of the master for the tortious acts of his servants, is when an injury happens to one servant through the negligence or wrongful act of a fellow-servant. Both the

[1] I. L. R., 11 Bom., 329.
[2] 16 C. B., 550.
[3] 34 L. J., Ex., 208.
[4] L. R. 6 C. P., 24.
[5] 6 M. and W., 499.
[6] 5 B. and C., 547.
[7] 6 L. R., 5 H. L., 45.
[8] 24 L. J. Q. B., 138.
[9] 13 C. B., 182.
[10] I. L. R. 10 Calc., 445.

servant injured and the servant doing the injury must, at the time the injury was done, have been acting in the service of the common master, and the wrong-doer must also be a person of ordinary skill and care, and the gear and tackle must be fit and sound. When all these circumstances concur, the party injured has no remedy against his master. This was held in the case of *Turner* v. *The S. P. and D. Railway Co.*,[1] where the plaintiff's husband, a platelayer in the company's service, died from injuries received in an accident to a train he was travelling in while in the defendants' service, the accident being occasioned by the negligence of a fellow-servant or servants of the company. Stuart, C. J., agreed to the judgment finding the company not liable, with a good deal of hesitation ; but Turner, J., held, following Lord Cranworth, C., in *The Bartonshill Coal Co.* v. *Reid*,[2] and Lord Cairns, C., in *Wilson* v. *Merry*,[3] that, as the deceased was at the time of the accident a servant of the company and travelling in their service, and the accident was caused by the negligence of a fellow-servant, the company could not be held liable, as there was no failure on their part to provide competent workmen and fit tackle and machinery.

The rule as laid down in *Wilson* v. *Merry* is that "a servant, when he engages to serve a master, undertakes, as between himself and his master, to run all ordinary risks of the service, including the risk of negligence on the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both."

Guardian of minor.

Guardians are not personally liable for torts done by minors under their charge—*Lachman Das* v. *Narayan*;[4] but guardians can sue for torts done to minors under

[1] Not reported.
[2] 4 Jur. N. S., 767.
[3] 1 L. R. H. and Sc. App. Ca., 326.
[4] All. H. C. Rep. 1866, p. 96.

their charge on their behalf: *Madhusudan and another* v. *Kaimullah Biswas.*[1]

Joint and several liability in tort.

The liability of the wrong-doer in tort is, as a rule, joint and several; but nice questions arise as to whether in *every* case of tort the Court is bound to pass a joint decree against the wrong-doers, where there are more than one, making each severally liable for the whole amount decreed; or whether, under certain circumstances, this strict rule may not be varied and damages in proportion and of various amounts be awarded, each wrong-doer being then only held liable to the extent of his share.

As to the strict rule of joint and several liability in tort, the case of *Ganesh Singh* v. *Ram Raja and others*[2] is the leading case. This was a suit for compensation for damage done to property by rioters, and their Lordships held, that each and every one of the wrong-doers was equally responsible for the loss sustained, when he happened to be a part of the common assembly and executed a common purpose, and not in proportion to his share of the plunder received or of the damage done by him. So, in *Jhunki Panri* v. *Ajudhya Das*[3] which was a suit to recover possession of land from the enjoyment of which as a tenant in common the plaintiff had been excluded by the joint action of all the defendants, who had divided the property between themselves, it was held by the Calcutta High Court that the defendants were all equally responsible for the damage sustained by the plaintiff, and that none of them could restrict their liability for mesne profits to that portion only of which they were in possession. Similarly, in *Shama Sankar Chaudhuri* v. *Srinath Banarji*,[4] in which the plaintiff had bought a house, and

[1] 9 W. R., 327.
[2] 3 B. L. R., P. C., 44; 12 W. R., P. C., 38.
[3] 19 W. R., 218.
[4] 12 W. R., 354.

the defendants in collusion with each other had prevented him from enjoying the rent, they were all held liable for mesne profits. It has further been held that it is immaterial how the parties got into wrongful possession ; *Piaran* v. *Ahmad Ali Khan*.[1] All parties in wrongful possession, *Satya Nand Ghosal* v. *Sarup Chandra Das*,[2] even though in possession *bonâ fide* without knowledge of the defect in their title, *Magna Chandra Chatturaj* v. *Sarbeshar Chakravartti*,[3] *Baijnath Prasad* v. *Badhu Singh* are jointly liable for mesne profits. A mortgagor, holding on after foreclosure, *Sarup Chandra Rai* v. *Mohendra Chandra Rai*,[5] an *ijaradar* who has taken an *ijara* of the property pending the litigation, *Bidya Mâi Debi* v. *Ram Lal Misra*[6] intermediate holders who have combined wrongfully to keep an auction-purchaser out of possession, *Ram Chandra Sarma* v. *Ram Chandra Pal*[7] and a person who, though not in actual occupation of the land, has leased the land to the actual occupiers, *Madan Mohan Singh* v. *Ram Das Chakravartti*[8] have all been held jointly liable for mesne profits.

Variation of strict rule.

But in a certain class of cases the strict rule of joint and several liability in tort has been varied. These were cases where the wrongful act was more legally than positively wrongful. I mean cases of a *bonâ fide* possession of land under an imperfect title, where the legal owner having recovered possession seeks mesne profits, and the property has passed through more than one pair of hands. Thus, in *Fazal Mahomed Mandal and another* v. *Raj Kumar Debi*,[9] *The Nawab Nazim of Bengal* v. *Raj Kumar Debi*,[10] *The Collector of Bogra* v. *Shama Shankar*

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[1] 4 W. R., Misc., 7.
[2] 14 W. R., 76.
[3] 8 W. R., 479.
[4] 10 W. R., 486.
[5] 22 W. R., 539.
[6] 17 W. R., 148.
[7] 23 W. R., 226.
[8] 6 C. L. R., 357.
[9] 6 W. R., 113.
[10] 6 W. R., 113.

Mozumdar and others,[1] the High Court of Calcutta, in awarding mesne profits against the defendants, who were legally trespassers, ordered them to be assessed rateably according to the amounts each defendant had realized while his legally wrongful possession had lasted. Again, in *Krishna Mohan Baisak* v. *Kunjo Bihari Baisak*,[2] which was a suit for mesne profits against a number of defendants who had been in possession of distinct portions of a newly formed *chur*, and who had been proved to have had no title thereto, it was said:—"It is contended that the court below was wrong in making the defendants in the present case severally liable in damages for the lands held by them. It is urged that all the defendants should be made by the decree jointly liable for the whole damages, and that they should be left to assess their respective shares of these damages amongst themselves. It appears to us that this contention is not one which can be supported. It is no doubt true that in the common law courts in England, the jury were obliged, in cases of tort to assess damages jointly against all the defendants, and that where they united in the answering pleas and in the issues, if the damages, under the old practice, were assessed severally instead of jointly, the judgment would have been reversed. Even in England, however, there are not wanting indications that that practice either has come or will shortly come to an end. In the third edition of his work on damages, Mr. Mayne says:—'Now that actions may be brought against all defendants against whom the right to relief is alleged to exist whether jointly, severally, or in the alternative, and judgment given against such one or more of them as may be found liable according to their respective liability, it is possible that juries will be allowed to distinguish between defendants in according damages for a joint unlawful act.'

[1] 6 W. R., 230.

[2] 9 C. L. R., 1.

Whatever may be the future practice in the courts in England, there can be no doubt that the courts in this country are in no way fettered as the old courts of common law were by any rule similar to that above noticed, and we think that it is quite open to courts in India in a suit of this kind to apportion the damages in respect of defendants severally. In the present case, the land for which mesne profits are claimed was a *chur*; and our experience of the litigation of this country teaches us that it is quite possible for persons to take possession of *chur* lands without being wrong-doers in the popular sense of this term, although they may be wrong-doers by intendment of law. When newly formed *chur* lands are taken possession of by neighbouring owners, it constantly happens that these owners *bonâ fide* believe the portions which they have occupied belong of right to their respective estates. A case has been recently before us in which, until a careful measurement and demarcation had been made, it was impossible to ascertain which of the neighbouring owners were entitled to the newly formed lands and in what portions. We think that in such a case the reason for treating as joint tort-feasors all persons who have occupied portions of lands ultimately found to belong to neighbouring estates, and for applying the rule of contribution or apportionment between joint tort-feasors, is wanting, and that it is fair and equitable that the defendants should be severally made liable for mesne profits in respect of the parcels occupied by them respectively."

To constitute a joint liability acts complained of must be joint.

To constitute a joint liability, the acts complained of must be joint, not separate; for, if separate, separate actions, and not a joint one, must be brought. Thus, in *Nilmadhub Mukharji* v. *Dukhiram Kottak and others*,[1] Pontifex, J., held, that an action for slander could not be brought jointly against several defendants. In

[1] 15 B. L. R., 161; O. C.

Uzirunnissa v. *Mahammed Husain and others*,[1] it was ruled by Phear, J., that this could only be done if it were alleged that the action was based on the special damage arising from the slanderous words, such special damage being the conjoined act of the defendants.

Plaintiff may elect which tort-feasor he will proceed against.

The plaintiff may, in an action on tort, make any or all of the wrong-doers defendants, and torts being in their nature several, some defendants may be dismissed the suit, and others cast (Pollock on Torts, 2nd Edit., 178), though there is a *dictum* of Jackson, J., to the contrary in *Satya Nand Ghosal* v. *Sarup Chandra Das*.[2] In *Nilkant Sarma and others* v. *Shushila Debi and others*,[3] which was an action against several defendants for having jointly misappropriated property, it was held, that any one defendant was not bound to entrust his defence to the counsel for the others, but that each defendant had a right to a separate defence, and was entitled to separate costs, if successful. But, if a plaintiff elect to sue only one of several joint tort-feasors, he cannot afterwards bring a suit against the rest. This was held in *King* v. *Hoare*,[4] and subsequently in *Brinsmead* v. *Harrison*,[5] where it was laid down as a rule, not of procedure only, but of principle, that a judgment obtained against one or more of several joint contractors or joint tort-feasors operated as a bar to a second suit against any of the others : *Hemendro Kumar Mallik* v. *Rajendrolal and others*.[6] This was a suit on a joint contract, not on a joint tort, but the remarks of Garth, C. J., are valuable as regards torts as well.

Where the plaintiff has sued several defendants jointly, and it appears that a separate action should have been maintained against each defendant, the plaintiff may be

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[1] 15 B. L. R., 166 (foot-note).
[2] 14 W. R., 76.
[3] 6 W. R., 324.
[4] 13 M. and W., 494, 505.
[5] L. R., 7 C. P., 547.
[6] I. L. R., 3 Calc., 353, 363.

put to his choice as to which one defendant he will proceed against in the suit before the Court. This was done in the case of *Nilmadhab Mukharji* v. *Dukiram Kottah and others*,[1] before quoted; and the plaintiff elected to proceed against the third defendant.

Contribution between joint wrong-doers.

There is a very interesting question connected with the subject of joint wrong-doers or joint tort-feasors, as they are called, and that is, whether, if one joint wrong-doer pays the compensation awarded against himself and the other joint wrong-doers, he is entitled to recover their proportionate shares from the others by an action for contribution.

The general rule is that he is not, as was decided in *Harnath* v. *Hari Singh and others*,[2] where it was held, that where one of several joint wrong-doers liquidates the whole amount of the damages awarded in satisfaction of a wrong committed by them all, he is not entitled to contribution from the rest. See also *Sappana Chari* v. *Chakkara Pattan*.[3] But stated thus the rule is too broad, and should be confined to those cases (of course the large majority) where the joint wrong-doers knew, or must be presumed to have known, they were doing an unlawful act. The law on this point has been very carefully laid down in *Rati Sirdar and others* v. *Saju Paramanik*,[4] in which the judgment of the Full Bench of the Court in *Sripati Rai* v. *Loharam Rai*[5] on a reference by the Judge of the Small Cause Court at Krishnagur was followed, and more recently in *Supat Singh* v. *Imrit Tewari and others*.[6] The case of *Rati Sirdar and others* v. *Saju Paramanik*[4] was as follows:—The plaintiff and defendants had jointly

[1] 15 B. L. R., 161, O. C.
[2] All. H. C. Rep., 1872, p. 116.
[3] 1 Mad., 411.
[4] 11 B. L. R., 345, A. C.; 20 W. R., 235.
[5] 7 W. R., 384; B. L. R., Sup. Vol., 687.
[6] I. L. R., 5 Calc., 720; 6 C. L. R., 62.

opposed and prevented the amin of a zamindar from measuring certain lands ; the zamindar, thereupon, brought a suit against them to have his right to measure declared, and obtained a joint decree with costs. In execution of the decree the property of the plaintiff was attached, and he solely paid the whole amount due for costs. In a suit by the plaintiff against the others for contribution, it was held, that the suit would lie, following the principles laid down in *Sripati Rai* v. *Loharam Rai*.[1] In that latter case, Peacock, C. J., said : "All that we can say is, that the plaintiff is not necessarily precluded from recovering contribution merely because the damages for which the decree was given were caused by a wrong in the legal sense of the word. The Judge, in such a case, should enquire as to the parts the defendants took in the trespass, and the benefits, if any, they respectively derived, and educe the proportion of the damages they should pay ; but if all were jointly concerned in committing an act they knew to be illegal, the plaintiff is not entitled to contribution." He quoted *Merryweather* v. *Nixan*,[2] where it was held, that no action for contribution was maintainable by one wrong-doer against another, though one satisfies the whole damages. But there Lord Kenyon laid down, as a general principle, that the decision would not affect cases of indemnity, in which one person may employ another to do an act not unlawful in itself. Peacock, C. J., also stated, that the true principle was laid down in *Adamson* v. *Jervis*,[3] where Best, C. J., said, that "the rule was confined to cases where the person seeking redress must be presumed to have known he was doing an unlawful act." In *Suput Sing* v. *Imrit Tewari and others*,[4] the Court, following *Sripati Rai* v. *Loharam Rai*,[5]

[1] 7 W. R., 384; B. L. R., Sup. Vol., 687.
[2] 8 Term Rep., 186.
[3] 4 Bligh., 72.
[4] I. L. R., 5 Calc., 720.
[5] 7 W. R., 384.

held, that the question to be determined was, whether all the defendants in the former suit were wrong-doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act. If that was the case, no suit for contribution would lie ; but if they had acted under a *bonâ fide* claim of right, and had reason to suppose that they had a right to do what they had done, then they might have a right of contribution *inter se ;* and in such case the Court should enquire what share they each took in the transaction, because, according to circumstances, one or more of them might be excused altogether or in part from contributing, as, for instance, one of them might have acted as a servant and by command of the others, or the others might have been the only persons benefited by the wrongful act, in which case those who were benefited, or who ordered the servant to do the act would not be entitled to contribution, but those not benefited or the servant might be.

This principle was followed in a recent case in the Allahabad High Court ; *Krishna Ram* v. *Rakmini Sewak Singh and others.*[1] The facts of this case were that the plaintiff had sold certain property in execution of a decree he had obtained against the defendants. Subsequently, the sale was set aside in a regular suit brought by one Hingu Lal against him and the defendants Rakmini Sewak Singh and others. The plaintiff, however, had to pay all the costs of that suit, upon which he sued his co-defendants for contribution. They pleaded that as Krishna Ram and they had been joint tort-feasors in respect of the matters out of which the suit of Hingu Lal, in which the costs were recovered, arose, he could not require contribution from them. The Court, however, said that there was no evidence to show that the plaintiff in attaching and advertising the property for

[1] I. L. R., 9 All., 22

sale in execution of his decree knew he was doing an illegal act,—indeed, the inferences were all the other way. Consequently, he was in their opinion fully entitled in law to maintain the present suit, and to recover the proportionate amount of the costs which he had had to pay for them.

But in a case in the Madras High Court, *Manja* v. *Kadugochen*,[1] where a decree for costs against two defendants was executed against one of them, who had set up a false defence in the suit in collusion with the other, and the former brought a suit to recover one moiety of the amount paid by him from the latter, it was held that the suit would not lie. In this case the defendants must have known that, in setting up a false defence, they were doing an unlawful act. In another case, *Brajendro Kumar Rai* v. *Rash Bihari Rai*[2] which was a suit for damages for breach of a covenant not to open a ferry at a particular place, and in which a decree obtained against all of the defendants was executed against one of them only, it was held that the latter was entitled to contribution, as the defendants were not joint tort-feasors but were only guilty of a breach of contract.

No merger of trespass in felony in India.

It has been sometimes said that according to English law, where an actionable wrong amounts to felony, the civil remedy is postponed until the criminal law has been put in force, and this is called "the merger of a trespass in a felony." Much doubt has recently been thrown on the correctness of this rule, and in *Wells* v. *Abrahams*,[3] it was held that the omission to prosecute could not form the subject of a plea in bar of the action. In England, therefore, there is no means of enforcing the rule, if it exists (Addison on Tort. 5th Edit., p. 65). It is, however, quite clear that in India no such rule prevails. In

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[1] I. L. R., 7 Mad., 89. [2] I. L. R., 13 Calc., 300.
[3] L. R., 7 Q. B., 554.

India, a person can sue for damages for a wrongful act, even though it amounts to an offence, without in the first instance instituting criminal proceedings against the offender: *Rupa Bewa* v. *Ram Kumar Sandyal*,[1] *Adram* v. *Harballabh*,[2] *Shama Charan Basu* v. *Bhola Nath Datta*,[3] *Srinath Mukharji* v. *Kamal Karmokar*,[4] *Chaitanno Paramanik* v. *Zamiruddin*,[5] *Viranna* v. *Nagayyah*,[6] *Abdul Kadir* v. *Mahamad Mera*,[7] and *Adamson* v. *Arumugan*.[8]

Effect of death of injured person on action in tort.

Before concluding this chapter the effect of the death of the person injured in respect of actions in tort may be noticed. By Act XII of 1855, which is an Act to enable executors, administrators and representatives to sue and be sued for certain wrongs, it is provided that an action may be maintained by the executors, administrators or representatives of a deceased person for any wrong committed in the lifetime of such person, which has occasioned pecuniary loss to his estate, provided that the wrong be such as the deceased person might himself have brought an action in respect of, had he been alive, and that the wrong was committed within a year before his death. Conversely, it is enacted that an action may be maintained against the executors, administrators, heirs or representatives of a deceased person for any wrong committed by him in his lifetime, for which he would have been subject to an action, provided that such wrong shall have been committed within one year before his death. Under this Act the Calcutta High Court has held in an old case, *Gokul Chandra* v. *Barik Begam*,[9] that a suit will lie against the representatives of a deceased

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[1] Marsh., 248; 2 Hay, 13.
[2] 2 N. W., 58.
[3] 6 W. R., C. R., 9.
[4] 16 W. R., 83.
[5] 18 W. R., 27.
[6] I. L. R., 3 Mad., 6.
[7] I. L. R., 4 Mad., 410.
[8] I. L. R., 9 Mad., 463.
[9] Mar., 344.

person for damages for an act of defamation committed by him within one year of his death. This case is noticeable, as in it it is pointed out that while under Act XII of 1855 the representatives of a deceased person can only bring an action for such a wrong as has occasioned pecuniary loss to the estate, yet they may be sued for any wrong committed by the deceased, whether it has occasioned pecuniary loss or not, the intention being, it was said, not to limit actions against personal representives to such wrongs as occasioned loss to the estate, but to permit of their being brought for all kinds of wrongs which might become the subject of a civil action. This ruling as regards an action for defamation is not good law now, for by section 268 of Act X of 1865 and section 89 of Act V of 1881, all demands and rights to prosecute or defend actions or proceedings existing in favor of or against a person at the time of his decease survive to or against his executors or administrators except causes of action for defamation, assault as defined in the Penal Code, or other personal injuries not causing the death of the party, and except also cases where after the death of the party the relief could not be enjoyed, or granting it would be nugatory. The Bombay High Court has held in a recent case, *Haridas Ramdas* v. *Ramdas Mathuradas*,[1] that the provisions of Act XII of 1855 do not apply to a suit for damages for wrongful arrest and malicious prosecution, which suit was instituted by the person injured himself before his death. Such a suit, it was pointed out, is a personal action, and is governed by the rule of common law that a personal action does not survive the death either of the person who did, or of the person who sustained, the injury, unless there be statutory provision to the contrary, or the estate is affected by the

[1] I. L. R., 13 Bom., 677.

tort. There is a further Act (XIII of 1855) which enables the families of a deceased person to sue for compensation for an actionable wrong which has caused the death of that person. The provisions of this Act are described in Chapter VII.

CHAPTER II.

OF TORTS AFFECTING IMMOVEABLE PROPERTY.

Definitions of immoveable property—Cases—Torts affecting immoveable property—Waste—Cases—Destructive Trespass—Physical injury to immoveable property by act done outside property injured—Rule laid down in *Rylands* v. *Fletcher*—Cases—Nuisances—Cases—Disturbance or usurpation of right—Trespass—Defences in actions for possession of immoveable property—Plea of adverse possession—Cases—Possession—Cases—Modes of possession—Cases—Legal presumptions in suits for possession—Cases—Possession goes with title—Cases—Waste, jungle and diluviated land—Cases—Chur land—Cases—Possession of a portion may be presumed to extend over whole of subject-matter of suit—Cases—Possession may be presumed to have existed during antecedent period—Case—Can plaintiff succeed on proof of possession and dispossession without proof of title—Cases—Symbolical possession—Cases—Confirmation of possession—Cases—Discontinuance of possession and dispossession—Cases—Adverse possession—Cases—Adverse possession by a co-sharer—Cases—Possession of tenant not adverse to landlord—Cases—Possession of mortgaged property when adverse—Cases—Adverse possession may be pleaded in addition to other title—Cases—Miscellaneous rulings as to trespass—Trespass of building on another's land—Cases—Right to remove trees planted on another's land—Cases—Trespass by co-sharers—Cases—Who may sue to eject a trespasser—Cases—Trespass after decree—Cases—Mesne profits include interest—Cases—When mesne profits may be awarded—Cases—Principle on which to be assessed—Cases—Deductions for collection charges and Government revenue—Cases.

Definitions of immoveable property.

IMMOVEABLE property is defined in the General Clauses Act (I of 1868) as including land, benefits arising out of land, and things attached to the earth, or permanently fastened to anything attached to the earth. In the Succession Act (X of 1865) the term is said to include land, incorporeal tenements, and things attached to the earth, or permanently fastened to anything which is attached to the earth. In the Registration Act (III of 1877) it is defined as including land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries, or any other benefit to arise out of land, and things attached to the

earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops or grass. By sec. 3 of the Transfer of Property Act (IV of 1882), too, standing timber, growing crops and grass are excluded from the category of immoveable property. Huts have been held not to be immoveable property within the meaning of both the Provincial and the Presidency Small Cause Court Acts of Bengal—(Acts XI of 1865 and IX of 1850): *Nathu Miah* v. *Nand Rani*,[1] *Kali Prasad Singh* v. *Hulash Chand*.[2] Standing timber and growing crops are immoveable property: *Gopal Chandra Biswas* v. *Ramjan Sirdar*,[3] *Tafail Ahmad* v. *Beni Madhab Mukharji*, *Pandah Ghazi* v. *Jenuddi*[5], *Jagrani Bibi* v. *Ganeshi*,[6] *Umed Ram* v. *Doulat Ram*;[7] but growing crops are of course not immoveable property according to the Registration and Transfer of Property Acts, *Kalka Prasad* v. *Chandan Singh*.[8] A lease-hold is immoveable property, *Ullman* v. *The Justices of the Peace of Calcutta*;[9] so is a private right of fishery, *Baban Mayacha* v. *Nagu Sravucha*,[10] *Bhundal Panda* v. *Pandol Pos Patil*,[11] and also a right of ferry: *Krishna* v. *Akilanda*.[12] A suit for *balute* (rent in kind) or *aya* (tribute) is a claim in respect of a right belonging to and forming the emoluments of, an hereditary office amongst Hindus, and, therefore, one in respect of immoveable property: *Appana* v. *Nagia*.[13] The doors and window-shutters of a house are immoveable property: *Piru Baipari* v. *Ronuo Maifarash*,[14] *Queen-*

[1] 8 B. L. R., 508; 17 W. R., 309.
[2] 10 B. L. R., 448; 20 W. R., 8.
[3] 5 B. L. R., 194; 13 W. R., 275.
[4] 24 W. R., 394.
[5] I. L. R., 4 Calc., 665; 2 C.L.R., 526.
[6] I. L. R., 3 All., 435.
[7] I. L. R., 5 All., 564.
[8] I. L. R., 10 All., 20.
[9] 7 B. L. R., Ap. 60.
[10] I. L. R., 2 Bom., 19.
[11] I. L. R., 12 Bom., 221.
[12] I. L. R., 13 Mad., 54.
[13] I. L. R., 6 Bom., 512.
[14] I. L. R., 11 Calc., 164.

Empress v. *Ibrahim*.[1] A tree standing on land is immoveable property · *Sakharam Mulshet Mhadik* v. *Vishram*.[2] It was held in *Nasir Khan* v. *Karamat Khan*,[3] where the question was whether fruit upon trees was moveable or immoveable property within the meaning of sec. 6 of Act XI of 1865 that the interpretation clause of the Registration Act of 1877 supplied a definition of what was moveable and immoveable property, which might be accepted as a guide. In *Maharana Fatesangji Jasvantsangji* v. *Desai Kallianrayaji Hukamatiayi*[4] the principle was approved which prevailed in *Krishnabhat* v. *Kapabhat*[5] and in *Balvantrav* v. *Purshotam Sidheshvar*,[6] viz.:—that as the term immoveable property is not defined in the Act (XIV of 1859) it must, when the question concerns the rights of Hindus, be taken to include whatever the Hindu law classes as immoveable although not so in the ordinary acceptation of that word.

Torts affecting immoveable property.

Torts affecting immoveable property arise either by actual physical damage to the property, or by interference with, or impairing of, the enjoyment of it ; or by disturbance or usurpation of the right to hold or possess it, whether such right be present or in expectation.

Actual physical damage may be caused by acts either of commission or omission, and these may be done either on the property itself or from outside it ; but in either case with actual physical damage to the property. When these acts of commission or omission are done by tenants or holders of the property for life or a term, they are technically known as 'waste,' which Blackstone defines as "a spoil or destruction of houses, gardens, trees, or other corporeal hereditaments, to the disinherison of him that hath the remainder or reversion. It is either volun-

Waste

[1] I. L. R., 13 Mad., 518.
[2] 19 Bom., 207.
[3] I. L. R., 3 All., 168.
[4] 10 Bom. H. C. Rep., 281.
[5] 6 Bom. H. C. Rep., 137 A. C., 7.
[6] 9 Bom. H. C. Rep., 99.

tary, which is a crime of commission as by pulling down a house ; or it is permissive, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste." All tenants would be liable, as well as all holders for life or a term, for voluntary or commissive waste ; but a tenant-at-will, or from year to year, would not be liable for permissive waste (Addison on Torts, 5th Edit., pp. 381, &c.). Actions for waste most frequently come before the Indian Courts, where a widow, who is tenant for life of her deceased husband's property, alienates to the injury of the reversioners ; and where there is more properly a disturbance of the right to possession in expectation, and not actual physical damage to the property. In *Gobind Mani Dasi* v. *Sham Lal Baisakh*[1] it was held, that the reversioner can, during the widow's lifetime, sue to obtain a declaration that the conveyance is not binding beyond the lifetime of the widow, and also to prevent waste. This was also held, or the reversioner's right to bring such a suit was admitted in *Rai Charan Pal* v. *Piari Mani Dasi*,[2] *Chattar Narain* v. *Uma Kunwari*,[3] *Maharani* v. *Nanda Lal Misra*,[4] *Radha Mohan Dhar* v. *Ram Das De*,[5] *Grose* v. *Amrito Mai Dasi*,[6] *Shama Sundari Chaudhurani* v. *Jamuna Chaudhurani*,[7] *Chottu Misra* v. *Jemah Misra*,[8] *Adi Deo Singh* v. *Dukharam Singh*,[9] *Raghupati* v. *Tirumalai*,[10] and *Sheobarat Kuari* v. *Bhagwati Prasad*.[11]

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[1] W. R. (F. P.), 165; B. L. R., Sup. Vol., 48.

[2] Marsh., 622.

[3] 8 W. R., 273.

[4] 1 B. L. R. A. C., 27; 10 W. R., 73.

[5] 3 B. L. R., A.C., 363; 24 W.R 86, note.

[6] 4 B. L. R., O. C., 1; 12 W. R., O. C., 13.

[7] 24 W. R., 86.

[8] I. L. R., 6 Calc., 198; 6 C. L. R., 588.

[9] I. L. R., 5 All., 532.

[10] I. L. R., 15 Mad., 422.

[11] I. L. R., 17 All., 523.

In *Hari Das Datta* v. *Apurna Dasi and another*[1] it was held, that a Court of Equity will not interfere, unless it is shown that there is danger from the mode in which the tenant-for-life in possession is dealing with the property. The mere fact of the tenant-for-life keeping in hand for about three months part of the *corpus* for the alleged purpose of an illegal investment, does not amount to waste, nor is in derogation of those entitled in reversion. Some act of waste threatening the *corpus* of the property must be proved: *Budhan* v. *Fazlur Rahman*.[2] Again, in *Lal Sundar Das* v. *Hari Krishna Das*,[3] it was held, that where a Hindu widow, entitled to a life-estate, only granted a patni of the lands, this did not work a forfeiture entitling the reversioners to enter, and that they were not entitled to have the patni set aside. Also that, to justify divesting a Hindu widow of her possession on the ground of waste, there must be clear evidence of acts on her part tending to injure the reversioners. A conveyance by a Hindu widow for other than allowable causes of property which has descended to her from her husband is not an act of waste destroying her right, and vesting the property in the reversioners, but is binding only during the widow's lifetime: *Gobind Mani Dasi* v. *Sham Lal Baisakh*,[4] *Nobin Chandra Chakrabartti* v. *Issar Chandra Chakrabartti*,[5] *Kamikha Prasad Rai* v. *Jagadamba*,[6] *Antaji* v. *Dattaji*.[7] In *Raja Modhu Sudan Singh* v. *Rooke*,[8] it was held that a patni lease granted without legal necessity by a Hindu widow in possession of her husband's estate as heiress is voidable, the reversionary heir having the right to treat it as valid. An attempt at the false adoption of a

[1] 6 Moo., I. A., 433.
[2] 9 W. R., 362.
[3] Marsh., 113; 1 Ind. Jur., O. S. 32; 1 Hay, 339.
[4] W. R. (F. B.), 135; B. L. R. Sup. Vol., 48.
[5] 9 W. R., 505.
[6] 5 B. L. R., 508.
[7] 19 Bom., 36.
[8] L. R., 24 I. A., 164.

son is not an act of waste: *Kamal Mani Dasi* v. *Alhad Mani Dasi*.[1]

There has been some conflict of decision as to a Hindu widow's right to alienate accumulations from the income of her husband's estate. In some cases it has been said that she has no right to do so: *Grose* v. *Amrito Mai Dasi*,[2] *Bholanath Thakur* v. *Bhagobati Dai*,[3] *Bhagobati Dai* v. *Bholanath Thakur*.[4] In the majority of cases, however, it has been that she has: *Surjomani Dasi* v. *Dinobandhu Mallik*,[5] *Chandraboli Debi* v. *Brody*,[6] *Padmamani Dasi* v. *Dwarkanath Biswas*,[7] *Grish Chandra Rai* v. *Broughton*.[8] In the recent case of *Sowdaminee Dossee* v. *The Administrator-General of Bengal*,[9] it was held that a Hindu widow who received from the executor of her husband's will a fund representing the accumulated income of his estate for eight years after his death was entitled to the same as her absolute property and full power to alienate it.

Destructive trespass.

Other cases of actual physical injury to property done by strangers to the property itself are known as destructive trespass, as when the defendants either maliciously or from gross negligence allowed their cattle to trespass on the plantiff's land and to destroy the indigo plants thereon: *Srihari Rai* v. *Hills*,[10] and there may be destructive trespass by one co-sharer on the joint property: *Gopi Kishen Gosayan* v. *Hem Chandra Gosayan*:[11] or by a corporation, *Corporation of Calcutta* v. *Jadu Lall Mullick*.[12]

Physical injury to immoveable property by act done outside the property injured.

Actual physical injury is often done to immoveable property by an act done on or with the wrong-doer's pro-

[1] 1 W. R., 256.
[2] 4 B. L. R., O. C., 1; 12 W. R., O. C., 13.
[3] 7 B. L. R., 93; 15 W. R., 63.
[4] L. R., 2 I. A., 256; 24 W. R., 168.
[5] 9 Moo. I. A., 123.
[6] 9 W. R., 584.
[7] 25 W. R., 335.
[8] I. L. R., 14 Calc., 861.
[9] L. R., 20 I. A., 12.
[10] 9 W. R., 156.
[11] 13 W. R., 322.
[12] I. L. R., 21 Calc., 528.

perty outside the property injured. The strict maxim of law applicable to the enjoyment of all property is *sic utere tuo ut alienum non laedas*, and, according to this, whoever does any act, whether negligently or not, on or with his own property, whereby damage is done to the property of another, is held responsible for it. This matter was fully discussed in *The Madras Railway Company* v. *The Zamindar of Carvetinagaram*.[1] The plaintiff in this case had sued the defendant without averring negligence, because a reservoir, which was the property of the latter had burst, and the flood caused by its bursting had destroyed the permanent way in places and done other damage. The plaintiff took his stand on the maxim *sic ut ere tuo ut alienum non laedas* and on the case of *Rylands* v. *Fletcher*,[2] where Lord Cairns had discussed the question, and said :—"If a person brings or accumulates on his land anything, which, if it should escape, may cause damage to his neighbour, he does so at his own peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage. And this is good sense, for, if a person in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut alienum non laedat.*" While admitting the force of all that was said in *Rylands* v. *Fletcher*[3] and the high authority of the case, their Lordships of the Privy Council held, that the defendant in the case before them possessed, as regards this reservoir, powers analogous to statutory powers and could not, therefore, be held liable unless negligence were averred and proved. It would appear, too, that the doctrine laid down in *Rylands* v.

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[1] 14 B. L. R., 209 P. C.; L. R., 1 I. A., 364; 22 W. R., 279.

[2] L. R., 3 H. L., 330.

[3] L. R., 3 H. L., 330.

Fletcher[1] will be varied, if the damage was due to an act caused by *vis major*, or "the act of God." This was laid down in *Ram Lal Singh and others* v. *Lil Dhari Muhton*,[2] in which it was held, that where a defendant showed a prescriptive right to maintain a 'bund,' and used all reasonable and proper precautions for its safety, he could not be made liable for damage caused by the escape or overflow of the water on to the land of others, and the consequent injury of the crops thereon, if the escape or overflow be caused by the act of God, or *vis major*. Ainslie, J., stated, that *The Madras Railway Co.* v. *The Zamindar of Carvetinagaram*[3] was the converse of the present case, but the principle was the same. He also referred to *Nichols* v. *Marsland*,[4] a more recent case than *Rylands* v. *Fletcher*,[5] where an ornamental piece of water in defendant's lands burst its banks and inundated plaintiff's lands on the occurring of an unusually heavy storm. This disaster was held due to *vis major;* and the defendant, having been shown to have taken all reasonable precautions, was held not responsible. So, in the present case, the damage was caused by an unusual inundation, and the defendants were similarly held not liable. In another case, *Guru Charan Mallik* v. *Ram Datta*,[6] in which the plaintiff sued for damages caused to his land by the bursting of a 'bund' erected by the defendant, it was found that the 'bund' had been made in a lawful manner, and that the breach was owing to no fault of the defendant, so the defendant was held not to be liable. Similarly, in *Kadir Baksh Biswas* v. *Ram Nag Chaudhri*,[7] in which the plaintiffs sued for damages for injury done to their land by the overflow of salt

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[1] L. R., 3 H. L., 330.
[2] I. L. R., 3 Calc., 776.
[3] 14 B. L. R., 209 P. C.; 22 W. R., 379; L. R., 1 I. A., 364.
[4] 2 L. R., Ex. D., 1.
[5] L. R., 3 H. L., 330.
[6] 2 W. R., 43.
[7] 7 W. R., 44.

water from a river, which water entered the river from a *khal* or water-channel, and which overflow was said to be due to the defendant's not maintaining a dam with sluice gate so as to prevent the salt water from overflowing and damaging the cultivated lands of the plaintiffs, it was held that the defendants were not liable, as there was no proof that the *khal* had been opened by them, or with their sanction or knowledge. or that there had been any wrongful act or omission on their part. But in ordinary cases the maxim will invariably apply, and no amount of care or forethought will relieve a man of the responsibility for injury he has done in this way to the property of another.

Nuisances. A nuisance is an interference with, or an impairing of, the enjoyment of immoveable property. Nuisances are of two sorts,—(1) public ; (2) private. The definition of a public nuisance given by section 268, Indian Penal Code, is as follows :—

"A person is guilty of a public nuisance who does any act, or is guilty of an illegal omission, which causes any common injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage."

Public nuisances, as we have seen before in Chapter I, are not actionable, unless, apart from the inconvenience caused to the public at large, some special and separate injury is alleged.

Obstructions to and encroachments on public roads are common instances of such nuisances, and when a person has suffered damage and inconvenience beyond and in excess of what his neighbours have suffered, it is clear

that a suit for damages as well as for an injunction will lie in the Civil Court, *Purobashi Pal* v. *Bhuban Chandra De*,[1] *Raj Kumar Singh* v. *Sahibzada Rai*,[2] *Kazi Sujaudin* v. *Madhavdas*,[3] *Abzul Miah* v. *Nasir Mahommed*.[4] An instance of a suit relating to a private nuisance occurs in *The Land Mortgage Bank of India* v. *Ahmedbhoy Habibbhoy and another*,[5] in which compensation was obtained by the owner of a building against the proprietors of a cotton mill on account of certain rooms in the building which remained unlet owing to the noise and smoke of the mill, and an injunction was obtained prohibiting any increase of smoke, cotton-fluff or noise of machinery beyond what subsisted at the date of the decree.

The disturbance of a right of ferry was held to be a nuisance in *Nityahari Roy* v. *Dunne*[6] adopting the view held in *Yard* v. *Ford*.[7] In another case a plaintiff was held entitled to cut away the branches of the defendant's tree which overhung his lands : *Hari Krishna Joshi* v. *Shankar Vithal*.[8]

We have also seen before that statutory powers cannot be pleaded in extenuation of a private nuisance, unless the nuisance complained of was expressly contemplated by the Statute. Thus, in *Rajmohan Basu and another* v. *The East India Railway Co.*,[9] the plaintiffs, who were owners and occupiers of a house in Howrah, sued for an injunction to restrain a nuisance created by certain workshops, forges, and furnaces erected by the defendants, and for damages for injury sustained thereby. The workshops, &c., had been erected in 1867, under the sanction of the Bengal Government,

[1] 21 W. R., 408.
[2] I. L. R., 3 Calc., 20.
[3] I. L. R., 18 Bom., 693.
[4] I. L. R., 22 Calc., 551.
[5] I. L. R., 8 Bom., 35.
[6] I. L. R , 18 Calc., 652.
[7] 2 Saund., 172.
[8] 19 Bom., 420.
[9] 10 L. R., 241, O. C.

on land purchased by the Government and made over to the defendants. A nuisance having been proved to exist, *i.e.*, such annoyance as materially interfered with the ordinary comfort of human existence in the house, and having been proved to have caused sensible injury to the property of the plaintiffs, it was held, that the defendants could not succeed either on the plea of laches or acquiescence on the part of the plaintiffs, because the contrary was shown ; or on the plea that the nuisance was caused by them in the reasonable exercise of the statutory powers conferred on them by the Legislature, because the Statute did not expressly contemplate the creation of the nuisance.

Disturbance or usurpation of right.

I now come to those wrongs affecting immoveable property which are caused by disturbance or usurpation of right. Whether the disturbance or usurpation of right is effected *malâ fide* or *bonâ fide*, in either case the wrong-doer is a trespasser—that is to say, whether A occupies B's property *bonâ fide*, or seizes it from B by force, as the same injury is inflicted on B, in either case, the remedy under the civil law is the same in either case, *viz.*, restoration of the property to B, together with compensation in the shape of mesne profits for the time he has been kept out of it, subject to the provisions of the Statute of Limitations, or damages according to the nature of the case. It was decided in *Robinson* v. *Carey*,[1] where the defendant, who was the officer commanding the station at Barrackpur, quartered soldiers in the plaintiff's premises by virtue of an alleged right under the then existing military regulations, that the defendant was a mere stranger and trespasser and that the plaintiff was entitled to a decree against him for the damages sustained.

In *Baij Nath Prasad* v. *Badhu Singh and others*[2] *and Magna Chandra Chattoraj* v. *Sarbesar Chakrabartti and*

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[1] Ind. Jur. N. S. 88.

[2] 10 W. R., 486.

others,[1] dissenting from a ruling of the late Sudder Court at Calcutta, it was held, that mesne profits were always recoverable from a person who has enjoyed them, even though he has been in *bonâ fide* possession without knowledge of the defect in his title; and in *Ramsundar Chakravârtti* v. *Beckwith and others*[2] it was held, going further still, that mesne profits were recoverable from the vendee of a trespasser.

An attempt has been made by the High Court, Allahabad, to draw a distinction between trespassers, *bonâ fide* and others; for in the case of *Altaf Ali* v. *Lalji Mall*,[3] the majority of the Full Bench (Stuart, C. J., dissenting) held that in estimating the mesne profits which the owner of the land is entitled to recover from a trespasser, the latter may be allowed such costs of collecting the rents of the land as are ordinarily incurred by the owner, where such trespasser has entered and continued on the land in the exercise of a *bonâ fide* claim of right; but that where he has done so without any such *bonâ fide* belief that he was entitled to do so, the Court may refuse to allow such costs, although he may still claim all necessary payments, such as Government revenue or ground-rent.

Defences in actions for immoveable property.

In treating of actions in tort brought to recover immoveable property, or interests therein, from which the plaintiff has been wrongfully dispossessed, or which have been wrongfully withheld from him, it may be noted that the defences are mainly twofold: (*a*) that the defendant has a better title than the plaintiff; (*b*) that, by prescription, *i.e.*, by defendant's having held the immoveable property or enjoyed the interest for twelve years and upwards, the plaintiff's title has become extinguished and the defendant has acquired a good one. The first we are not particularly concerned with here;

[1] 8 W. R., 479. [2] 1 W. R., 255. [3] I. L. R., 1 All., 518.

the latter, as a mixed question of law and fact, demands a careful study.

Plea of adverse possession.

Act XV of 1877 (The Indian Limitation Act), sec. 28, enacts, that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property is extinguished." This goes further than sec. 29 of the old law, Act IX of 1871, which only enacted the above as regards land (in which on the maxim *quod hæret in solo cedit solo* would be included what land covers) or a hereditary office. Twelve years is the period limited by the Act (sched. ii, Act XV of 1877) for actions in tort for the recovery of immoveable property or any interest therein. This period runs from various dates according to the nature of the suit. For instance, the time from which the period begins to run, when a person has been dispossessed from, or has discontinued the possession, of immoveable property, is the date of the dispossession or discontinuance (art. 142, sched. ii of the Act), and where a suit is brought for the possession of immoveable property, or any interest therein, not provided for specially by the schedule, from the date the possession of the defendant became adverse to that of the plaintiff (art. 144, sched. ii of the Act). In cases, therefore, where the plaintiff has formerly had possession, but has either been dispossessed or has discontinued possession, if he omits to sue within twelve years from the date of his dispossession or discontinuance of possession, his title is extinguished, and the defendant has acquired a good title. In all other cases of suits for possession of immoveable property or interests therein, unless specially provided for by arts. 134, 135, 136, &c., &c., of sched. ii of the Act, the date at which the possession became adverse to the plaintiff is selected as the starting point for time to run towards limitation; and if he fails or omits to sue within twelve

years from that date, his right is extinguished, and the defendant has acquired a good title. Thus, in *Bijai Chandra Banarji* v. *Kali Prasanno Mukharji*,[1] Markby, J., said :—"If by adverse possession the statute is set running, and it continues to run for twelve years, then the title of the true owner is extinguished, and the person in possession becomes the true owner." This doctrine of the extinguishment of title of the true owner, and the acquiring of a good title by the trespasser, was previously laid down in *Gosain Das Chandra* v. *Issar Chandra Nath*,[2] where it was held, that twelve years' continuous adverse possession of land not only bars the remedy and extinguishes the title of a rightful owner, but confers a good title on the wrong-doer. This decision was based on the construction put by the Calcutta High Court on the judgment of the Privy Council in *Ganga Govind Mandal* v. *The Collector of the 24-Parganas*,[3] where it was held, that such continuous possession for upwards of twelve years bars the remedy : and Garth, C. J., in the Calcutta case above quoted, said that the construction the Calcutta Court had given to the law as laid down by the Privy Council was that a twelve years' possession by a wrong-doer not only extinguishes the title of the rightful owner, but that it further confers a good title upon the wrong-doer. This has also been laid down in *Baroda Kant Rai* v. *Pran Krishn Paroi*,[4] *Ram Sahai Singh* v. *Kuldip Singh*,[5] *Amirunnissa Khatun* v. *Umar Khan*,[6] *Ram Lochan Chakrabartti* v. *Ram Sundar Chakrabartti*,[7] *Brindaban Chandra Rai* v. *Tara Chand Banarji*,[8] *Narsingh Das* v. *Musharu Bhandari*,[9] *Golak Chandra*

[1] I. L. R., 4 Calc., 327.
[2] I. L. R., 3 Calc., 224.
[3] 11 Moo. I. A., 345 ; 7 W. R. P. C., 21.
[4] 3 B. L. R., A. C., 343 ; 12 W. R., 192.
[5] 15 W. R., 80.
[6] 8 B. L. R., 540 ; 17 W. R., 119
[7] 20 W. R., 104.
[8] 11 B. L. R., 237 ; 20 W. R., 114.
[9] 25 W. R., 282.

Masanta v. *Nando Kumar Rai*,[1] *Radhabhai and Ram Chandra Konher* v. *Anantrav Bhagvant Deshpande*,[2] *Badesab* v. *Hanmanta*,[3] and *Jagrani Gangeshi*.[4] The Calcutta Court has also gone further, and held that the title of the wrong-doer can be transferred to a third person whilst it is in the course of acquisition, and before it has been perfected by a twelve years' possession, so as to be perfected after the twelve years have passed by reckoning both the wrong-doer's and his transferee's possession: *Brindaban Chandra Rai* v. *Tara Chand Bandhopadhya*.[5]

Further, it was held in *Namder* v. *Ramchandra Gomaji Marwadi*[6] that where the plaintiff had purchased certain property at an auction sale in execution of a decree but had left the judgment-debtor in actual possession the defendant who subsequently purchased the property from the judgment-debtor could avail himself of the judgment-debtor's possession which was adverse to the plaintiff: *cf. Harjivan* v. *Shivram*.[7]

Possession.

It will be useful here to discuss what is meant by the words 'possession,' 'dispossession,' 'discontinuance of possession,' and 'adverse possession.' The remarks of Peacock, C. J., in *Watson & Co.* v. *The Government and others*,[8] as to what 'possession' is, are in point here. He said: "The marks of possession, therefore, with regard to property, depend upon the nature of the property. It is not necessary in order to prove possession to prove an actual bodily continuous possession:" and he quoted Domat's Civil Law, p. 846, para. 2130,—"Thus, one possesses lands by cultivating them, reaping the fruits, going or coming through them, or disposing thereof at pleasure:" and again p. 847, para.

[1] I. L. R., 4 Calc., 699; 3 C. L. R., 450.
[2] I. L. R., 9 Bom., 198.
[3] 21 Bom., 509.
[4] I. L. R., 3 All., 435.
[5] 11 B. L. R., 237; 20 W. R., 114.
[6] I. L. R., 18 Bom. 37.
[7] I. L. R., 19 Bom., 620.
[8] 3 W. R., 73.

2132,—"Although possession implies the detention of what we possess, yet this detention ought not to be so understood as if it was necessary to have always either in our hand or in our sight things of which we have possession. But after possession is once acquired it is preserved without actual possession." Thus, the owner of a thing may retain possession of it through a servant, trustee, or other representative. A landlord is in constructive possession of the soil through his tenant, and when he participates in the crops with his tenant, who merely gets a share of the crops in lieu of wages, he may even be held to be in actual possession of it, so as to enable him to sue in trespass for loss of the produce or damage to the property; *Venkatachalam Chetti* v. *Andiappan Ambalam*.[1] If, however, the interest of the tenant is heritable, transferable and perpetual, then his possession cannot be considered as the possession of the grantor of the lease or of the true owner of the land, but it is clearly possession on his own behalf: *Bijai Chandra Banarji* v. *Kali Prasanno Mukharji*.[2]

Modes of possession.

There has been much discussion as to the various modes in which the possession of land can be enjoyed and what evidence should be accepted as proof of possession. In *Sivasubramanya* v. *The Secretary of State for India*,[3] the Madras High Court has said that "when there is an intention to hold a thing as owner, it is not necessary that it should be enjoyed in any particular way, but it is sufficient if some overt act is done upon the thing in the execution of such intention."

The Calcutta High Court in *Watson & Co.* v. *Government*[4] has said:—"The exercise of such acts of ownership over jungle lands as would ordinarily be exercised over property of that description would be evidence of posses-

[1] I. L. R., 2 Mad., 232.
[2] I. L. R., 4 Calc., 327.
[3] I. L. R., 9 Mad., 203.
[4] 3 W. R., 73.

sion. Those who have to deal with the facts of the case must determine whether the acts were referable to the right of property or possession, or acts of mere right of easement independent of possession." Again, in *Mahomad Ali Khan* v. *Abdul Ghani*,[1] it has observed that "possession is not necessarily the same thing as actual user. The nature of the possession to be looked for and the evidence of its continuance must depend upon the character and condition of the land in dispute. Land is often either permanently or temporarily incapable of actual enjoyment in any of the customary modes, as by residence or tillage or receipts of a settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand by an inundation ; it may produce some profit, but trifling in amount, and only of occasional occurrence, as is often the case with jungle land. In such cases it would be unreasonable to look for the same evidence of possession as in the case of a house or of a cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land." In *Mohini Mohan Das* v. *Krishna Kishor Datta*[2] which was a suit for the possession of a plot of land covered with water, the plaintiff proved that he had exercised rights of fishing over it, when it was so covered. It was thereupon held that in the absence of proof that the exercise of such rights was referable to some other right, such exercise was an act of possession and ownership. So, in *Sivasubramanya* v. *Secretary of State for India*,[3] previously cited, the plaintiff proved that he and his ancestors had cut wood, pastured cattle, and gathered forest produce in certain forests for fifty years, and it was held that as these acts had been done

[1] I. L. R., 9 Calc., 744 ; 12 C. L. R., 257.

[2] I. L. R., 9 Calc., 802 ; 12 C. L. R., 337.

[3] I. L. R., 9 Mad., 285.

under the belief and assertion that the forests formed portion of the zamindari, and that the plaintiff and his ancestors were owners of them, these acts were evidence of possession. "In principle," it was said, "the act done is one of ownership or evidence of easement according as the person doing it asserts ownership or a particular right in another's property—and, further, the enjoyment of any right of ownership over the soil, whether it be the cutting of timber or of turf or the gathering of produce is *primâ facie* proof of ownership of the soil." In *Gangaram* v. *The Secretary of State for India*[1] neither side was able to prove any title to the land in dispute, but the plaintiff proved that he had been in possession for ten years and had built a shed upon it, upon which facts the Court held, following the ruling of their Lordships of the Privy Council in *Ismail Ariff* v. *Mahomed Ghouse*,[2] that though no declaration of the plaintiff's title could be made, he was entitled to the land and the shed upon it. Possession is *primâ facie* evidence of title and is primarily exclusive, and it is for him who impugns the exclusive title to show that the possession originated in a way not to affect his own right: *Krishnacharya* v. *Lingawa*.[3]

Legal presumptions in suits for possession of immoveable property.

I will now allude to certain presumptions with regard to possession, which the Courts have held may be made. The general rule is that when a plaintiff sues for possession of land from which he alleges he has been dispossessed, he must not only prove title, but possession and dispossession within the twelve years previous to the suit, or must show that his cause of action accrued within that period. The leading case on the subject is that of *Nitressur Singh* v. *Nand Lal Singh*.[4] There are numerous other cases to the same effect: *Sidhi Nazir Ali Khan* v. *Umesh Chandra Mittra*,[5] *Buli Singh* v. *Harobans Narain*

[1] 20 Bom., 793. [2] L. R., 20 I. A., 99. [3] I. L. R., 20 Bom., 270.
[4] 8 Moo. I. A., 199; 1 W. R., P. C., 51. [5] 2 W. R., 75.

Singh,[1] *Lal Singh* v. *Madhu Sudan Rai*,[2] *Prahlad Sen* v. *Budhu Singh*,[3] *Bir Chandra* v. *Deputy Collector of Bhalluah*,[4] *Basirunnissa Chaudhurani* v. *Lilanand Singh*,[5] *Amir Ali* v. *Indrojit Koer*,[6] *Gosain Das Kundu* v. *Siru Kumari Debi*,[7] *Niljari* v. *Majibullah*,[8] *Kali Narain Basu* v. *Anand Mai Gupta*,[9] *Lachu Khan* v. *Foley*,[10] *Mahomed Kabir* v. *Abdul Azim*,[11] *Khuda Newaz Chaudhri* v. *Brajendro Kumar Rai Chaudhri*,[12] *Ranjit Singh* v. *Schoene, Kilburn and others*,[13] *Mahomed Ibrahim* v. *Morrison*,[14] and *Secretary of State for India* v. *Kota Bapanamma Garu*.[15] As stated in *Lachho* v. *Har Sahai*,[16] it is usual for the plaintiff who seeks ejectment to prove his title, the presumption of law being that possession indicates ownership.

Possession goes with title.

On the other hand, where the question of possession is doubtful, a presumption will arise in favour of the party who proves title: *Ranjit Ram Pande* v. *Gobardhan Pande*,[17] *Mohima Chandra De Sirkar* v. *Haro Lal Sirkar*,[18] *Dharm Singh* v. *Har Prasad Singh*.[19] In the first of these cases, their Lordships of the Privy Council say:—"In the midst, therefore, of this conflicting evidence, their Lordships think it right to consider whether there is any presumption to be derived from the other parts of the case in favour of the one side or the other. Now, the ordinary presumption would be that possession went with the title. The presumption cannot, of course, be of any avail in the

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[1] 7 W. R., 212.
[2] 8 W. R., 426.
[3] 12 Moo. I. A., 275; 2 B. L.R., P. C., 111; 12 W R., P. C., 6.
[4] 13 W. R., P. C., 23.
[5] 14 W. R., 135.
[6] 15 W. R., 43.
[7] 19 W. R., 192; 12 B. L. R., 219.
[8] 19 W. R., 209.
[9] 21 W. R., 79.
[10] 24 W. R., 273.
[11] 24 W. R., 315.
[12] 24 W. R., 417.
[13] 4 C. L. R., 390.
[14] I. L. R., 5 Calc., 36.
[15] 19 Mad., 165.
[16] I. L. R., 12 All., 46.
[17] 20 W. R., 25.
[18] I. L. R., 3 Calc., 768; 2 C. L. R., 364.
[19] I L. R., 12 Calc., 38.

presence of clear evidence to the contrary; but where there is strong evidence of possession, as there is here on the part of the respondents, opposed by evidence, apparently strong also, on the part of the appellants, their Lordships think that in estimating the weight due to the evidence on both sides, the presumption may, under the peculiar circumstances of this case, be regarded; and that with the aid of it there is a stronger probability that the respondents' case is true than that of the appellants."

Presumption of possession in case of waste, jungle and accreted land.

A similar presumption may be made with regard to waste and jungle land, *Watson and Co.* v. *Government*,[1] *Mahomed Basir* v. *Karim Baksh*,[2] *Lilanand Singh* v. *Basirunnissa*,[3] *Mitrojit Singh* v. *Radha Prasad Singh*,[4] *Mochiram* v. *Bissambhar Rai Chaudhri*,[5] *Mohamed Ibrahim* v. *Morrison*,[6] *Ram Bandhu* v. *Kusu Bhattu*,[7] *Mahomed Ali Khan* v. *Abdul Ghani*,[8] to land formed by the gradual drying up of lakes or water channels, *Radha Gobind Roy Saheb* v. *Inglis*,[9] *Sunad Ali* v. *Karimunnissa*,[10] *Mohini Mohan Das* v. *Krishna Kishor Datta*,[11] and to land diluviated and then reformed by the gradual action of a river; *Kali Charan Sahu* v. *Secretary of State for India*,[12] *Man Mohan Ghosh* v. *Mathura Mohan Rai*,[13] *Gunga Kumar Mittar* v. *Ashutosh Gossami*.[14]

In one of the above cited cases, *viz.*, *Rahda Gobind Roy Saheb* v. *Inglis*, however, it would appear as if the Privy Council had gone so far as to lay down that in suits for the possession of land, when the title of the plaintiff is

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[1] 3 W. R., 73.
[2] 11 W. R., 267.
[3] 16 W. R., 102.
[4] 23 W. R., 368.
[5] 24 W. R., 410.
[6] I. L. R., 5 Calc., 36.
[7] 5 C. L. R., 481.
[8] I. L. R., 9 Calc., 744; 12 C. L. R., 25.
[9] 7 C. L. R., 364.
[10] 9 W. R., 124.
[11] 12 C. L. R., 587; I. L. R., 9 Calc., 802.
[12] I. L. R., 6 Calc., 725; 8 C. L. R., 90.
[13] I. L. R., 7 Calc., 225; 8 C. L. R., 126.
[14] I. L. R., 23 Calc., 863.

admitted or established, the burden of proof is then on the defendant. This suit related to land, which at one time had formed the bed of a large *bhil* or lake, but which had become dry and culturable, and it was said by their Lordships that, as the plaintiff had proved his title, the onus of proof lay on the defendant and that it was for the defendant to prove that the plaintiff had lost his title by reason of his (the defendant's) adverse possession. Various attempts have since been made by the Courts of this country to reconcile this decision with their Lordships' earlier decision in the case of *Nitressar Singh* v. *Nando Lal Sing*.[1] See *Kali Charan Sahu* v. *Secretary of State*,[2] *Man Mohan Ghosh* v. *Mathura Mohan Rai*,[3] *Mahomed Ali Khan* v. *Abdul Ghani*,[4] *The Secretary of State* v. *Vira Rayan*,[5] *Moro Desai* v. *Ram Chandra Desai*.[6] In *The Secretary of State* v. *Vira Rayan*, the Madras High Court said that the probable explanation of the ruling in *Radha Gobind Roy Saheb's* case is that when a plaintiff proves title and possession, it is to be presumed that his possession continues till the defendant proves that the title was interrupted, but that where the plaintiff can prove title only and not possession, he must prove that the adverse possession of the defendant, or the acts of which he complains as impugning his title, occurred within the period prescribed by the Limitation Act. Garth, C. J., in *Mahomed Ali Khan* v. *Abdul Ghani*,[7] approved of this mode of reconciling the two decisions. The Bombay High Court, however, in *Moro Desai* v. *Ram Chandra Desai*, overcame the difficulty by observing that in their opinion the Privy Council by their

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[1] 8 Moo. I. A., 199; 1 W. R., P. C., 51.

[2] I. L. R., 6 Calc., 725; 8 C. L. R., 90.

[3] I. L. R., 7 Calc., 225; 8 C. L. R., 126.

[4] I. L. R., 9 Calc., 744; 12 C. L. R., 257.

[5] I. L. R. 9 Mad., 175.

[6] I. L. R., 6 Bom., 508.

[7] I. L. R., 9 Calc., 744; 12 C. L. R., 257.

decision in *Radha Gobind Roy Saheb* v. *Inglis*, did not mean to interfere with the general rule that, when a plaintiff claims land from which he has been dispossessed, the burden is upon him to prove possession and dispossession within twelve years, or at least that the cause of action arose within that period.

Presumption as to possession in case of *chur* land.

The question of the presumption as to possession which may be made in favour of a plaintiff has been much discussed in cases in which the subject of dispute was *chur* land, or land formed by alluvion. In *Gopal Krishna Sen* v. *David*,[1] which was a suit in which *chur* land was claimed partly as a reformation on the original site of diluviated land, and partly as an accretion to the mainland, and in which adverse possession was pleaded by the defendant, it was held that the plaintiff must prove that the land in dispute before it diluviated or disappeared was in the possession of his vendor. In *Mahomed Ibrahim* v. *Morrison*,[2] which was also a suit in respect of *chur* land, Mitter, J., said: "It is a settled rule of law in this country, that whenever the plea of limitation is raised, it is for the plaintiff to show *primâ facie* that the cause of action on which he is suing is not barred. But the case of *chur* land (land formed by alluvion) has been said to be an exception, and the reason suggested for the exception is, that *chur* lands, during the first few years, are not generally cultivated. To a certain extent this appears to us to be correct. Where limitation is pleaded in a suit, the subject-matter of which is *chur* land not brought under cultivation, it is for the defendant, before he can succeed in his plea, to establish that he has exercised adverse rights of ownership over the disputed land for more than twelve years. But when the suit relates to a piece of *chur* land already brought under cultivation, the plaintiff, in order to get over the plea of limitation, must

[1] 23 W. R., 443. [2] I. L. R., 5 Calc., 36.

at least establish that either the land in suit formed within twelve years or was not in a fit state of cultivation within that period."

In *Kalicharan Sahu and others* v. *The Secretary of State for India*,[1] in which case also the question arose on whom the burden of proof lay in a suit to recover possession of diluviated land, it was held *per* Garth, C. J., that where the plaintiff could show that he held possession of certain lands prior to diluvion, his possession must be taken as continuing during diluvion until he became dispossessed, and that the *onus* lay on the defendant, the dispossessor to show that he had acquired a title under the law of limitation which had put an end to the rights of the original possessor. The defendant in this case was, however, able to show that he had taken possession of the land in dispute under a claim of right, and had held it for four or five years before it again diluviated. It was accordingly decided that his possession must be presumed to have continued during the period of submergence, and as he took possession again as soon as the land became culturable, and the total period of his possession in this way exceeded twelve years, the plaintiff's title was extinguished, and the defendant had acquired a good title to the land.

In the subsequent case of *Man Mohan Ghosh* v. *Mathura Mohan Rai*,[2] which was also a suit in respect of *chur* land, Wilson, J., laid down as undoubted the following propositions :—1st, that, as a general rule, when the plaintiff claims land from which he alleges he has been dispossessed, the burden is upon him to show possession and dispossession within twelve years ; 2nd, that when the diluviation has been more than

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[1] I. L. R., 6 Calc., 725; 8 C. L. R., 96.

[2] I. L. R., 7 Calc., 225; 8 C. L. R., 126.

twelve years before suit, the claimant, unless he can show possession since reformation, must at least show, that he was in possession down to the date of diluviation; 3rd, that when the true owner is in possession at the time of diluviation, his possession is presumed to continue as long as the land continues submerged, probably also afterwards until he is dispossessed. "This proposition, however," it was said, "would not be sufficient to shift the burden of proof. It would leave it upon the plaintiff; but would enable him to prove his case either by showing the dispossession to have been in fact within twelve years; or that the submergence has continued down to within twelve years; so that his possession cannot have been interfered with more than twelve years ago. But then," it was added, "arises the question whether we ought not to presume something further in favor of the plaintiff, whether when he has proved his possession down to the period of diluviation, and has shown the diluviation to have occurred at such a date, and under such circumstances as in this case, we ought not to presume the submergence, and with it the plaintiff's possession to have continued until the contrary is shown. If this presumption can properly be made, the burden is shifted to the defendant of showing adverse possession for twelve years. Upon principle, I think such a presumption may properly be made." After examining the authorities upon the subject, Wilson, J., held that they too were in favor of the making of such a presumption. In the same case, Field, J., observed that the principle to be gathered from the cases is that although according to the general rule it lies upon the plaintiff, who is met with the plea of limitation to show his own possession within twelve years before the institution of the suit, when the property in the suit is capable of actual and visible possession, yet from the nature of the thing an exception must be made to this

general rule in the case of property which is not capable of actual and visible possession. In respect of this latter class of cases, it appears to be only reasonable to say that, when the title and possession have been proved up to a certain point of time, when there has been no transfer of title to any third person, and there is no evidence that possession was exercised by a person other than the person having the title, so long as actual visible possession was possible, the possession of the person having the title will be presumed to continue till the property has again become susceptible of actual visible possession. Again, in *Mahomed Ali Khan* v. *Abdul Ghani*,[1] in which the subject of dispute was jungle land, but in which the case of land in general either permanently or temporarily incapable of actual enjoyment was considered, it was held by a Full Bench that the rule on this subject was a follows :— "Where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also, till the contrary is shown." It was, however, added that the presumption spoken of was in no sense a conclusive one, and that its bearing on each particular case must depend upon the circumstances of the case, and was always liable to be rebutted by evidence. The rule laid down in this case was followed in *Mohini Mohan Dass* v. *Krishna Kishor Datta*,[2] which was a suit for possession of land which was covered with water more than twelve years before the institution of the suit, and in which the plaintiff proved that he had exercised acts of ownership

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[1] I. L. R., 9 Calc., 744 ; 12 C. L. R., 257.

[2] I. L. R., 9 Calc., 802 ; 12 C. L. R., 377.

as by letting out the jalkar to tenants when the land was covered with water. It was therefore held that, unless the defendant could make out a twelve years' statutory title by adverse possession, the plaintiff's possession must be presumed to have continued, and that it was not necessary for him to show a possession by acts of ownership within the twelve years. Where the plaintiff sued to recover possession of certain land alleging that he had obtained possession as purchaser and that his possession was obstructed by the defendants, it was held that the case fell under article 142 of the Limitation Act (XV of 1877) and that the plaintiff must show that he or those from whom he claimed had been in possession within twelve years before suit and could not rest merely on proof of title: *Faki Abdulla* v. *Babaji Gungaji*.[1]

Possession a portion may be presumed to extend over whole of subject-matter of suit.

Another presumption which has been held to arise in suits for possession is that when a party proves his possession of a certain portion of a tract of land with a defined boundary, his possession may be presumed to extend over the remainder of the tract; *Sivasubra Munya* v. *Secretary of State for India*,[2] *Sunad Ali* v. *Karimunnissa*,[3] *Bijai Nath Chatarji* v. *Bengal Coal Co.*[4]

Possession may be presumed to have existed at antecedent period.

Finally, it may be pointed out that when possession at a certain time has been satisfactorily proved, a presumption of possession at an antecedent period may in certain circumstances arise. Thus, in *Ananga Manjair Chaudhurani* v. *Tripura Sundari Chaudhurani*,[5] their Lordships of the Privy Council remarked:—"When the state of possession for a long period has been satisfactorily proved, in the absence of evidence to the contrary, *presumitur retro*."

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[1] I. L. R., 14 Bom., 458.
[2] I. L. R., 9 Mad., 285.
[3] 9 W. R., 124.
[4] 23 W. R., C. R., 45.
[5] I. L. R., 14 Calc., 740.

Can plaintiff succeed on proof of previous possession and dispossession without proof of title?

An important point on which the Calcutta, Madras and Bombay High Courts are at variance is as to whether a plaintiff in a suit for possession of immoveable property other than a suit under section 9 of the Specific Relief Act is entitled to succeed merely upon proof of previous possession and dispossession by the defendant, or whether he is bound to prove title. All the earlier cases of the Calcutta High Court are in favor of the plaintiff's right to succeed in such a suit upon mere proof of previous peaceable possession and of dispossession :— *Jadabnath* v. *Ram Sundar Sarmah*,[1] *Inayatullah Chaudhri* v. *Krishna Sundar Sarmah*,[2] *Radha Ballabh Gosain* v. *Krishna Gobind Gosain*,[3] *Dabji Sahu* v. *Tamizudin*, *Ayesha* v. *Kanhai Mullah*,[5] *Shama Sundari Debi* v. *The Collector of Maldah*,[6] *Trilochan Ghosh* v. *Kailashnath Bhattacharji*,[7] *Gaur Paroi* v. *Uma Sundari Debi*,[8] *Nagor Mani Debi* v. *Smith*.[9] In the case of *Kawa Manjhi* v. *Khawaj Nashyo*,[10] however, the Bench (Morris and Prinsep, JJ.), disagreed. The opinion of Morris, J., which as that of the senior judge prevailed, was that as the plaintiff had proved that he had been in possession of the land in suit, and had been ousted by the defendants he was entitled to succeed, as possession is *prima facie* evidence of title, and cannot be disturbed unless the party so disturbing it can show a better title. Prinsep, J., however, dissented, and held that proof of prior possession and of illegal dispossession is not sufficient evidence of title except in a possessory suit under the Specific Relief Act. He further expressed an opinion that the presumption of a good title which section 110 of the Evidence

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[1] 7 W. R., 174.
[2] 8 W. R., 386.
[3] 9 W. R., 71.
[4] 10 W. R., 102.
[5] 12 W. R., 146.
[6] 12 W. R., 164.
[7] 12 W. R., 175.
[8] 12 W. R., 472.
[9] 23 W. R., 291.
[10] 5 C. L. R., 278.

Act gives to one who is in possession of land is only to be made in favor of actual and present possession, the section not declaring generally that possession shall always be *primâ facie* evidence of title. Subsequently, in two other cases, *viz.*, *Mahabir Prasad Singh* v. *Mahabir Singh*,[1] and *Brajo Sundar Gosami* v. *Kailash Chandra Kar*,[2] it was held that proof of quiet possession at the time of disturbance is sufficient to establish a *primâ facie* case against a trespasser. After this, the views of the Calcutta High Court changed, and in *Debi Charan Boido* v. *Ishar Chundra Manji*,[3] and *Ertaza Hossain* v. *Beni Mistri*,[4] it was held that mere recent possession would not entitle a plaintiff to obtain a decree for recovery of possession except under the Specific Relief Act, which entitles him to recover possession if the suit is brought within six months from the date of dispossession. These decisions were founded on a passage in the judgment of their Lordships of the Privy Council in *Wise* v. *Amirunnissa Khatun*,[5] in which it was said :— "If the plaintiffs had wished to contend that the defendants had been wrongfully put in possession and that the plaintiffs were entitled to recover on the strength of their previous possession without entering into a question of title at all, they ought to have brought their action within six months under section 15 of Act XIV of 1859 ; but they did not do so. The High Court with reference to this point say (and, in their Lordship's opinion correctly say) : 'lands to which the plaintiff is unable to make out a title cannot be recovered on the ground of previous possession merely, except in a suit under section 15 of Act XIV of 1859, which must be

[1] I. L. R., 7 Calc., 591 ; 9 C. L. R., 164.
[2] 11 C. L. R., 133.
[3] I. L. R., 9 Calc., 39 ; 11 C. L. R., 342.
[4] I. L. R., 9 Calc., 130 ; 11 C. L. R., 393.
[5] L. R., 7 I. A., 73.

brought within six months from the date of dispossession.'" This later view has been adhered to in the recent case of *Parmeshar Chaudhri* v. *Brajo Lal Chaudhri*.[1]

The views of the Madras High Court on this question appear to be in accord with the recent rulings of the Calcutta High Court: *Rassonada* v. *Sitharama*[2] and *Tirumalasami* v. *Ramasami*;[3] but there have been no cases on this point recently decided by the Madras High Court.

The course of opinion in Bombay has been the opposite to that in Calcutta. The Bombay High Court at first held views similar to those now held by the Calcutta High Court. In *Dadabhai Narsidas* v. *Sub-Collector of Broach*,[4] it was said that "the law of India requires that in an action for ejectment we should always enforce the ordinary rule that a plaintiff should always recover by the strength of his own legal title. My reason for this is that the law of this country gives to a person who is dispossessed of property a remedy which the law of England does not provide; and that if he does not choose to avail himself of this remedy, he has no claim to the advantages which it would have secured to him." This was followed in *Lakshmibhai* v. *Vithal Ram Chundra*.[5] Subsequently, however, in a Full Bench judgment delivered by Westropp, C.J., in *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti*[6] it was laid down that possession is a good title against all persons but the rightful owner, and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses him. This was followed in *Krishnarav Yashvant* v. *Vasudeb Apaji*

[1] I. L. R., 17 Calc., 256.
[2] 2 Mad. H. C. Rep., 171.
[3] 6 Mad. H. C. Rep., 420.
[4] 7 Bom. H. C. R., 82.
[5] 9 Bom. H. C. R., 53.
[6] I. L. R., 6 Bom., 215.

Ghotikar[1] in which *Dadabhai Narsidas* v. *The Sub-Collector of Broach* was dissented from, and it was said that the passage in the Privy Council judgment in *Wise* v. *Amirunnissa Khatun* had not the effect attributed to it by the Calcutta High Court.

The question was also raised, though not expressly decided, in a recent case, *Lachho* v. *Har Sahai*[2] in the Allahabad High Court. In this case, which was a suit for the possession of immoveable property, the plaintiff proved that he and his predecessors in title had been in undisturbed possession for thirty or forty years previous to his dispossession by the defendant. The defendant alleged but failed to prove that the plaintiff had paid him rent as a tenant at will. Mahmud, J., before whom the case came, remarked that this would go far to prove that the plaintiff's possession was adverse. He also observed :—"It seems to me that it is usually for the plaintiff who seeks ejectment to prove his title. But I also hold that when possession for thirty or forty years is proved to have been peaceably enjoyed, the person who has recently dispossessed such plaintiff has to meet the presumption of law, that the plaintiff's long possession indicates his ownership of the property." As the lower court had erroneously regarded the plaintiff as only a licensee of the defendants, the case was accordingly remanded for disposal on the merits. The views of Mr. Justice Mahmud in this case would seem to be in favour of the view taken by the Calcutta High Court of this question, for long possession would certainly be regarded by the Calcutta High Court as good evidence of title. According to the ruling of the Privy Council in *Ismail Ariff* v. *Mahomed Ghouse*,[3] lawful possession of land is sufficient

[1] I. L. R., 8 Bom., 371. [2] I. L. R., 12 All., 46.
[3] L. R., 20 I. A., 99.

evidence of right as owner as against a person who has no title whatever and is a mere trespasser.

It is clear that when a plaintiff in a suit for possession proves only previous possession and fails to prove a forcible ouster by the defendant, he is not entitled to succeed: *Arumugam* v. *Perriyannam*.[1]

Symbolical possession.

The question has arisen whether formal or symbolical possession given by a Court in execution of a decree in accordance with the provisions of the law, can be looked upon as such possession as will defeat limitation. In *Ambica Charan Gupta* v. *Madhab Ghosal and others*,[2] it was held that formal possession, given to a decree-holder by an officer of the Court in execution of his decree, was sufficient to give him a fresh cause of action, notwithstanding that he might never have obtained actual possession at any time within twelve years from the time when such formal possession was given. In this case a former decision of the Court—*Piari Mohan Poddar* v. *Jagabandhu Sen*[3] was dissented from on the ground that it was opposed to the decision of the Privy Council in *Ganga Gobind Mandal* v. *Bhupal Chandra Biswas*,[4] where their Lordships observed: "Joykristo executed the decree, under which a five-anna share was delivered to him in the manner in which delivery is made under executions of decrees for land in the possession of ryots,—*viz.*, by beat of drum and the affixing of bamboos, and he filed a receipt for the same in the Court of the Principal Sadder Ameen. The decree and execution put an end altogether to limitation. It is immaterial whether Joykristo obtained actual possession or not." This was also the view taken in *Kunjo Mohan Das* v. *Nabo Kumar Saha*[5] But in *Shotinath Mukharji and*

[1] 25 W. R., P. C., 81.
[2] I. L. R., 4 Calc., 870.
[3] 24 W. R., 418.
[4] 19 W. R., 101.
[5] I. L. R., 4 Calc., 216.

others v. *Abhai Nand Rai and others*,[1] it was held, that symbolical possession, such as may be given by the Nazir of a Court, by sticking a bamboo on the ground, or the like, of a dwelling-house, or of a share in a dwelling-house, of which actual possession might have been granted, was not such a *bonâ fide* possession as to save limitation. In this case the plaintiffs, in 1863, purchased a half share in a dwelling-house, at a sale in execution of a decree. In 1869, the Nazir of the Court gave them symbolical possession. In 1871, with the aid of the Nazir, the plaintiffs entered the house and for the space of about a minute remained in possession of one of the rooms of the house, when the defendants turned them out. It was held, that neither the symbolical possession given by the Nazir in 1869, nor the momentary possession attained in 1871, could save limitation ; and as the suit was brought more than twelve years from the 31st January 1863, when the plaintiffs first became entitled to possession, it was barred by limitation. Jackson, J., also considered that the Munsiff had no jurisdiction to give orders for the plaintiffs to be put in possession in 1869, or in 1871, six and eight years after the suit was decided in their favour. (But see *contra* on this point, *Kylasa Goundan* v. *Ramasami*,[2] *Vithal Janardan* v. *Vithojirav Putlajirav*,[3] *Devidas* v. *Pirjada*,[4] *In re Lakshman*.[5]) As there could be no doubt that this decision conflicted with the first decision quoted, the Judges of a Division Bench of the Calcutta High Court in the case of *Jagabandhu Mukharji* v. *Ram Chandra Baisakh*[6] made a reference to a Full Bench, stating that there was a conflict on this point

[1] I. L. R., 5 Calc., 331.
[2] I. L. R., 4 Mad., 172.
[3] I. L. R., 6 Bom., 586.
[4] I. L. R., 8 Bom., 377.
[5] I. L. R., 9 Bom., 472.
[6] I. L. R., 5 Calc., 584 ; 5 C. L. R., 548.

between decisions of the Division Benches, and that it was desirable to settle it. So the matter was referred to the Full Bench for decision, the point mainly to be considered in their opinion being whether the words of the decision of the Privy Council in the *Mandals'* case, as it is called, were to be taken as an exposition of the law generally, or were only to be considered with reference to the particular facts on the record of that case. On this the Full Bench, after carefully perusing the judgment of the Privy Council, and referring to the facts, stated that they did not consider that the *Mandals'* case was in point, and in the case before them held, without taking that case into consideration, that delivery of possession by going through the process prescribed by sec. 224 of Act VIII of 1859 was the only way in which the decree of the Court awarding possession to a plaintiff could be enforced; and as in contemplation of law both parties must be considered as being present when the delivery was made, such delivery must, as against the judgment-debtor be deemed equivalent to actual possession. As against third parties, it was said, such symbolical possession would be of no avail, because they were not parties to the proceedings. But if the defendant subsequently dispossessed the plaintiff by receiving rent and profits, the plaintiff would have twelve years from the date of dispossession to bring his suit.

This ruling was followed by the Calcutta High Court in *Mozaffar Wahid* v. *Abdus Samad*,[1] *Lokessar Koer* v. *Pargan Rai*,[2] *Dayanidhi Panda* v. *Kalai Panda*,[3] *Ranjit Singh* v. *Banwari Lal Sahu*,[4] *Shama Charan Chatarji* v. *Madhab Chandra Mukharji*,[5] *Gossami Dalmar Puri* v. *Bepin Behary Mitter*,[6] by the Allahabad High Court in

[1] 6 C. L. R., 538.
[2] I. L. R., 7 Calc., 418.
[3] 11 C. L. R., 395.
[4] I. L. R., 10 Calc., 993.
[5] I. L. R., 11 Calc., 93.
[6] I. L. R., 18 Calc., 520.

Gopal Das v. *Than Singh*,[1] by the Bombay High Court in *Mohinudin* v. *Manchershah*,[2] *Haryivan* v. *Shivram*,[3] and by the Madras High Court in *Venkatramanna* v. *Viramma*.[4] It may, therefore, be now regarded as settled law.

In a subsequent case *Jagabandhu Mitra* v. *Purnanand Gossami*,[5] the principle laid down in *Jagabandhu Mukharji* v. *Ram Chandra Baisakh* was extended by another Full Bench of the Calcutta High Court to the case of an auction-purchaser who had obtained only symbolical possession of the property purchased by him. It was held that this symbolical possession gave him a good cause of action against a person who had taken an *ijara* from the son of the judgment-debtor in the original case. By this Full Bench decision a previous ruling to the contrary effect in *Krishna Lal Datta* v. *Radha Krishna Surkhel*[6] was overruled.

Confirmation of possession.

Before leaving the subject of "possession" it may be observed that on the principle that a party is bound by his pleadings in the case it has been held that when a plaintiff sues for confirmation of possession, his suit will be dismissed if his allegation of possession be found to be false: *Terietpat Singh* v. *Gosain Sudarsan Das*,[7] and in a suit for confirmation of possession by declaration of title, it was held insufficient for the plaintiffs to show that possession is with them; they are bound to make out their title: *Uzir Ali* v. *Makbul Ali*.[8] But according to the later authorities, lawful possession is sufficient evidence of right as owner as against a person

[1] I. L. R., 4 All., 184.
[2] I. L. R., 6 Bom., 650.
[3] 19 Bom., 620.
[4] I. L. R., 10 Mad., 17.
[5] I. L. R., 16 Calc., 530.
[6] I. L. R., 10 Calc., 402.
[7] I. L. R., 4 Calc., 46. See also 6 W. R., 64; 10 W. R., 176; 25 W. R., 6; and *contra*, 15 W. R., 286; 16 W. R., 27; L. R., 1 I. A., 192; 24 W. R., 301; 25 W. R., 168; 11 C. L. R., 443, 451.
[8] 19 W. R., 282.

who has no title whatever, and in such a case the plaintiff can obtain a declaratory decree as to his right; *Ismail Ariff* v. *Mahomed Ghouse*:[1] and that, though no declaration of his title can be made, yet he is lawfully entitled to the land in dispute; *Gangara Chimna Patel* v. *Secretary of State for India*.[2]

Discontinuance of possession, and dispossession.

I now come to consider the words 'discontinuance of possession' and 'dispossession.' In *Pandurang Govind* v. *Balkrishna Hari*,[3] it was held that, in an action for ejectment, the plaintiff, though he could not prove that he had been in possession of the land he claimed within twelve years before the date of the institution of the suit, must not, on that account, of necessity, fail. He must, however, show that his cause of action had accrued within that period, and a plaintiff's cause of action arose when another person took possession of his land, but not before. If any question of limitation arose, the burden of showing that the cause of action had arisen within the legal period of limitation lay upon the plaintiff. Reference was made to the observations of Blackburne, J., in *McDonnell* v. *McKinty*,[4] who said,—"The word 'discontinuance' means an abandonment of possession by one person followed by the actual possession of another person. This I think must be its meaning, for if no one succeed to the possession vacated or abandoned, there could be no one in whose favour or for whose protection the act (Statute of Limitations) could operate. To constitute 'discontinuance,' there must be both dereliction by the person who has the right to be protected, and actual possession, whether adverse or not," and to those of Parke, B., in *Smith* v. *Lloyd*,[5] who said:

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[1] I. L. R., 20 Calc., 831: L. R., 20 I. A., 99.

[2] 20 Bom., 795.

[3] Bom. H. C. Rep., 1869, 125.

A. C.

[4] 10 Ir. L. R., 516.

[5] 9 Exch., 571.

"There must be both absence of possession by the person who has the right to be protected, and actual possession by another, whether adverse or not, to bring the case within the Statute." On these authorities the Bombay Court held, that the date of 'discontinuance' was not the date the plaintiff abandoned the property, for then the discontinuance was not complete, but the date on which another person took possession of the abandoned property whether adversely or not; because on that date discontinuance was legally complete.

In *Govind Lal Sil and others* v. *Debendro Nath Mallik and others*,[1] it was held, that, where the owner of property has allowed permissive occupation on the ground of charity or relationship, he cannot be said to have 'discontinued' the possession. Lord Justice Bramwell, in *Leigh* v. *Jack*,[2] was quoted. He said as to entry by the real owner: "After all it is a question of fact, and the smallest act (*i.e.*, of ownership) would be sufficient to show that there was no 'discontinuance.'" Garth, C. J., said: "I think the words 'dispossession,' and 'discontinuance' apply only to cases where the owner of land has, either by his own act or that of another, been deprived altogether of his dominion over the land itself, or the receipt of its profits; but where the owner, in the exercise of his own proprietary rights, permits some other person to occupy his land or receive his rents then, whether the relation of landlord and tenant exists between the parties or not, I consider that the possession of the owner is not discontinued, because, under such circumstances, the possession of the occupier is the possession of the owner." In *Kali Charan Sahu and others* v. *The Secretary of State for India*,[3] White, J., held, that the dispossession or

[1] I. L. R., 6 Calc., 311; 7 C. L. R., 381.

[2] L. R., 5 Ex. D., 272.

[3] I. L. R., 6 Calc., 725; 8 C. L. R., 90.

discontinuance of possession mentioned in art. 143, sched. ii, Act IX of 1871 (corresponding with art. 142, sched. ii, Act XV of 1877), was that which occurred where the property was taken actual possession of by another, and did not apply to the case where the property was submerged by the act of God and so made impossible of occupation and actual possession.

A mere act of trespass, such as fishing in the plaintiff's *bhil*, does not amount to a complete ouster of the plaintiff, unless it be shown that he has been excluded from participation in the enjoyment of his property. *Lachmipat Singh* v. *Sadaulla Nasya* ;[1] *Lakhimani Dasi* v. *Karuna Kanth Moitro*.[2]

Adverse possession.

Excepting the case of discontinuance, where the subsequent possession may or may not be adverse, and that of dispossession, where the subsequent possession is manifestly adverse, in all other cases, where the plea of possession for twelve years and more is raised in defence, the possession must be adverse to succeed. In *Bijai Chandra Banarji* v. *Kali Prasanno Mukharji*,[3] Markby, J., defined "adverse possession" as possession by a person holding the land on his own behalf or of some other person other than the true owner, the true owner having a right to immediate possession, and, again, in *Khirod Mani Dasi* v. *Durga Mani Dasi*,[4] he defined it as possession of that which the plaintiff is entitled to possess, held not on behalf of the plaintiff, but of some other person. In *Madhava* v. *Narayana*,[5] Muttusami Ayyar, J., has said:—"As regards an interest in immoveable property, I take adverse possession to mean possession by a person claiming that interest against the true owner, who is entitled to repudiate it and to recover immediate

[1] I. L. R., 9 Calc., 698.
[2] 3 C. L. R., 509.
[3] I. L. R., 4 Calc., 327.
[4] I. L. R., 4 Calc., 455; 3 C. L. R., 315.
[5] I. L. R., 9 Mad., 244.

possession." Possession is *primâ facie* adverse to the person out of possession unless that person can show the contrary, as for instance that the possession is permissive, as in *Ganga Din Chaudhri* v. *Har Sahai Singh*,[1] *Tulsiram* v. *Nahar Singh*,[2] *Ali Baksh* v. *Rup Koer*,[3] or that of a co-sharer, or is referable to some right subordinate to that of the person out of possession, such as the right of a tenant or mortgagee. "Possession is evidence of title," it has been said by West, J., in *Vithoba* v. *Narayan*,[4] and "is primarily exclusive. It is for him who opposes the exclusive title to show that the possession originated in some way, which has preserved his own right; otherwise we must attribute a legal origin and the usual incidents to actual continued and peaceable possession...The man who is out must make out some *primâ facie* title and some agreement or acknowledgment of that title, such that possession of his adversary is deprived of its ordinary effect through being held on a joint right or on one subordinate to the right set up." When the person out of possession can prove this, it is for the person in possession to show that this joint or subordinate right has been put an end to. "As long as a possession can be referred to a right consistent with the subsistence of an ownership in being at its commencement, so long must the possession be referred to that right rather than to a right which contradicts the ownership. As the right to possession exists, the owner is not called on to take any step towards putting an end to it, and hence no presumption arises against him from his quiescence, nor does the possession become adverse to him": *Ram Chandra Yashvant Sirpotdar* v. *Sadáshiv Abáji Sirpotdar*.[5] In *Wahiudin* v. *Jhangori and others*,[6] it was held, that, to make out

[1] All. H. C. Rep., 1868, 261.
[2] 3 Agra, 271.
[3] 2 N. W., 106.
[4] I. L. R., 11 Bom., 221.
[5] I. L. R., 11 Bom., 422.
[6] All. H. C. Rep., 1870, 16.

a complete legal bar, the occupation should be proved to be adverse during the whole of the twelve years before suit, and it should be ascertained with what persons the actual possession has been during that time.

In one case, *Poresh Narain Rai* v. *Watson & Co.*,[1] the Calcutta High Court had held that even dishonesty in obtaining possession will not make the possession the less adverse or prevent the possessor from availing himself from the law of limitation (see *contra*, *Hiralal Saha* v. *Jadab Chandra Chenchkey*).[2]

Adverse possession by co-sharers.

The possession of a co-sharer may or may not be adverse to the rights of his other co-sharers: *Haro Narain Singh* v. *Baikantho Narain Singh*,[3] *Jahnabi Dev Narain Singh* v. *Ambika Prasad Narain Singh*,[4] v. *Sharafunnissa* v. *Kailash Chandra Gangapadhya*,[5] *Asad Ali Khan* v. *Akbar Ali Khan*.[6] Many acts which would clearly be adverse and might amount to dispossession as between a stranger and the true owner of land, between joint owners naturally bear a different construction: per Wilson, J., in *Mahamad Ali Khan* v. *Abdul Ghani*.[7] Possession of a plot of land does not constitute adverse possession in relation to a co-sharer, unless the latter claims or asserts some right on the land, which is denied by the sharer in possession: *Sharafunnissa* v. *Kailash Chandra Gangapadhya*,[5] *Lachmeswar Singh* v. *Manowar Hossain*.[8] In the case of a joint property, it may be that there is a sole possession of a particular portion of the property without a cessation of ownership of the joint owners. It does not follow that occupation and enjoyment by one sharer is adverse to his co-sharers. Such sole pos-

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[1] 5 W. R., 283.
[2] Cor., 119.
[3] 14 W. R., 51.
[4] 17 W. R., 74.
[5] 25 W. R., 53.
[6] 1 C. L. R., 364.
[7] I. L. R., 9 Calc., 744: 12 C. L. R., 257.
[8] L. R., 19 I. A., 48.

session would not be adverse unless there was some distinct act of denial of the rights of the co-sharers, so as to put an end to the original joint ownership : *Asad Ali Khan* v. *Akbar Ali Khan*,[1] and when one co-sharer sets up as against another adverse possession of land which had previously been waste, but at a former time had been occupied and had then admittedly been held jointly, it is for him to show that he has held possession in such a way as to give distinct notice to his other co-sharers of his intention to set up a title adverse to them : *Rakhaldas Bandopadhya* v. *Indra Mani Debi*.[2]

Possession of tenant not adverse to his landlord.

The possession of a tenant is in the eye of the law the possession of his landlord : *Grish Chandra Rai* v. *Bhagwan Chandra Rai*.[3] His possession is not adverse to his landlord even if he does not pay rent for many years: *Haronath Rai* v. *Jogendra Chandra Rai*,[4] *Trailokhya Tarini Dasi* v. *Mohima Chandra Matak*,[5] *Rangolal Mandal* v. *Abdul Ghafur*,[6] *Dadoba* v. *Krishna and others*,[7] *Tatia* v. *Sadashiv*,[8] *Gangabai* v. *Kalapa Dari Mukrya*.[9] Once the relation of landlord and tenant is established, it is for the tenant to establish its determination by affirmative proof over and above the mere non-payment of rent : *Prem Sukh Das* v. *Bhupia*,[10] *Adimulam* v. *Pir Ravuthan*,[11] *Bangsraj Bhukta* v. *Megh Lal Puri*,[12] *Ramdhan Santra* v. *Nobin Chandra Chaudhuri*,[13] *Parbati Dasi* v. *Ram Chand Bharttacharji*.[14] But if a tenant openly sets up an adverse title, and holds adversely, limitation runs : *Haronath Rai* v. *Jogendro Chandra Rai*.[15] The assertion

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[1] 1 C. L. R., 364.
[2] 1 C. L. R., 155.
[3] 13 W. R., 191.
[4] 6 W. R., 218.
[5] 7 W. R., 400.
[6] I. L. R., 4 Calc., 314 ; 3 C. L. R., 119.
[7] I. L. R., 7 Bom., 34.
[8] I. L. R., 7 Bom., 40.
[9] I. L. R., 9 Bom., 419.
[10] I. L. R., 2 All., 547.
[11] I. L. R., 8 Mad., 424.
[12] 20 W. R., 398.
[13] 12 W. R., 250.
[14] 3 C. L. R., 576.
[15] 6 W. R., 218.

of an adverse title by a tenant, however, does not make his possession adverse unless made to the knowledge of his landlord : *Gangabai* v. *Kalapa Dari Mukrya*.[1]

Possession of mortgaged property when adverse.

Similarly, so long as the relation of mortgagor and mortgagee subsists, the possession of the mortgagor cannot be adverse to the mortgagee : *Ghinaram* v. *Ram Manarath Ram*;[2] and so long as those who claim under the mortgagor assert a title to redeem, and advance no other title inconsistent with it, then possession must, *primâ facie* at least, be treated as perfectly reconcileable with, and not adverse to, the title of the mortgagee : *Pran Nath Chaudhri* v. *Ram Ratan Rai*.[3] The possession of a mortgagee does not become adverse whenever a mortgagee chooses to style himself or is styled proprietor of the mortgaged property ; for the mere assertion of an adverse title will not enable a mortgagee in possession to abbreviate the period of sixty years which the law allows to a mortgagor to prosecute his right to redeem and seek his remedy by suit : *Ali Mahamad* v. *Lalta Baksh*.[4] On the other hand, on the authority of *Cholmondeley* v. *Clinton*,[5] it was held in *Puttapa* v. *Timmaji*,[6] that there can be an adverse possession of an equity of redemption as against the true owner. When a person has obtained possession of mortgaged property by asserting a right of pre-emption and purchasing it from the mortgagor, his possession does not become adverse to the mortgagee, until there are conflicting claims in respect of the mortgage from which the assertion of an adverse title on his part against the mortgagee can be gathered : *Durga Prasad* v. *Sambhu Nath*.[7] The Privy Council have,

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[1] I. L. R., 9 Bom., 419.

[2] I. L. R., 6 Calc., 566 ; 7 C. L. R., 580.

[3] 7 Moo. I. A., 323 ; 4 W. R., P. C., 37.

[4] I. L. R., 1 All., 655.

[5] 2 J. & W., 1.

[6] I. L. R., 14 Bom., 176.

[7] I. L. R., 8 All., 86,

however, held in *Anand Mai Dasi* v. *Dharendra Chandra Mukharji*[1] that the possession of a purchaser at a sale in execution of a decree without notice of a mortgage of the property is the possession of an owner and adverse to the mortgagee, and also in *Brajo Nath Kundu* v. *Khilat Chandra Ghosh*,[2] that the possession of a person who *bonâ fide* purchased from another land in fact mortgaged, and obtained possession and mutation of names, was adverse to the mortgagee, as his possession was in no sense possession by permission of the mortgagee.

Adverse possession may be pleaded in addition to other title.

Where the defendant was unable to prove his title by purchase, it was held still open to him to establish his title without purchase, on the ground of an adverse possession of the premises for over twelve years: *Sambhu Bhai Karsandas* v. *Shivlaldas Sadashibdas Desai*.[3] A plaintiff, too, on failure of the particular title set up by him in his plaint may yet succeed on proof of twelve years' adverse possession, provided his title to the land on this ground also has been pleaded by him with sufficient clearness in his plaint: *Ram Lochan Chakrabarti* v. *Ram Sundar Chakrabarti*,[4] *Narsingh Das* v. *Musharu*,[5] *Bhaigo Mati* v. *Mahomed Wasil*,[6] *Shiro Kumari Debi* v. *Govindo Shaha*,[7] *Gossain Das Chandra* v. *Issar Chandra Nath*,[8] *Golak Chandra Masanta* v. *Nando Kumar Rai*,[9] *Krishna Charan Baisakh* v. *Pratab Chandra Sarmah*,[10] *Jaitara Dasi* v. *Mahomed Moborak*,[11] *Sundari Dasi* v. *Madhu Chandra Sirkar*.[12]

Miscellaneous rulings as to trespass.

I will now give a few miscellaneous rulings about trespass, and subjects connected with trespass. Apprehension

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[1] 8 B. L. R., 122; 14 Moo. I. A., 101; 16 W. R., P. C., 19.

[2] 8 B. L. R., 104; 14 Moo. I. A., 144; 16 W. R., P. C., 33.

[3] I. L. R., 4 Bom., 89.

[4] 20 W. R., 104.

[5] 25 W. R., 282.

[6] 25 W. R., 315.

[7] I. L. R., 2 Calc., 418.

[8] I. L. R., 3 Calc., 224.

[9] I. L. R., 4 Calc., 699; 3 C. L. R., 450.

[10] I. L. R., 7 Calc., 560.

[11] I. L. R., 8 Calc., 975; 11 C. L. R., 399.

[12] I. L. R., 14 Calc., 592.

of trespass gives no ground for an action : *Param Sukh* v. *Sitaram*,[1] *Gibbon* v. *Abdur Rahman Khan*,[2] *Puran Chand Galicha* v. *Pareshnath Singh*.[3]

A lessee holding on after expiry of lease, without consent of the owner, is a trespasser : *Mackintosh* v. *Gopi Mohan Mazumdar*,[4] and parties entering on the land as cultivators are not called upon to show the ex-lessee their authority : *Gale* v. *Maharani Srimati*.[5] These rulings, however, will not apply to agricultural tenants in provinces in which a special rent law prevails.

It has been ruled that the owner out of possession can sue the trespass for mesne profits without suing for possession : *Dayamoyi Dayi and others* v. *Madhu Sudan Mahanti*.[6]

A trespasser cannot allege fraud in acquiring his title in the owner or in the owner's vendors, so as to resist his right to re-entry : *Ramsahai Singh* v. *Kuldip Singh*.[7]

Where the trespass was found to be malicious, substantial damages were held to be recoverable : *Srihari Rai* v. *Hills*.[8] No suit for trespass against the Government will lie for taking up lands under the Act for the acquisition of land for public purposes : *Ram Chandra Bhadro and others* v. *The Collector of Jessore and others*.[9] But in a case in which lands were occupied by Government for the purpose of making an embankment without the observance of the formalities required by Reg. I of 1824, the owner of the land was held entitled to maintain a suit for the rent of the land during the time he was kept out of possession : *Collector of 24-Parganas* v. *Jai Narain Basu*.[10]

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[1] All. H. C. Rep., 1867, 119.
[2] 3 B. L. R., A. C., 411.
[3] 12 W. R., 82.
[4] 4 W. R., 24.
[5] 15 W. R., 133.
[6] 3 W. R., 147.
[7] 15 W. R., 80.
[8] 9 W. R., 156.
[9] 3 W. R., 131.
[10] W. R., F. B., 18.

An action will lie by the owner of a house against a trespasser on adjoining property who obstructs his light: *Dhuman Khan* v. *Muhammad Khan*.[1]

Trespass of building on another's land.

There have been a great many cases about building on another person's land. As we have seen before in Chapter I, when the acquiescence of the owner of the land is either express or to be inferred from the circumstances, he has in some cases been held to be debarred from bringing his suit. The rule of English Equity is stated by the Bombay High Court to be that ordinarily the owner of the land can recover the land with whatever is on it, *Narayan bin Raghoji* v. *Bholagir Guru Manjir*;[2] but in this case they declined to apply the English law, because, while the defendant was building his house on the plaintiff's land, the plaintiff well knowing that it was his land, and the defendant only knowing that the plaintiff laid claim to the land, the plaintiff took no steps to stop the building and set the defendant right. The defendant was, therefore, allowed to remove the house.

Buildings do not pass with land in the mofussil of Bengal.

In *Thakur Chandra Paramanik and others* v. *Ramdhan Bhattacharji*,[3] it was held that buildings and other such improvements made on land *in the mofussil* do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil. If he who makes the improvement is not a bare trespasser, but is in possession under any *bonâ fide* claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building, if it be allowed to remain for the benefit of the owners of the soil; the option of taking the building or allowing the removal of the materials remaining with the owner of

[1] 19 All., 153.

[2] Bom. H. C. Rep., 1869, A. C., 80.

[3] B. L. R., F. B., 595; 6 W. R., 228.

the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess. This was followed in *Shib Das Bandopadhya* v. *Baman Das Mukhopadhya*,[1] the cause of action in which also arose in the mofussil of Bengal, in which it was said that "apart from any particular relation between the parties, the ownership and right of possession in the soil does not necessarily carry with it a right of possession to the buildings erected thereon." No doubt, in *Gopal Mallik and others* v. *Anand Chandra Chatarji*[2] it was held that a person occupying the land of another was not entitled to remove additions, which he had made to a building belonging to that other, but at most to compensation for present value or for the expenses incurred in making the addition. But it was added that he might in some cases be allowed to remove the additions if he could do so without injuring the building. This rule, however, does not apply to cases in which the person who erects the building is a mere trespasser: *Gajadhar Singh* v. *Nandram*,[3] *Guru Das Dhar* v. *Bijai Gobind Baral*,[4] *Rajendro Lal Gosami* v. *Shama Charan Lahiri*[5] (both case of trespass by a co-sharer), *Kali Prasad Datta* v. *Gauri Prasad Datta*,[6] *Govind Paramanik* v. *Guru Charan Datta*.[7] Nor will it apply to cases in which a man makes improvements upon the premises of another entirely for his own convenience and such as the rightful owner would not have made; *Wahidullah* v. *Ghulam Akbar*,[8] nor to cases in which a man erects buildings on another's land otherwise than in good faith and believing the land to be his own: *Far-*

[1] 8 B. L. R., 237; 15 W. R., 360.
[2] 15 W. R., 363.
[3] All. H. C. Rep., 1866, 244.
[4] 1 B L. R., A. C., 108; 10 W. R., 71.
[5] I. L. R., 5 Calc., 188; 4 C. L. R., 417.
[6] 5 W. R., 108.
[7] 3 W. R., 71.
[8] 25 W. R., 205.

and Ali Khan v. *Aka Ali Mahomed.*[1] Where the owner of property allowed another to enter thereupon, build and subsequently signed a rent-note, it was held that the owner could not recover possession of the land or require removal of the buildings without recouping the other the money he had expended. He was estopped from denying the claim by standing by in silence while the tenant spent his money on the land: *Dattatraya Rayaji Pai* v. *Shridhar Narayan Pai.*[2]

Buildings pass with the land in Calcutta.

In the Presidency town of Calcutta the law is different, and the rule of English law applies. This was decided in the case of *Jagat Mohini Dasi* v. *Dwarkanath Baisakh*,[3] in which the assignee of the interest of a tenant-for-life who had built a house upon the land was held not to be entitled either to compensation for it, or to be allowed to remove the materials. There are two earlier cases to the contrary, *viz.*, *Parbati Bewa* v. *Umatara Debi* and *Rasik Lal Madak* v. *Loknath Karmokar*.[5] In the former case the plaintiff was, by virtue of the custom obtaining in Calcutta, held entitled to remove certain huts from the land of the defendant, and custom apart, she was also held entitled to do so, as she had bought the huts from the defendant's outgoing tenant, whom she had succeeded in the tenancy, with defendant's knowledge, and had also partially pulled them down and rebuilt them, and with her knowledge. But this was a case stated for the Court, and the custom in question was admitted. The latter case, *Rasik Lal Madak* v. *Loknath Karmokar*, was considered by the Judges (Garth, C. J., and Pontifex, J.) who delivered the judgment in *Jagat Mohini Dasi* v. *Dwarkanath Baisakh*, and must therefore be considered as overruled.

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[1] 3 C. L. R., 194.
[2] I. L. R., 17 Bom., 736.
[3] I. L. R., 8 Calc., 582.
[4] 14 B. L. R., O. C., 201.
[5] I. L. R., 5 Calc., 688; 5 C. L. R., 492.

Madras case.

In *Mahalatchmi Ammal* v. *Palani Chetti and others*,[1] which was a suit to eject the defendants, who held under a lease, from a house-ground, and to compel them to remove the buildings thereon erected, the defendants pleaded that the lease was a permanent one, and the plaintiff had no right to eject. The lease expressly authorized the lessee to build. The Munsiff held that the lease was not a permanent one, and decreed as prayed. The Appellate Court, while concurring with the Munsiff as to the lease not being a permanent one, gave the plaintiff the option of paying for the house and resuming the land, or of receiving the value of the land from the defendants; and this was held the right course by the High Court. A zamindar, in another case, was held to be entitled to an injunction to compel the defendant who held agricultural lands comprised in the zamindari with occupancy-right, to demolish a dwelling-house erected thereon for purposes not connected with agriculture and to restrain him from altering the character of the land: *Ramanadhan* v. *Zemindar of Ramnad*.[2]

When trees planted in another's land may be removed.

The maxim *quod haeret in solo cedit solo*, has been held to apply to trees, *Ram Baran Ram* v. *Saligram and others*,[3] where it was held that trees accede to the soil and pass to the landholder with the land on the termination of a tenancy, and unless the tenant uses, during the term of his tenancy, his privilege, *where he has it*, to remove the trees, he cannot do so afterwards; he would then be a trespasser. This followed *Fakir Sunar* v. *Khanderan and others*,[4] where it was held, that trees, so long as they were not severed, were, *primâ facie*, to be taken as passing with the land on which they grow. In *Kasim Mian* v. *Banda Husain*,[5] too, it was said that the presumption of law

[1] 6 Mad. H. C. Rep., 245.
[2] I. L. R., 16 Mad., 407.
[3] I. L. R., 2 All., 896.
[4] All. H. C. Rep., 1870, p. 251.
[5] I. L. R., 5 All., 616.

and the general rule is that property in timber on a tenant's holding rests in the landlord in the same way as, and to no less an extent than, the property in the soil itself. In *Ajudhia Nath* v. *Sital*,[1] it was pointed out as an easement and as of right, without interruption, and for twenty years, the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible. Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit, wherein the claim to which such period relates is *Lalman* v. *Mannu Lal*.[3]

The Calcutta High Court, too, has held that a zamindar has a right in the trees grown on the land by the tenant, and although the tenant has a right to enjoy all the benefits of the growing timber during his occupancy, he has no power to cut the trees down and convert the timber to his own use. The zamindar may sue to have his title in the growing trees declared: *Abdul Rahman* v. *Dalaram Bashi*,[4] *Chatturbhuj Tewari* v. *Villait Ali Khan*,[5] *Chaiman Khajah* v. *Jan Ali Chaudhuri*.[6] But where a lease is granted in perpetuity at a fixed rent, and the lessor reserves no reversionary interest in the land or in the trees growing on it, the lessees are entitled to the ownership of the trees: *Saroda Sundari Debi* v. *Goni*.[7] So, in the case of a grant at a quit rent of homestead and waste land, assigning a heritable right in a tract of a land capable of yielding fruits, by virtue of which the holder during the continuance of his right possessed absolutely the entire use and fruits thereof, it was held that the lessor or grantor had no more right

[1] I. L. R., 3 All., 567.
[2] I. L. R., 8 All., 467.
[3] I. L. R., 6 All., 19.
[4] W. R., 1864, 367.
[5] W. R., 1864, 223.
[6] 1 W. R., 46.
[7] 10 W. R., 419.

to the trees planted by the lessee than he had to the crops sown by him : *Golak Rana* v. *Nabo Sundari Dasi*.[1] But a lease which gives the lessee the produce of certain trees does not give him the trees themselves : *Mahamed Ali* v. *Battuk Deo Narain Singh*,[2] though a lease of the land on which a tree stands is to be presumed to include the tree : *Mahamed Ali* v. *Bolaki Bhagat*.[3] In a suit by landlords against their tenants who had a right of occupancy for appropriating some mango trees growing on their land which they had cut down, it was held that the tenants had to prove the custom they alleged giving them the right to sell the trees, and on failure to prove such custom they were liable in damages for appropriating them : *Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal*.[4] But under section 23 of the Bengal Tenancy Act the onus is on the landlord to show that a tenant with occupancy right is debarred from cutting down trees : Cf. *Samsar Khan* v. *Lochin Dass*.[5]

The Bombay High Court has also held that the occupier of land who does not come under section 40 of the Bombay Survey and Settlement Act, 1865, has not in the absence of agreement any proprietary right to the trees growing on his land : *Govind Purshattam Kolatkar* v. *Sub-Collector and Deputy Conservator of Forests of Colaba*.[6] So, too, the Privy Council in a Bombay case, *Ruttonji Edulji Shet* v. *The Collector of Tanna*,[7] has held that in the case of a lease granted for a limited period for the purpose of the cultivation of a large tract of swamp land in the island of Salsette on which there were forest trees, that the lessee could only cut trees growing on the lands demised for the purpose of clearance and cultivation, or

[1] 21 W. R., 344.
[2] 1 W. R., 352.
[3] 24 W. R., 330.
[4] I. L. R., 22 Cal., 742.
[5] I. L. R., 23 Cal., 854.
[6] 6 Bom., A. C., 188.
[7] 11 Moo. I. A., 295 ; 10 W. R., P. C., 13.

for repairs, and that he had no right to fell and carry away for sale unassessed timber growing on the forest lands. But where there was no reservation in a lease of land granted for the purpose of clearing and bringing it under cultivation, it was held that the lessee had the right to appropriate the trees when cut: *Mohini Goopta* v. *Raghoonath Misser*.[1] It was held by the Allahabad High Court that in the case of the fallen timber of self-grown trees within an occupancy-holding, the claimant must prove his right to it by showing a general custom of the district which gives him the right, and their lordships expressed the opinion that the law in England as to fallen timber could not be accepted as respresenting the law in India on the point: *Nathan* v. *Kamla Kuar*.[2]

Trespass by co-sharers.

That co-sharers can commit trespass *inter se* on the joint estate has been held in *Dirgpal Rai* v. *Bhondo Rai*,[3] *Mehdee Hossein Khan* v. *Auzad Ali and others*,[4] *Guru Das Dhar* v. *Bijai Govind Baral*,[5] *Rajendro Lall Gosami* v. *Shama Charan Lahiri and others*,[6] *Gopi Krishna Gosain* v. *Hem Chandra Gosain and another*,[7] *Holloway* v. *Mahomed Ali and others*.[8] In *Gopi Krishna Gosain* v. *Hem Chandra Gosain* it was pointed out that a Court of Equity will not interfere when a tenant-in-common acts reasonably for the purpose of enjoying the property held in common in any way in which an owner can enjoy such property without injury to his co-parcener; but the case is different where there has been a direct infringement of a clear and distinct right. So, in *Sheo Prasad Singh* v. *Lila Singh*,[9] and

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[1] I. L. R., 23 Calc., 209.
[2] I. L. R., 13 All., 573.
[3] All. H. C. Rep., 1867, 341.
[4] All. H. C. Rep., 1874, 259.
[5] 1 B. L. R., A. C., 108; 10 W. R., 171.
[6] I. L. R., 5 Calc., 188; 4 C. L. R., 417.
[7] 13 W. R., 322.
[8] 16 W. R., 140; 12 B. L. R., 191, note.
[9] 12 B. L. R., 188; 20 W. R., 160.

Stalkart v. *Gopal Pande*,[1] it was laid down that one of several co-sharers has no right to take exclusive possession and alter the condition of any portion of the joint property without the consent of his co-sharers, and the Court will grant an injunction to restrain him from doing so. He can, therefore, be restrained from growing indigo on the joint land without the consent of all the proprietors, as indigo as a crop is valueless for purposes of distraint: *Crowdie* v. *Bhikdari Singh*,[2] *Hanuman Singh* v. *Crowdie*,[3] *Lloyd* v. *Sogra*,[4] *Debi Prasad Sahu* v. *Gajadhar Prasad Narain Singh*,[5] *Holloway* v. *Madan Mohan Lal*,[6] *Kannakaya* v. *Narasimhulu*,[7] *Naju Khan* v. *Imtiaz-ud-din*.[8] But in one such case, *Crowdy* v. *Indro Rai*[9] an injunction was refused, and it was held that the plaintiff's remedy lay in an action for damages: Cf. *Watson & Co.* v. *Ramchund Dutt*.[10] So, too, he cannot erect a factory, *Holloway* v. *Mahomed Ali*[11] or other building, *Sheo Prasad Singh* v. *Lilah Singh*[12] on joint land, *Mehdi Hossein Khan* v. *Aujad Ali*[13] without the consent of his co-sharers. In *Muhammad Ali Jhan* v. *Faiz Bakhsh*,[14] it was held that certain co-parceners who had purchased a building erected on land jointly held by several co-parceners by a stranger to the property were *quoad* the building in suit trespassers, and could be sued by the remaining co-parceners to be put into joint possession of the building.

In several cases the Courts have ordered the demolition of buildings erected on joint land. In many others,

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[1] 12 B. L. R., 197; 20 W. R., 168.
[2] 8 B. L. R., Ap., 45; 16 W. R., 41.
[3] 23 W. R., 428.
[4] 25 W. R., 313.
[5] 25 W. R., 374.
[6] I. L. R., 8 Calc., 446; 10 C. L. R., 381.
[7] 19 Mad., 38.
[8] 18 All., 115.
[9] 18 W. R., 408.
[10] I. L. R., 18 Calc., 10; L. R., 17 I. A., 110.
[11] 16 W. R., 140; 12 B. L. R., 191, note.
[12] 20 W. R., 160; 12 B. L. R., 188.
[13] All. H. C. R., 1874, 259.
[14] 18 All., 361.

however, they have refused to do so. The following cases are instances of such buildings being ordered to be removed: *Guru Das Dhar* v. *Bijai Gobind Baral*,[1] *Bissambhar Shaha* v. *Shib Chandra Shaha*,[2] *Rajendro Lal Gossami* v. *Shama Charan Lahiri*,[3] *Shadi* v. *Anup Singh*,[4] *Kannakaya* v. *Narasimhulu*.[5] In *Rajendro Lal Gossami* v. *Shama Charan Lahiri and others*[6] one co-sharer had erected a "naubatkhana," or platform to accommodate musicians, on the land of a small joint property, the extent of which was very limited, without the consent of all his co-sharers, and the act was held to impair the enjoyment of the property and cause considerable annoyance and discomfort to the other co-sharers.

In the following cases the Courts have refused to order the demolition of buildings erected on joint land: *Nobin Chandra Mitra* v. *Mahesh Chandra Mitra*,[7] *Bishambar Lal* v. *Rajaram*,[8] *Srichand Sahu* v. *Nim Chand Sahu*,[9] *Dwarkanath Bhuiyah* v. *Gopinath Bhuiyah*,[10] *Masim Mollah* v. *Panjo Gharami*,[11] *Mohim Chandra Ghosh* v *Madhab Chandra Nag*,[12] *Durga Lal* v. *Halwant Sahai*,[13] *Nocury Lall Chuckerbutty* v. *Brindabun Chunder Chuckerbutty*,[14] *Paras Ram* v. *Sherjit*.[15] In most of these cases the Courts proceeded on the ground that the act complained of was not proved to be destructive of, or detrimental to the enjoyment of the joint property. In *Mohim Chandra Ghosh* v. *Madhab Chandra Nag*,[16] in which the plaintiff

[1] 1 B. L. R.; A. C., 108; 10 W. R., 171.
[2] 22 W. R., 286.
[3] I. L. R., 5 Calc., 18; 4 C. L. R., 417.
[4] I. L. R., 12 All., 436.
[5] 19 Mad., 38.
[6] I. L. R., 5 Calc., 188; 4 C. L. R., 417.
[7] 3 B. L. R., Ap., 111; 12 W. R., 69.
[8] 3 B. L. R., Ap., 67; 13 W. R., 37, note; 16 W. R., 140, note; 21 W. R., 373, note.
[9] 5 B. L. R., 25; 13 W. R., 337.
[10] 12 B. L. R., 189, note; 16 W. R., 10.
[11] 21 W. R., 373.
[12] 24 W. R., 80.
[13] 25 W. R., 306.
[14] I. L. R., 8 Calc., 708.
[15] I. L. R., 9 All., 661.
[16] 24 W. R., 80.

alleged that the plaintiff had dispossessed him by digging a tank, building a school-room and manufacturing bricks for his own use upon the joint property, a doubt was expressed as to whether these acts constituted dispossession. "It requires consideration," it was said, "whether, in order to maintain a suit for possession by one shareholder against another, something more than what is stated in this plaint must not be done, something amounting to an actual turning of the co-sharer out of possession, or a refusal to let him enter."

In the last cited case, *Nocury Lall Chuckerbutty* v. *Brindabun Chunder Chuckerbutty*,[1] it was said :—"There is a considerable difference between a case in which the other co-sharers acting with diligent watchfulness of their rights seek by an injunction to prevent the erection of a permanent building, and a case in which after a permanent building has been erected at considerable expense he seeks to have that building removed. In a case such as that last mentioned, the principle which seems to have been settled by the decisions of this Court is this, that though the Court has a discretion to interfere and direct the removal of the building, this is not a discretion which must necessarily be exercised in every case ; and, as a rule, it will not be exercised unless the plaintiff is able to show that injury has accrued to him by reason of the erection of the building, and perhaps further that he took reasonable steps in time to prevent the erection." In one case, the *Shamnagar Jute Factory Co.* v. *Ram Narain Chatarji*,[2] the Calcutta High Court refused to grant an injunction at the instance of a co-sharer in a patni tenure, restraining the lessee of other co-sharers in the patni from building on land appertaining to the patni, following the English rule that in granting or withholding an injunction,

[1] I. L. R., 8 Calc., 708. [2] I. L. R., 14 Calc., 189.

the Courts exercise a judicial discretion, and weigh the amount of substantial mischief done or threatened to the plaintiff, and compare it with that which the injunction, if granted, would inflict on the defendant. "We are not aware of any decision," it was said in this case, "which establishes the broad proposition contended for by the plaintiff, that one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights, absolutely, and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction." This was followed in *Jai Chandra Rakhit* v. *Bipro Charan Rakhit*[1] in which it was held that before a Court will, in a case of co-sharers, make an order directing that a portion of the joint family property, alleged to have been dealt with by one of the co-sharers without the consent of the other shall be restored to its former condition, the plaintiff must show that he has sustained by the act he complains of some injury which materially affects his position. In this case the act complained of was the excavation of a tank, and it was held that the fact that a portion of the land on which the tank had been excavated was fit for cultivation, did not render the excavation of the tank an injury of such a substantial nature as would justify the Court in putting the defendant to the expense of refilling the tank. In some cases, however, it has been said that when the enjoyment by a co-sharer of his property has been interfered with by his other co-sharers, his remedy lies in a suit for partition: *Bindubashini Debi* v. *Patit Paban Chattopadhya*,[2] *Dwarkanath Bhuiyah* v. *Gopinath Bhuiyah*,[3] *Gokul Krishna Sen* v. *Ishar Chandra Rai*.[4]

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[1] I. L. R., 14 Calc., 236.
[2] 3 B. L. R., A. C., 267.
[3] 12 B. L. R., 189; 16 W. R., 10.
[4] 1 W. R., 12.

Who may sue to eject a trespasser.

Any one of several joint tenants of land may sue to eject a trespasser. The consent of one joint tenant as to the possession of a trespasser does not make him less a trespasser with regard to the other joint tenants: *Tilak Rai and others* v. *Ramjus Rai and others*,[1] *Lachman Prasad* v. *Debi Din*.[2] So, too, the Calcutta High Court has held in *Radha Prasad Wasti* v. *Isaf*,[3] that, where a tenant has been put into possession of joint property with the consent of all the co-sharers, no one or more of the co-sharers can turn the tenant out without the consent of all the others; but no person has a right to intrude upon such property against the will of the co-sharers or any of them: if he does so, he may be ejected without notice either altogether, if all the co-sharers join in the suit, or partially, if some wish to eject him. The legal means by which such a partial ejectment is effected is by giving the plaintiffs possession of their shares jointly with the intruder, as explained in *Halodhar Sen* v. *Guru Das Rai*.[4] See also *Madan Singh* v. *Nurpat Singh*,[5] and *Ghansham Singh* v. *Ranjit Singh*,[6] and *contra*, *Lachman Sahai Chaudhuri* v. *Seami Jha*.[7]

That the reversioner can sue for trespass only, where there is a permanent damage from trespass to the reversion, is the rule of English law: and thus, as a rule, the tenant or holder should sue in all cases of trespass unless there is permanent damage to the property. In *Dhirmani Dasi* v. *Croft*,[8] it was held, that the lessor (reversioner) might sue a third party for damages caused by excavations on lands leased out to a lessee. Here there was a permanent damage to the reversion;

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[1] All. H. C. Rep., 1873, 182.
[2] 3 Agra, 264.
[3] I. L. R., 7 Calc., 414; 9 C. L. R., 76
[4] 20 W. R., 126.
[5] 2 W. R., 290.
[6] 4 W. R., Act X, 39.
[7] 5 W. R., Act X, 93.
[8] 3 W. R., S. C. C. Ref., 20.

and so too in *Manindro Chandra Sirkar* v. *Manirudin Biswas and another*,[1] where the lessor sued the sub-lessees of his lessee to compel them to fill up a tank they had excavated on land leased by him and sub-leased to them by the lessee, or in lieu to recover damages, it was held, that the plaintiff had a direct remedy against the sublessees. Also, in the case of *Ram Chandra Jana* v. *Jiban Chandra Jana*,[2] where the defendant erected an embankment across a river, whereby lands let by the plaintiff to tenants were flooded, and the crops lost—the tenants only paying rent to plaintiff when they managed to reap the crops from these lands—the plaintiff, lessor, was held to have such an interest as to entitle him to sue for damages.

In *Venkata Chalam Chetti* v. *Andiappan Ambalam*,[3] it was said that the rule of English law that a landlord who has parted with his possession to a tenant cannot sue in trespass for damage to the property, unless the wrongful act complained of imports a damage to the reversionary interest, rests upon the ground that the landlord has for the term of his tenancy parted with his interest, and that temporary damage, the consequences of which cannot be prolonged beyond the term of his tenancy so as to affect his reversionary interest, does not concern him. This rule, however, does not apply to such landlords in India as participate with the cultivators in the crop, and who are therefore, as it were, partners with their tenants.

Trespass after decree.

As to trespass after decree : in *Madan Mohan Singh* v. *Kanai Das Chakrabartti*,[4] it was held, that where a person, who had obtained a decree for land, had, by his own act and not by the act of the officer of the

[1] 11 B. L. R., App., 40 ; 20 W. R., 230.

[2] 1 B. L. R., A. C., 203.

[3] I. L. R., 2 Mad., 232.

[4] 12 B. L. R., A. C., 201.

Court, taken possession of more land than the decree gave him, a suit would lie to recover possession of any land taken in excess of that given by the decree ; this was also held in *Sarat Sundari Debi* v. *Onwar Prasad Narain Rai*.[1] In *Ram Newaz Singh* v. *Kishen Rai*[2] it was held, that if a person in whose favour a decree for possession of land had been passed, peaceably obtained possession of the land without executing his decree, and was subsequently dispossessed, he might maintain a fresh suit for possession. On the other hand, in *Jagendro Narayan* v. *Sarnomayi*,[3] it was held, that a suit would not lie, if such dispossession was the act of the officer of the Court ; but it would be a question between the parties relating to the execution of the decree. This was in accordance with the general rule that questions relating to the execution of a decree must be determined by the Court executing the decree and that no fresh suit will lie in respect of such matters : *Krishna Sundar Rai* v. *Prasunno Nath Bhuttacharji* ;[4] *Shama Sundari Debi* v. *Bijai Gobind Baral* ;[5] *Radha Gobind Shaha* v. *Brajendro Kumar Rai Chaudhri*.[6]

In *Sungara Narayana Pillai* v. *Sandira Pillai*,[7] the plaintiff had got a decree for the possession of certain land with the crops on it. The plaintiff asked for the execution of the decree in respect of the land and of the crops which he alleged had been unlawfully taken away by the defendants. Possession of the land was given to the plaintiff, but he was referred to a separate suit for the value of the crops removed. It was held that no such suit lay, but plaintiff's remedy was by a proceed

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[1] 12 B. L. R., 207 (note) ; 12 W. R., 85.

[2] All. H. C. Rep., 1874, 137.

[3] 12 B. L. R., 203 (note) ; 14 W. R., 39.

[4] W. R., 1864, 208.

[5] W. R., 1864, 331.

[6] 7 W. R., 372.

[7] 6 Mad. H. C. Rep., 13.

ing in execution of the decree under sec. 11, Act XXIII of 1861, and in *Basant Kawal* v. *Forth*,[1] that where *B* had obtained a decree to be maintained in possession of land leased by *N* to *F* and to cancel the lease, and subsequently to the date of the decree entered on the land, which had been already sown with indigo by *F*, and *F*, on the ground that he was still in possession, sued *B* to recover damages for trespass and injury to the indigo sown by him, it was held, that *B* was at liberty to enter upon the land and cultivate it notwithstanding that he had not taken out execution of his decree, and that if any injury occurred to *F* from *B's* occupation of the land after his decree, *F* had no claim on *B* for damages. So, in *Jawitri* v. *Emile*,[2] in which the plaintiff had obtained a mandatory injunction for the removal of a wall which the defendant had built on his land, but which decree he did not execute, he was held not entitled to sue for damages for non-compliance with the mandatory injunction, to compel performance with which, it was said, the plaintiff had his remedy in execution.

Mesne profits include interest.

The last subject in connection with trespass on immoveable property to which attention will be directed is that of "mesne profits." Mesne profits are defined by law (explanation to s. 211, Act XIV of 1882) to be "those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received therefrom, *together with interest on such profits*." The corresponding section of Act X of 1877 did not contain the words printed in italics, but they were added to it by the amending Act, II of 1879, in consequence of the rulings of the Calcutta High Court awarding interest in cases where the lower Courts had failed to award them: *Lakhi Narayan* v.

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[1] All. H. C. Rep., 1875, 47. [2] I. L. R., 13 All., 98.

Kali Poddo Banarji,[1] and *Haro Durga Chaudhurani* v. *Sarat Sundari Debi*.[2] In another case, *Krishnanand* v. *Pratab Narain Singh*,[3] in which interest on mesne profits was allowed, it was said by their Lordships of the Privy Council that under the former Procedure Code, there being no rule of law obliging a Court to allow interest upon mesne profits, it is a matter for the discretion of the Court upon consideration of the facts to allow interest or not. Compound interest may be awarded as an essential portion of the damages recoverable by a person wrongfully kept out of immoveable property, but the term "mesne profits" does not include compound interest, and so such interest cannot be allowed on mesne profits, unless claimed in the plaint and awarded by the decree: *Pratap Chandra Baruah* v. *Svarno Mayi*,[4] *Haro Durga Chaudharani* v. *Sarat Sundari Debi*,[5] *Brajendro Kumar Rai* v. *Madhab Chandra Ghosh*.[6]

When mesne profits may be awarded.

Mesne profits cannot be claimed or awarded except in suits for the recovery of possession of immoveable property yielding rent or other profits. When a larger amount is found to be due for mesne profits than that stated in the plaint, the plaintiff is not bound down to the amount claimed in the plaint, though it may be used as evidence against him in favour of the defendant. If ultimately more is found due to the plaintiff, he is entitled on payment of further Court dues to the larger amount so found due: *Haro Gobind Bhakat* v. *Digambari Debi*,[7] *Piari Sundari Dasi* v. *Ishan Chandra Basu*,[8] *Jadumani Debi* v. *Mahomed*

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[1] I. L. R., 4 Calc., 882; 4 C. L. R., 60.

[2] I. L. R., 4 Calc., 674; 3 C. L. R., 517.

[3] I. L. R., 10 Calc., 785; L. R., 11 I. A., 88.

[4] 14 W. R., 151.

[5] I. L. R., 8 Calc., 332; L. R., 9 I. A., 1.

[6] I. L. R., 8 Calc., 343.

[7] 9 W. R., 217.

[8] 16 W. R., 302.

Ali Khan,[1] *Gauri Prasad Kundu* v. *Reily*.[2] Mesne profits can only be recovered if they are awarded in the decree: *Wise* v. *Rajendro Kumar Rai*,[3] *Ekkauri Singh* v. *Bijainath Chattopadhya*,[4] *Raisunnissa Begam* v. *Saroda Sundari Chaudhurani*,[5] *Amir Ahmad* v. *Zamir Ahmad*,[6] *Broughton* v. *Prahlad Sen*,[7] *Bhubaneshari Chaudhurani* v. *Manson*,[8] *Sadasiva Pillai* v. *Ramalinga Pillai*,[9] *Abdul Ali* v. *Ashrafan*,[10] *Ram Rup Singh* v. *Sheo Ghulam Singh*,[11] *Fakhrudin Mahamed Ahsan* v. *The Official Trustee of Bengal*,[12] *Ram Ghulam* v. *Dwarka Rai*,[13] *Gannu Lal* v. *Ram Sahai*[14] *Chandra Kumar Singh* v. *Gonesh Chandra Das*.[15] But in one case, *Kalinath Das* v. *Raja Miah*,[16] in which an auction-purchaser who prayed for possession, as well as mesne profits, obtained a decree for possession which said nothing about mesne profits, and no reason appeared why mesne profits should be refused, the Calcutta High Court allowed mesne profits in execution.

Terms of decree for mesne profits must be strictly adhered to.

In executing a decree for mesne profits the terms of the decree as to the period during which mesne profits are to be allowed must be strictly adhered to: *Haronath Rai* v. *Indu Bhusan Deb*,[17] *Ram Lochan* v. *Mansur Ali Chaudhuri*,[18] *Janoki Nath Mukharji* v. *Rai Krishna Singh*,[19] *Ram Manikya De* v. *Jagannath Gop*.[20] But a decree awarding possession with mesne profits from the date of the suit was held to be rightly construed as awarding

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[1] I. L. R., 8 Calc., 295.
[2] I. L. R., 9 Calc., 112; 12 C. L. R., 41.
[3] 11 W. R., 200.
[4] 13 W. R., 11; 4 B. L. R., A. C., 111.
[5] 16 W. R., 25.
[6] 18 W. R., 122.
[7] 19 W. R., 154.
[8] 22 W. R., 160.
[9] 24 W. R., 193; 15 B. L. R., 383; L. R., 2 I. A., 219.
[10] 25 W. R., 215.
[11] 25 W. R., 327.
[12] I. L. R., 8 Calc., 178; L. R., 8 I. A., 197; 10 C. L. R., 176.
[13] I. L. R., 7 All., 170.
[14] I. L. R., 7 All., 197.
[15] I. L. R., 13 Calc., 283.
[16] 22 W. R., 406.
[17] 6 W. R., Misc., 33.
[18] 11 W. R., 339.
[19] 15 W. R., 292.
[20] I. L. R., 5 Calc., 563.

mesne profits up to the date when delivery of possession was effected: *Banshi Singh* v. *Nazaf Ali Beg*.[1] And when in a suit for recovery of possession and mesne profits a decree for possession is given, which is silent as regards mesne profits which have accrued between the date of the institution of the suit and the delivery of possession, a separate suit will lie for such subsequent mesne profits: *Man Mohan Sirkar* v. *The Secretary of State for India in Council*.[2]

Principle on which mesne profits should be assessed.

As to the principles on which mesne profits are to be assessed, in *Lakhi Narayan* v. *Kali Padmo Banarji*,[3] it was held, that, in determining the amount payable to the holder of a decree for mesne profits, a Court is bound to consider not what has been or what with good management might have been realized by the party in wrongful possession, but what the decree-holder would have realized if he had not been wrongfully dispossessed. This sounds very like a contradiction to what is said in the explanation to s. 211 of the Civil Procedure Code; and I should almost fancy that, according to law, the principle adopted by the lower Court (whose judgement was dated 1st June 1878, after Act X of 1877, in which the expression "mesne profits" was defined in the same terms as it is in Act XIV of 1882, had become law) was the correct one. The lower Court said: "The point I have to consider is not what the decree-holder might, by another course of management, have realized during the period in question, but what the party in wrongful possession did realize, or might, with good management, have realized." Surely this is word for word what the law says too. In *Ganga Prasad* v. *Gajadhar Prasad and others*,[4] it was held, that where parties to a suit for mesne profits were co-sharers in the estate in which the land for which

[1] 22 W. R., 328.
[2] I. L. R., 17 Calc., 968.
[3] I. L. R., 4 Calc., 882; 4 C. L. R., 60.
[4] I. L. R., 2 All., 651.

mesne profits were claimed was situated, and the defendants had occupied and cultivated the land themselves, the most reasonable mode of assessing mesne profits was to ascertain what would be a fair rent for the land if it had been left to an ordinary tenant and not been cultivated by the defendants. Here, again, we have a ruling after the passing of Act X of 1877, and in a case decided originally on the 18th June 1878, opposed to the plain words of the explanation to s. 211, Act X of 1877. This ruling followed a ruling of the Calcutta Court—*Asmed Koer* v. *Indrajit Koer*[1]—where the plaintiff, a zamindar, sued to recover land from the wrong-doers, who held and cultivated it themselves; and the Court held, that, in such cases, the proper damages would be the amount of rent payable by a tenant for lands of the kind. In *Watson and others* v. *Piari Lal Shaha*,[2] where the plaintiffs were cultivators, mesne profits were assessed at the net profits of cultivation according to the various capabilities of the soil in an average season, deductions having been made for expenses of cultivation, rise and fall of prices, and price of seed,—following the principle laid down in *Saudamini Debi* v. *Anand Chandra Haldar*,[3] where Markby, J., said: "The collections of the land may be a very proper criterion where the plaintiff is not himself the cultivator, but where he is, or where he himself uses or wishes to use the land, the principle on which mesne profits ought to be calculated is, I think, what he would have made by himself holding possession of the land." These rulings, too, take as the standard what the plaintiff might have made, not what the defendant actually received, or with good management might have received. There are other cases, however, more consonant with the present law. In *Durga Sundari Debi*

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[1] B. L. R., F. B., 1003; 9 W. R., 445.

[2] 7 B. L. R., 175.

[3] 7 B. L. R., 178, A. C. (footnote); 13 W. R., 37.

v. *Shibeshari Debi*,[1] it was held, that, in a case of wrongful dispossession, the principle on which mesne profits should be assessed, was to ascertain the actual rents or proceeds of the estate, and to make the wrong-doer account for them to the person dispossessed, everything being presumed against the wrong-doer ; and in *Dwarka Nath Mitra* v. *Ram Dhan Biswas and others*,[2] mesne profits were defined to mean those profits which the person in actual wrongful possession of the land did actually receive, or might, with ordinary and due diligence, have received, from that land. This was followed in *De Silva and others* v. *Teherani and others*,[3] and in *Rukmini Koer and others* v. *Ram Tahal Rai and others*.[4] See also *Thakur Das Rai* v. *Nobin Krishna Ghose*,[5] *Jai Krishna Das* v. *Turnbull*,[6] *Guru Dyal Mardar* v. *Gopal Singh*.[7] In *Brajendro Kumar Rai* v. *Madhab Chandra Ghosh*,[8] it was said that it lies upon the wrong-doers to show what were the sums realized as rent during the time of their possession. Where a cultivating raiyat is dipossessed by his landlord, the mere rent of the land realised by the landlord is not necessarily the measure of the damage sustained by the raiyat and recoverable by him as mesne profits : *Bhairo Chandra Mazumdar* v. *Bamandas Mukharji*.[9] In such a case the landlord is liable to make good the loss which the raiyat sustains by being dispossessed : *Haraklal Saha* v. *Srinibash Karmokar*.[10]

Deductions for collection charges and Government revenue.

In calculating mesne profits, collection charges and payments on account of Government revenue are according to the Calcutta High Court to be deducted : *Bissaneshari Debi* v. *Tara Sundari*,[11] *Dinabandhu*

[1] 8 W. R., 101.
[2] 8 W. R., 103.
[3] 9 W. R., 374.
[4] 17 W. R., 156.
[5] 22 W. R., 126.
[6] 24 W. R., 137.
[7] 24 W. R., 271.
[8] I. L. R., 8 Calc., 343.
[9] 3 B. L. R., A. C., 88; 11 W. R., 461.
[10] 15 W. R., 428.
[11] Marsh., 201.

Nandi v. *Keshab Chandra Ghosh*,[1] *Ram Dhal Singh* v. *Parameshari Prasad Singh*,[2] *Palmer* v. *Bal Gobind Das*,[3] *Erfunnissa Chaudhurani* v. *Rakibunnissa*.[4] The Privy Council too, in one case, *Haro Durga Chaudhurani* v. *Sarat Sundari Debi*[5] has allowed collection charges to be deducted from mesne profits. The Calcutta High Court has, further, in a suit for the mesne profits of endowed lands, held the judgment-debtor to be entitled to a deduction of the expenses incurred by him in carrying on the worship of the idols: *Thakur Das Acharji Chakrabartti* v. *Sashi Bhushan Chatarji*.[6] But the Allahabad High Court, as already pointed out (*ante*, p. 75) in *Altaf Ali* v. *Lalji Mal*,[7] has made a distinction between the case of a trespasser *bonâ fide* and that of one *mala fide*, and has held that collection charges may be allowed, if the trespasser has entered on or continued on the land in exercise of a *bonâ fide* claim of right, but that they should be disallowed if when he entered or continued on the land, he was aware of the defect in his title, although such necessary payments as Government revenue or ground rent may be deducted. In *Tilak Chand* v. *Saudamini Dasi*,[8] it was held, that a trespasser was entitled to a deduction of Government revenue so as to show there were no profits at all, but could not recover any sum so paid in excess of the profits claimed, either by plea of set-off or in a separate suit, but must be content to bear the burden of his own wrong. "In a suit for mesne profits," it was said in this case, "the plaintiff is only entitled to recover the actual loss which he has sustained by being kept out of actual posses-

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[1] 3 W. R., Misc., 25.
[2] 7 W. R., 78.
[3] 7 W. R., 230.
[4] 9 W. R., 457.
[5] I. L. R., 8 Calc., 332; L. R., 9 I. A., 1.
[6] 17 W. R., 208.
[7] I. L. R., 1 All., 518.
[8] I. L. R., 4 Calc., 566; 3 C. L. R., 456.

sion ; and therefore in ascertaining the amount of such loss, it is right to take into consideration the receipts on one hand and the necessary payments on the other. But it does not follow from this that if a man has wrongfully taken possession of property and held it adversely to the true owner, and has been a loser in consequence, he has a right to recoup himself for his losses against the true owner." In a recent case in the Allahabad High Court, *Shitab Rai* v. *Ajudhia Prasad and others*,[1] the plantiffs were lessees of certain land and their landlord without giving them such a notice as would legally determine their tenancy, let the land to the defendants, who took possession, demanded rent from the sub-tenants and received the rents and profits. The plaintiff then sued for possession and subsequently sued for mesne profits. It was held that the defendants were wrong-doers in usurping possession and taking the rents and profits of the land, and being tort-feasors were not entitled to deduct the costs of the collection of money they had wrongfully collected. They were, however, entitled to a deduction of a sum paid by them for Government revenue.

[1] I. L. R., 10 All., 13.

CHAPTER III.

OF TORTS AFFECTING RIGHTS INCIDENTAL TO THE POSSESSION OF IMMOVEABLE PROPERTY—NATURAL RIGHTS—EASEMENTS—*PROFITS A PRENDRE*—RIGHTS OF PROSPECT AND PRIVACY—LICENSES AND CUSTOMARY RIGHTS.

Natural rights—Definition of easement—*Profits à prendre*—Cases—Suspension of natural rights by easements—Cases—Inconsistent easements cannot co-exist unless subordinated—Modes of acquisition of easements—Grant—Prescription—Cases—'Peaceably and openly enjoyed'—Cases—'As of right'—Cases—'Interruption'—Cases—Acquisition of easements against Government—Cases—Easements by implication of law—Of necessity—On severance of tenements—Cases—Acquisition of easements of necessity and of quasi-easements according to the Easements Act—Acquisition of easements by local custom—Cases—By long user—Cases—Tenants cannot acquire easements proper as against their landlord—Cases—Burden of proof in cases of infringement of natural rights and easements—Cases—Extent and mode of use of easements—Cases—Transfer of easements—Cases—Extinction of easements—Cases—Abandonment of easements—Cases—Rights of riparian proprietors in natural watercourses—Cases—In artificial watercourses—Cases—As to flow of water—Cases—Rights as to surface water—Cases—Rights of fishery—In the sea—Cases—In tidal and navigable rivers—Cases—In non-tidal waters—Cases—Rights o fishery in gross—Cases—Servitus stillicidii—Cases—Natural rights and easements connected with light and air—Cases—Quantity of light and air to which the occupant of a building is entitled—Cases—No prescriptive right to passage of light and air to an open space of ground—Whether a prescriptive right to wind or breeze can be acquired—Cases—Remedies in cases of infringement of rights to light and air—Cases—Natural rights and easements connected with support—Cases—Rights of way—Classes of rights of way in India—Public rights of way—Cases—Rights of way belonging to classes of persons—Cases—Private rights of way—Cases—No right of prospect exists—Cases—Rights of privacy—Cases—Licenses—Cases—Customary rights—Cases.

Natural rights.

I NOW come to consider torts as affecting those rights which are incidental to the possession of immoveable property, and which are known as natural rights, easements properly so-called, and rights resembling easements, and *profits à prendre*.

A natural right is a right *ex jure naturæ*, inherent to the possession of land, and given by the law to every owner of land as a matter of course. These rights "secure necessary support from the adjacent and subjacent soil" (to the conterminous and surface soil), "and the due enjoyment of air, light and water, which, by the provision of nature, flow over the soil of one land-owner to that of another for the common benefit of each." (Goddard's Law of Easements, 3rd Edn., p. 3.)

Definition of easement.

An easement in English law may be defined to be "a privilege, without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former." (Goddard's Law of Easements, 3rd Edn., p. 2.)

By section 4 of the Indian Easements Act (V of 1882), which, up to the 6th March 1891, was in force only in Madras, the Central Provinces and Coorg, but which, by Act VIII of 1891, passed on the 6th March 1891, has been extended to Bombay, the North-West Provinces and Oudh, an easement is defined to be "a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own."

In Indian law the word "easement" has a much wider signification than it has in English law, as by section 3, Act XV of 1877 (the Indian Limitation Act), it includes also a right, not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon, the land of another, and in the explanation to section 4,

Act V of 1882, the expression "to do something is defined as including removal and appropriation by the dominant owner for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon." The word "easement in Indian law, therefore, includes not only a real servitude, but what is known in English law as a *profit à prendre*.

Profits à prendre.

A *profit à prendre* is a right "vested in one man of entering upon the land of another, and taking therefrom a profit of the soil." (Addison on Torts, 5th Edn., p. 255.) In India, when Act IX of 1871 was in force, the right of *profits à prendre* was known as "an interest in immoveable property"—*Parbati Nath Rai Chaudhri* v. *Madhu Paroi*,[1] where it was held, that a *jalkar* (in this case a right to fish) in the tank of another was not an 'easement' within the meaning of section 27, Act IX of 1871, but an "interest in immoveable property" within the meaning of clause 145, schedule ii of that Act.

That the word 'easement' as used in Act XV of 1877 includes a *profit à prendre* has been pointed out in *Chandi Charan Rai* v. *Shib Chandra Mandal*,[2] from which it is further apparent that *profits à prendre* in gross as well as those appurtenant to land are included in the term 'easement,' as used therein. In this case a prescriptive right of fishery in gross and not appurtenant to any property was held to be an 'easement,' and if enjoyed for the time and in the manner prescribed by section 26 of the Act, the person enjoying it was held to have acquired an indefeasible right, although he could not prove that he possessed, enjoyed, or occupied any dominant tenement. The word 'easement' in Act IX of 1871

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[1] I. L. R., 3 Calc., 276 ; 1 C. L. R., 592.

[2] I. L. R., 5 Calc., 945 ; 6 C. L. R., 269.

was not defined as it has been in section 3, Act XV of 1877, and hence this conflict in the rulings. The definition of an 'easement' given in Act V of 1882, however is framed so as to exclude all rights in gross.

Suspension of natural rights by easements.

Natural rights may be suspended by an inconsistent easement,—that is to say, by an easement acquired which suspends the action of the natural right; but the natural right is not thereby extinguished, and revives at once if the easement ceases. This subject will be fully considered when we come to speak of the rights of riparian proprietors in natural and artificial water-courses. As natural rights and inconsistent easements over the same property cannot co-exist, that is, belong at the same time to the same person, a plaintiff cannot sue to establish his ownership in a plot of land and in the alternative an easement over it. In such a case, the Calcutta High Court has held, he must be called on to elect which branch of his case he will proceed with and to abandon the other: *Bijai Keshab Rai* v. *Abhai Charan Ghosh*;[1] *Dhanpat Singh* v. *Narain Prasad Singh*;[2] and *Tulsimani Debi* v. *Jogesh Chandra Shaha*.[3] Evidence of immemorial user adduced in support of a right founded upon ownership, does not, when that right is negatived, tend to establish an easement: *Chunilal Fulchand* v. *Mangaldas Govardhandas*.[4]

Inconsistent easements cannot co-exist unless subordinated.

Inconsistent easements, too, cannot co-exist according to Goddard (Law of Easements, 3rd Edn., p. 32), because a man cannot grant a right to a third person inconsistent with an existing easement he has already created. Nor can such a right be acquired by prescription, because, according to English law, an easement can only be acquired by prescription when a grant can be presumed. But easements apparently inconsistent may co-exist in subor-

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[1] 16 W. R., 198.
[2] 20 W. R., 94.
[3] 1 C. L. R., 425.
[4] I. L. R., 16 Bom., 592.

dination to one another. Thus, where one man has the right to an uninterrupted flow of water for his mill by virtue of one easement, another may also have the right to divert the water, when not required for the mill, by virtue of another easement: *Rolle* v. *Whyte*.[1] (Goddard's Law of Easements, 3rd Edn p. 34.)

Acquisition of easements.

Easements may be acquired by—

(1) Grant.
(2) Contract.
(3) Prescription.
(4) Implication of law arising out of—
  (*a*) Necessity.
  (*b*) Severance of tenements.
(5) Local custom.
(6) Long user.

Grant.

A grant or contract not being required by the law in India to be in writing may be either verbal or in writing. No instrument in writing is, therefore, requisite for the imposition of an easement:—*Krishna* v. *Rayappa*.[2] However, verbal grants and contracts require very strict proof; and easements acquired in this way are difficult, though not impossible, to prove.

Prescription.

Before the passing of Act IX of 1871, the acquisition of easements by prescription was regulated in the Presidency towns by the English law as it was previous to the passing of the Prescription Act (2 and 3 Wm. IV, c. 71): *Bagram* v. *Khetronath Karformah*;[3] *Bhubon Mohan Banerji* v. *Elliott*;[4] *Madhusudan De* v. *Bissonath De*.[5] This Act never applied to this country: *Bagram* v. *Khetronath Karformah*;[3] *Jai Prakash Singh* v. *Amir Ali*.[6] Prescription at common law has been abolished by the Indian Easements Act[7] and the acquisition of easements by pre-

[1] L. R., 3 Q. B., 302.
[2] 4 Mad., 98.
[3] 3 B. L. R., O. C., 18.
[4] 6 B. L. R., O. C., 85.
[5] 15 B. L. R., 361.
[6] 9 W. R., 91.
[7] Whitley Stokes's Anglo-Indian Codes, Vol. I., p. 883.

scription is now regulated by the provisions of section 15, Act V of 1882, and in those parts of India where the Easements Act is not in force by Act XV of 1877, sections 26 and 27, which mainly re-enact the old law (sections 27 and 28, Act IX of 1871). They run as follows :—

Section 26.—" Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, and as of right, without interruption, and for twenty years, and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative), has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years, the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible. Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit, wherein the claim to which such period relates is contested.

" *Explanation.*—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

" *Section* 27.—Provided that, when any land or water upon, over, or from which any easement has been enjoyed or derived, has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said

last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water."

The provisions of section 15, Act V of 1882, are similar, but they do not require the access and use of light or air to or for any building to have been enjoyed as of right, because it was considered that every person has a right to as much air and light as can come in at his windows. They provide expressly for the easement of support, which is not mentioned in the Limitation Act, and they substitute the words "right of way" for the words "any way or watercourse or the use of any water," occurring in section 26, Act XV of 1877.

User for twenty years as an easement is not alone sufficient for the acquisition of an absolute and indefeasible right, but in the case of light and air, the user or enjoyment must be (*a*) peaceable, (*b*) as of right, according to Act XV of 1877, and (*c*) without interruption and in the case of ways, watercourses, any use of water or any other easement— (*a*) peaceable, (*b*) open, (*c*) as of right, and (*d*) without interruption. In both Acts it is clearly defined in what 'interruption,' in the sense in which the term is used in the Act, consists and does not consist. It will, therefore, be my task, with the aid of the decisions of the Courts, to explain what is meant by peaceably and openly enjoyed,' 'as of right,' and I shall also comment on the words 'without interruption.'

"Peaceably and openly enjoyed."

In *Shama Charan Addi* v. *Tarini Charan Banarji*,[1] where the owner of the dominant tenement had himself, with the intention of preventing the use of the way, created a permanent obstruction, which rendered such use impossible, it was held, that the way could not be

[1] I. L. R., 1 Calc., 422; 25 W.R., 228.

said, during the continuation of the obstruction, to have been 'openly enjoyed' within the meaning of section 27, Act IX of 1871 (the old law exactly corresponding with section 26, Act XV of 1877); and that, accordingly, though there had been no interruption within the meaning of the section, a right to the way had not been established under the Act. The facts were, that the owner of the dominant tenement had blocked up a door to which the lane, over which the right of way was claimed, led, with the express intention that the right of way should not be used, and kept it so blocked for several years, which period the plaintiff wrongly included in the time reckoned towards the alleged acquisition of the easement. On the other hand, in *Mathura Das Nandvalabh* v. *Bai Amthi*,[1] it was held that the enjoyment by the plaintiff of light and air through apertures, ten inches square, in the back wall of his house for more than twenty years was open and manifest, and not furtive or invisible, and therefore sufficient to establish an easement.

Where a right is alleged to exist by custom no fixed period of enjoyment is laid down by law as necessary to establish it, and in *Palaniandi Tevan* v. *Puthirangonda Nadan*,[2] it was held that a customary right to use a well may exist apart from a dominant heritage.

Knowledge of servient owner not necessary.

In *Arzan* v. *Rakhal Chandra Rai*[3] it was pointed out that for the purpose of acquiring a right of way or other easement under section 26 of the Limitation Act, it is not necessary that the enjoyment of the easement should be known to the servient owner. "So long," it was said, "as the right of way is enjoyed as an easement peacefully and quietly, as of right, and without interruption for twenty years by a person claiming right thereto, his right at the end of that time becomes absolute

[1] I. L. R., 7 Bom., 522.
[2] 20 Mad., 389.
[3] I. L. R., 10 Calc., 214.

and indefeasible. Nothing is said in the Act as to the knowledge of the servient owner being necessary to the acquisition of the right, and as the right to be acquired is not a prescriptive one,[1] the rule which obtains in England with reference to prescriptive rights," (according to which an easement cannot be gained by prescription without the knowledge of the servient owner), "seems inapplicable here." See contra, *Bhuban Mohan Banarji* v. *Elliott*;[2] but this was a case, the cause of action of which arose in the town of Calcutta, and was decided under the English law which, as already pointed out, was in force in Calcutta before Acts IX of 1871 and XV of 1877 came into operation.

"As of right."

The meaning of the expression "as of right" was discussed in *Madhusudan De* v. *Bissonath De*.[3] In this case the plaintiff sued to restrain the defendants from obstructing the access of light and air through certain windows of the plaintiff's house, but it appeared that during part of the period in the course of which the plaintiff alleged he had acquired the right of easement, he, though not the owner of both houses, had been in possession of both, and it was held that the unity of possession in the plaintiff for part of the period of twenty years excluded the operation of section 27, Act IX of 1871, as the enjoyment during that time was not "as of right." "The quasi-possession or enjoyment of an easement, as of right," it was said by Markby, J., "just like the possession of land or goods depends according to the best authorities partly upon facts, but partly also upon intention. The possessor of land or goods must intend to hold them on his own behalf to the exclusion of any other person, or adversely, as it is called.

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[1] Garth, C. J., here means prescription-at-common law, which import an implied grant.

[2] 6 B. L. R., 85.

[3] 15 B. L. R., 361.

The quasi-possessor of an easement must intend to enjoy it as claiming a right thereto as against all persons, and especially as against the owner of the servient tenement. It seems to me impossible that a person can intend as dominant owner to enjoy an easement as of right against himself as servient occupier." The rule laid down in this case has been embodied in illustration (*b*) to section 15, Act V of 1882. In order to acquire an easement under section 26 of the Limitation Act (XV of 1877) the enjoyment must have been by a person claiming title thereto as an easement as of right for twenty years: *Chunilal Fulchand* v. *Mangaldas Govardhandas*.[1]

Enjoyment "as of right" does not mean merely user without trespass; it means user in the assertion of a right: *Mallik Jawad-ul-Huq* v. *Ramprasad Das*,[2] *Hira Lal Koer* v. *Parmessar Koer*,[3] *Alimudin* v. *Wazir Ali*.[4] It does not imply a right obtained by grant from the owner of the servient tenement: *Mathura Das Nandvalabh* v. *Bai Amthi*.[5] It clearly does not mean mere permissive user, and permissive user has been held as not counting towards the acquisition of the right: *Asutosh Chakrabartti* v. *Titu Haldar*,[6] *Askar* v. *Ram Manik Rai*,[7] *Akhai Kumar Chakrabartti* v. *Nabi Nawaz*,[8] *Mahamed Ali* v. *Jugal Ram Chandra*,[9] *Fateh Ali* v. *Asgar Ali*.[10] Illustration (*c*) to section 15, Act V of 1882, expressly lays this down, for it shows that when a plaintiff has been in peaceable and open enjoyment of a right of way for twenty years, if the defendant proves that the plaintiff on one occasion admitted that the user was not of right, and asked his leave to enjoy the right, this is sufficient to

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[1] I. L. R. 16 Bom., 592.
[2] 3 B. L. R., A. C., 281.
[3] 15 W. R., 401.
[4] 23 W. R., 52.
[5] I. L. R., 7 Bom., 522.
[6] W. R., 1864, 293.
[7] 13 W. R., 344.
[8] 13 W. R., 449.
[9] 14 W. R., 124.
[10] 17 W. R., 11.

show that the enjoyment has not been of right, and the suit shall be dismissed.

"Interruption."

To constitute 'interruption' within the meaning of the explanation to section 26, Act XV of 1877, and of explanation 2 to section 15, Act V of 1882, there must be an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and a submitting to, or acquiescing in, the same for one year after notice. In *Shama Charan Addi* v. *Tarini Charan Banarji*,[1] there was clearly no interruption, because the blocking up of the door was the act not of some person acting adversely, but of the owner of the dominant tenement himself, whom the plaintiff represented; nor was there 'abandonment,' because, as Garth, C. J., said, this term, as applied to easements, means generally "the voluntary and permanent relinquishment by the dominant owner of a right which he has actually acquired;" and here the plaintiff had never acquired the right. Garth, C. J., was of opinion, that 'discontinuance' was the proper word for what had occurred, which was not a discontinuance by adverse obstruction, but such a voluntary discontinuance of the user of the easement as would prevent the statutory right being acquired. He then proceeded to state, that the reason why such discontinuance prevented the right being acquired, was because the enjoyment could no longer be said to be 'open,' when as a matter of fact, it was impossible.

The case of *Elliott* v. *Bhuban Mohan Banarji*[2] affords a clear illustration of what is an interruption within the meaning of the Act. In this case the defendant had commenced a building before the expiration of the period of twenty years for the express purpose of creating

[1] I. L. R., 1 Calc., 422; 25 W. R., 228.

[2] 12 B. L. R., 406; 19 W. R., 194 L. R., I. A., Sup. Vol., 175.

an obstruction to the acquisition by the plaintiffs of an easement of light through their windows, and it was, therefore, held, both by the Calcutta High Court and by the Privy Council on appeal, that there had not been an enjoyment of the right for twenty years by the plaintiffs so as to entitle them to maintain the suit.

Discontinuance of actual user does not amount to interruption.

In section 26 of Act XV of 1877 and section 15, Act V of 1882, it is laid down that the period of twenty years for the acquisition of an easement shall be taken to be a period ending within two years next before the institution of the suit, and in an illustration to the former Act it is pointed out that if a suit is brought in 1881 for obstructing a right of way, and the plaintiff merely proves that he has enjoyed the right peaceably and openly, claiming title thereto as an easement, and as of right without interruption from 1858 to 1878, his suit should be dismissed, as no exercise of the right by actual user has been proved to have been taken place within two years next before the institution of the suit. Accordingly, in two cases, *Gopi Chand Setia* v. *Bhuban Mohan Sen*,[1] and *Lachmi Prasad Narain Singh* v. *Tilakdhari Singh*,[2] it was held with reference to the provisions of section 27, Act IX of 1871, which were the same as those of section 26, Act XV of 1877, that to establish a right of way it was not sufficient for a plaintiff to prove user for twenty years, which ended more than two years next before the institution of the suit, but he must show exercise of the right by actual user within such period of two years. So, too, in *Haridas Nandi* v. *Jodunath Datta*[3] it was held that a right of way over the land of another must be kept up by constant use, and that after a discontinuance of six years, no suit could be brought to re-establish it. But in *Kailash*

[1] 23 W. R., 401.
[2] 24 W. R., 295.
[3] 5 B. L. R., App., 66; 14 W. R., 79.

Chandra Ghosh v. *Sonatan Chang Barui*,[1] Garth, C. J., dissented from the rule laid down in the above cited illustration, and held that it was not necessary for a plaintiff in a suit to establish a right of way to prove actual user within two years previous to the institution of the suit; it was sufficient if he proved continuance of the enjoyment of the right. This suit was one in which the plaintiffs claimed a prescriptive right of passage for boats over the defendant's land when it became covered with water during the rainy season. The argument of the Chief Justice in this case is as follows: "The 26th section of the Limitation Act renders it necessary, as far as we can see, that the enjoyment of the right claimed should have continued till within two years before suit. The section says not a word as to any actual user or exercise of the right within the two years. It is obvious to us, that the enjoyment intended by the section means something very different from actual user. In order to establish the right, the enjoyment of it must continue for twenty years; but in the case of discontinuous easements, this does not mean that actual user is to continue for the whole period of twenty years. On the contrary, there may be days and weeks and months during which the right may not be exercised at all, and yet during all those days and weeks and months the person claiming the right may have been in full enjoyment of it. The easement with which we have to deal in the present case affords a remarkable illustration of this. The right which the plaintiffs claim can only be used by them during the two or three months of the year when the defendant's land is flooded; and if there were a lack of rain, it is probable that even for twenty or twenty-one months, the right might not be exercised at all; and yet, so long as the plaintiff's right was not interfered with, whenever they had occasion to use it, their enjoyment

[1] I. L. R., 7 Calc., 132; 8 C. L. R., 281.

must, we conceive, be considered as continuing all the year round. Unless this were so, a person in the plaintiff's position, who could only use his right during a short period of the year could never gain a prescriptive right at all. Illustration (*b*), therefore, which would seem to make 'enjoyment' equivalent to 'actual user' must, we think, be rejected, especially as the latter clause, which follows the words 'the suit shall be dismissed,' is obviously quite unnecessary for the purpose of the illustration." The result of this case is that in such a suit it is sufficient for a plaintiff to prove enjoyment of the easement claimed for twenty years and absence of interruption during the two years next before suit. There can be no doubt that this is now the law, for there is no such illustration to section 15, Act V of 1882, it having been omitted when the Act was passed owing to this decision of the Calcutta High Court.

In *Jamnadas Shankar Lal and another* v. *Atmaram Harjivan*,[1] the effects of delay and acquiescence on the acquisition of an easement were discussed. The law is, however, very clear now, as any submission to the obstruction, as well as acquiescence in it for a year after notice, is fatal.

Acquisition of easements against Government.

The question by how many years' user an easement by prescription can be acquired against Government is an important one. In *Arzan* v. *Rakhal Chandra Rai and The Secretary of State for India*,[2] it was assumed that easements could be acquired against Government by prescription in the same way as they are acquired against private individuals. In *Viresa* v. *Tatayya*[3] on the other hand, it was assumed that sixty years' user is required to establish a right by prescription against Government, and in the recent case of *The Secretary*

[1] I. L. R., 2 Bom., 133. [2] I. L. R., 10 Calc., 214.
[3] I. L. R., 8 Mad., 467.

of State for India v. *Mathura Bhai*,[1] it was pointed out that it is a well established rule in England that the Crown is not included in an Act unless there be words to that effect, and that in *Ganpat Putaya* v. *The Collector of Kanara*,[2] it had been said that "this rule of interpretation is well established, and applies not only to the Statutes passed by the British, but also to the Acts of the Indian Legislature framed with constant reference to the rule recognized in England." It was accordingly held that the provisions of section 26, Act XV of 1877, do not apply to the Crown, for the section is clearly in prejudice of the Crown's rights, and the other provisions of the Act do not afford sufficient evidence of an intention that this section should apply to the Crown. There can be no question that this is the law in those parts of India in which Act V of 1882 is in force, for, by the last paragraph of section 15, it is expressly provided that user for twenty years shall not establish an easement when the property over which the right is claimed belongs to Government, and that user for sixty years must be proved before an easement can be prescribed against Government.

Easements of necessity.

Easements may be acquired by implication of law arising out of necessity. Thus, where a property is situated so as to be inaccessible except over a neighbour's land, there may be a right of way of necessity over that land. According to English law, in these cases (*a*) the necessity must be clearly apparent, and (*b*) a grant must be capable of being presumed. Thus a way of necessity can only be acquired when a land owner has *no other way* to his ground: if he have another way however inconvenient, the balance of authority is against allowing him to pass over his neighbour's soil: *Holmes* v. *Goring*,[3] *Proctor* v.

[1] I. L. R., 14 Bom., 213. [2] I. L. R., 1 Bom., 7. [3] 2 Bing., 76.

Hodgson,[1] *Dodd*, v. *Burchell* :[2] (Goddard's Law of Easements, 3rd Edn., p. 317.) This was the principle of the decision in *Municipality of the City of Poona* v. *Vaman Rajaram Gholap*,[3] where it was held that a person purchasing a plot of land adjoining his own land, and having access to the plot through his land could not acquire a way of necessity over his vendor's land, of which the plot formed a part. But had the plot been sold to a third person it might have been otherwise. Further, a grant must be capable of being presumed, for, in *Ballard* v. *Harrison*,[4] Lord Ellenborough, C. J., said :—" The plea seems to suppose that, whenever a man has not another way, he has a right to go over his neighbour's close ; but that is not so, as a way of necessity is a thing founded on grant. Thus, if inaccessable land has been acquired by escheat, there has been held to be no way of necessity—*Proctor* v. *Hodgson* :[5] (Goddard's Law of Easements, 3rd Edn., p. 318.)

Though a tenant cannot, as against his landlord, acquire by prescription an easement of way in favour of the land occupied by him as tenant over other land belonging to his landlord, yet he may be entitled to a way of necessity over the adjoining land of his landlord : *Jenabali* v. *Alibuddin*.[6]

Easements by severance of tenements.

Easements may also be acquired by implication of law arising from the severance of tenements. The case of *Morgan* v. *Kirby*,[7] is an authority in India on this point. This was a case in which the plaintiff sued to restrain the defendant from interfering with and diverting the flow of water in a channel, and for damages. The facts were as follows :—In 1860, Mr. Rae, whom the plain-

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[1] 10 Exch., 824.
[2] 31 L. J., Exch., 364.
[3] I. L. R., 19 Bom., 797.
[4] M. & S., 387.
[5] 10 Exch., 824.
[6] 1 C. W. N., 151.
[7] I. L. R., 2 Mad., 46.

tiff represented, agreed with the Government for the lease of a plot of ground, and got possession. In 1865, Mr. Rae took a lease of the estate from Government for 999 years, to enure from 1860, when he entered into possession. The defendant's estate adjoined the plaintiffs, and his title, also derived from Government, dated from 1869. A formal lease was granted to his predecessor in 1874 in similar terms to that to plaintiff. In 1864, Mr. Rae opened an artificial channel for the conveyance of water for the use of his estate. This channel was taken off from a ravine in Government waste land, and before reaching the plaintiff's estate, passed through land which, in 1864, belonged to Government, but which subsequently formed part of the defendant's estate. When the lease, under which defendant claimed, was made in 1874, the flow of waters through the channel was enjoyed by the plaintiff. In this case Innes, J., in a most elaborate judgment, discussed the subject of easements and rights analogous to easements, though not strictly easements. He pointed out that easements might be acquired by prescription, or might be the subjects of grant or contract; and that, in the present case, an easement must have been acquired by grant or contract under the lease, or by implication of law arising out of the severance of tenements under the lease. As the plaintiff was lessee, though, for 999 years, which was almost equivalent to absolute ownership, he could not strictly acquire an easement, because *in initio* an easement requires the existence of two separate tenements in the ownership of two distinct persons. The lessor, however, might convey by the contract of letting rights of the nature of easements to enure for the term of the holding. Such rights were: (1) Rights of easement already existing and held by the lessor over the property of neighbouring proprietors, which by the lease he passes for the term of the lease to

the lessee; (2) Easements of necessity: such easements arise on the severance of tenements, when the convenience claimed is one without which the vendee or lessee could not have the use of the tenement then severed off from the main heritage; (3) Continuous and apparent easements, which have, in fact, been used by the owners during the unity of possession for the purpose of that part of the united tenement which corresponds with the tenement conveyed. The first did not apply in this case, as the property leased to the plaintiff was contiguous, at the time of lease, to no third person's property, but was surrounded on all sides by waste lands belonging to the Government. Nor did the second apply, because the plaintiff could use the tenement beneficially without the so-called easement, though perhaps not as beneficially as he could have done with it; but it came under the third head,—that is to say, the right claimed was a right in a flowing stream running from the lessor's, to and through the lessee's, tenement, which existed as a flowing stream prior to the lease, and which was made expressly for the purpose of the tenement leased to Mr. Rae. It was, therefore, a continuous easement requiring no language to pass it, but which passed by implication of law. Innes, J., drew the distinction between continuous and discontinuous easements as follows: "A discontinuous easement, as a right of way, not being a way of necessity, cannot be implied from the disposition of severed tenements, and will not pass under a deed of grant of land or a lease, such as the present, without express words showing that it was the intention to pass it along with the property granted." And he quoted Erle, J., in *Polden* v. *Bastard*,[1] which was approved in *Watts* v. *Kelson*,[2] where he said:—"There is a distinction

[1] L. R., 1 Q. B., 156.

[2] L. R., 6 Chan., 166.

between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognize this distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass unless the owner, by appropriate language, shows an intention that they should pass." Innes, J., therefore, found the plaintiff entitled to a right to the flowing water within the ambit of the property leased to him,—that is to say, a right to use the water and pass it on; and that the defendant, who held land both above and below plaintiff's land, was not entitled to interrupt it; but he too might use it as it passed through his grounds. Each was entitled to a reasonable use of the flowing water. Kernan, J., while not prepared to say that this right did not pass under the general word 'easement' used in the lease of 1865 to Mr. Rae, because an easement, in fact, existed when the lease was made, considered the right, one by implication of law to an open, apparent, and continuous easement, in fact existing before and at the time of the lease and that the extent of such right was as expressed by Wilde, B., in *Ewart* v. *Cochrane*,[1] where he said: "It seems to me that, in cases of implied grant, the implication must be confined to a reasonable use of the premises for the purpose for which, according to the obvious intention of the parties, they are demised."

So, too, in *Ratanji Hormasji Bottlewala* v. *Edulji Hormasji Bottlewala*,[2] where two houses were originally held jointly by several owners deriving their title from a common ancestor, and one of the houses enjoyed a

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[1] Macq., H. L. C., 117.

[2] 8 Bom. H. C. Rep., O. C., 181.

continuous easement over the other, it was held, that such easement would, upon partition of the premises, pass to the dominant tenement both by implication of law and also under the general words contained in the deed of partition.

The subject seems first to have been discussed by the Calcutta High Court in *Amatul Rasul* v. *Jhumach Singh*,[1] which was a suit in respect of a "païn," or water-course which had been dug for the joint benefit of two villages at a time when they both belonged to one and the same person. Both villages had then enjoyed the benefit of irrigation from this watercourse. Subsequently, the two villages were sold at auction, and the plaintiff bought one and the defendant the other. It was held that both plaintiff and defendant purchased subject to the arrangements for irrigation made by the former owner of both properties. A recent case is that of *Charu Sarnokar* v. *Dokauri Chandra Thakur*.[2] This was a suit to restrain the defendant from using a path on the plaintiff's land. It appeared that the land held by the plaintiff and defendant had originally belonged to one owner, and that the plaintiff and the defendant had obtained their respective tenements more than twenty years previously. The path had been admittedly made by the original owner, but the plaintiff contended that when he purchased the land he had closed the path. In this case it was said by Field, J.: "In the present case the defendant did not allege that he had acquired an easement by twenty years' enjoyment as of right. His case was that the two tenements originally belonged to the same owner; and that while this unity of possession continued, the path and the ghat were constructed by the single owner; and that when the two tenements became the property of separate owners, this path over the plaintiff's tenement continued to be used by the

[1] 24 W. R., 345.

[2] I. L. R., 8 Calc., 956; 10 C. L.R., 577.

owner of the other tenement; in other words, the defendant alleged an implied grant. This implied grant might arise in one of two ways: (i) The use of the path and ghat might be absolutely necessary to the enjoyment of the defendant's tenement, in which case there would be an *easement of necessity;* (ii) The use of the path and ghat, though not absolutely necessary to the enjoyment of the defendant's tenement, might be necessary for its enjoyment in the state in which it was at the time of severance;—and in this case, if the easement were apparent and continuous, there would be a presumption that it passed with the defendant's tenement. This latter case is discussed in the books under the principle of the disposition of the owner of two tenements (*destination du pere de famille*) see Gale on Easements, 5th Edn., pp. 96, 97, and following pages; and as to right of way, p. 103 note p. 124 note, and *Pyer* v. *Carter*.[1] This principle is just and fair and accords with common sense. It is in consonance with the rule of justice, equity, and good conscience which must guide the Courts in the absence of positive direction of the Legislature. In a still more recent case, *Bolai Chandra Sen* v. *Lalmani Dasi*,[2] the parties had obtained shares of a joint family dwelling-house by a decree of Court, which provided that they should take their shares by mutual conveyances with liberty to the defendant to raise a partition wall. No conveyances were executed, and the plaintiff sued to restrain the defendant from erecting walls so as to interfere with his easements of air and light. It was contended that although in a case of a sale or other transfer *inter partes* a grant of the easement claimed by the plaintiff would be properly implied, no such right could be implied in a case of a partition by the act of a Court of law. The Court did not decide this

[1] H. and N., 916.

[2] I. L. R., 14 Calc., 797.

question, which it observed was one of considerable difficulty It said that the defendant had entered on the share alloted to her on the strength of the original partition decree, by which either party could insist upon mutual conveyances. She was, therefore, bound to execute a conveyance whenever required, and she could not in equity be allowed to deal with the land in such a way as would defeat any conveyance called for. Further, the terms of the order which authorised her to raise partition walls went far to negative the right to raise any other obstruction. The last reported case on the subject is that of *Purshotam Sakharam* v. *Durgoji Tukaram*,[1] in which the parties were originally in joint possession of certain land. In 1865 they divided the land, and ten years later built at their joint expense a partition wall between their respective portions, leaving a hole and a drain in the wall for the passage of water from plaintiff's land to defendant's land. In 1885 the defendant stopped the flow of water by the drain, and the plaintiff sued him to restrain him from causing the obstruction. The lower Court held that the plaintiff had not shown that the water must of necessity be carried off by the drain in the wall, and that there was no express agreement for the water to be so carried off. But the High Court held that the plaintiff would be entitled to the easement claimed by him if he could show either that it was necessary for his share of the property, or that it was apparent and continuous and necessary for enjoying the share as it was enjoyed when the partition took place. It, therefore, remanded the case.

The acquisition of easements of necessity and of quasi-easements according to the Easements Act.

The acquisition of easements of necessity and of quasi-easements, that is, apparent and continuous easements necessary for enjoying property as it was enjoyed when it was separated by grant or bequest, is provided for by

[1] I. L. R., 14 Bom., 452.

section 13, Act V of 1882. It is to be remarked that in sub-section (*d*) of this section, it is enacted that if the transferor of a property subject to an apparent and continuous easement wishes to transfer the property without the easement, his intention to do so must be expressed or necessarily implied. This is in accordance with recent English cases on the subject, in which *Pyer* v. *Carter*, quoted by Field, J., in *Charu Sarnokar* v. *Dokauri Chandra Thakur* was considered, and in which, according to Goddard (3rd Edition, p. 172), " the principle is maintained that if a grantor wishes to reserve any right to himself at all inconsistent or at variance with the grant, or in any way in derogation of it, he must do so in plain and express terms, and that such a reservation cannot be implied. "

Acquisition of easements by local custom.

An easement can be acquired by local custom. This is laid down in section 18, Act V of 1882, and is the law in other parts of India as well as in those to which Act V of 1882 applies.

In the case of *The Secretary of State for India* v. *Mathurabhai and others*[1] the possibility of acquiring an easement by local custom was admitted. In this case the plaintiffs claimed a right, as the inhabitants of a certain village, to graze their cattle on the banks and dry part of a village tank. They thus claimed a *profit à prendre*, which by Indian law is an easement. It was said that the rule of English law that a claim to a *profit à prendre* cannot be acquired by the inhabitants of a village, does not apply to a right of pasturage claimed by a village in the Presidency of Bombay as against the Government, for the right of free pasturage had always been recognized by Government as a right belonging to certain villages, and must have been acquired by custom or

[1] I. L. R., 14 Bom., 213.

prescription. The suit was, however, dismissed, as it was held that the plaintiffs had not established their right to graze their cattle on the particular piece of land claimed by them, for it was said, this right of free pasturage which certain villages enjoyed according to the recognized custom of the country, and which was admittedly enjoyed by this village, did not necessarily confer the right of pasturage on any particular piece of land. In the case of *The Collector of Thana* v. *Bal Patel*,[1] a claim to graze cattle, not only in a particular village, but in every other village in the district of Thana was rejected. Another instance of an easement acquired by local custom is to be found in the case of *Mohun Lal* v. *Nur Ahmad*,[2] in which a piece of land had been used from time immemorial by the inhabitants of a *mohulla* as a burial-ground, and such use was held to exclude any claim to exclusive possession by the zamindar, which would interfere with that use. In the case of *Narasayya* v. *Sami and others*,[3] the plaintiffs were fishermen residing in a village on the banks of the tidal river Upputeru and, by virtue of a local custom, they claimed the exclusive right of fixing stakes and nets for the purpose of catching fish at a certain point in the river. They succeeded in proving thirty years' user of this right, but it was contended that sixty years' user was required to establish such a right. The Madras High Court, however, held that this was not necessary, and the plaintiffs obtained a decree. A right to place *tazias* on a certain plot of land during the *Moharram* was held by the Allahabad High Court to be a right of the nature of the customary easements referred to in section 18 of Act V of 1882, and may be acquired as such by prescription : *Kuar Sen* v. *Mamman*.[4] In the same case it was held by Edge and

[1] I. L. R., 2 Bom., 110.
[2] All. H. C. Rep., 1869, 116.
[3] I. L. R., 12 Mad., 43.
[4] I. L. R., 17 All., 87.

Bannerji, JJ., that where a local custom excluding or limiting the general rules of law is set up, a court should not decide that it exists until satisfied of its reasonableness, and its certainty as to extent and application, and that the enjoyment of the right has not, by leave granted, or by stealth, or by force, and that it had been openly enjoyed for such a length of time as suggests that originally by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things it concerned. It was held in *Palaniandi Tevan* v. *Puthirgonda Nadan*,[1] that no fixed period of enjoyment is laid down by law as necessary to establish a customary right.

Acquisition of easements by long user.

In addition to these modes of acquiring easements, it is clear that in those parts of India where sections 26 and 27 of Act XV of 1877 are in force, easements may also be acquired by long user or enjoyment of such a character and duration as to justify the presumption of a grant or other lawful origin of the right claimed.

In *Madhusudun De* v. *Bissonath De*[2] it was held, that the provisions of Act IX of 1871, did not exclude other modes of acquiring easements besides the mode the Act prescribes; and the same will hold good with regard to Act XV of 1877. A recent ruling of the Privy Council in *Rajrup Koer* v. *Abul Hossein and others*,[3] also clearly lays this down. In this case more than twenty, and possibly fifty or sixty, years before suit, the plaintiff's ancestors and predecessors in estate had constructed and used an artificial watercourse ('païn') on the defendant's land, making compensation to them. The "païn," by a channel at one part of its course, contributed to the water in a 'tâl,' or reservoir, belonging to the defendants, and by a channel at another part

[1] I. L. R., 20 Mad., 389.
[2] 15 B. L. R., 361, O. C.
[3] I. L. R., 6 Calc., 394; L. R., 7 I. A., 240; 7 C. L. R., 529.

took the water which overflowed from the 'tâl' after the defendants had used as much as they required. Less than twenty years before the suit, the defendants, without authority, obstructed the flow of water along the 'païn' in several places. The Courts below differed as to whether some of these obstructions had not been made more than two years before the suit, the rest having been made within that period; and the result was, that the claim was held to be barred by limitation. Their Lordships held, that the provisions of Act IX of 1871, a remedial Act, and neither prohibitory, nor exhaustive, did not exclude or interfere with the acquirements of rights otherwise than under them. A title might be acquired under the Act by a person having no title at all, but it did not exclude or interfere with other titles and modes of acquiring easements; and section 27, by allowing a user of twenty years, if exercised until within two years of suit, under the conditions prescribed, to give without more a title, did not prevent proof of an easement founded on another title independently of the Act. Such a long enjoyment as the plaintiff had proved should be referred to a legal origin, and the long use of the 'païn,' and of the superfluous water of the 'tâl' afforded evidence giving rise to a presumption that a grant or an agreement had been made creating an easement. And although, on the assumption that some of the obstructions in question existed for more than two years before the suit, the plaintiff might not have shown a right under Act IX of 1871, section 27, yet he did not require its aid. And it was further held, that such obstructions being continuous acts, as to which the cause of action accrued *de die in diem*, Act IX of 1871, schedule ii, part 5, clause 31, fixing two years from the date of the obstruction as the period of limitation "for obstructing a watercourse," did not preclude a suit complaining of obstructions, though made more than two

years preceding the date of the commencement of the suit. The latter point was very similarly decided in *Ponnusamy Taver* v. *The Collector of Madura and others*,[1] where the diversion of water was held to be a continuing injury down to the time of the institution of the suit.

In *Achal Mahta and others* v. *Rajan Mahta and others*[2] it was held, that the proper issues to frame when limitation was pleaded in a suit to establish an easement were—(1) Whether the easement in question was peaceably, openly, and as of right enjoyed by the plaintiff or those through whom he claims, within two years of the institution of the suit; and (2), in the event of the above issue being found in the negative, whether there is evidence of enjoyment on the part of the plaintiff, or those through whom he claims, of such a character and duration as to justify the presumption of a grant or other legal origin of the plaintiff's right independent of the provisions of Act XV of 1877, section 26. This ruling was based, as far as the second issue framed went, on the decision of the Privy Council before quoted.

Then, in *Punja Kavarji* v. *Bai Kuvar*,[3] in which the plaintiff proved that from time immemorial and certainly for more than twenty years prior to the date of the obstruction by the defendants, he had enjoyed the right of having an egress for his rain-water through a drain in the defendant's land, and in which more than two years from the date of the obstruction he sued the defendants for its removal, it was held that, though under the circumstances he had failed to prove a title acquired under section 26. Act XV of 1877, yet he, having a title evidenced by immemorial user, did not require the aid of that Act, and inasmuch as the obstruction complained of constituted a continuing nuisance as to which the cause of

[1] 5 Mad. H. C. Rep., 6. [2] I. L. R., 6 Calc., 812.
[3] I. L. R., 6 Bom., 20.

action was renewed *de die in diem*, the plaintiff's claim was not barred by any provision of the Act, but on the contrary was saved by the express provisions of section 23.

In one case, however, *Subramaniya Ayyar* v. *Rama Chandra Rau*[1] decided when Act IX of 1871 was in force, the Madras High Court has said that as the Legislature has fixed twenty years for the acquisition of an easement, and as there is no common law on the subject, the only way in which an easement can now apparently be acquired is by the fulfilment of the requirements of section 27, Act IX of 1871. But in a subsequent case, *Srinibas Rau* v. *The Secretary of State for India*,[2] it ruled that a right to the uninterrupted flow of water along a defined channel over the lands of others may exist independently of the provisions of section 27 of the Limitation Act of 1871, and that when such a right is claimed as a hereditary and customary right and evidence is given in support of long user, such evidence may be sufficient to justify the Court in presuming a grant of the easement, and the Court is not justified in dismissing the suit on the ground that there has been no user within two years prior to suit.

How many years user will justify the presumption of a grant is uncertain.

It is, however, by no means certain how many years user must be proved to justify a Court in making the presumption of the grant of an easement. In the Presidency towns, twenty years' user has been held to be necessary: *Bagram* v. *Khettro Nath Karformah*,[3] *Elliott* v. *Bhuban Mohan Banarji*,[4] *Pranjivan Das* v. *Mayaram*.[5] In certain cases, the cause of action in which arose in the province of Bengal, twelve years' user has been held to be sufficient: *Jai Prakash*

[1] I. L. R., 1 Mad., 335.
[2] I. L. R., 5 Mad., 226.
[3] 3 B. L. R., ; O. C., 18.
[4] 19 W. R., 194; 12 B. L. R., 406; L. R., I. A., sup. Vol., 175.
[5] 1 Bom., H. C., 148.

v. *Amir Ali*,[1] *Mohima Chandra Chakrabartti* v. *Chandi Charan Guho*,[2] *Kartik Chandra Sirkar* v. *Kartik Chandra De*,[3] *Bijai Keshab Rai* v. *Abhai Charan Ghosh*.[4] In *Krishna Mohan Mukharji* v. *Jagan Nath Rai*[5] and *Mallik Karim Baksh* v. *Harihar Mandar*,[6] Jackson, J., pointed out that under the law no particular period was necessary for the establishment of an easement by long and continuous enjoyment. In *Ponnusami Taver* v. *The Collector of Madura*[7] it was held that a grant might be presumed from a twelve years' user, and in *Kurupam Zamindar* v. *Mearngi Zamindar*[8] eighteen years' user was held sufficient. In the mofussil of the Bombay Presidency, proof of more than thirty years' user was held to be required under the provisions of clause 1, section 1, Regulation V of 1827 : *Ram Rau* v. *Babushet*,[9] *Anuji* v. *Morushet*.[10] No definite rule can therefore be laid down on the subject. All that can be said is that enjoyment of the easement claimed must be proved for such a period as to justify the Court in presuming a lawful origin or a lost grant of the right : *Guru Prasad Rai* v. *Baikantho Chandra Rai*,[11] *Punja Kuvarji* v. *Bai Kuvar*.[12] Further, the Calcutta High Court has expressed its disapproval of findings of user for indefinite periods, such as "all along" (*barabar*) and "from before." Such user does not necessarily prove a right : *Muktaram Bhattacharji* v. *Haro Chandra Rai*.[13]

As to the acquisition of easements by tenants, Innes, J., in *Kristna Ayyan and others* v. *Venkatta Chella Mudali and others*,[14] has said : "An easement implies

Acquisition of easements by tenants.

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[1] 9 W. R., 91.
[2] 10 W. R., 452.
[3] 11 W. R., 522 ; 3 B. L. R., A. C., 166.
[4] 16 W. R., 199.
[5] 11 W. R., 236.
[6] 13 W. R., 440 ; 5 B. L. R., 174.
[7] 5 Mad. H. C. Rep., 6.
[8] I. L. R., 5 Mad., 253.
[9] 2 Bom. H. C. Rep., 333.
[10] 2 Bom. H. C. Rep., 334.
[11] 6 W. R., 82.
[12] I. L. R., 6 Bom., 20.
[13] 7 W. R., 1.
[14] 7 Mad. H. C. Rep., 60.

an absolute outright grant to some person of an incorporeal right as appurtenant to his corporeal property. Such a grant cannot be conceived as made to a mere tenant in respect of a tenement in which his interest is precarious. A grant of this kind cannot, therefore, in such a case, be implied ; or, in other words, there cannot be an easement claimed by a tenant as against his landlord." This being so, the question arose whether, under the contract of letting, the plaintiffs could claim to prevent any diversion of the water for the use of defendants, the tenants of the same landlord in other villages. It was held, that they had not this exclusive privilege ; but that their right was limited to reasonable enjoyment of the water for the purposes of irrigation and the like, which right had not been invaded. By section 12 (3) of Act V of 1882, no lessee of immoveable property can acquire, for the beneficial enjoyment of other property of his own, an easement in or over the property comprised in his lease : cf. *Udit Singh* v. *Kashi Ram.*[1] A right of user of a drain or passage may be exercised for the owner by a tenant : *Amjadi Begam* v. *Ahmad Hossain.*[2]

Burden of proof in cases of infringement of natural rights and easements.

In the case of an easement, the burden of proof is upon the party claiming such a right, but in the case of natural rights, the burden of proof will lie on the party alleging a right to restrain another from exercising them : *Chaet* v. *Krishna Sundari Dasi,*[3] *Abhai Charan De* v. *Lakhi Mani,*[4] and *Hari Mohan Thakur* v. *Krishna Sundari.*[5] In one case, *Pachai Khan* v. *Abed Sirdar,*[6] in which the plaintiff sued for a declaration that the defendant had no right of way over certain land, it was held that the onus of proving an easement did not lie with the defendant, but that it

[1] I. L. R., 14 All., 185.
[2] 6 W. R., 314.
[3] 15 W. R., 83.
[4] 2 C. L. R., 555.
[5] I. L. R., 11 Calc., 52.
[6] 21 W. R., 140.

was for the plaintiff to prove that he was entitled to exclusive possession. This ruling was, however, dissented from and overruled in *Abhai Charan De* v. *Lakhi Mani.*

Extent and mode of use of easements.

The extent and mode of use of easements will, when granted by deed, be ascertained from the words of the deed, and where acquired by prescription, from the accustomed use of the right. (Goddard's Law of Easements, 3rd Edn., pp. 320, 321; Act V of 1882, sections 20, 28: *Zamir Ali* v. *Durgahim.*[1])

No easement can be used to such an extent as to destroy the servient tenement: *Zamir Ali* v. *Durgaban,*[2] *Guru Charan Gun* v. *Ganga Gobind Chatarji,*[3] *Jai Durga Dasi* v. *Jagannath Rai*[4]; Act V of 1882, section 17 (*a*).

There can be no prescriptive right to injure another, even though such injury has the warrant of very ancient user: *Sridhar De* v. *Adoyto Karmokar and others.*[5] The defendants in this case used to throw the burnt earth, of which their crucibles were made, into the plaintiff's tank, and were gradually filling it up.

As to right accessory to easements see *Parsotam Ghela* v. *Gandrap Fatelal Gokuldas,*[6] *Hayagreeva* v. *Sami.*[7]

No length of enjoyment can legalize a public nuisance: *The Municipal Commissioners of the Suburbs of Calcutta* v. *Mahomed Ali*[8] and in *Hari Krishna Joshi* v. *Shankar Vithal*[9] it was held that the private nuisance caused by boughs overhanging land of another could not create a right by prescription though it had existed for more than forty years.

Transfer of easements.

The right to easements appurtenant to a property goes with the property when sold by the owners; section 8, Act IV of 1882, and section 19, Act V of 1882, *Nobin*

[1] 2 W. R., 212.
[2] 1 W. R., 230.
[3] 8 W. R., 269.
[4] 15 W. R., 295.
[5] 20 W. R., 237.
[6] I. L. R., 17 Bom., 745.
[7] I. L. R., 15 Mad., 286.
[8] 7 B. L. R., 499; 16 W. R., Cr., 6.
[9] I. L. R., 19 Bom., 420.

Chandra Ballabh v. *Bhuban Chandra Mandal.*[1] This rule applies also when the property is sold by the Court in execution of a decree against the owner : *Hari Madhab Lahiri* v. *Hem Chandra Gossami.*[2]

But a mortgagee may not be bound. Thus, where *A* had brought a suit against *B* to have it declared that *B* had no right of way over his lands, and the suit was dismissed, and *B's* right pronounced to be established, it was held, that *A*, having mortgaged the lands to *C* before the suit, and *C* having, after the suit, caused the lands to be sold and having become the purchaser, *C* was not bound by the decision against *A* from again raising the question of the validity of the right of way : *Bonomali Nag* v. *Kailas Chandra De.*[3]

In *Chandra Kumar Mukharji* v. *Kailash Chandra Sett*,[4] the meaning of the words "appurtenant or belonging" was discussed, and it was held that these words will ordinarily carry only actual existing easements and, therefore, will carry no right of way over the land of the grantor. Where further words are used, such as "therewith held or used," such words will carry a way formerly enjoyed as an easement, but as to which the right has been suspended by unity of possession. But such words will not carry a way made by the owner of both properties during the unity of possession for his own greater convenience in the use of the two properties jointly. When, however, during the unity of possession, a way, which has never existed as an easement, is in fact used for the convenience of one of the tenements afterwards severed, the authorities show that the words in question are large enough to carry it.

Extinction of easements.

An easement is extinguished when either the dominant or the servient heritage is completely destroyed. *Tikram*

[1] 15 W. R., 526.
[2] 22 W. R., 522.
[3] I. L. R., 4 Calc., 692.
[4] I. L. R., 7 Calc., 665.

v. *Durga Prasad* ;[1] section 45, Act V of 1882. Land taken up under the Land Acquisition Act is discharged of all easements : *Collector of the 24-Parganas* v. *Nobin Chandra Ghosh* ;[2] *In the matter of the petition of Fenwick* ;[3] *Taylor* v. *The Collector of Purneah.*[4]

Abandonment of easements.

An easement may be abandoned. The abandonment may be either by express agreement between the owner of the dominant land and the owner of the servient land, or it may be implied from a long and continuous interruption on the part of the owner of the servient land, submitted to by the owner of the dominant land : *Khettranath Ghosh* v. *Prosunno Ghosh*,[5] *Kena Mahomed* v. *Bohatu Sirkar.*[6] When a party suing for the use of a waterway was found to have allowed it to be filled up without objection, and another of the same description to be constructed, which he had used for a year or two, he was held to have abandoned his right to the former waterway : *Jagabandhu Chakrabartti* v. *Jagat Chandra Chaudhuri.*[7] So, in *Raj Bihari Rai* v. *Tara Prasad Rai*,[8] where a new way had been substituted for an old one with the consent of the person entitled, and the non-user of the old way was accompanied by acts which warranted the Court in inferring an intention to release, it was held that the right of resumption was lost, and that the non-user need not extend over any defined period. In one case, *Hari Das Nandi* v. *Jadunath Datta*,[9] the Calcutta High Court said that a right of way over the land of another must be kept up by constant use, and that after a discontinuance of such use for six years no suit can be brought to re-establish it. This, however, would seem not

[1] All. H. C. Rep., 1866, p. 196.
[2] 3 W. R., 27.
[3] 6 B. L. R., App., 47 ; 14 W. R., Cr., 72.
[4] I. L. R., 14 Calc., 423.
[5] 7 W. R., 498.
[6] Mar., 506.
[7] 12 W. R., 519.
[8] 20 W. R., 188.
[9] 5 B. L. R., App., 66 ; 14 W. R., 79.

to be good law now, unless there were circumstances to justify the inference that the party discontinuing the use of the right intended to abandon it. It is to be remarked that the dominant owner may abandon the easement whenever he thinks proper. The servient owner cannot prevent him from doing so : *Khurshed Hossein* v. *Teknarain Singh.*[1]

Rights of riparian proprietors in natural water-courses.

We will now consider natural rights, easements, and *profits à prendre* as connected with water, light and air, and support. I shall first proceed to discuss them in connection with water, and especially as to the rights of riparian proprietors in natural and artificial water-courses. The natural right possessed by each successive riparian proprietors in a natural water-course, is a right to use the water and pass it on : *Manowar Hossein* v. *Kanhya Lal*,[2] *The Court of Wards* v. *Lilanand Singh*,[3] *Chamru Singh* v. *Mallik Khairat Ahmad.* He has no right to pen back the water or divert it or the like, unless he has acquired that right by an easement inconsistent with the natural right, and thereby the natural right is suspended. The subject was discussed by the Madras High Court in the case of *Perumal* v. *Ramasami Chetti*,[5] in which it was said that riparian proprietors are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture, subject to the conditions (i) that the use is reasonable, (ii) that it is required for their purposes as owners of the land, and (iii) that it does not destroy or render useless, or materially diminish or affect the application of the water by riparian owners below the stream in the exercise either of their natural right or their

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[1] 2 C. L. R., 141.
[2] 3 W. R., 218.
[3] 13 W. R., 48.
[4] 18 W. R., 525.
[5] I. L. R., 11 Mad., 16.

right of easement, if any. There is also a Bombay case, *The Assistant Collector of Nasik* v. *Shamji Dasrath Patil*,[1] which illustrates the rights of riparian proprietors in natural streams, and the extent to which they can be interfered with. In this case the plaintiffs were inhabitants of a village on the banks of the river Girna. A dam had been in existence across this river for upwards of 280 years, and during all that time, the plaintiffs' village D, and another village P, had received an equal supply of water from separate sluices in the dam. The Government authorities being of opinion that the village D required less water than the village P, reduced the size of the D sluice, and consequently the amount of water flowing to the D village. The village D was held immediately of Government. The inhabitants of D accordingly sued Government, and it was held that Government had no such right of interference; neither (1) as riparian proprietors, supposing them to be such, since the right to the enjoyment of the water of a river belongs to the occupant of the river bank, whatever the nature of his tenancy; nor (2) by any imaginable rights existing in the Government as such, since, if any such rights ever existed, the long user of upwards of 280 years of the water from the dam by the village of D would be amply sufficient to justify a presumption of an original *animus dedicandi* in the Government.

Rights of riparian proprietors in artificial water-courses.

But in an artificial water-course there is no natural right to the use of the water. Thus, in *Ramessar Prasad Narayan Singh* v. *Kunjo Bihari Pattak and another*,[2] it was held, that the right to water flowing through an artificial water-course constructed on a neighbour's land, must rest on some grant or arrangement proved or presumed from or with the owner of the land from

[1] I. L. R., 7 Bom., 209.

[2] I. L. R., 4 Calc., 633; L. R., 6 I. A., 33.

which the water is artificially brought, or in some other legal origin. Such a right might be presumed from the time, manner, and circumstances under which the easement had been enjoyed. Successive riparian proprietors in the water of a natural stream were declared entitled, *primâ facie*, to an uninterrupted flow of water in the natural course, and to reasonable enjoyment thereof as a natural incident of ownership ; but where the stream was artificial, then a right of easement must be proved or presumed either by grant or arrangement, or by some other legal origin, such as prescription. *Wood* v. *Waud*[1] was quoted, where the Court said :—"The right to artificial water-courses as against the party creating them surely must depend upon the character of the water-course, whether it be of a temporary or permanent nature, and upon the circumstances under which it was created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary nature and liable to variations." Also *Greatrex* v. *Hayward*,[2] where Parke, B., said :—"The right of a party to an artificial water-course as against the party creating it must depend upon the character of the water-course and the circumstances under which it was created."

A similar distinction between the rights in the two kinds of streams was drawn in *Bhup Narayan Singh and another* v. *Keramat Ali* ;[3] and rights as defined above in natural water-courses were laid down in *Khettronath Ghosh* v. *Prosunno Ghosh*,[4] *Sardowan and others* v. *Harbans Narayan Singh*,[5] and *Subramaniya Ayyar and others*

[1] 3 Exch., 748.
[2] 8 Exch., 291.
[3] 6 W. R., 99.
[4] 7 W. R., 498.
[5] 11 W. R., 254.

v. *Ramachandra Rau and others*,[1] as well as in the cases already cited ; and in artificial water-courses, in *Indrojit Koer* v. *Lachmi Koer*.[2] Where the claim was to erect a "bund" in a natural water-course, it was held incumbent on the plaintiff to prove the acquisition of a legal right by user—*Hiranand Sahu* v. *Khabirunnissa*,[3] even if the "bund" were erected on his own land, that is, it is to be presumed, even if the bed of the stream belonged to him : *Ram Dass Sarmah* v. *Sonatan Guho*.[4]

Rights of riparian proprietors as to flow of water.

Intermediate riparian proprietors cannot stop the flow of a natural stream unless they have acquired an easement to do so : *Chamru Singh and others* v. *Mallik Khairat Ahmed and others*,[5] *Subramaniya Ayyar and others* v. *Ramachandra Rau and others*.[1] There is no right to tap an artificial water-course unless by grant or prescription : *Ran Bahadur and others* v. *Pudhi Rai and others*.[6] But a prescriptive right to irrigation from such a stream once established cannot be interfered with : *Badan Thakur* v. *Shankar Das* ;[7] and an action will lie for an act which deprives a party of a rise in the water of such a channel : *Shankar Sahu* v. *Garbhu Sahu*.[8] An easement may also be acquired in the surplus water of a tank flowing through a defined channel, whether natural or artificial : *Rayappan* v. *Virabhadra*.[9]

Rights as to surface water.

The right to surface water standing on the soil is in the owner of the soil : *Bansi Sahu and another* v. *Kali Prasad* ;[10] and in *Maniyan Narasimma and others* v. *Ayya Krishnama Chariyar and others*,[11] and *The Collector of North Arcot* v. *Ayya Krishnama Chariyar and others*,[11]

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[1] I. L. R., 1 Mad., 335.
[2] 14 W. R., 349.
[3] 15 W. R., 516.
[4] W. R., 1864, 275.
[5] 18 W. R., 525.
[6] W. R., 1864, 319.
[7] W. R., 1864, 106.
[8] 15 W. R., 216.
[9] I. L. R., 7 Mad., 530.
[10] 13 W. R., 414.
[11] 7 Mad. H. C. Rep., 37.

where the plaintiffs claimed a prescriptive right to throw back water from their tank on to the defendant's land, and keep it there till it was gradually absorbed into the tank, it was held, that there was no object over which such a right could be exercised, and that water not running in a defined stream was the absolute property of the owner of the land of which it forms part, and before it reaches a defined stream he might draw it off and put it to what purpose he pleased. This followed *Rawstron* v. *Taylor*[1] and *Broadbent* v. *Ramsbotham*.[2] It was further held, that a prescriptive right to throw back and keep water standing on the land of another existed only where the water flowed n a defined stream. It did not apply to surface water, though it might ultimately, if not arrested, flow into a tank. For similar rulings, see *Ram Ratan Neogi and others* v. *Phul Singh*,[3] and *Bansi Sahu and others* v. *Kali Prasad*.[4]

In *Kena Mohomed* v. *Bohatu Sirkar*,[5] the converse was held, namely, that a man has no prescriptive right to the flow of surface drainage water from another man's land into his own, unless it flows in a definite channel. In *Perumal* v. *Ramasami Chetti*[6] it was point ed out that it is undoubtedly the natural right of every owner of land to collect and dispose of all water on the surface which does not pass in a defined channel, and that both under s. 17 (*c*), Act V of 1882, and English cases surface water not flowing in a stream and not permanently collected in a pool, tank, or otherwise, is not a subject of easement by prescription, but may be the subject of express grant or other contract. But the proprietor of land on a higher level has a right to have the water which falls thereon run off over adjoining land of a lower level:

[1] 25 L. J. Exch., 73.
[2] Ibid, 115.
[3] W. R., 1864, 147.
[4] 13 W. R., 414.
[5] Marsh, 506.
[6] I. L. R., 11 Mad., 16.

Hamidunnissa v. *Anundomoyee Dasi*,[1] *Khettronath Ghosh* v. *Prasunno Ghosh*,[2] *Kopil Puri* v. *Manik Sahu*,[3] *Imam Ali* v. *Poresh Mandal*,[4] *Abdul Hakim* v. *Gunesh Datta*,[5] *Subramaniya Ayyar* v. *Ramachandra Rau*.[6] In *Imam Ali* v. *Poresh Mandal*,[4] it was said that not only was there a well-recognized servitude of lower lands to receive the natural drainage of adjoining lands on a higher level, but it had been established that for a long series of years the waters from the plaintiff's lands had been accustomed to escape in a particular direction and by certain separate passages across the defendant's land, so the defendants could not do anything which would interfere with the plaintiff's rights in that respect: *Hamidunnissa* v. *Anundomoyee Dasi*,[1] *Khettronath Ghosh* v. *Prasunno Ghosh*,[2] *Kopil Puri* v. *Manik Sahu*,[3] *Subramaniya Ayyar* v. *Ramachandra Rau*,[6] and *Abdul Hakim* v. *Gunesh Datta*,[5] in which last cited case it was laid down that this right was one incident to the ownership of land in this country and not merely a right to be acquired by long user: Cf. *Parshotam Sakharam* v. *Durgoji Tukaram*,[7] and *Bala* v. *Maharu*.[8]

Rights of fishery.

I will now deal with rights of fishery, which according to English law are not easements but *profits à prendre*, but which are easements according to Indian law. Under Act XV of 1877 rights of fishery are easements, whether appurtenant to any land or in gross. According to Act V of 1882, they are only easements if annexed to the ownership of immoveable property. They may be considered according as they are to be exercised in (1) the

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[1] W. R., F. B., 25; Marsh., 85.
[2] 7 W. R., 498.
[3] 20 W. R., 287.
[4] I. L. R., 8 Calc., 468: 10 C. L. R., 396.
[5] I. L. R., 12 Calc., 323.
[6] I. L. R., 1 Mad., 335.
[7] I. L. R., 14 Bom., 452.
[8] I. L. R., 20 Bom., 788.

sea ; (2), tidal navigable rivers ; and (3), non-tidal rivers, *bhils*, tanks and other sheets of water.

Rights of fishery in the sea.

The law of rights of fishery in the sea has been settled by the Bombay High Court by its decision in *Baban Mayacha and others* v. *Nagu Sravucha and others*,[1] in which the rights of the Crown and of the public in the waters and subjacent shore of the sea below low water-mark, and within three miles of it, were discussed ; and it was held, that the right of the public to fish in the sea, whether it and its subjacent soil were vested in the Crown or not, was common, and was not the subject of property. Also that, in certain parts of the sea, that right might be regulated by local custom, and that members of the public exercising the common right to fish in the sea were bound to exercise that right in a fair and reasonable manner, and not so as to impede others from doing the same ; and that conduct which prevented another from a fair exercise of his equal right, if special injury thereby resulted to him, was actionable. Merely preventing the enjoyment of the right was not a sufficient ground of action, as the right interfered with was a public right,—hence, as we have seen before, special damage would have to be alleged.

In *Viresa* v. *Tatayya*,[2] it was, however, decided that the right of the public to fish in the sea, as well as in all navigable and tidal waters, may be restrained by the Legislature, as well as by an exclusive privilege acquired either by grant or prescription. "Although the general, if not the universal, law of all civilised nations," it was said, "recognises in all citizens a common and general right of fishing in the sea and in all bays, coves, branches, and arms of the sea, and in all navigable and tidal waters (Angell, chap. 3, para. 65*a*), this right within the territorial waters may be restrained or regulated by

[1] I. L. R., 2 Bom., 19. [2] I. L. R., 8 Mad., 467.

the Legislature, and it may be curtailed by an exclusive privilege acquired either by grant or prescription by certain persons within certain limits. . . . . There is no law, nor do we know of any custom," it was added, "which distinctly determines the period of exclusive possession necessary to prove a title by prescription to such a common of fishery ; but as an infringement on the general rights of the public, it is clear that the right could be acquired by a period of enjoyment which would suffice for the acquisition of an easement against the Crown."

Rights of fishery in tidal and navigable rivers.

Tidal navigable rivers belong to the Crown, which has a freehold in the bed of such rivers, as well as in the land between high and low-water mark : *Doe dem Shib Krishna and others* v. *The East India Company*,[1] *Satcowri Ghosh Mondal* v. *Secretary of State for India*.[2] In *Prasanno Kumar Sirkar and others* v. *Ram Kumar Paroi*,[3] it was held, that a private right of fishing in a public navigable river could only be derived from the Crown, if indeed it could be acquired at all, which was extremely doubtful, and must be proved by the clearest evidence. In *Satcowri Ghosh Mondal* v. *Secretary of State for India* (*q. v. s.*), the value of the *thakbust* map as evidence in such cases was discussed. In *Chandra Jallah and others* v. *Ram Charan Mukharji and others*,[4] it was held, that the right of fishing in a tidal navigable river did not belong to the public, nor was the Government prohibited from granting to individuals the exclusive right of fishing in such a river by any law. In *Bagram* v. *The Collector of Bhulluah and others*,[5] it was held, that where the exclusive right of *jalkar* in a public navigable river was set up against the ordinary rights of the State and the public, it must be established by clear and strong proof.

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[1] 6 Moo. I. A., 267.
[2] I. L. R., 22 Calc., 252.
[3] I. L. R., 4 Calc., 53.
[4] 15 W. R., 212.
[5] W. R., 1864, 243.

The subject of *jalkar* rights in tidal navigable rivers was, however, exhaustively dealt with by the Calcutta High Court in the Full Bench decision in the case of *Hari Das Mal* v. *Mahomed Jaki*,[1] in which it was pointed out that by the law of England the public have the right of fishing in all tidal navigable rivers, and since the passing of the Magna Charta the Crown has no power to interfere with that right by making exclusive grants to private individuals in derogation of it. But the English law on the subject is a part of the territorial law of England, and it has been held over and over again that the territorial law of England does not prevail in the Indian Mofussil. Whether or not the proprietary right in the soil of British India is vested in the Crown or not, it is clear that the Crown has the power of making settlements or grants of all unsettled and unappropriated lands. It follows, therefore, that in India the exclusive right of fishery in tidal navigable rivers may be granted by the Crown to private individuals, and such a right must ordinarily be proved either by proof of a direct grant from the Crown or by prescription.

The Madras High Court has come to similar conclusions. In *Viresa* v. *Tatayya*[2] which deals with the case of tidal navigable rivers as well as of the sea, it is pointed out that in England in the case of navigable streams the maintenance of a fishing weir which interrupts navigation cannot be claimed, if there is evidence that it came into existence subsequently to the Statute of Edward I. But "in this country," it was said, "we know of no law which prevented the Sovereign from making a grant of a common of fishery." It was then added, as already explained, that there is no law or custom which determines the period of exclusive possession necessary to prove a

[1] I. L. R., 11 Calc., 434. [2] I. L. R., 8 Mad., 467.

title by prescription to such a common of fishery, but that it was cleared that it could be acquired by such a period of enjoyment as would suffice for the acquisition of an easement against the Crown. There is a subsequent case, *Narasayya* v. *Sami*,[1] which at first sight appears to be at variance with the ruling in *Viresa* v. *Tatayya* as to the period of prescription necessary to establish an exclusive right of fishing in a navigable and tidal stream. In this case the plaintiffs claimed a right to catch fish in a tidal stream, *viz.*, the river Upputeru, by fixing stake nets at a certain spot. The lower Courts found that the plaintiffs had fixed the stake nets at this spot for more than thirty years in their own right, and that there existed a custom for the fishermen of the village in which the parties resided to make use of a particular spot for putting up their nets. It was contended in the High Court that thirty years' user was not sufficient to establish such an easement against the public and the Crown. The Court, however, did not decide this point, but proceeded on the custom found by the lower Courts to prevail. Muttasami Ayyar, J., held that the plaintiffs' and the defendants' rights of fishing in the river were subject to a regulation evidenced by a custom obtaining in the village for upwards of thirty years, and said that he saw no reason why it should not be enforced as creating an obligation not to interfere with each other's privilege founded on such custom.

Effect of a change in course of tidal navigable river.

The question of the effect of a change in the course of a tidal navigable river upon the rights of fishery in it has been considered in three cases, *Grey* v. *Anand Mohan Moitro*,[2] *Shibeshari Debi* v. *Lakhi Debi*,[3] and *Tarini Charan Singh* v. *Watson & Co.*[4] In the first of these cases it was said that if such a river merely changed its

[1] I. L. R., 12 Mad., 43.
[2] W. R., 1864, 108.
[3] 1 W. R., 88.
[4] I. L. R., 17 Calc., 963.

course, the old bed of the river must be taken to have become private property, and as incident to and part of the same, the owner of the soil would be entitled to all *bhils*, ponds or gulfs, in which water remained, but which did not communicate with the river except in time of flood. The right of the defendant in that suit to the fishery in the water in question, being merely granted out of and a part of the right of Government to the river, could no longer exist, it was said, when the right of Government itself was gone. The case of *Shibeshari Debi* v. *Lakhi Debi* was one in which the plaintiff alleged that certain lands of her taluk had been flooded by the incursion of the river Hooghly in which the defendant had a right of fishery, and she sued to dispossess the defendant from a *daha* or streamlet, of which she had taken possession. In this case the doctrine was laid down that if the flooding of the plaintiff's taluk had occurred by imperceptible decrees, her right of ownership in the portion covered with water might be lost, but that if the flooding was caused by a sudden irruption of the river, so that a definite and ascertainable area was submerged at once, then that area would not become lost to the talukdar, nor would the owner of the rights of fishery in the river become entitled to extend his fishery rights over it. The case of *Tarini Charan Singh* v. *Watson & Co.* was the converse of *Grey* v. *Anand Mohan Moitro*. In this case a tidal navigable river had changed its course and flowed over the plaintiffs' land, and the plaintiffs sued to establish their right over the portion of the river which flowed through their land. The Subordinate Judge before whom the case first came held on the authority of *Shibeshari Debi* v. *Lakhi Debi* that, as the incursion of the river was sudden and not gradual, the defendants were not entitled to exercise their rights of fishery over the river in its present course, and that the right of fishery over that portion of the river had become

vested in the plaintiffs, they being the owners of the bad of the river. The High Court, however, approved of the principle laid down in the case of *Grey* v. *Anand Mohan Moitro*, viz., that, so long as the river retains its navigable character, it is subject to the rights of the public, and the right of fishery remains in the person who holds it under a grant from Government. It accordingly held that the defendants in the suit had a right of fishery over the river in its present course to the same extent and under the same limits as they possessed previously to the change in its channel.

Rights of fishery in non-tidal waters.

As to fishery rights in non-tidal rivers, *bhils*, tanks and other sheets of water, it has been said that a person owning the right of fishery in a river is entitled to exercise that right in the open channels, and also in all closing or closed channels abandoned by the river up to the time when the channels become finally closed, that is, so long as fish can pass to and fro: *Krishnendro Rai Chaudhuri* v. *Sarnomoyi*.[1]

But the owner of a right of fishery in a river is not entitled to take fish in pools of standing water formed by inundation on or near the banks of the river. His rights are confined to the river itself. If, however, a person is the proprietor of the rights of fishery in a whole pargana, he is entitled to catch fish in any natural water-course or any *jhil* or pond not made by human agency: *Karuna Mayi Chaudhurani* v. *Jai Sankar Chaudhuri*.[2]

A person has no right to erect a 'bund' in a natural stream even on his own land, that is, even if the bed of the stream belongs to him, so as to intercept the passage of fish in it, and thereby render the right of fishing of another person in that stream less profitable. But if the "bund" has existed for many years, the first person's

[1] 21 W. R., 27.

[2] W. R., 1864, 267.

right of fishery must be deemed subject to the other person's right to keep up the 'bund:' *Ram Das Sarmah* v. *Sonatan Guho.*[1]

Rights of fishery in gross.

A right of fishing in a river, *bhil* or tank, which is not appurtenant to any property was, as already pointed out, not an easement according to Act IX of 1871, but an interest in immoveable property, and, hence, when a defendant proved that he had been exercising the right of fishing in certain water adversely to the plaintiff for more than twelve years, it was held that the plaintiff's suit for a declaration that he was entitled to the exclusive right of fishing in such water was barred by limitation: *Parbati Nath Rai* v. *Madhu Paroi.*[2] So, too, it was held under Act IX of 1871, that when a person exercises his right of fishing in a tank adversely for twelve years, his right to fish becomes absolute and indefeasible: *Lakhimani Dasi* v. *Karuna Kant Moitro.*[3] Such a right, as said before, is not an easement under the Indian Easements Act, as it does not appertain to any dominant heritage. It is also not an easement according to the Transfer of Property Act, as it is an incorporeal hereditament, *Forbes* v. *Mir Mahomed Hussain,*[4] and immoveable property, *Bhundal Panda* v. *Pandol Pos Patil,*[5] and so capable of being transferred apart from any dominant heritage. It is, however, an easement under Act XV of 1877, and therefore under that Act requires twenty years' uninterrupted enjoyment as of right to establish it: *Chandi Charan Rai* v. *Shib Chandra Mandal.*[6] The right must further be exercised by some particular person for that period; so a fluctuating body such as the tenants of a pargana, claiming to have a prescriptive

[1] W. R., 1864, 275.

[2] I. L. R., 3 Calc., 276; 1 C.L.R., 592.

[3] 3 C. L. R., 509.

[4] 12 B. L. R., P. C., 210; 20 R., 41.

[5] I. L. R., 12 Bom., 221.

[6] I. L. R., 5 Calc., 945; 6 C. L. R., 269.

right to fish in a *bhil* cannot acquire such a right by prescription. No grant can be presumed in such a case, for there can be no ascertained grantee or grantees, and it cannot be gained by custom, for a custom under which there is no limitation as to the number of persons entitled to enjoy the right to fish is unreasonable, and, therefore, invalid: *Lachmipat Singh* v. *Sadaulla Nashyo.*[1]

Servitus stillicidii.

There is an easement known as *servitus stillicidii* which is a right to drop the rain-water from the house, which is the dominant tenement, on to the property constituting the servient tenement. This was one of the urban servitudes under the Roman law. There have been a few cases connected with this right in India. In *Akilandammal and another* v. *Venkata Chala Mudali*[2] it was held, that where the alteration of a building created *stillicidium*, or rendered more burdensome an existing *servitus stillicidii*, it would be very dangerous to hold that this justified the demolition of the building. In *Lala Mani Dasi* v. *Jai Narayan Shâh*[3] it was held, that the *servitus stillicidii* claimed in that suit being permissive, no action lay to maintain it. There is also a Bombay case, *Mohan Lal Jechand* v. *Amratlal Bechardas*,[4] in which the plaintiff sought to establish his right as against the defendant of compelling the defendant to receive upon the roof of his house the rain-water which flowed from the house of the plaintiff, which he had newly erected. It was held that the plaintiff could only have acquired such an easement by contract or prescription, on neither of which he relied, and so his claim was rejected.

Natural rights and easements connected with light and air.

We now come to the subject of natural rights and easements connected with light and air.

[1] I. L. R., 9 Calc., 698; 12 C. L. R., 382.

[2] 6 Mad. H. C. Rep., 112.

[3] 11 W. R., 508.

[4] I. L. R., 3 Bom., 174.

The right to light and air is a natural right as to the light and air flowing over property, and an easement in other cases. The remarks of Littledale, J., in *Moore* v. *Rawson*,[1] quoted in *Pranjivandas Harjivandas* v. *Mayaram Samaldas and another*,[2] on the subject of the natural rights to, and easements in, light and air, appeared to contain almost the whole law on the subject. He said:—"Every man on his own land has a right to all the air which will come to him, and he may erect even at the extremity of the land buildings with as many windows as he pleases. In order to make it lawful for him to appropriate to himself the use of the light, he does not require any consent from the owner of the adjoining land. He, therefore, begins to acquire the right to the enjoyment of the light by mere occupancy. After he has erected his building the owner of the adjoining land may afterwards, within twenty years, build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour; but if the light be suffered to pass without interruption during that period to the building so erected, the law implies from the non-obstruction of the light for that period, that the owner of the adjoining land has consented that the person who has erected the building upon his own land shall continue to enjoy the right, without obstruction, so long as he shall continue the specific mode of enjoyment which he has been used to have during that period." The doctrine, that a landowner may build what he pleases on his own land, so long as he does not interfere with an easement which has been acquired by another, was laid down in *Ram Ruch and another* v. *Deokee Nandan and others*[3] and in *Puran Madak* v. *Udaichand Mallik*.[4] In *Elliott and others* v. *Bhuban Mohun Banarji and others*,[5] where a building, obstructing the access of light and air to

[1] 3 Bram. and Cress., 340.
[2] 1 Bom. H. C. Rep., 148.
[3] All. H. C. R., 1870, p. 169.
[4] 3 W. R., 29.
[5] 12 B. L. R., P. C., 406; 19 W. R. 94; L. R., I. A., Sup. Vol., 175.

the plaintiffs' building was, commenced after notice to the plaintiffs before the expiry of the twenty years necessary to the acquisition of the easement by the plaintiffs, it was held that there were not twenty years of enjoyment with the acquiescence of the defendants, such as to entitle the plaintiffs to maintain their suit for the right, although the defendants' building did not in point of fact amount to an obstruction to the access of light and air till after the twenty years had elapsed. In *Pranjivandas Harjivandas* v. *Myaram Samuldas and another*,[1] it was held that to acquire by prescription a right to uninterrupted access of light and air, it was sufficient if the building had assumed the appearance of a dwelling-house for more than twenty years before the institution of the suit ; though the house were not completed or used as a dwelling-house for twenty years before that institution ; and in *Elliott and others* v. *Bhuban Mohan Banarji and others*,[2] it was held that the date of the plaintiffs' beginning to acquire the easement was to be taken to be the 14th April 1850, because the windows were then in a sufficiently finished state to create the right. The owner of a house, the light coming to which is obstructed by a building on adjoining land erected by a trespasser thereon, may possibly have a right of action against him even though he had not acquired an easement by prescription ; but unless he has acquired an easement he would not, in the case of a similar obstruction, have a right of action against the owner of the adjoining land or his licensee : *Dhuman Khan* v. *Muhammad Khan*.[3]

In *Ratanji Hormasji Bottlewala* v. *Edalji Hormasji Bottlewala*,[4] it was said that the Court would not merely look at the use to which rooms in a house from which

[1] 1 Bom. H. C. Rep., 148.
[2] 12 B. L. R. P. C., 406 ; 19 W. R., 194 ; L. R., I. A., Sup. Vol., 175.
[3] I. L. R., 19 All., 153.
[4] 8 Bom. H. C. Rep., O. C., 181.

the light is obstructed are actually put at the time of obstruction, but also to the use to which they may be put for all reasonable purposes of occupation ; and that it was immaterial whether light was admitted through a window for a door, as in either case, in event of obstruction, the owner of the dominant tenement was entitled to protection.

In *Mohanlal Jechand* v. *Amartlal Bechardas*,[1] the defendant had built the roof of his house in such a way as to project over the plaintiff's land, and it was held that by an interrupted user of thirty years he had established a right to the column of space, both upwards and downwards, resting on the plaintiff's land and to the extent by which the roof projected over it.

The quantity of light and air to which the occupant of a building is entitled.

An important point in connection with this subject is as to the quantity of light and air to which the occupant of a building is entitled. In *Bagram* v. *Khettranath Karformah*,[2] the rule on this point as to light was laid down by Peacock, C. J., who said that the only amount of light for a dwelling-house which can be claimed by prescription or by length of enjoyment without actual grant is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house. "Principles of general convenience," it was said, "upon which the presumptions of right to light by prescription or grant depend, require that lights in a dwelling-house, which have been uninterruptedly used for a long time, should not be darkened so as to render the house unfit for habitation, but they do not require such a presumption as would impede the erection of buildings on the servient tenement, which would not deprive the dominant house of any degree of what was reasonably necessary for comfortable habitation." In the same case

[1] I. L. R., 3 Bom., 174. [2] 3 B. L. R., O. C., 18.

the rule as to air was laid down by Norman, J., as follows :—"To give a right of action (in a case when there is no express contract on the subject) for an interference with the access of air to dwelling-houses by building on adjoining land, the obstruction must be such as to cause what is technically called a nuisance to the house ; in other words, to render the house unfit for the ordinary purposes of habitation and business." These rules were followed in *Madhusudan De* v. *Bissonath De*,[1] in which it was said that the law of Calcutta with regard to light and air was that "by enjoyment only the right to so much air can be gained as is necessary to avoid a nuisance, and only the right to so much light as is necessary for comfortable habitation." In *The Delhi and London Bank* v. *Hem Lal Datta*,[2] the Calcutta High Court again followed the rules laid down in *Bagram's* case. In this case, Trevelyan, J., alluded to what is known as the "45-degree rule," first enunciated in *Beadel* v. *Perry*[3] by the Vice-Chancellor Sir John Stuart, who said : "It seems to me that when opposite to ancient lights a wall is built not higher than the distance between that wall and the ancient lights, there cannot, under ordinary circumstances, be such a material obstruction of the ancient lights for this Court to interfere by way of injunction." Trevelyan, J., observed that this was not a positive rule of law, but it is a circumstance which the Court may take into consideration, and is especially valuable when the proof of the obscuration is not definite or satisfactory. In *Bala* v. *Maharu*,[4] it was held that an easement of light to a window only gives a right to have buildings that obstruct it removed, so as to allow the access of sufficient light to the window.

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[1] 15 B. L. R., O. C., 361.
[2] I. L. R., 14 Calc., 839.
[3] L. R., 3 Eq., 465.
[4] I. L. R., 20 Bom., 788.

But the extent of the obstruction will further be considered in considering the relief to be afforded. In *Ghanasham Nilkant Nadkarni* v. *Moroba Ramchandra Pai*,[1] where the plaintiff's light had been sensibly diminished by the defendant's building, but the damage had not been sufficient to require interference by injunction, the appeal court varied the decree of Starling, J., and refused an injunction, ordering the defendant to pay Rs. 500 as damages. This case was followed and approved in *Sultan Nawaz Jung* v. *Rustomji Nanabhoy*.[2]

It is to be remarked that Act V of 1882 does not follow this case-law, but allows of the acquisition of an easement with regard to air in the same way as with regard to any other natural right, and in section 28 (*c*) of the Act, it is laid down that the extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of air or light which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used.

No prescriptive right to passage of light and air to an open space of ground can be acquired.

By section 17 (*b*) of the Easements Act, it is enacted that no prescriptive right can be acquired to the free passage of light or air to an open space of ground. This is also the law in England, *Roberts* v. *Macord*,[3] and in those parts of India where Act V of 1882 is not in force, Act XV of 1877 only providing for the acquisition by prescription of the access and use of light or air to and from any *building*.

Whether a prescriptive right to wind or breeze can be acquired.

An important matter in India is the right to uninterrupted enjoyment of the wind or breeze. In those parts of India where Act V of 1882 is not in force, no such right can be acquired by prescription. This was ruled in *Barrow* v. *Archer*[4] and in *Bagram* v. *Khettranath*

[1] I. L. R., 18 Bom., 474.
[2] I. L. R., 20 Bom., 704.
[3] 1 Moo. and Rob., 230.
[4] 2 Hyde, 125.

Karformal by Peacock, C. J., who said: "I am of opinion that oy the use of the south window uninterruptedly for upwards of twenty years, the plaintiff did not acquire a right to enjoy the south breeze without obstruction. Such a right may be acquired by express grant, but it cannot be acquired merely by presumption arising from user, whether the presumption is a presumption of prescription or not." This was followed in the *Delhi and London Bank* v. *Hem Lal Datta*.[2] It would seem possible, however, though the terms 'wind or breeze' have not been mentioned in Act V of 1882, that under that Act such a prescriptive right may be acquired. For though section 7 of the Act recognises as incidental to the ownership of property only a right to so much air as may pass vertically thereto, yet as Mr. Whitley Stokes has pointed out, the "section has been so drawn as not to exclude any other natural right (as for example a right to the lateral passage of light and air), should such be shown to exist in any part of India, or to exclude an easement in derogation of such right."[3] Then, as already pointed out, the Act allows of the acquisition by prescription of a right to the access of air in the same way as any other easement may be acquired. The provisions of section 28 (*c*) are also in favour of the acquisition of such a right, while explanation 3 to section 33 expressly points out that where the easement disturbed is a right to the free passage of air to the openings in a house, the damage is substantial within the meaning of the section, if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.

Another important matter is what remedies are open to a person whose rights in regard to light and air have been infringed on. In *Prorabutti Debi* v. *Mahendro Lal* Remedies in case of infringement of rights to light and air.

[1] 3 B. L. R., O. C., 18.

[2] I. L. R., 14 Calc., 839.

[3] Whitely Stokes's Anglo-Indian Codes, I, 881.

Basu,[1] it was held, following *Tapling* v. *Jones*,[2] "that if a man has a right to light from a certain window and opens a new window, the owner of an adjoining house has a right to obstruct the new opening, if he can do so without obstructing the old, but if he cannot obstruct the new without obstructing the old, he must submit to the burden." In this case the plaintiff was entitled as of right to light and air through a certain window, and subsequently enlarged it. The defendant obstructed it, and the plaintiff gave him notice to remove the obstruction two days after it had been completed. It was held that the plaintiff had been guilty of no delay in taking steps to prevent the obstruction, and she was entitled to a mandatory injunction requiring the defendant to remove it. In the following cases mandatory injunctions for the removal of obstructions to easements of light and air have been granted: *Mahamed Hussein* v. *Jafar Ali*,[3] *Jamnadas Shankar Lal* v. *Atmaram Harjivan*,[4] *Nand Kishor Balgovan* v. *Bhagubhai Pranvalabhdas*,[5] *Kadarbhai* v. *Rahim Bhai*,[6] *Bala* v. *Maharu*.[7] In the following cases they were not granted:—*Bihari Sahu* v. *Ajnas Koer*,[8] *Dhanjibhoy Cowasji Umrigar* v. *Lisboa*,[9] *Nilkant Nadkarni* v. *Moroba Ramchandra Pai*,[10] *Sultan Nawaz Jung* v. *Rustomji Nanabhoy*[11] and *Binod Kumari Dasi* v. *Saudamini Dasi*.[12] In this last mentioned case, the law regarding relief by mandatory injunction was explained. It was said by Wilson, J., that the leading cases on the subject fall "under one or other of two classes. The first kind of case is that of a man who has a right to light and air, which is obstructed by his neighbour's building, and who brings his

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[1] I. L. R., 7 Calc., 453.
[2] 11 H. L. C., 290.
[3] 4 W. R., 23.
[4] I. L. R., 2 Bom., 133.
[5] I. L. R., 8 Bom., 95.
[6] I. L. R., 13 Bom., 674.
[7] I. L. R., 20 Bom., 788.
[8] 6 W. R., 86.
[9] I. L. R., 13 Bom., 252.
[10] 18 Bom., 474.
[11] I. L. R., 20 Bom., 704.
[12] I. L. R., 16 Calc., 252.

suit and applies for an injunction as soon as he can after the commencement of the building, or after it had become apparent that the intended building will interfere with his light and air." Leading cases under this head "establish that although the remedy by mandatory injunction is always in the judicial discretion of the Court, and the circumstances of each case may be taken into consideration, still, as a general rule, and in the absence of special circumstances, if the injured man comes into Court on the first opportunity after the buildings have been commenced, or on the first opportunity after he has seen that they will injure his right, an injunction being necessary, an injunction is granted. On the other hand, however, there may be circumstances which will lead the Court to refuse the injunction, as has certainly been done in two cases—*Senior* v. *Pawson*[1] and *Holland* v. *Worley*. The other class of cases comes under a different principle. When a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building has been finished, and then asks the Court to have it removed, a mandatory injunction will not generally be granted, though there might be cases where it would be." It was further ruled in this case that mere notice not to continue buildings so as to obstruct a plaintiff's rights, when not followed by legal proceedings, is not a sufficiently special circumstance for granting the relief of a mandatory injunction.

Natural rights and easements connected with support, will now have to be considered; but these rights have not been the subject of many reported cases in India. As mining operations extend, the right of support from the subjacent to the surface soil may become a subject of greater importance than it is at present. It will be use-

Natural rights and easements connected with support.

[1] L. R., 3 Eq., 330.

[2] L. R., 26 Ch. D., 578.

ful, however, to state, that the natural right of support to land consists in a right that one person's land shall not be disturbed by the removal of the support naturally rendered by the subjacent and adjacent soil, and that the owner of this right cannot increase it suddenly or impose a new or additional burden on the servient tenement by erecting buildings. It would in that case be a question if the land would have sunk owing to the withdrawal of the support whether the building had been erected or not—*Brown* v. *Robins*[1] and *Stroyan* v. *Knowles*.[2] The natural right of support exist in respect of land, and not in respect of buildings; but a right of support for buildings from both adjacent and subjacent land may be acquired, and when acquired, the right is an easement—*Hide* v. *Thornborough*,[3] *Partridge* v. *Scott*,[4] *Wyatt* v. *Harrison*.[5] There is one Indian case, *Anando Lal Das* v. *Baikantho Ram Rai*[6] which would seem to afford an illustration of this principle. In this case the plaintiff was owner of a house, and he sued the defendant for damages in digging the foundations of an adjoining house in such a way as to cause the west wall of the plaintiff's house and certain godowns attached to it to fall. But in this case no question of an easement of support was alleged or considered. The defendant was said to have been guilty of negligence and was sued for consequential damages.

It may be mentioned that section 26, Act XV of 1877, does not expressly provide for the acquisition of an easement of support by prescription. Section 15, Act V of 1882, however, does so. But the easement of support

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[1] 4 H. and N., 186; 28 L. J., Exch., 250.

[2] 6 H. and N., 454; 30 L. J., Exch., 102.

[3] 2 Car. and K., 250.

[4] 3 M. and W., 220; 7 L. J., N. S., Exch., 101.

[5] 3 B. and Ad., 871; 1 L. J., N. S., K. B., 237.

[6] I. L. R., 5 Calc., 283; 4 C.L.R., 472.

is no doubt included in the words "any other easement" occurring in section 26, Act XV of 1877.

The mere fact of the contiguity of buildings imposes an obligation on the owners to use due care and skill in removing the one building so as not to damage the other, even though no right of support has been acquired—*Dodd* v. *Holme*.[1] A right to deprive land of the natural right of support may be acquired as an easement —*Rowbotham* v. *Wilson*,[2] and *Murchie* v. *Black*,[3] where Lord Wensleydale, in the House of Lords, said: "I do not feel any doubt that this was a proper subject of a grant, as it affected the land of the grantor; it was a grant of the right to disturb the soil from below, and to alter the position of the surface, and is analogous to the grant of a right to damage the surface by a way over it; and it was admitted at your Lordships' bar, that there is no authority to the contrary." (Goddard's Law of Easements, 3rd Edn., pp. 51—64.)

The removal of the means of support to which a dominant owner is entitled, does not give rise to a right to recover compensation, unless and until substantial damage is actually sustained (section 34, Act V of 1882, and section 24, Act XV of 1877).

Rights of way.

I will now speak of rights of way. There is no natural right to rights of way. Rights of way, as we have seen before, are discontinuous easements, and may be acquired in the same ways as other easements are acquired. As to the precise nature of a right of way, there is no difference in principle between a public right of way and a private right of way, as it is in either case the mere right of passing over the soil of another person uninterruptedly, though in the one case the right is for every individual to pass, while in the other it is

[1] 1 A. and E., 506.
[2] 8 H. L. C., 359.
[3] 19 C. B., N. S., 190; 34 L. J., C. P., 337.

for a particular person only. The right is not a right to the land, nor to any corporeal interest in the land, and the soil is in no way the property of the owner of the right. From this it follows that, so long as the owner of the right of way is not prevented enjoying his easement, he has no right to prevent the landowner doing anything he pleases with the soil (Goddard's Law of Easements, 3rd Edn., p. 99). Rights of way may be general in their character, or in other words, usable for all purposes, or they may be limited to a particular purpose. Thus, a right of way may be limited for agricultural purposes only, or it may be limited for the purposes of driving cattle or carriages, or it may be a horseway or merely a way for foot-passengers ; but the extent of the right must always depend upon the words of the instrument creating the right, if any written instrument exist, or it must be measured by the accustomed user, if the right has been gained by prescription (Goddard's Law of Easements, 3rd Edn., p. 104).

Classes of rights of way in India.

In India, there are three classes of rights of way ; (1) public rights of way, the source of which is ordinarily dedication ; (2) rights of way belonging to certain classes of persons ; and (3) private rights of way, vested in particular individuals or the owners of particular tenements, which commonly have their origin in grant or prescription : *Chuni Lal* v. *Ram Krishna Sahu*.[1]

Public right of way.

The cases relating to the first class of rights of way, *i.e.*, public rights of way, may be classified under two sub-heads, *viz.* (1) those in which it is sought to establish that a certain way is or is not a public highway, and (2) those in which the public rights are undoubted, but there is a dispute as to the extent of those rights or as to the remedies available for interference with them.

[1] I. L. R., 15 Calc., 460.

In order to establish that a road is a public road, it is sufficient if acts of user by the public are shown to have been acquiesced in by the owner or owners of the land over which the road passes, and that those acts are of such a character as to warrant the inference that the owner or owners intended to make over to the public the right to use the land as a public highway : *Anderson* v. *Jagadamba Debi*.[1] If a man owns land, and anybody trespasses on it, claiming a right to use it as a public highway, there can be no doubt that a suit for damages will lie. Under special circumstances, and if the injury likely to result were of a grave nature, an injunction might be granted to restrain the threatened invasion of a man's property under a claim of public highway. A suit for a declaration of right under section 42 of the Specific Relief Act will also lie on the part of an owner of land against any one who has formally claimed to use the land as a public road, and thereby endangered the title of the owner. Such a suit could not have been maintained before the Specific Relief Act was passed, because no consequential relief could have been claimed, and on this ground the decision proceeded in *Madhab Chandra Guha* v. *Kamala Kant Chakrabartti*.[2] But the law in this point has been altered by the Act. The declaration given would be absolutely binding only on the defendant to the suit, but it would be admissible against a stranger under section 42 of the Evidence Act ; *Chunilal* v. *Ramkrishna Sahu*.[3]

Rights in soil of public roads.

In the Bombay Presidency, by section 37 of the Bombay Act V of 1879, the soil of every public road is vested in the Secretary of State. The case is the same in Calcutta under section 202 of the Calcutta Municipal Consolidation Act, 1888, which vests the soil of public

[1] 6 C. L. R., 282.

[2] 6 B. L. R., 643 ; 15 W. R., 233.

[3] I. L. R., 15 Calc., 460.

streets in the Commissioners, and in the mofussil of Bengal under section 30 of Bengal Act III of 1884. This, however, was not the case under Act V of 1876, B.C. (The Bengal Municipal Act): *Chairman of the Naihati Municipality* v. *Kishori Lal Gossami*.[1] But though public highways may be vested in Municipal Commissioners, this does not *ipso facto* give them, nor *á fortiori*, their Vice-Chairman alone, power to stop up or divert such public highways: *Empress on the prosecution of Jadunath Ghosh* v. *Brajo Nath De*.[2] There is a presumption that a highway or waste land adjoining to it belongs to the owners of the soil of the adjoining land. Section 38, Act XV of 1873 (N.-W. P. and Oudh Municipalities' Act), was not intended to deprive persons of any right of property they might have in the land used as a public highway or to confer such rights on the Municipality. In a case, therefore, where such land ceased to be used as a public highway, and was granted by the Municipality to third persons, who proceeded to build thereon, it was held that the owners had a good cause of action against such persons for the demolition of the buildings, and the restoration of the property to its original conditions: *Nihal Chand* v. *Azmat Ali Khan*.[3] In a Calcutta case, *Mobarak Shah* v. *Tofani*,[4] there was quoted with approval a rule of English law to the effect that where a road has been for many years the boundary between two properties and there is no evidence that the owner of either property gave up the whole of the land necessary for it, the site of the road must be presumed to belong to the adjoining proprietors, half to one and half to the other, up to the middle of the road. So, in *Jagamani Dasi* v. *Nilmani Ghosal*[5]

[1] I. L. R., 13 Calc., 171.
[2] I. L. R., 2 Calc., 425.
[3] I. L. R., 7 All., 362.
[4] I. L. R., 4 Calc., 206; 2 C. L. R., 446.
[5] I. L. R., 9 Calc., 75.

where the plaintiff's ancestor had built a temple, a bathing ghat, a room, and a ghat close to it, to which persons on the point of death were removed, and where certain ceremonies were performed, and the defendants used the last mentioned ghat for the purpose of landing goods, it was held by the Calcutta High Court that the plaintiff's ancestor, when he erected the buildings, intended to grant to the Hindu community merely a right of easement over the property, and not to transfer the ownership therein to the community, and, therefore, the plaintiff was entitled to maintain a suit to restrain the defendants from using the ghat for trading purposes. In *Rup Lal Das* v. *The Chairman of the Municipal Committee of Dacca*,[1] it was said that the bank of a river is not regarded by the law as public property. It may be, and constantly is, private property, though there may be public rights of passage over it for purposes of navigation.

No suit lies for obstructing a public road unless there is special damage.

A suit will not lie for obstructing a public road without showing any particular inconvenience to the plaintiff in consequence of such obstruction : *Baroda Prasad Mostafi* v. *Gora Chand Mostafi*,[2] *Raj Lakhi Debi* v. *Chandra Kant Chaudhri*,[3] *Bhagirath Rishi* v. *Gokul Chandra Mandal*,[4] *Bhagirath Das* v. *Chandi Charan Koibartho*,[5] *Parbati Charan Mukhopadhya* v. *Kali Nath Mukhopadhya*,[6] *Ram Tarak Karati* v. *Dinanath Mandal*,[7] *Raj Kumar Singh* v. *Sahibzada Rai*,[8] *Chuni Lal* v. *Ram Krishna Sahu*,[9] *Karim Baksh* v. *Budha*,[10] *Fazal Hak* v. *Maha Chand*,[11] *Satku valad Kadir Sausare* v. *Ibrahim valad Mirza Aga*,[12] *Gehenaji bin Kes Patil* v.

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[1] 22 W. R., 276.
[2] 3 B. L. R., A. C. 295 ; 12 W. R., 160.
[3] 14 W. R., 173.
[4] 18 W. R., 58.
[5] 22 W. R., 463.
[6] 6 B. L. R., App., 73.
[7] 7 B. L. R., 184 ; 24 W. R., 414.
[8] I. L. R., 3 Calc., 20.
[9] I. L. R., 15 Calc., 460.
[10] I. L. R., 1 All., 249.
[11] Ibid, 557.
[12] I. L. R., 2 Bom., 457.

Ganpati bin Lakshuman,[1] *Adamson* v. *Aramugam*,[2] *Siddeswara* v. *Krishna*,[3] *Sujaudhin* v. *Madhavdas*,[4] *Abzal Miah* v. *Nasir Mahommed*.[5] In the last case quoted the principle was held to apply, but the plaintiffs who, by reason of the obstruction of the way from their village to their pastures, were deprived of the only means of grazing their cattle, and had lost some cows thereby, were held entitled to maintain an action for the removal of the obstruction.

Right to use public roads for processions.

In *Sivappachari* v. *Mahalinga Chetti and others*,[6] it was held that the right to conduct a marriage procession along the public highway could only be questioned by the Magistrate, and that an action would lie against persons forcibly stopping such procession, even, *semble*, where it was unusual for the persons of the plaintiff's caste to conduct one. The right to use the public streets for religious processions has been discussed in two other Madras cases: *Parthasáradi Ayyangar* v. *Chinnakrishna Ayyangar*,[7] and *Sundram Chetti* v. *Ponnusami Chetti*.[8] In the former of these cases it was said that persons of whatever sect are entitled to conduct religious processions through public streets, provided that they do not interfere with the ordinary use of such streets by the public, and subject to such directions as the Magistrates may lawfully give to prevent obstructions of the thoroughfare, or breaches of the public peace. But, in *Sujaudhin* v. *Madhavdas*,[4] it was held that a civil action will not lie to enforce a right to conduct a religious procession along a public road without an allegation of some personal loss or damage to the plaintiff. Cf. *Satku* v. *Ibrahim*,[9] *Mohamed Abdul Hafiz* v. *Latif Hossein*.[10]

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[1] I. L. R., 2 Bom., 469.
[2] I. L. R., 9 Mad., 463.
[3] I. L. R., 14 Mad., 177.
[4] I. L. R., 18 Bom., 693.
[5] I. L. R. 22 Calc., 551.
[6] 1 Mad. H. C. Rep., 50.
[7] I. L. R., 5 Mad., 304.
[8] I. L. R., 6 Mad., 203.
[9] I. L. R., 2 Bom., 457.
[10] I . R., 24 Cal., 524.

A person who sustains special injury by an obstruction to a highway may bring a suit.

Where special damage is caused to any person by an obstruction placed upon a public thoroughfare, he is entitled to bring an action in the Civil Court to have the nuisance abated, notwithstanding the provisions of the Criminal Procedure Code for summary proceedings before a Magistrate, and notwithstanding that he may be entitled to damages: *Raj Kumar Singh* v. *Sahibzada Rai*.[1] Any one who sustains special injury by reason of an obstruction to a highway may bring a suit, claiming damages and any other appropriate relief: *Chuni Lal* v. *Ram Krishna Sahu*.[2] An Allahabad case, *Fazal Haq* v. *Maha Chand*,[3] affords an illustration of the relief to which a person whose right to use a public thoroughfare has been obstructed is entitled. The plaintiff in this case, had, while certain land formed part of a public thoroughfare, a right of access to such thoroughfare and the use of a certain drain. The Municipal Committee sold such land to the defendant, and constructed a new thoroughfare. The defendant used and occupied such land so as to obstruct the plaintiff's access to the new thoroughfare, and his use of the drain. The plaintiff, therefore, sued the defendant, and it was held that, as the plaintiff had suffered special damage from the defendant's acts, he had a right of action against him, and that there was nothing in the circumstance that the defendant's title was derived by purchase from the Municipality, which could affect the plaintiff's right to relief. Although by the Municipalities Act, it was said, the Committee could with the sanction of the Local Government, sell any portion of land vested in them, which was not required for the purposes of the Act, yet there was nothing in the Act which debarred the Civil Courts from giving relief in respect of any civil right which might be

[1] I. L. R., 3 Cal., 20.
[2] I. L. R., 15 Cal., 460.
[3] I. L. R., 1 All., 557.

shown to have been infringed through the exercise by the Municipality of its powers under the Act. It was further said that the relief which the plaintiff sought, *viz.*, that a cart-road, nine feet wide, communicating with the high-way, should be reserved, and that the existing course of drainage be not interfered with, was very reasonable, and the Court gave him a decree accordingly.

Rights of way belonging to certain classes of persons.

Instances of the second class of rights of way alluded to by Wilson, J., in his judgment in *Chuni Lal* v. *Ram Krishna Sahu*[1] are to be met with in *Shama Sundar Bhartacharji* v. *Mani Ram Das*,[2] *Fatehyab Khan* v. *Mahomed Yusuf*,[3] *Kali Das* v. *The Municipality of Dhandhuka*,[4] and *Ranchordas Amthabhai* v. *Maneklal Gordhandas*.[5] In the first of these cases it was said that it was absurd to say that a road used only by a particular section of a community is a public road. In the Allahabad case it was held that a right of way across a court-yard, which was confined to the people dwelling in a particular part of the town, and going to and from the houses in that part of the town, was not a public road, and that, therefore, a suit brought for the removal of an obstruction in the court-yard was a suit in respect of an interference with a private easement and could be maintained without proof of special damage. In the Bombay case, the plaintiff was owner of three houses out of a set of six, which were built round an open court, across which the occupant of each house had a right of way, and which was used as a means of access to the houses by persons having business with the householders. The plaintiff built a verandah and put up a wooden bench in front of his house, and the Municipality ordered them to be removed. Upon this, the plaintiff sued to have this order set aside,

[1] I. L. R., 1 All., 557.
[2] 25 W. R., 233.
[3] I. L. R., 9 All., 434.
[4] I. L. R., 6 Bom., 686.
[5] I. L. R., 17 Bom., 618.

and it was held that such limited right of access as the public had to the court was not sufficient to show that the court ceased to be private property or was converted into a street vesting in the Municipality, and that, therefore, the Municipality had no right to interfere with the plaintiff's erection, whatever liability he might have incurred to an action by any of the other householders who occupied the court.

With regard to this class of rights of way, Wilson, J., in *Chuni Lal* v. *Ram Krishna Sahu* has said that it is important to observe that besides the civil remedies, available in the case of strictly private ways, there are some additional remedies open for asserting such rights of way, on the one hand, and for resisting them on the other. "First," it is said, "where such a right is claimed, it would seem that a member of the class entitled might, by taking proper steps under section 30 of the Civil Procedure Code, obtain permission to sue on behalf of himself and of the other members of the class any one who disturbed or sought to disturb the right of way. Upon the other hand, in section 42, illustration (*a*) of the Specific Relief Act, it seems to be distinctly pointed out that where such a right is claimed, a suit will lie by the owners of the soil for a declaration negativing the right, and I presume, under section 30 of the Civil Procedure Code, a suit might be so brought with the permission of the Court, against one or more members of the class as representing the rest. Section 54, illustration (*p*) of the Specific Relief Act further shows that if the owner of the soil obtained a declaratory decree against several villages negativing a right of way, this would be good ground for restraining by injunction suits subsequently brought by the others."

Classes of private rights of way

We now come to rights of way of the third class, *i.e.*, private rights of way. The following different kinds of

private rights of way are recognized by Indian case law :— (1) Rights of way for general purposes : *Raj Manik Singh* v. *Rattan Manik Basu*,[1] *Loknath Gossami* v. *Man Mohan Gossami*,[2] *Imambandi Begam* v. *Sheo Dyal Ram*.[3] In the first of these cases, a general right of way, and in the second, a general right of way and passage for boats, was held to include a right to conduct marriage and general processions ; (2) Rights of way for foot passengers: *Golak Chandra Chaudhri* v. *Tarini Charan Chakrabartti*,[4] *Hamid Hussein* v. *Gervain*,[5] *Tulsimani Debi* v. *Jogesh Chandra Saha*[6] and *Arzan* v. *Rakhal Chandra Rai Chaudhri*.[7] In the first of these case, it was pointed out that a right of way over land imports *ex vi termini* a right of passing in a particular line and not the right to vary it at pleasure ; and in the second, it was ruled that if a person has a right of way from one place to another over a particular line, he cannot be compelled to use a different and substituted way. But where the right is simply to pass from one point to another, the party desiring to exercise the right cannot claim to pass in a particular tortuous and indirect course between the two points. In the third case it was held that a person who has a right of way cannot claim more than that a reasonable exercise of his right shall not be obstructed, as it is only ownership of the land that carries with it the ownership of everything *usque ad cœlum* ; (3) Rights of way for the passage of sweepers : *Jadulal Mallik* v. *Gopal Chandra Mukharji*.[8] In this case the plaintiff established a right of passage for his sweepers several times in the year for the purpose of cleansing a cess-pool. The facts indicated by way of limit to the

[1] 15 W. R., 46.
[2] 20 W. R., 293.
[3] 14 W. R., 199.
[4] 4. W. R., 49.
[5] 15 W. R., 496.
[6] 1 C. L. R., 425.
[7] I. L. R., 10 Calc., 214.
[8] I. L. R., 9 Calc., 778 ; 13 Calc., 136 ; L. R., 13 I. A., 7.

user of the passage only showed that it must be a reasonable user for the above passage. There was no agreement specifying times or occasions of access, and the inference was that if the plaintiffs had thought fit to use the passage more frequently than they did, they were at liberty to do so. Subsequently, in 1876, instead of the plaintiffs' sweepers, those employed by the Municipality came and went upon the passage, not at distant intervals but daily, the plaintiffs being bound under the Municipal bye-laws to give them access, and the system being to clean the place daily. It was held that the above was neither a discontinuance by the plaintiffs of their user nor an aggravation of the servitude, and also that although a servitude gained for one purpose cannot be used for another, yet the purposes before and after 1876 being identical, the user proved prior to that year supported a right in the plaintiffs to use the passage for giving access to the servants of the Municipality for the above purpose at reasonable and convenient times: *Cf. Esubai* v. *Damodar Ishvardas;*[1] (4) Rights of way for driving cattle: *Jai Darga Dasi* v. *Jagannath Rai*,[2] *Mahamed Ansar* v. *Sefatullah*.[3] In the former case it was said that no length of time could give a party a straggling right to the promiscuous use of a whole property for the purpose of driving cattle over it, as such a right would destroy all the ordinary use of the servient property; (5) A right of way for the passage of boats over water: *Loknath Gossami* v. *Monmohan Gossami*, *Kailash Chandra Ghosh* v. *Sonatan Chang Barui*,[5] *Durga Charan Dhar* v. *Kali Kumar Sen*.[6] In the last of these cases it was said that a right of passage for boats in the rainy season over a channel wholly in another man's land is, in respect of extent, analogous to

[1] I. L. R., 16 Bom., 552.
[2] 15 W. R., 295.
[3] 22 W. R., 340.
[4] 20 W. R., 293.
[5] I. L. R., 7 Calc., 132; 8 C. L. R., 281.
[6] I. L. R., 7 Calc., 145; 8 C. L. R., 375.

an ordinary right of way ; and the dominant owner cannot complain of the servient owner's narrowing the channel, so long as the latter by so doing does not prevent the former from passing and repassing as conveniently as he has always been accustomed to do. It was further held that a right of passage for boats in the rainy season over another person's tank must be claimed in a particular direction to be valid ; (6) Rights of way in particular seasons of the year only : *Ram Sundar Baral* v. *Umakant Chakrabartti*,[1] *Omar Shah* v. *Ramzan Ali*,[2] *Kailash Chandra Ghosh* v. *Sonatan Chang Barui*,[3] *Durga Charan Dhar* v. *Kali Kumar Sen*.[4]

No right of prospect exists.

The imaginary right of prospect and the right of privacy now remain to be treated of. It has been asserted that one of the principal rights in connection with land is a right that the prospect or view should not be impeded by the erection of interposing buildings. But as long ago as *Aldred's case*,[5] the legal possibility of such a right was discussed ; and in this case, which is one of the oldest on record, Wray, C. J., said :—"That for stopping as well of the wholesome air as of light, an action lies, and damages shall be recovered for them, *for both are necessary*. . . but that for prospect, which is a matter only of delight, and not of necessity, no action lies for the stopping thereof, and yet it is a great commendation for a house if it has a long and large prospect. . . . . But the law do not give you an action for such things of delight." The only Indian case that I can find, in which the right to prospect is referred to is *Bagram* v. *Khettra Nath Karformah*,[6] in which Peacock, C.J., said :—"An action upon the case for a nuisance will not lie for the obstruction of a prospect."

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[1] 1 W. R., 217.
[2] 10 W. R., 363.
[3] I. L. R., 7 Calc., 132 ; 8 C. L. R., 281.
[4] I. L. R., 7 Calc., 145 : 8 C. L. R., 375.
[5] 9 Coke's Rep., 58.
[6] 3 B. L. R., O. C., 18.

Right of privacy.

As is natural in a country where domestic interior arrangements are most jealously secluded from prying eyes, the right to privacy is one which has been most keenly striven for in India: but until of late years in vain. The earlier rulings of the Calcutta and Allahabad High Courts on the point are conflicting; but until recently it was adopted as a general principle of law, that no action lies to maintain privacy. In *Gur Das* v. *Manohur Das*[1] and in *Ram Baksh* v. *Ramsukh*,[2] it was held, that the doctrine that the injury caused by the invasion of another's privacy was a sentimental grievance rather than a substantial injury for which relief could be granted at law, had not received sanction from the Indian tribunals, and was opposed to the feelings, and unsuited to the habits of the natives of this country. But in *Jugal Lal Datta* v. *Jasoda Bibi*,[3] these rulings and the practice of the old Sadr Court were held to be wrong, and it was decided, that where a man did an act consistent otherwise with the legal rights he has of enjoyment of his property, which gave him a wider range of vision than before, no legal right is given to his neighbour on the other side of the road to complain of loss of privacy. In *Srinath Datta and others* v. *Nand Kishor Basu and others*,[4] where the plaintiff built up his wall so as to overlook his neighbour, and the defendant, the neighbour, in turn erected a wall, which he, plaintiff, alleged, deprived him of necessary light and air, he, plaintiff, was held to have no right of suit, being the greater wrong-doer in that he had invaded the privacy of the defendant first: but in *Ramlal* v. *Mohesh Babu*,[5] and *Ghulam Ali* v. *Mahomed Zahar Alam*,[6] it was ruled, that no suit to maintain a right to privacy lay in law so long as the viola-

[1] All. H. C. Rep., 1867, p. 269.
[2] *Ibid*, 253.
[3] All. H. C. Rep., 1867, p. 311.
[4] 5 W. R., 208.
[5] 5 B. L. R., 677 (foot-note).
[6] 6 B. L. R., App., 76.

tion of that privacy was caused by the legal enjoyment by another of his own property. In *Komathi* v. *Gurunada Pillai*,[1] the same principle was adhered to.

In *Mahomed Abdur Rahim* v. *Birju Saha*,[2] however, it was held that a right to privacy was not a right inherent to property, but might be gained by prescription, grant or express local usage. In *Kali Prasad* v. *Ram Prasad Saha*,[3] it was said it required to be proved by local usage, permission or grant.

In Bombay the case was different, where the alleged invasion of privacy occurred in Gujerat. Thus, in *Manishankar Hargovan* v. *Trikam Narsi and others*,[4] *Keshav Harkha* v. *Gunput Hirachand*,[5] it was held that invasion of privacy in Gujerat was, according to the custom of that province, an actionable wrong. And in *Kuvurji Premchand and others* v. *Bai Javer*,[6] it was held actionable in Gujerat, even when there was a public road between the dwellings. In *Shrinivas Udpirav* v. *The Magistrate of Dharwar and others*,[7] however, it was ruled, that invasion of privacy in Dharwar was not an actionable wrong, there being no local custom to that effect in that province as in Gujerat; and that it, therefore, fell there under the customary designation of a sentimental grievance.

In Allahabad it was held that the customary right of privacy which prevails in various parts of the North-Western Provinces is a right which attaches to property and is not dependent on the religion of the owner of such property: *Abdul Rahman* v. *Emile*, *Emile* v. *Abdul Rahman*.[8] The invasion of the right of privacy by the

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[1] 3 Mad. H. C. Rep., 141.

[2] 5 B. L. R., A. C., 676; 14 W.R., 103.

[3] 18 W. R., 14.

[4] 5 Bom. H. C. Rep., 42.

[5] 8 Bom. H. C. Rep., A. C., 87.

[6] 6 Bom. H. C. Rep., 143.

[7] 9 Bom. H. C. Rep, 266.

[8] I. L. R., 16 All., 69.

opening of windows was held in *Azuf* v. *Ameera Bibi*[1] not to be a wrong for which an action would lie, cf. *Komathi* v. *Gurunada Pillai*.[2]

But by section 18, illustration (*b*) of Act V of 1882, the law has been changed so far as those parts of India where the Act is in force are concerned, for this illustration expressly points out that a right to privacy can be acquired in virtue of a local custom, and in *Lachman Prasad* v. *Jamna Prasad*[3] the Allahabad High Court found the plaintiff entitled by local custom to an easement of privacy.

The leading case on the subject is now the case of *Gokal Prasad* v. *Radho*[4] in which Edge, C.J., in an exhaustive judgement reviewed the whole Indian case-law relating to the right of privacy. His conclusions are that such a right of privacy exists and has existed in these provinces, apparently by usage, or custom, and that substantial interference with such a right of privacy where it exists, if the interference be without the consent of the owner of the dominant tenement, affords such owner a good cause of action . . . . . "Every case," it was said, "must depend on its own facts. A primary question must in all cases be :—Does the privacy in fact and substantially exist, and has it been, and is it in fact enjoyed ? If it were found that no privacy substantially exists or is enjoyed, there would be no further question in an ordinary case to decide. If, on the other hand, it were found that privacy did substantially exist and was enjoyed, the next question would be :—Was that privacy substantially or materially interfered with by acts of the defendant alone without the consent or acquiescence of the person seeking relief against those acts ? In the case of old buildings, what can an owner of one of the old buildings have to complain

[1] I. L. R., 18 Mad., 163.
[2] I. L. R., 3 Mad., 141.
[3] I. L. R., 10 All, 162.
[4] I. L. R., 10 All., 358.

of, if a usage or custom exists, by which he cannot so alter his buildings, as to deprive his neighbour's old building, of the privacy which has been enjoyed, and make it unavailable as a *zenana*, or in other words, deprive it of all residential value, and in this way depreciate its market value. Such a custom, where it exists in India is merely an application of the maxims '*Sic utere tuo ut alienum non laedas*,' and '*aedificare in tuo proprio solo non licet quod alteri noceat.*' . . . . In the case of a building for *parda* purposes newly erected without the acquiescence of the owner of an adjacent building site, it appears to me that a custom which would prevent the owner of such an adjacent site from building so as to interfere with the privacy of the first new building would be an unreasonable and consequently a bad custom in law. If, however, the owner of such an adjacent building site were without protest or notice to allow his neighbour to erect, and consequently, to incur expenses in erecting buildings or premises for the use of *parda-nishin* women, I think, a custom which would prevent him subsequently interfering with the privacy of such new building, would not be unreasonable in this country."

Licenses.

I will conclude this chapter with a few rulings relating to licenses and customary rights. A license is defined in section 52, Act V of 1882, as a right granted to another, or to a definite number of other persons, to do, or to continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and which right does not amount to an easement or to an interest in such property. An excellent illustration of a license, and of the respective rights and liabilities of the grantee and grantor of a license, is to be found in the case of *Evans* v. *The Trustees of the Port Trust of Bombay*,[1] the facts of which

[1] I. L. R., 11 Bom., 329.

case are detailed in Chapter I (*ante*, *p.* 34). The plaintiff in this case was a licensee, having received the tacit permission of the Port Trustees, the first defendants, to cross their land, and he was injured by falling into a hole dug by one Hewson, who had been employed by the second defendant, the lessee of the first defendants, to make borings in the land, but who had, late in the afternoon, improperly dug the hole right across the path used by the plaintiff. In this case it was held that the plaintiff was a bare licensee, and that the first defendants were under no obligation or duty to him to keep the path in a safe state or in good order. The plaintiff took the permission to use the path with its concomitant circumstances and perils. Moreover, the first defendants were not liable for the acts of Hewson, for he had been permitted to make borings and had dug a hole instead, and it was said there was no authority under which an owner or occupier, who without negligence licenses a proper person to enter on his land to do a lawful act can be held liable in damages if the person so licensed does something of a different kind, unknown to the owner or occupier, which may make the person who does it or his employer or principal liable for negligeece. The second defendant was, however, held liable in damages, for it was found that Hewson was his servant, and there was a duty to the plaintiff to use ordinary care and skill to avoid doing him an injury. A person coming on lands by license, it was said, has a right to suppose that the person who gives the license, and much more a person who is a wrong-doer, will not do anything which will do him an injury. (*See also section* 58, Act V of 1882). The case of *Snadden* v. *Mah Wine and Aga Syad Abdul Hossein*,[1] is also another instance of a

[1] 2 B. L. R., A. C., 292.

license. In this case the plaintiff had by license obtained an exclusive right to cut and to authorize others to cut timber in a forest. It was held that this right did not vest in him the timber in the forest, and while he might have a right to recover damages from any person, who by cutting timber should interfere with his exclusive right, this would not vest in him the timber cut by others.

In a recent Calcutta case, *Prasanno Kumar Singh* v. *Ram Kumar Ghosh*,[1] the right to revoke a license was considered, and, following *Wood* v. *Leadbitter*,[2] it was laid down that the license to go upon another man's land unless coupled with a grant, is revocable at the will of the grantor, subject to the right of the other to damages if the license is revoked contrary to the terms of any express or implied contract. A license may be deemed to be revoked when the licensee releases it, expressly or impliedly, to the grantor or his representative: *Guru Charan Sur* v. *Sri Charan Ghosh*,[3] section 62 (*b*), Act V of 1882.

Customary rights.

A custom is a usage attached to a locality, and a customary right belongs to no individual in particular, but may be enjoyed by any who for the time being inhabit the locality to which the right is attached, or who belong to the particular class entitled to the benefit of the custom (Goddard on Easements, 5th Editn., p. 24). The two English cases usually cited as examples of customary rights are *Mounsey* v. *Ismay*[4] and *Abbott* v. *Weekly*.[5] In the former the right to hold horse-races on certain land was claimed by freemen of the city of Carlisle, and, in the latter, the right to dance on a certain close by inhabitants of the parish of Dale. Instances of such rights are to be met with in Indian case-law. In the case of *Ashraf*

[1] I. L. R., 16 Calc. 640.
[2] 13 M. & W., 838.
[3] 15 W. R., 308.
[4] 1 H. & C., 729; 34 L. J. Exch., 52.
[5] 1 Levinge, 176.

Ali v. *Jagan Nath*[1] the plaintiffs claimed the right to go upon certain land and celebrate the *Holi* festival there, and it was said that the right set up by the plaintiff could not be regarded as an easement, as it was not said to be appurtenant to any dominant tenement, but was a claim of the nature described in *Mounsey* v. *Ismay*, and *Abbott* v. *Weekly*. In *Lachmipat Singh* v. *Sadaulla Nashyo*,[2] the defendants claimed a right to fish in certain *bhils* under a custom according to which all the inhabitants of the zamindari had a right to fish in them. Such a right, if established, would have been a right of this nature, but it was disallowed on the ground that the alleged custom was unreasonable, as under it the defendants could carry off the whole of the fish stocked in the *bhils*, leaving nothing for the plaintiff, who was admittedly the owner of them, and therefore could not be valid. The rights set up by the accused in *Madhu Mandal* v. *Umesh Parui*[3] and *In the matter of the Petition of Madhab Hari*[4] in accordance with which they alleged that, as inhabitants of certain villages, they were entitled to fish in certain *bhils* on a particular day in each year would appear to have been rights of this nature. Another instance of a customary right is to be met with in the case of *Chinnanam Pillay* v. *Manuputtur*,[5] in which the inhabitants of a village claimed to have a customary right to bathe in a tank. It was pointed out that the Easements Act did not affect such rights (see section 2 (*b*), Act V of 1882) and that such a right must be confined to the inhabitants of a particular place, and must otherwise be a reasonable one.

As to the evidence required to establish the existence of a customary right, it was held by the Allahabad High

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[1] I. L. R., 6 All., 497.
[2] I. L. R., 9 Calc., 698; 12 C. L. R., 382.
[3] I. L. R., 15 Calc., 392.
[4] I. L. R., 15 Calc., 390.
[5] Madras Law Journal, I, 47.

Court, in *Kuar Sen* v. *Mamman*,[1] that where a local custom excluding or limiting the general rule of law is set up, a Court should not decide that it exists unless such Court is satisfied of its reasonableness, and its certainty as to extent and application, and is further satisfied by the evidence that the enjoyment of the right was not by leave granted or by stealth or by force, and that it had been openly enjoyed for such length of time as suggests that originally by agreement or otherwise the usage had become a customary law of the place in respect of the persons and things which it concerned.

[1] I. L. R., 17 All., 87.

CHAPTER IV.

OF TORTS AFFECTING MOVEABLE PROPERTY OF ALL DESCRIPTIONS.

Definitions of moveable property—Cases—Injuries to goods bailed by wrong-doing third parties—Cases—Conversion—Cases—Wrongful seizure of cattle—Cases—Stolen notes—Cases—Liability of innkeeper where guests' moveables are stolen—Case—Measure of damages in cases of conversion—Cases—*Omnia praesumuntur contra spoliatorem*—Cases—Damage from negligence—Case—Imitation of trade-mark—Cases—Infringement of patent—Cases—Infringement of copyright—Cases.

Definitions of moveable property.

"MOVEABLE property" is defined by the General Clauses Act [I of 1868, section 2 (6)] and the Succession Act (X of 1865, section 3) as meaning property of every description except immoveable property. The definition of the term given in the Penal Code (section 22) is substantially the same, for it is there said to include corporeal property of every description except land and things attached to the earth or permanently fastened to any thing which is attached to the earth. For the purposes of the Registration Act, the term includes standing timber, growing crops and grass, fruit upon, and juice in, trees (Act III of 1877, section 3), and according to the Transfer of Property Act (Act IV of 1882, section 3), it includes standing timber, growing crops and grass. Following the definition given in the Registration Act, the Allahabad High Court has held that fruit growing upon trees is moveable property : *Nasir Khan* v. *Karamat Khan*.[1] In one case, *Naru Pira* v. *Naro Shideshvar*,[2] the Bombay High Court held that a suit for *baluta* was a suit for a share in produce severed from land, and, therefore, for moveable property. But

[1] I. L. R., 3 All., 168.

[2] I. L. R. 3 Bom., 28.

subsequently by a Full Bench, *Appana* v. *Nagia*,[1] it decided that such a suit was one for a right forming the emoluments of a hereditary office amongst Hindus, and, therefore, one in respect of immoveable property.

Injuries to goods bailed by wrong-doing third parties.

Addison, in his Law of Torts, treats of bailments and breaches of bailments as torts ; but, by the law of India (Act IX of 1872), all matters between the bailor and bailee are matters of contract, and all breaches of the bailment are, as between those parties, breaches of contract, so that, as far as bailments are concerned, we have only to do, in a work on Torts, with injuries done, to the goods bailed, by third parties, who, under the provisions of Act IX of 1872, section 180, as wrong-doers, are liable to a suit, by either the bailor or the bailee for wrongfully depriving the bailee of the use or possession of the goods bailed, or for doing them any injury,—the bailee being entitled to use such remedies as the owner might have used in a like case if no bailment had been made. Thus, in *Bhinji Gobindji* v. *Manohar Das and Sewnarain*,[2] in which case in execution of a decree obtained by *A* against *B*, the goods of *B* were taken out of the possession of *C*, a bailee, *C* was held entitled to recover possession of the goods. So, too, when from the collusion, or fraud, or misconduct of the bailee, he has been deprived of the use of, or has parted with, the goods bailed, the owner may sue the third party who has benefited by such collusion, fraud, or misconduct. It will be observed that, in all these cases, the action, as between the owner and the third party is purely an action on tort, as there is no privity of contract whatever between them ; and such actions it will be proper to consider here, although bailment is by the law a contract. Thus, in *Baldeo Narain* v. *Scrymgeour*,[3] where the plaintiff

[1] I. L. R., 6 Bom., 512.
[2] 5 B. L. R., Ap., 31 ; 14 W. R., 303.
[3] 6 B. L. R., O. C., 581.

entrusted certain valuable securities to one *B*, a broker, to purchase Company's paper with, and *B* gambled them away to *C*, the defendant, the plaintiff was held to be entitled to recover from *C*, because *C* was not a *bonâ fide* holder for value,—that is to say, he had wrongfully deprived *B*, the bailee, of the possession of the notes. *Greenwood* v. *Holquette*[1] and *Kartik Charan Setty* v. *Gopalkristo Palit*[2] are also cases where the owner (bailor) recovered the goods bailed from a third party, into whose possession they had wrongfully passed from the bailee; and the cases of *Biddomoyi Debi* v. *Sitaram*[3] and *Biddomoyi Debi* v. *Subal Das Mallik*,[3] show that where a servant, entrusted with his mistress' property, illegally pawned it, the pawnees, defendants, were held liable to her action for recovery. In *Harris* v. *Kailash Chandra Bannarji*,[4] where plaintiff's husband had sold her separate moveable property to the defendant, she was held entitled to recover it directly from him.

Conversion.

The more ordinary forms of action for torts to moveable property arise where there is no bailment, and where the goods are forcibly or fraudulently removed from the owner's possession, and either detained or converted to the wrong-doer's use, or where wilful damage out of malice is done to moveable property, or where damage is done to moveable property by negligence. In all cases where there is a contract of bailment, the detention or conversion of the goods by the bailee is a breach of contract, and not a tort properly so called,—that is to say, the bailee does not become, by his conduct, a wrong-doer in the eyes of the law, but a breaker of his contract. It is very necessary that this distinction should be borne in mind, and that the position of the defendant as a bailee or

[1] 12 B. L. R., 42; 20 W. R., 467.
[2] I. L. R., 3 Calc., 264.
[3] I. L. R., 4 Calc., 497; 3 C. L. R., 398.
[4] I. L. R., 1 Calc. 285.

as a wrong-doer should be carefully determined, otherwise the Courts will be treating as torts acts which by law are mere breaches of contract. Where, for instance, a person is in *bonâ fide* possession of goods, but without the consent of, and without delivery by, the true owner, and not having contracted to hold them as bailee, the action to recover those goods would be an action on pure tort; but where the goods have been delivered by one person to another for some purpose upon a contract, that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them, or when a person already in possession of the goods of another contracts to hold them as bailee, the subsequent detention or conversion of the goods would give rise to an action for breach of contract, and not to an action on tort,—that is to say, the plaintiff would have his remedy under section 73 of Act IX of 1872.

An illustration of an action for tort where there was merely conversion and no bailment is to be found in the case of *Nadiar Chand Saha* v. *Prannath Saha*,[1] in which the plaintiff sued the defendant for recovery of possession of two boats, and for damages for having taken them out of his possession and for having placed them in such a position that in consequence of the drying up of the river they could not be taken back and replaced in the river until the ensuing rainy season. Another illustration is to be met with in the case of *Khursedji Rustomji Colah* v. *Pestonji Cowasji Bucha*,[2] which was a suit for the recovery of two Government Promissory Notes wrongfully taken away or for their value.

A refusal to deliver up an idol whereby the plaintiff was prevented enjoying his turn of worship, has been held

[1] 21 W. R., 8.

[2] I. L. R., 12 Bom., 573.

to be actionable : *Debendronath Mallik* v. *Udit Chand Mallik*,[1] *Ishan Chandra Rai* v. *Man Mohini Dasi*,[2] *Gopi Krishna Gossami* v. *Thakur Das Gossami*.[3]

Where the title to goods is contested, a lien on them cannot be set up by the defendant as well : *Jagannath Das* v. *Brijnath Das*.[4]

Wrongful seizure of cattle.

It has been held by the Calcutta High Court in *Shatrughan Das Kumar* v. *Kokna Showtal*,[5] that a suit for damages for wrongful seizure of cattle will lie in the Civil Court, the provisions of Act I of 1871 being no bar to such a suit. In this case the Court approved and followed *Namaz Mollah* v. *Lal Mohan Tagadgir*[6] and dissented from *Aslam Khan* v. *Kala Darji*,[7] in which the contrary had been held.

Stolen notes.

Any meddling with the property of another would seem to render the wrong-doer liable. Thus, in *Kissori Mohan Rai* v. *Raj Narain Sen*,[8] in which two notes had been stolen from *A*, which *B* (not being a *bonâ fide* holder for valuable consideration) tendered to *C* in payment of certain articles, *C*, not knowing *B*, refused to deal with him, whereupon *B* brought *D*, who was known to *C*, and the purchase was made by him. It was held that the part which *D* performed in this transaction amounted to "a conversion of the notes to his own use," and that he was liable to *A*. But it would seem that the notes themselves cannot be recovered, if they have come honestly into the hands of the holder, for in the criminal case of *Michell* v. *Jageshar Mochi*,[9] in which a Government Currency note had been stolen from *A* and cashed in good faith by *B* for *C*, on the conviction of *C*

[1] I. L. R., 3 Calc., 390.
[2] I. L. R., 4 Calc., 683.
[3] I. L. R., 8 Calc., 807.
[4] I. L. R., 4 Calc., O. C., 322 3 C. L. R., 375.
[5] I. L. R., 16 Calc., 159.
[6] 15 W. R., 279.
[7] 2 C. L. R., 344.
[8] 1 Hyde, 263.
[9] I. L. R., 3 Calc., 379 ; 1 C. L. R., 39.

for theft, the Magistrate ordered the note to be given to *B*, and it was held that the order of the Magistrate was right, as the note had come honestly into the hands of *B*, and though under section 108, Act IX of 1872, no seller can give to the buyer of goods a better title than he has himself, yet a currency note is not goods within the meaning of section 76 of the Contract Act, and the change of a currency note for money is not a contract of sale. *In Ganesdas Ramnarayan* v. *Lachminarayan*,[1] the plaintiff bought a *shahjog hundi* drawn on the defendant which he endorsed to *R* to whom he sent it by post for collection. It was stolen in transmission and the name of *D* substituted for that of *R*. *D* presented it for payment to whom the defendants paid the money. The defendants were held guilty of conversion of the hundi and liable in trover to the plaintiff.

Liability of inn-keeper where guests' moveables are stolen.

The liability of an inn or hotel-keeper, when his guest's property has been stolen, was elaborately discussed in *Whately* v. *Palonji Pestonji*.[2] The plaintiff brought a suit to recover from the defendant the value of certain articles that were stolen from his (the plaintiff's) rooms at an hotel in Bombay, of which the defendant was the licensed proprietor. The defendant was in the habit of entertaining for longer or shorter periods all comers willing to pay the usual charges, and the plaintiff was an insurance broker doing business at Bombay, who had lived at the hotel for more than a year, paying for his board and lodging at first by the day and afterwards by agreement at the rate of so much a month ; but neither was the plaintiff under any obligation to remain, nor the defendant to accommodate him for any fixed time. It was held, that the relation of inn-keeper and guest subsisted between the parties, and that the defendant

[1] I. L. R., 18 Bom., 570.

[2] 3 Bom. H. C. Rep., O. C., 137.

was *primâ facie*, and without proof of actual negligence, liable to make good the loss sustained by the plaintiff. Burn's Justice, sec. 16, was quoted to the following effect: "It is necessary to render the innkeeper thus liable that the party leaving the goods should, at the time of the injury, be a guest at the inn. One who goes casually to an inn and eats and drinks or sleeps there is a guest, although not a traveller. So is one who remains at the end of his journey at an inn without a special contract even for half a year." This was a case of liability owing to relation (see *ante*, p. 45) for a tort committed by a third party.

Measure of damages in cases of conversion.

As to the measure of damages in cases of conversion, it was held in an action for the wrongful conversion of timber, in which the plaintiff claimed to recover as damages the market value of the timber at the town of Rangoon to which it was being conveyed at the time of the conversion, that the cost of carriage to Rangoon from the place where the wrongful conversion occurred must be deducted: *Bombay-Burmah Trading Corporation* v. *Mahomed Ali*.[1] In a case in the Allahabad High Court, *Bansidhar* v. *Sant Lal*,[2] which was a suit for the wrongful conversion of a crop of indigo which was hypothecated, and which the defendant knew to be hypothecated to the plaintiff, but which he nevertheless appropriated and sold, it was held that the defendant was a wrong-doer, and the plaintiff had a right to damages, the measure of which would, under ordinary circumstances, where a fair price had been realised, be the amount he had realised by the sale.

Omnia praesumuntur contra spoliatorem.

In all cases where goods are wrongfully detained or converted, the maxim *omnia praesumuntur contra spoliatorem* will apply when their value is being determined:

[1] I. L. R., 4 Calc., 116.

[2] I. L. R., 10 All. 133.

Sundar Mani Chaudhrani v. *Bhuban Mohan Chaudhri*,[1] where, it having been proved that the defendant wrongfully took the property, it was held, that, unless he produced it and showed that it was not of the value stated by the plaintiff, the strongest presumption should be made against him and the highest value assumed. In *Framji Hormasji* v. *The Commissioner and Deputy Commissioner of Customs, Bombay*,[2] which was an action for wrongfully detaining a vessel, the property of the plaintiff, the High Court, on the maxim *omnia praesumuntur contra spoliatorem* held, that where a vessel was seized on suspicion of having a greater quantity of salt on board than was allowed by its permit, and immediately afterwards a number of men boarded the vessel, and with the assistance of the agent of the owner (the plaintiff) threw a considerable quantity of salt overboard, a presumption arose that there was an excess of salt on board at the time of the seizure beyond the amount allowed by the permit; and that where, under a permit to pass a certain number of maunds of salt, on which duty has been paid, an amount in excess of such number is removed, the whole of such salt must be considered as removed contrary to the provisions of the Salt Acts, XXVII of 1837 and XXXI of 1850, and that the whole of such salt, and not merely the excess, was, under these circumstances, liable to confiscation under the Acts. Russell on Crimes, Vol. III, page 217, 4th Edn., was quoted, where he says:—"Where a person is proved to have suppressed any species of evidence, or to have defaced or destroyed any written instrument, a presumption will arise that, if the truth had appeared, it would have been against his interest, and that his conduct is attributable to his knowledge of this circumstance." *Delamirie* v.

[1] 11 W. R., 536.

[2] 7 Bom. H. C. Rep., A. C., 89.

Armory,[1] *Dalston* v. *Coalsworth*,[2] and *The Hunter*,[3] an Admiralty case, were also cited. In the latter Lord Stowell said: "It is certain by the law of every Maritime Court of Europe, that spoliation of papers not only excludes further proof, but does *per se* infer condemnation founding a presumption, *juris* and *de jure*, that it was done for the purpose of fraudulently suppressing evidence, which, if produced, would lead to the same result; and this surely not without reason, although the lenity of our code has not adopted the rule in its full vigour, but has modified it to this extent, that if all other circumstances are clear, this one alone shall not be damnatory, particularly if the act was done by a person who has interest of his own that might be benefited by the commission of this injurious act. But though it does not found an absolute presumption *juris* and *de jure*, it only stops short of that, for it certainly generates a most unfavourable presumption. A case, which escapes with such a brand upon it, is only saved so as by fire. There must be that overwhelming proof arising from the concurrence of every other circumstance in its favour that forces a conviction of its truth in spite of the powerful impression which such an act makes to its entire reprobation."

Damage from negligence.

In *Koegler & Co.* v. *Yule & Co.*[4] the plaintiffs let the defendants a godown on an upper story over their own for the purpose of storing goods, the only stipulation in writing being that no combustible or hazardous goods should be stored. The plaint alleged that the understanding was that the defendants should use the premises in a tenant-like manner, whereas they did not do so, and overloaded the floor, which broke down, and thereby damage was done to the plaintiffs' goods in

[1] 1 Str., 505.
[2] 1 P. Wyms., 731.
[3] 1 Dods, 480, 486.
[4] 5 B. L. R., 401; 14 W. R., O. C., 45.

the godown below. The evidence showed that the defendants had stored heavier goods than the previous tenants, but that the floor ought to have been able to bear a heavier pressure per superficial foot than it was bearing when it fell down, and there was no evidence of improper storing. Under these circumstances, it was held that the plaintiffs had failed to make out their case, and the suit was dismissed. In *Choutmull Doogur* v. *Rivers Steam Navigation Company*[1] the plaintiffs had delivered to the defendants certain goods for carriage by river under a special contract. The goods were destroyed by fire on the defendants' flat. It was held that the defendants were liable, as the occurrence of the fire was of itself evidence of negligence and they had not discharged the onus cast upon them by law of showing that there was no negligence.

Imitation of trade-marks.

There have been several cases in the Indian Courts which show how far the Courts will protect a person in the use of trade-marks. In *Graham & Co.* v. *Ker, Dods & Co.*[2] the defendants sold goods bearing the same trade-mark as the plaintiffs' merchandise. The Court observed that obviously there was a close imitation of the plaintiffs' trade-mark, and that it was not sufficient to show that there was no fraudulent intention. It therefore granted an injunction.

In *Ralli* v. *Fleming*,[3] which was a suit brought to restrain the defendant from using an imitation of the plaintiff's trade-mark, it was held, that the trade-mark used by the defendant was a colourable imitation of the plaintiff's trade-mark, and calculated to mislead the public. On appeal, Garth, C. J., held, that if the imitation of the plaintiff's trade-mark generally or the use of the No. 2008 in particular, would be calculated to deceive or mislead the public, the defendant ought to be restrain-

[1] I. L. R., 24 Calc., 786.
[2] 3 B. L. R., Ap., 4.
[3] I. L. R., 3 Calc., 417 ; 2 C. L. R. 93.

ed from the use of them, and that, as such was the case in the suit before the Court, an order to that effect made by the Court below should be continued. Markby, J., dissented as to the effect of the use of the particular No. 2008, but agreed generally to the injunction granted by the lower Court being continued. In a somewhat similar case the Bombay High Court held that the plaintiffs were entitled to an injunction restraining the defendant from using a label which was a colourable imitation of the label on their goods: *Badische Aniline and Soda Fabrik* v. *Maneckji Shapurji Katrak*.[1]

There are two cases decided in the Madras High Court, which relate to trade-marks. In *Taylor* v. *Virasami Chetti*,[2] it was said:—"The general principles on which the Court gives relief in cases of trade-mark. ... are applied to different classes of cases—first, to those of imitation of the entire trade-marks, about which no question could exist; secondly, to imitation so nearly resembling the original as to be colourable, though not fraudulently so (*Millington* v. *Fox*,[3] of which *Croft* v. *Day* is an example); thirdly, to a class of cases where the entire original was not very closely copied, as discussed in *Leather Cloth Company* v. *American Leather Cloth Company*."[5] The Court held that the case in question came within the third class, and was governed by the principle enunciated by Lord Cranworth in *Seixo* v. *Provezende*,[6] *viz.*—"I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have from the mark or device he has used become known in the market by a particular name, I think the adoption by a rival trader of any mark which will

[1] I. L. R., 17 Bom., 584.
[2] I. L. R., 6 Mad., 108.
[3] 3 M. & C., 338.
[4] L. R., 1 Ch. App., 196.
[5] 7 Beav., 84.
[6] 11 H. L., 538.

cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of the device." The plaintiff was, therefore, held to be entitled to a perpetual injunction. In *Lavergne* v. *Hooper*,[1] it was laid down that such possession and use of a trade-mark in one market as to constitute a right in it, establishes in the owner thereof an exclusive right to that trade-mark in other markets, although the owner may not have used it in such markets. To constitute a trade-mark it must have been adopted as a symbol devised to distinguish a particular class of goods as the goods of that class manufactured or selected by a particular manufacturer or merchant. The plaintiffs in this case, however, had by their conduct led the defendant to believe that they claimed no right to a certain trade-mark, and that it was open to the defendant to adopt it as his own, and the defendant had adopted it, and by his industry had secured a wide popularity for it in the Indian market. It was, therefore, held that the plaintiffs were estopped from denying the defendant's right to use it in the Indian market. In a Bombay case, *The Manockji Petit Manufacturing Company, Limited* v. *The Mahalaxmi Spinning and Weaving Company, Limited*,[2] the defendants were found to have infringed the plaintiffs' trade-mark, and to have caused loss to them by causing the goods sold by the plaintiffs to be sold at a diminished price. It was, therefore, held that the defendants were liable for the loss sustained by the plaintiffs, and that the amount of the reduction in the price of the goods was the measure of damages.

But the right to the exclusive user of a trade-mark or number is largely a question of fact, and it is only when

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[1] I. L. R., 8 Mad., 149.

[2] I. L. R., 10 Bom., 617.

the use of that name or number deceive, or is reasonably likely to deceive the public that it can be interfered with or prevented : *Barlow* v. *Govindram*.[1]

Infringement of patents.

In *Sheen and another* v. *Johnson*[2] the plaintiff sued the defendants for damages for the infringement of a patent the plaintiff's assignor had obtained under Act XV of 1859, and which he was entitled to enjoy exclusively for fourteen years. It appeared that in June 1870, one Richard Johnson had acquired the exclusive privilege of making, selling, and using a new kind of thermantidote for fourteen years, and that in September 1875, he assigned this exclusive privilege over to the plaintiff, his son. The defendants pleaded that prior to Richard Johnson's patenting his invention they had made a similar thermantidote, and the lower Court found this to be the case, but that such thermantidote had not been "publicly or actually used" within the meaning of section 23, Act XV of 1859. On appeal, Spankie, J., said :—"Now the meaning of public use is, that a man shall not by his own private invention which he keeps locked up in his own breast or in his own desk and never communicates, take away the right another man has to a patent for the same invention." The prior use of an invention need not be general. It has been held that a single instance of use would be sufficient, but it must be public. In the case of *Carpenter* v. *Smith*,[3] Alderson, B., said that 'public use' means "a use in public so as to come to the knowledge of others than the inventor as contradistinguished from the use of it by himself in his chamber ;" and Lord Abinger said : "The public use and exercise of an invention means a use and invention in public, not by the public." The learned Judge, after commenting on the evidence in the case before him, considered that it was not satisfactorily proved

[1] I. L. R., 24 Calc., 364 ; 1 C. W. N., 281.

[2] I. L., R., 2 All., 368.

[3] M. & W., 300.

that there was a public and actual use of the defendants' thermantidote prior to the patent being taken by R. Johnson. The Court, therefore, held that the patent had been infringed, and a remand having been made that damages might be assessed, damages were finally awarded to the plaintiff in addition to the injunction he had already obtained.

In *Kinmond* v. *Jackson*,[1] which was a case of an alleged infringement of a patent for a tea-rolling machine, it was found that the defendant's machine, though it contained improvements, was substantially the same as the plaintiff's earlier patented machine. The defendant, however, had not patented his improvements, but had patented his machine as an entire invention. It was therefore held that he had infringed the plaintiff's patent, and the plaintiff was held entitled to an injunction, but not to both an account of profits and to damages. It was said that he must elect between the two remedies. In another Calcutta case, *In the matter of Moses*,[2] it was ruled, following the English case of *Clark* v. *Adie*,[3] that a licensee under a patent cannot, as between himself and the patentee, challenge the soundness of the patent during the continuance of his license. In the case of *Petman* v. *Bull*,[4] the plaintiff's suit was at first dismissed on the ground that he had not given in his plaint sufficient particulars of the breaches of his patent complained of; but on appeal to the Privy Council,[5] it was said that the sole object of Act XV of 1889 was to give the defendant fair notice of the case which he had to meet, and it was quite immaterial whether the requisite information be given in the plaint itself or in a separate paper. It was

[1] I. L. R., 3 Calc., 17; 1 C. L. R., 66.

[2] I. L. R., 15 Calc., 244.

[3] L. R., 2 H. L., 423.

[4] I. L. R., 5 All., 371.

[5] I. L. R., 9 All., 191; L. R., 13 I. A., 134.

further pointed out that particulars of breaches must be distinguished from particulars of objection from want of novelty. In the latter case, the particular instances may not be within the knowledge of the patentee (*i.e.*, the defendant), and must be specified ; in the former, the defendant must know whether and in what respect, he has been guilty of infringement. It was finally held on a consideration of the plaint, that the plaintiff had sufficiently complied with the Act.

Infringement of copyright.

There have been a few cases concerning the infringement of the copyright of books. The law relating to the copyright of books is to be found enacted in 5 & 6 Vict., c. 45, Act XX of 1847, Act XXV of 1867, and Act X of 1890. In *In the matter of the petition of Himidullah*,[1] the Calcutta High Court ruled that cases of infringement of copyright arising in the mofussil should be tried by the Court exercising the highest original civil jurisdiction, that is, in the Court of the District Judge. *In MacMillan & Co.* v. *Suresh Chandra Deb*,[2] many questions relating to the law of copyright were considered. The plaintiffs were the publishers and proprietors of a book called "The Golden Treasury of Songs and Lyrics," which was a selection made by Professor Palgrave from the poems of numerous English authors. The first edition was published in 1861, and a new edition was published in 1882. It was prescribed as a text-book by the Calcutta and Bombay Universities. The defendant published the same selection of poems and songs, but altered their arrangement. He also published many of Professor Palgrave's notes, some with acknowledgment and some without. It was held by Wilson, J., that such a selection could be the subject of copyright. "In the case of works not original in the proper sense of

[1] I. L. R. 6 Calc., 499 ; 7 C. L. R., 471. [2] I. L. R., 17 Calc., 951.

the term," it was said, " but composed of or compiled or prepared from materials which are open to all, the fact that one man has produced such a work does not take away from anybody else the right to produce another work of the same kind, and in doing so to use all the materials open to him. But, as the law is concisely stated by Hall, V. C., in *Hogg* v. *Scott*,[1] the true principle in all these cases is that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work, that is, in fact, merely to take away the result of another man's labour, or in other words, his property." It was further held on the pleas raised by the defendant (1) that, though the plaintiff's book was registered in 1861, and the infringement complained of was of an edition published in 1882, yet it was reasonable to assume that successive editions of a book of this kind, under the same name, arethe same book; (2) that it was unnecessary to show an assignment of the copyright by Professor Palgrave to the plaintiffs ; (3) that the registration was not bad because it contained the name of the firm and business address of the plaintiffs and not the individual names and addresses of the partners in the firm ; (4) that the title to copyright is complete before registration, which is only a condition precedent to the right to sue ; and (5) that the suit was not barred by the one year's rule of limitation laid down in sec. 26, 5 and 6 Vict., c. 45.

There are also two Bombay cases on the subject. In the case of *Ganga Vishnu Shrikisondas* v. *Moreshvar Bapuji Hegishte*,[2] the plaintiff had published a new edition of a Sanskrit work, with additions from other works introduced and foot-notes appended. The defendant subsequently printed and published an edition of

[1] L. R., 18 Eq., 444. [2] I. L. R., 13 Bom., 358.

the same work, which was substantially a copy of the plaintiff's edition. It was held that the plaintiff's edition was such a new arrangement of old matter as to be original in the sense that it entitled the plaintiff to the protection of the law of copyright, and that the defendant was liable to pay to the plaintiff as damages the price of the copies of his book sold by him. In *Abdurrahman* v. *Mahomed Shirazi*,[1] it was ruled that a translation into Persian of a book originally published in Urdu did not constitute an infringement of copyright, as it was a translation and not a copy, and under English law a translation has been always considered to be an original work. Under 15 and 16 Vict., c. 12, if an author wishes to reserve the right of translating his work, he must notify such an intention on the title-page of the work.

The principle that translations are not copies was maintained in *MacMillan* v. *Shamshul-Ulama M. Zaka*.[2]

[1] I. L. R., 14 Bom., 586.

[2] I. L. R., 19 Bom., 557.

CHAPTER V.

OF TORTS ARISING OUT OF MALICIOUS ABUSE OF LEGAL PROCESS AND OUT OF TRESPASS IN EXECUTION OF PROCESS—MALICIOUS PROSECUTION—WRONGFUL ARREST—FALSE IMPRISONMENT.

Abuse of legal process—Rule of English law—Cases—Rule different in India—Cases—Proof of malice and of sufferance of collateral injury essential—Cases—When costs of civil action can be sued for—Cases—Trespass in execution of decree—Cases—Who is liable—Cases—What must be proved in suits for damages for malicious prosecution—Proof of both malice and want of reasonable and probable cause necessary—Cases—Malice and want of reasonable and probable cause need not be expressly pleaded—Case—Whether in India it is necessary that the proceedings should have terminated in the plaintiff's favor—Cases—Damages in suits for malicious prosecution—Cases—Costs incurred in prosecution in Criminal Court cannot be recovered—Case—Wrongful arrest—Case—False imprisonment—Cases.

Abuse of legal process.

In considering malicious abuse of legal process and trespass in execution of legal process, I may begin by stating that the former occurs chiefly in cases where the person complaining is a party to the proceedings in the execution of which the process is taken out; the latter, usually in cases where the party complaining is a stranger to the proceedings in the execution of which the process is taken out.

Rule of English law as to abuse of legal process.

The rule of English law with regard to the former class of cases is that "the malicious assertion of a legal right is not actionable. If one man prosecutes a civil action against another maliciously, and without reasonable and probable cause, an action for damages is not maintainable against the prosecutor of the action. So, if one man slanders another in an action in a proper Court, no action will lie for it. There is a great difference between the bringing of an action and indicting mali-

ciously and without cause. When a man brings an action, he claims a right to himself, or complains of an injury done to him; and if a man fancies he has a cause of action, he may sue and put forward his claim, however false and unfounded it may be. . . . . No action will lie for improperly promoting a civil action in the name of a third person, unless it is alleged and proved to have been done maliciously and without reasonable and probable cause; but if there is malice and want of reasonable and probable cause, the action will lie, provided there is also legal damage." (Addison on Torts, 7th Edn., p. 29.) The rule of English law on this subject was followed by the Bombay High Court in *Pran Shankar* v. *Govindhlal Parbhudas*,[1] in which it was held that no action is maintainable for damages occasioned by a civil action, even though brought maliciously and without reasonable and probable cause. In one case, *Doyle* v. *Dwarkanath Chatarji*,[2] it has, however, been said that if a Court should attempt to execute a decree in a case in which the Court passing the decree had no jurisdiction, the plaintiff who applied for that execution would be liable to be sued in an action for damages for executing the decree.

The rule different in India.

But it is clear that, according to Indian law, an action will lie for the improper issue of mesne and other legal process. Sec. 491 of the Civil Procedure Code (XIV of 1882) expressly recognizes such a right of action, for it empowers a Court which has issued an order for arrest or attachment in the course of a suit to award compensation not exceeding one thousand rupees, if it should appear that such arrest or attachment was applied for on insufficient grounds. It then provides that the Court shall not award a larger amount than it could do in a suit for

[1] I. L. R., 1 Bom., 467. [2] 8 W. R., 88.

compensation, and that an order under this section shall bar a suit for compensation in respect of such arrest or attachment. Sec. 497 contains similar provisions with regard to compensation for the issue of an injunction on insufficient grounds. Accordingly, there are numerous instances of such suits having been brought: *Haro Sundari Dasi* v. *Bangshi Mohan Das*,[1] *Mohamed Reazudin* v. *Hussain Baksh, Khan*,[2] *Gobardhan Manjhi* v. *Beni Chandra Das*,[3] *Wilson* v. *Kanhya Sahu*,[4] *Nanda Kumar Shaha* v. *Gaur Shankar*.[5]

Proof of malice and of sufferance of some collateral wrong essential in such cases.

The circumstances in which such suits will lie have been considered in several cases. In *Goutiere* v. *Robert Charriol and others*,[6] it was held that proof of legal, not actual, malice was sufficient to support a suit for damages for the wrongful suing out of mesne process. In *Dharmo Narayan Sahu and others* v. *Srimati Dasi*,[7] it was held that where a Court had issued mesne process after being satisfied that the defendant was about to remove or dispose of his property with intent to obstruct or delay the execution of a decree which might be passed against him, it must be presumed that there was reasonable and probable cause for the plaintiff to have moved the Court to issue the mesne process, even though the suit was eventually unsuccessful, and that unless the contrary was shown, damages could not be recovered. But in *Raj Chandra Rai* v. *Shama Sundari Debi*[8] it was held on the authority of *Wren* v. *Weild*,[9] that a suit to recover damages for an injury caused by an arrest in accordance with the execution of a decree of a competent Court could be maintained under special cir-

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[1] 3 W. R., Misc., 28.
[2] 6 W. R., Misc., 24.
[3] 21 W. R., 375.
[4] 11 W. R., 143.
[5] 5 B. L. R., Ap., 4; 13 W.R.,305.
[6] All. H. C. Rep., 1870, p. 353.
[7] 18 W. R., 440.
[8] I. L. R., 4 Calc., 583.
[9] 38 L. J., Q. B., 327.

cumstances, and that the plaintiff must show—(1) that the original action out of which the alleged injury arose was decided in his favour ; (2) that the arrest was procured maliciously and without reasonable and probable cause by the defendant ; (3) that the injury sustained was something other than an injury which has been, or might have been, compensated for by an award of the costs of the suit, *i.e.*, that he has suffered 'some collateral wrong': *Savile* v. *Roberts*,[1] per Lord Holt : for, under section 201, Act VIII of 1859, the creditor had his option of enforcing his decree against the property or the person of his debtor, and that the decree was *ex parte* made no difference. Also, that where a plaintiff must show an absence of reasonable and probable cause, malice was not alone sufficient to entitle him to a verdict.

When cost of civil action can be sued for.

It was further ruled in *Pran Shankar Shivshankar* v. *Govindhlal Parbhudas*,[2] following *Chengulva Raya Mudali* v. *Thangatchi Ammal*,[3] that no suit will lie to recover costs awarded by a Civil Court, though it may lie for costs which could not be so awarded. In *Mahram Das* v. *Ajudhia*[4], Mahmud, J., after pointing out that there is some conflict of authority on this point (see *Jalam Punja* v. *Khoda Javra*,[5] and *Kabir* v. *Mahadu*[6]), has laid down the following rule on the subject:—"Where a Court has jurisdiction and orders costs, that order is final and binding. But where the former Court is not entitled to order costs, and costs are incurred, they may be made the subject of consideration as to damages in a subsequent suit." This was followed in the subsequent case of *Kadir Baksh* v. *Salig Ram*.[7]

Trespass in execution of decree.

In cases where process is executed against a third person not a party to the proceedings, it has been ruled in

[1] 1 Ld. Raym., 374.
[2] I. L. R., 1 Bom., 467.
[3] 6 Mad. H. C. Rep., 192.
[4] I. L. R., 8 All., 452.
[5] 8 Bom. H. C. Rep., A. C., 29.
[6] I. L. R., 2 Bom., 360.
[7] I. L. R., 9 All., 474.

the following decisions that an action for damages will lie, however innocently and mistakenly the decreeholder may have acted : *Raynor* v. *Sanjhir Singh*,[1] *Saljan and others* v. *Sariatulla*,[2] *Kanai Prasad Basu* v. *Hira Chand Manu*,[3] *Kissory Mohun Roy* v. *Harsukh Das*,[4] *Damodhar Tuljaram* v. *Lallu Khushaldas*,[5] *Goma Mahad Patil* v. *Gokaldas Khimji and another*.[6] In the Calcutta case first quoted, Norman, J., said :—"It is a settled rule of law that every person who directs, orders, or procures the commission of a trespass is liable as a wrong-doer or a trespasser If a decree-holder, having obtained a warrant authorizing the attachment of the goods of *A*, points out to the officer of the Court and causes him to attach and remove goods belonging to *B* as the goods of *A*, the decree-holder is a wrong-doer and cannot in any way justify his proceedings under the warrant. In causing *B's* goods to be attached and taken out of his possession, he procures a trespass to be done to *B*. If a man, for his own profit and advantage wrongfully or without any warrant in law trespasses on the land of another, takes away his goods, or procures his goods to be seized and taken out of his possession, he is responsible even though he acts innocently or mistakenly. A party to a suit is liable if by his order the officer takes the goods of the wrong person, a stranger in execution ; and, in like manner, he is responsible if his attorney or agent, in taking a step necessary to enable his client to get the fruits of the decree, inadvertently or ignorantly cause the person or property of a stranger to be seized by the officer of the Court." The cases of *Jarmain* v. *Hooper*[7] and *Walley* v. *McConnell*[8]

[1] All. H. C. Rep., 1873, p. 211.
[2] 3 B. L. R., A. C., 413 ; 12 W. R., 329.
[3] 5 B. L. R., App., 71; 14 W. R., 120.
[4] I. L. R., 17 Cal., 436; L. R., 17 I. A., 17.
[5] 8 Bom. H. C. Rep., A. C., 177.
[6] I. L. R., 3 Bom., 74.
[7] 6 M. & G., 827.
[8] 13 Q. B., 903.

were quoted as authorities for the rule laid down. The learned Judge then proceeded to point out that neither under Act VIII of 1859, nor under Act XXIII of 1861, did any enquiry appear to be contemplated as to whether the property sought to be attached was that of the judgment-debtor or not; and then went on to say,—"Of course, if, after having all the facts as to the right of a defendant to particular moveables brought before it, the Court, after adjudicating on the materials before it, were to order the attachment of specified property, or decide as to the right of such attachment, the order would be the act of the Court, and if the decree-holder had acted *bonâ fide* in bringing the facts fully before the Court, he would not be liable." On this principle *Jai Kali Dasi* v. *Chand Malla*[1] was decided. The case of *Lock* v. *Ashton*[2] was quoted as a good instance of the distinction between the liability of a man for his own acts and his responsibility for those of a Court which he sets in motion. The defendant in this case gave the plaintiff into custody on a charge of felony, and had him taken to a Police office. The Magistrate remanded the plaintiff, and on a subsequent examination the plaintiff was discharged, it having been discovered that the charge had been made by mistake. In the suit brought it was held that the defendant was not liable in damages for the detention of the plaintiff under the remand, such detention being the independent judicial act of the Magistrate. Coleridge, J., said:—"Suppose the defendant took the plaintiff to the Police office on a day when he knew there would be a remand." It was answered, "that would be evidence in an action for malicious prosecution." Also the case of *Edgell* v. *Francis*,[3] where the defendant improperly gave the plaintiff into custody on a charge of felony; and Tindal, C. J.,

[1] 9 W. R., 133. [2] 12 Q. B., 871. [3] 1 M. & G., 226.

held, that the defendant was responsible for all that was done by the officer in the ordinary discharge of his duty.

In two other cases, *Raj Ballabh Gop* v. *Issan Chandra Hazrah*,[1] and *Dular Chand Shahu* v. *Ram Shai Bhagat*,[2] the Calcutta High Court seems to have proceeded on this principle. In the latter case, the defendant had a decree against a third person, who was a boat-owner, and who had let three or four of his boats to the plaintiff for the purpose of taking down a cargo of goods to Calcutta. The decree-holder applied for the attachment of the boats, but not for their actual seizure. The officer of the Court entrusted with the duty of executing the order of attachment, however, seized the boats, and detained them from proceeding on their voyage. While so detained, one of the boats sank and its cargo was destroyed ;—upon which the plaintiff sued the decree-holder for damages. It was, however, held that unless it could be shown that the defendant or his servants personally interfered and caused the officer of the Court to attach the boats by seizure, the decree-holder was not liable for damages. "When a proper application for process has been made, and a proper order granted," it was said, "the officer of Court cannot be considered to be the agent of the person for whose benefit the process of Court has issued. The defendant is, therefore, not responsible for the mistake or misconduct of the officer, unless her or his servants have personally interfered, and have superintended or directed the action of the officer." The Calcutta High Court has further held that when process has been taken out against a third party not only wrongfully but also maliciously, this is an aggravation of the trespass, and calls for exemplary damages to be awarded: *Vilait Ali Khan* v. *Matadin Ram*.[3]

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[1] 7 W. R., 355. [2] 24 W. R., 139. [3] 13 W. R., 3.

The Bombay High Court seems disposed to hold the wrong-doing decree-holder responsible to a much greater extent than the Calcutta High Court has held him to be. Thus, in *Goma Mahad Patil* v. *Gokaldas Khimji and another*,[1] certain unthreshed rice belonging to the plaintiff had been wrongfully attached by the defendants under a money-decree obtained by them against a third party. The attachment had been made under a warrant which specified the rice in question, and which had been issued upon an application presented by the defendants, in which they prayed for the attachment of this particular rice as their judgment-debtor's property. The rice, while in the custody of a bailiff of the Court in the place where it had been attached, was clandestinely threshed and carried off by thieves, who left the straw. The plaintiff thereupon sued to recover the value of the unthreshed rice from the defendants, but the lower Courts dismissed his claim on the ground that the theft was not the immediate or probable result of the attachment, and that the conduct of the defendants had not in any way conduced to the loss of the rice. The Bombay High Court, however, held that the defendants were liable. When the wrongful seizure was made at the instance of the defendants, it was said, the plaintiff's cause of action was complete. The theft might have rendered the defendants unable to restore the rice *in specie*, but could not purge, and was no satisfaction of, the previous trespass which rendered the defendants liable for the full value of the rice. The measure of damages should be the value of the rice as it stood at the time of the wrongful attachment made at the instance of the defendants. If, however, the plaintiff accepted the straw left by the thieves, it was added, the value of the straw, as it stood at the time of such acceptance, should be deducted from the value of the straw

[1] I. L. R., 3 Bom., 74.

and rice when unsevered from each other. In this case the Bombay High Court alluded to the case of *Sabjan* v. *Sariatulla*,[1] in which the Calcutta High Court had held that the decree-holder was not liable for the value of three bullocks, which had died while *in custodia legis*, and expressed an opinion that in that case it lay upon the decree-holder to show how he was not responsible for their value.

In another case, *Mudvirapa Kulkarni* v. *Fakirapa Kenardi*,[2] *A* complained to the Magistrate that *B* had committed theft of his grain. The Magistrate, then, of his own motion, attached the grain. He subsequently dismissed the complaint, but continued the attachment pending the decision of the Civil Court to which he referred the parties. *A* then sued in the Civil Court to establish his title to the grain, but his suit was rejected, and *B* at last got back his grain but in a damaged condition. *B* then sued *A* for damages for the wrongful detention of his grain and for its consequent deterioration in quality and value. West, J., in this case said that though the action of the defendant began and ended with his complaint to the Magistrate, he could not escape all responsibility for the subsequent proceedings of the Magistrate as a basis on which damages were to be estimated. He, however, held that *B's* cause of action arose on the date of *A's* complaint, or at the latest on the date of the attachment of the grain, and that as *B* had not brought his suit until more than two years from the latter date, his suit was barred by limitation.

Who is liable in such cases.

In *Kanai Prasad Basu* v. *Hira Chand Manu*,[3] it was argued that where the plaintiff's (a third party's) goods had wrongfully been attached and sold in execution of

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[1] 3 B. L. R., A. C., 413; 12 W. R., 329.

[2] I. L. R., 7 Bom., 427.

[3] 5 B. L. R., App., 71; 14 W. R., 120.

process, the plaintiff's remedy lay against the purchaser and not against the decree-holder; and *Mahanand Haldar* v. *Akial Mehaldar*[1] was quoted in support of this contention. But this case only decided that, under similar circumstances, the plaintiff had a right to follow his property into the hands of the purchaser, and not that he was bound to sue the purchaser and him only. So Mitter, J., in the case before the Court, held on the authority of *Sabjan Bibi* v. *Sariatulla*, which has just been discussed, that the decree-holder as well as the purchaser was liable to make good the loss caused by such sale.

In *Bheema Charlu* v. *Donti Murti*,[2] where a third person had been arrested in execution of a decree to which he was no party, it was held that the decree-holder not having taken an active part in his arrest was not liable, unless he had obtained the issue of the process fraudulently or improperly. In India no attachment or arrest is ever made, in the mofussil at all events, except at the instance and in the presence of the decree-holder, or of his agents or servants. They invariably accompany the officer of the Court to point out the property to be attached, or to identify the person to be arrested. An instance, therefore, where property was attached or a person arrested without the decree-holder having taken an active share in the attachment or arrest, will most rarely, it may almost be said never, occur. The only instances would be found in cases where persons had wrongfully represented themselves to the officers of the Courts to be the agents or servants of the decree-holder and had procured attachments or arrests from private ill-will and malice; but though in practice I have heard of such cases, I have never come across one in the reports.

What must be proved in suits for damages for malicious prosecution.

Malicious prosecution is a favourite form of action in India. In *Ganesh Datta Singh* v. *Magniram Chaudhri*

[1] 9 W. R., 118.

[2] 8 Mad. H. C. Rep., 38.

and others,[1] the law as to what the plaintiff must allege and prove in an action of the kind is clearly laid down. Their Lordships said that the plaintiff in a suit for malicious prosecution would have to prove—(1) that the defendant was the prosecutor in the criminal proceedings against him (plaintiff); (2) that he (defendant) was actuated by malice; and (3) that his (defendant's) proceeding was without reasonable and probable cause.

In Underhill on Torts, p. 140, *et seq.*, 5th edition, four essentials to the successful maintaining of an action for malicious prosecution are laid down, *viz.*—(1) malice; (2) want of probable cause on the part of the defendant; (3) that the former proceedings were determined in the plaintiff's favour; and (4) damage by reason of the prosecution.

As I shall show later on, it is a matter of doubt whether in India the third circumstance is essential. The Privy Council at all events do not lay it down as one of the things necessary for a plaintiff to prove.

Proof of both malice and want of reasonable and probable cause necessary.

As to malice and want of reasonable and probable cause, the Calcutta High Court has in some cases held, that where the plaintiff has been acquitted in the Criminal Court and the charge has there been pronounced false, this is sufficient proof of want of reasonable and probable cause, and that it will lie on the defendant to rebut this proof: *Hira Chand Banarji* v. *Beni Madhab Chatarji*,[2] *Bishonath Rakhit* v. *Ramdhan Sirkar*[3] and *Ganga Prasad* v. *Ramphal Sahu*.[4] But the majority of the decisions are to the effect that it is essential for the plaintiff to prove both malice and want of reasonable and probable cause: *Naukauri Chandra Sarmah* v. *Brahmomai Debi*,[5] *Magniram Chaudhri* v.

[1] 11 B. L. R., P. C., 321; 17 W. R., 283.

[2] 6 W. R., 29.

[3] 6 B. L. R., 375, note; 11 W. R., 42.

[4] 20 W. R., 177.

[5] 3 W. R., 169.

Ganesh Dŭtta Singh,[1] *Brajonath Rai* v. *Krishna Lal Rai*,[2] *Mohendra Nath Datta* v. *Kailash Chandra Datta*,[3] *Dungrassi Baid* v. *Giridhari Mal Dugar*,[4] *Gaur Hari Das* v. *Hayagrib Das*,[5] *Roshan Sirkar* v. *Nobin Chandra Ghatak*,[6] *Kaibatulla* v. *Moti Peshakar*,[7] *Aghor Nath Rai* v. *Radhika Prasad Basu*,[8] *Ram Badan Singh* v. *Sirdar Dyal Singh and another*,[9] *Dunne* v. *Legge*,[10] *Kishori Lall* v. *Enayat Hossein Khan*,[11] *Weatherall* v. *Dillon*,[12] *Svami Nayuda* v. *Subramaniya Mudali*,[13] *Vengama Naikar* v. *Raghavachari and others*,[14] *Moonee Ummah* v. *The Municipal Commissioners of Madras*,[15] *Girdhar Lall Dyaldass* v. *Jagarnath Girdhar Bhai and another*,[16] *Acworth* v. *Sharaksha Dhunjibha*,[17] *Raghavendra* v. *Kashinath Bhat*.[18]

The Calcutta High Court in *Rai Jung Bahadur* v. *Rai Gudor Sahoy*[19] appeared to adopt a middle course, inferring malice from the absence of reasonable and probable cause—"ordinarily the absence of a reasonable and probable cause in instituting a proceeding which terminates in favour of the plaintiff would give rise to the inference of malice."

The subject has also been considered in *Hall* v. *Venkatakrishna*,[20] in which the defendant had prosecuted the plaintiff for misappropriating certain sums, which he had to collect for him as rent. The plaintiff was tried and acquitted, and thereupon he sued the defendant for

[1] 5 W. R., 134.
[2] 5 W. R., 282.
[3] 6 W. R., 245.
[4] 10 W. R., 439.
[5] 6 B. L. R., 371.
[6] 6 B. L. R., 377, note; 12 W. R., 402.
[7] 13 W. R., 276.
[8] 14 W. R., 339.
[9] 17 W. R., 101.
[10] All. H. C. Rep., 1866, p. 38.
[11] All. H. C. Rep., 1869 (Feb.), 11.
[12] All. H. C. Rep., 1874, p. 200.
[13] 2 Mad. H. C. Rep., 158.
[14] 2 Mad. H. C. Rep., 291.
[15] 8 Mad. H. C. Rep., 151.
[16] 10 Bom. H. C. Rep., 182.
[17] I. L. R., 19 Bom., 485.
[18] I. L. R., 19 Bom., 717.
[19] 1 C. W. N., 537.
[20] I. L. R., 13 Mad., 394.

damages for the false and malicious prosecution which he said had been instituted against him. In this case the Madras High Court quoted with approval the rule laid down by Lord Bramwell in *Abrath* v. *North-Eastern Railway Company*[1] to the effect that to maintain an action for malicious prosecution, it must be shown that there was an absence of reasonable and probable cause, and that there was malice or some indirect and an illegitimate motive for the prosecution. It accordingly held that it was not sufficient for the plaintiff to prove absence of probable cause for the prosecution against him, for the essence of the wrong lay in putting the criminal law into motion without reasonable cause against an innocent person from malice or some indirect and illegitimate motive. It further held that the burden of proving both that the defendant had not used proper care to inform himself of the facts and also that he did not honestly believe the case which he laid before the Magistrate lay upon the plaintiff. Ultimately, as the findings on both these points were against the plaintiff, the suit was dismissed.

Malice and want of probable and reasonable cause need not be expressly pleaded.

But though necessary to prove both malice and want of probable cause in a suit for damages for malicious prosecution, it does not appear that it is absolutely necessary that both should be expressly pleaded in the plaint. For in *Ramasami Ayyan* v. *Ramu Mupan*,[2] it was held, that where the plaint alleged as the cause of action, the prosecution of a false charge of forgery, and the statements of the subject-matters imported that the charge was false to the knowledge of the defendant, the omission to allege expressly malice and want of reasonable and probable cause was no good ground for objection to the suit.

When "malice" and "want of reasonable and probable cause" may be inferred.

The test to discover want of reasonable and probable cause, and how and when to infer malice therefrom, were admirably laid down in the case of *Goday Narayan*

[1] L. R., 11 App. Cases, 251.

[2] 3 Mad. H. C. Rep., 372.

Gajpati v. *Sri Ankitam Venkata Garu*,[1] which was an action to recover damages for a malicious prosecution and which has been referred to in Chapter I (see *ante*, pp. 31, 33). An application made in good faith to a Magistrate on which he acts and orders a prosecution does not form a ground for a suit for malicious prosecution, because the prosecution is the act of the Magistrate: *Pariag Singh and others* v. *Jagessar Sahai*.[2] Again, in *Chintamani Bapuli* v. *Digambar Mitra and others*,[3] it was held that the *bonâ fide* institution of proceedings in a Magistrate's Court was no ground of action, and that the plaintiff was not bound by the subsequent illegal act of the Magistrate. So, in *Ammani Ammal* v. *Sellaye Ammal*[4] in which a dispute having occurred regarding the possession of certain land, an order was passed by the Magistrate forbidding both plaintiff and defendant to interfere with the land until either established his title in a Civil Court, in consequence of which order the land was not cultivated the following year. The plaintiff then sued and established her title to the land, and also claimed damages for loss of profits owing to the land having lain waste. The Court following *Lock* v. *Ashton*[5] held that the plaintiff was not entitled to such damages, as they were not the probable result of the wrongful act of the respondents, but the consequences of a judicial act proceeding from the Magistrate.

The case of *Weatherall* v. *Dillon*[6] is one of the leading Indian cases on malicious prosecution, and affords an illustration of what the Indian Courts regard as sufficient proof of "malice" and "want of reasonable and probable cause," so that it will not be out of place to give a slight sketch of it here. The plaintiff made

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[1] 6 Mad. H. C. Rep., 85.
[2] 8 W. R., 111.
[3] 10 W. R., 409; 2 B. L. R., s. n., 15.
[4] I. L. R., 6 Mad., 426.
[5] 12 Q. B., 871.
[6] All. H. C. Rep., 1874, p. 200.

and delivered to the defendant a punkah with iron supports, and charged the iron in the bill as weighing four maunds. The defendant paid something on account, and promised to pay the rest if the charge for the iron was not exorbitant. The plaintiff sued the defendant in the Small Cause Court for the balance due, and the claim was dismissed on the ground that the payment made already was sufficient, and it was proved that only two maunds of iron had been used. The defendant then applied to the Judge for sanction to prosecute the plaintiff, and the next day, without any inquiry and without waiting till the Judge had investigated the matter, accused the plaintiff of cheating in the Magistrate's Court. The Judge investigated the matter and refused sanction, but the defendant did not withdraw the charge in the Magistrate's Court, which was dismissed. It was proved that the plaintiff had given out four maunds of iron to his workmen for the punkah, and that his store-keeper had entered that amount as expended. The plaintiff then sued the defendant for damages for a malicious prosecution, and it was held that the institution of the charge in the Magistrate's Court after the defendant had brought the matter before the Judge of the Small Cause Court, and knew it was under the Judge's consideration, and his persistence in the charge in the Magistrate's Court when, after investigation, sanction had been refused to a prosecution by the Judge of the Small Cause Court, were sufficient proof of malice, and that on the facts there was no reasonable and probable cause for criminal proceedings.

Whether in India it is necessary that the proceedings should have terminated in the plaintiff's favour.

It has been ruled that a conviction unreversed on appeal bars an action for malicious prosecution : *Bhairab Chandra Chakrabatti* v. *Mahendro Chakrabatti and others*,[1] *Swami Nayuda* v. *Subramaniya Mudali* ;[2] while in *Kuibatulla* v.

[1] 13 W. R., 118.

[2] 2 Mad. H. C. Rep., 158.

Moti Peshakar and others,[1] and *Parimi Bapurazu* v. *Bellamkonda Chinna Venkayya and others*,[2] it has been held that a conviction, even though reversed on appeal, is very strong evidence in favour of there being reasonable and probable ground for the charge. In the latter case the Court said :—"We do not know any instance of a suit of this kind being successfully maintained after a conviction of the plaintiffs by the sentence of one competent tribunal, although that conviction was reversed on appeal. It was tried in the case of *Reynolds* v. *Kennedy*,[3] but failed." Still, the Court went on to say, special circumstances such as the defendant keeping back information from the Court convicting the plaintiff, might rebut the otherwise almost irresistible presumption created by a conviction in favour of there being reasonable and probable cause. It may be noted that the Privy Council in *Ganesh Datta Singh* v. *Magniram Chaudhri and others*[4] do not lay it down as essential to the maintaining of an action for malicious prosecution that the plaintiff should allege and prove that the proceedings in the criminal case did either originally or eventually terminate in his favour. In *Basébé* v. *Matthews*,[5] this was held to be an essential if the proceedings were capable of such a termination, and it was held not to be sufficient to allege that the plaintiff was convicted, and that there was no appeal by law from such conviction. This opens up a very nice point of law. It has been laid down that no fact found proved in a Criminal Court shall on that account be taken to be proved in a Civil Court; see *Bishonath Neogi* v. *Haro Govind Neogi and others*,[6] where it was held, that a conviction for an offence by a Criminal Court could not be taken as

[1] 13 W. R., 276.
[2] 3 Mad. H. C. Rep., 238.
[3] 1 Wilson, 232.
[4] 11 B. L. R., P. C., 321: 17 W. R., 283.
[5] L. R., 2 C. P., 684.
[6] 5 W. R., 27.

conclusive evidence of the fact of the offence in a Civil Court: *Durga Das Laha* v. *Durga Charan Sha*,[1] where it was held, that acquittal by the Criminal Court for robbery did not bar a suit in the Civil Court for money alleged to have been forcibly taken: *Shambu Chandra Chaudhri* v. *Madhu Kaibarto and others*,[2] where it was held, that a plea of guilty in the Criminal Court was evidence of the fact in a Civil Court, but not a verdict of conviction: *Ali Baksh* v. *Samiruddin*,[3] where a conviction for assault in the Criminal Court was held to be no evidence of the 'factum' of the assault in the Civil Court: *Aghornath Rai* v. *Radhika Prasad Basu*,[4] where, in a suit for malicious prosecution, it was held, that the proceedings of the Criminal Court were not evidence in the suit in the Civil Court. Again, in *Gunga Ram* v. *Hulassi*,[5] it was held that in a suit to recover damages for loss of character owing to a maliciously false charge having been brought against the plaintiff, if the plaintiff had been convicted on the charge brought, that might be regarded as a weighty circumstance to show that the defendant acted with some adequate cause and not maliciously. Here a conviction was not considered as a complete bar to the suit, but only as a piece of evidence strongly in favour of the defendant. In the face of these rulings it is a little difficult to see why a conviction of the Criminal Court unreversed on appeal should be looked upon as conclusive proof of reasonable and probable cause for the charge; and as the Privy Council, as has been said before, did not lay down that the acquittal of the plaintiff was essential to his successfully maintaining an action for malicious prosecution, it may be doubted whether this

[1] 6 W. R. Civ. Ref., 26.
[2] 10 W. R., 56.
[3] 4 B. L. R., A. C., 31; 12 W. R., 477.
[4] 14 W. R., 339.
[5] All. H. C. Rep., 1870, p. 88.

conclusion is not perhaps a little arbitrarily arrived at, and whether, conviction or no conviction, the plaintiff should not be allowed an equally fair field. In India especially, where numbers of convictions made by an untrained and inexperienced Magistracy are unappealable, I am not sure of the wisdom of this ruling, though it is true, it follows the law as expounded by the Judges in England, where the unpaid Magistracy are as liable to err on the plainest facts as our Magistracy out here.

It is to be observed that a discharge, not amounting to an acquittal and which is capable of being set aside is such a termination of the prosecution as entitles the accused to maintain an action for malicious prosecution : *Vena* v. *Coorya Narayan.*[1]

Damages in suits for malicious prosecution.

A plaintiff's feelings may be taken into account in assessing damages for a malicious prosecution : *Haro Lal Biswas* v. *Haro Chandra Rai and others.*[2] He is also entitled to recover the costs necessarily incurred by him in defending himself on the criminal charge : *Shama Charan Haldar* v. *Bihari Lal Koilay,*[3] *Bonomali Nandi* v. *Hari Das Bairagi,*[4] including the fee paid by him to his pleader : *Subba Rau* v. *Virappa.*[5] Such costs are recoverable only by a suit for damages for malicious prosecution : *Mahomed Ali* v. *Bayama.*[6] But in a case in which the plaintiff in a suit for damages on account of malicious prosecution had not been summoned, but had employed counsel in anticipation of an application for sanction to prosecute for offences under the Penal Code, which application was unsuccessful, it was held that this did not afford sufficient cause for such an action : *Ezid Baksh* v. *Harsukh Rai.*[7]

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[1] I. L. R., 6 Bom., 376.
[2] 12 W. R., 89.
[3] 14 W. R., 443.
[4] I. L. R., 8 Cal., 710; 11 C. L. R., 265.
[5] I. L. R., 5 Mad., 162.
[6] I. L. R., 14 Bom., 100.
[7] I. L. R., 9 All., 59.

In the recent case of *Rai Jung Bahadur* v *Rai Gudor Sahoy*,[1] it was held that damages in this form of action were to be given on two bases, *first*, on the ground of *solatium* for injury to the feelings of the party prosecuted; *secondly*, as a reimbursement for legitimate expenses incurred by him in his defence.

Costs incurr in prosecuti in Crimin Court cannot be recovered.

In *Fazal Imam* v. *Fazal Rasul*,[2] the Allahabad High Court has ruled that when a plaintiff has prosecuted the defendant in a Criminal Court and the latter has been convicted, he cannot sue the defendant in the Civil Court for the expenses incurred by him in prosecuting the defendant in the Criminal Court. In this case the previous ruling to the contrary in *Ram Lal* v. *Tularam*[3] was expressly overruled.

Wrongful arrest.

As to what amounts to an arrest; where the person submits to the process or to the commands of the officer intimating that he is in custody, there is a perfect arrest. Actual contact is not necessary to constitute an arrest (Addison on Torts, 7th Edn., p. 146). So, when a false charge led to a person being prevented going to his house until he had furnished bail, he was held entitled to damages: *Madhab Chandra Sirkar* v. *Beni Madhab Rai*.[4]

False imprisonment.

False imprisonment is a trespass committed by one man against the person of another by unlawfully arresting him and detaining him without any legal authority. Every confinement of the person is an imprisonment, whether it be in a common prison or a private house, or in the stocks, or by forcibly detaining any one in the public streets. False imprisonment may also arise from the arrest or detention of the person by an officer without a warrant or by an illegal warrant, or by a legal warrant executed at an unlawful time. (Addison on Torts, 7th Edn., p. 146.)

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[1] 1 C. W. N., 537.
[2] I. L. R., 12 All., 166.
[3] I. L. R., 4 All., 97.
[4] 15 W. R., 85.

Indian law is not rich in cases of false imprisonment. The best known case is *Patton* v. *Hariram*.[1] The appellant (defendant) who was the commanding officer of a regiment stationed at Allahabad had unlawfully caused the respondent (plaintiff), a contractor, to be arrested and kept in confinement on a reasonable suspicion of fraud entertained against him, believing himself to be lawfully possessed of the authority to do so, and not acting with malice nor in conscious violation of the law, nor for the furtherance of any unlawful purpose. He had failed, however, to establish the fraud imputed, so the Court held that, under the circumstances, the plaintiff was entitled to substantial damages. In *Parankusam Narasaya Pantula* v. *Stuart and another*,[2] it was held that the retaining of a person in a particular place, or the compelling him to go in a particular direction by force of an exterior will, overpowering or suppressing in any way his own voluntary action, was an imprisonment on the part of the person exercising that exterior will. The plaintiff was suspected of an offence for which he could not be arrested without a warrant, and which was bailable. The first defendant sent a letter to the plaintiff ordering him to go to the second defendant, a Magistrate, and sent two constables with the letter who saw him there. This was held to be false imprisonment on the part of defendant No. 1. See also *Sinclair* v. *Broughton* and *Fisher* v. *Pearse*.[4]

In *Rajah Pedda Vencatapa* v. *Aruvala Rudrapa Naidu and another*,[5] it was held, that a zamindar had no power to restrain the persons of his officers, and that, if he were proved to have done so, substantial, not nominal, damages should be awarded.

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[1] All. H. C. Rep., 1868, p. 409.
[2] 2 Mad. H. C. Rep., 396.
[3] I. L. R., 9 Calc., 341 ; 13 C. L. R 185 ; L. R., 9 I. A., 152.
[4] I. L. R., 9 Bom., 1.
[5] 2 Moo. I. A., 50 .

Where the plaintiff was imprisoned for not paying a fine, which was ultimately recovered from him and paid over as compensation to the defendant, it was held that the plaintiff could not sue to recover the fine, as the imprisonment he underwent was not in lieu of the fine, but because it was not paid at once : *Manullah* v. *Ganesh*.[1]

[1] All. H. C. Rep., 1868, 390.

CHAPTER VI.

OF THE TORTS, LIBEL, SLANDER AND SLANDER OF TITLE.

Defamation—Definition of libel—Matter must be libellous—Cases—Publication—Cases—The law infers malice from publication—Cases—Truth of libel bars action—Cases—Privileged communications—Cases—Privilege of witnesses—Cases—Privilege of parties—Cases—No absolute privilege in criminal prosecutions—Case—Damage from libel—Cases—Slander when actionable according to English law—Cases—In India suit for damages for verbal abuse lies without proof of actual damage—Cases—Remedies for defamation—Joint action for slander when maintainable—Case—Action must be brought by person defamed—Cases—Defamation of a deceased person—Cases—Slander of title—Cases.

Defamation.

THE use of the word 'defamation,' indifferently for either slander or libel, in the earlier reports makes it a little difficult to be certain whether the action before the Court was one for defamatory words spoken, or for defamatory matter written and published. This was probably due to the fact that the Indian Penal Code uses the term 'defamation' to embrace both slander, or injurious words spoken, and libel, or written and published defamatory matter.

Definition of libel.

Every false and unprivileged publication by writing, printing, picture, effigy or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation, is a libel. An action is maintainable against the writer and publisher unless the publication ranges with the class of communications which are termed privileged communications, or unless the libeller can prove the truth of the libel. (Addison on Torts, 7th Edn., p. 167.)

Matter complained of must be libellous.

The plaintiff in an action for libel must first satisfy the Court that the matter complained of and set out in his plaint is libellous in law. The matter must be libellous, though it is not necessary that the words should be libellous in themselves, as they might have been used in an ironical sense. Whether they are libellous or not, the Court must decide, and the plaintiff is bound to show, that their natural meaning under the circumstances is libellous, and not that the words are merely capable of such a meaning. Thus, in *Wyman* v. *Banks*,[1] it was held, that on the presentation of a plaint for libel, the Court must see if the alleged libellous matter set out in the plaint is really libellous or not; if it is not, there is no ground of action, and the plaint ought not to be admitted. Also that, if the words set out in the plaint are not a libel, the plaintiff cannot, by alleging that they were printed and published by the defendant with intent to injure him, and bring him into public scandal and disgrace, and to expose him to public scorn and ridicule, and to cause it to be suspected that he was a dishonest person, and had been actuated by sinister and fraudulent motives, make them a libel; nor can the plaintiff by alleging that the words were used ironically make them libellous, if they do not appear to the Court to be so. On appeal, Couch, C. J., said that the English Judges were unanimous as to the same doctrine in *Wright* v. *Clements*,[2] where Lord Tenterden observed :—"In actions for libel the law requires the very words of the libel to be set out in the declaration in order that the Court may judge whether they constitute a ground of action, and unless a plaintiff professes so to set them out, he does not comply with the rules of pleading;" and Holroyd, J., said :—"Where a charge, either civil

[1] 10 B. L. R., O. C., 71; 18 W. R., 516. [2] 3 Barn. & Ald., 506.

or criminal, is brought against a defendant arising out of a publication of a written instrument, as is the case in forgery or libel, the invariable rule is, that the instrument itself must be set out in the declaration or indictment, and the reason of that is, that the defendant may have an opportunity, if he pleases, of admitting all the facts charged, and of having the judgment of the Court whether the facts amount to a cause of action or a crime. For it is clear that when it can be shown distinctly what the instrument is upon which the whole charge depends, the instrument must be shown to the Courts in order that they may form their judgment. A defendant is not bound to put the question as a combined matter of law and fact to the jury, but has a right to put it as a mere question of law to the Court." This was followed in *Blagg* v. *Sturt*,[1] and the rule that the plaintiff cannot extend the meaning of words beyond their natural import was clearly laid down in *Wheeler* v. *Haynes*,[2] where it was held, that the plaintiff could not by alleging that words were spoken ironically make them libellous if they did not appear to the Court to be so. In *Shepherd* v. *The Trustees of the Port of Bombay*,[3] the first question was, whether the words of the resolution passed by the defendants reflecting on the plaintiff amounted in law to a libel or not. The resolution ran :—"Mr. Shepherd's offer of Rs. 520 in full of all claims should be accepted, but any further transactions with him should be avoided, it possible." This was held to amount in law to a libel, because the Court considered the words calculated to deter other persons who had or might have business relations with the plaintiff from continuing or commencing such relations, and that they, therefore, were libellous in law. Green, J., laid down that in this country it was for the

[1] 10 Q. B. Rep., 899.

[2] 9 Ad. & Ellis, 286.

[3] I. L. R., 1 Bom., 477.

judge to determine from the plain and ordinary meaning of the words used whether they were libellous or not, and that witnesses could not be called to state what they understood from the words used, and he said: "It is for the plaintiff in a suit for libel to establish that the words in question did in fact mean what he alleges, and not merely that they were capable of bearing such meaning;" and "in any case it is for the plaintiff to establish that the alleged libel does in fact bear the meaning ascribed by him to it in his declaration or plaint:" and again:—"It is, I think, quite clear that in the case of libel or slander couched in ordinary English words, not words of art or slang, it is not admissible to ask witnesses in what sense they understood them."

Publication.

Thus, first of all, the plaintiff must convince the Court that the matter alleged by him to be libellous is really libellous in law. If the Court accepts that view, the question whether there was an uttering and a publication in law will arise. As to this point, Green, J., in the Bombay case before alluded to quoted Mr. Justice Holroyd in *Rex* v. *Burdett*,[1] where he said:—"The mere delivery over or parting with the libel with the intent to scandalize the party is deemed a publishing. The making of matter known to an individual (other than the plaintiff) only is indisputably in law a publishing;" and again: "The mere parting with a libel with an intent to scandalize by which the defendant loses his control over it is an uttering;" and Green, J., remarked, that the intent to scandalize need not be an express intent, but it was enough if that were the natural result of the defendant's act in parting with the libel, and that the meaning of 'scandalize' was that the plaintiff should thereby to a greater or less degree lose his good fame.

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[1] 4 B. & Ald., 95.

On the facts adduced on this point he held that the act of the Trustees in transmitting the copy of their resolution to the Government, in which copy this resolution found a place, was a publication of the libel, although the Trustees were bound by a law to transmit such a copy. A question was also raised as to whether the fact that the resolutions were given to clerks to copy did not also constitute a publication. The defendants pleaded that the acts of the clerks must be looked upon as the acts of the Corporation itself, and that so long as the defamatory matter did not pass beyond the custody and the control of the employés, there was no parting with or uttering of the libel by the Corporation. The case of *Heckford* v. *Galstin*[1] was considered and distinguished. That was an action for libel brought against the defendant, who was manager of Gregory and Co., contained in a letter written by defendant to plaintiff, and copied by one of the clerks. This was held to be evidence of publication, but then the defendant wrote the letter in his private capacity, and not on behalf of Gregory and Co. Green, J., however, declined to decide this nice point, having already held, that the sending of the copy of the resolutions to the Government constituted a publication of the libel in law.

That there must be a publication of the libellous matter, that is, a parting with it to some person other than the plaintiff, has also been held in *Mahamed Ismail Khan* v. *Mahamed Jubir*,[2] and *Kamal Chandra Basu* v. *Nobin Chandra Ghosh*,[3] where the defendants wrote letters abusing the plaintiffs, and hurting their feelings, it was held, that no action for libel would lie, because there had not been any publication of the libellous matter. In *Queen-*

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[1] 2 Hyde, 274. All. H. C. Rep., 1874, p. 38.

[3] 10 W. R., 184; 1 B. L. R., S. N., p. 12.

Empress v. *Sadashiv Atmaram*,[1] it was held that the mere sending of a notice to a person albeit containing matter of a defamatory nature cannot be held to be equivalent to making or publishing an imputation intending to do harm to the reputation of the person to whom it is addressed.

It is to be observed that the repetition of a libel published in the first instance by another is sufficient to render the person repeating the libel liable in an action for defamation. This is pointed out in *Kaikhusru Naoroji Kabraji* v. *Jehangir Byramji Murzban*,[2] in which the defendant was the editor of a newspaper and had reprinted in his paper an article libelling the plaintiff, which was copied from another newspaper. The defendant endeavoured to guard himself against the consequences of this publication by commenting on the article and observing that it was evidently untrue. It, however, appeared that the defendant for years past had been writing of the plaintiff in opprobrious terms and calling him by offensive names. It was therefore held that, upon reading the article as a whole and in its natural sense, and taking it in connection with the previous articles appearing in the defendant's newspaper with reference to the plaintiff, it was in itself defamatory of the plaintiff, and that the defendant was liable; also the editor of a newspaper who prints defamatory articles in one city and permits his printer to send copies to another city is responsible in the absence of proof to the contrary for the publication of the defamatory matter in the latter place: *Queen-Empress* v. *Girjashankar Kashiram*.[3]

The law infers malice from publication.

If the second stage, therefore, in a libel case, is passed, and the matter having first been shown to be libellous, *per se*, its publication is also proved, the law will infer

[1] I. L. R., 18 Bom., 205. [2] I. L. R., 14 Bom., 532.
[3] I. L. R., 15 Bom., 286.

malice, *Peter* v. *Dufour*,[1] and it will lie on the defendant to clear himself. This has also been laid down in *Shephred* v. *The Trustees of the Port of Bombay*,[2] in which it has been said: "From the fact that a person has voluntarily parted with, uttered, or published matter in a written, printed, or pictorial form, the effect of which, when it comes to the knowledge or notice of a third person, is likely to be injurious to, or defamatory of, the person referred to in such publication, the law *presumes*, on the part of the person so publishing, an intention to injure or defame the person so referred to, or, in other words, presumes the publication to have been malicious."

Truth of libel bars the action.

The person who has published the libel, however, may plead the truth of the libel, and the *onus* of proving the truth will lie on him: *Altaf Hossain* v. *Tasaduk Hossain*,[3] *Dharmo Das Kundu* v. *Kailash Kamini Dasi*.[4] If he succeeds in proving the truth of the libel, no action will lie in a Civil Court, because the law will not permit a man to recover damages in respect of an injury to character which he either does not, or ought not to, possess: *per* Littledale, J., in *McPherson* v. *Daniels*[5] (Addison on Torts, 7th Edn., p. 212). This is also shown by the case of *Aminudin Ahmad* v. *Khairunnissa*.[6] This was an action to recover damages for defamation of character brought by the late mukhtar and manager of a *pardahnashin* lady, who, in a petition to a Munsif, had represented that she had discharged the plaintiff from her service, because he had not managed her properties truthfully and correctly, but had acted corruptly and in fraud. The suit was dismissed by the lower Court, and it was held by the High Court that, looking

[1] 6 W. R., 92.
[2] I. L. R., 1 Bom., 477.
[3] All. H. C. Rep., 1867. 87.
[4] 12 W. R., 372.
[5] 10 B. & C., 272.
[6] 20 W. R., 60.

to the conduct of the plaintiff, who had rendered no accounts and had allowed a year to pass before resenting the libel, the defendant had reasonable grounds for making the statement, and in the absence of evidence of malice the suit was rightly dismissed.

Privileged communications.

The defendant may also plead that the publication was privileged. Should he succeed in that plea, the plaintiff must allege and prove express malice in making the communication, otherwise the plea will prevail. The subject of privileged publications or communications is thoroughly treated in *Shepherd* v. *The Trustees of the Port of Bombay*.[1] Green, J., began by stating that if the publication of this libel was held to be privileged, the presumption of malice, which the law made from the voluntary parting with to another of defamatory matter, would be excluded ; and quoted Parke, B., in *Toogood* v. *Spyring*,[2] who said :—"In general an action lies for the malicious publication of statements, which are false in fact and injurious to the character of another, and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interests are concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits." Also Cockburn, C. J., in *Harrison* v. *Bush*,[3] who said :—"A communication made

[1] I. L. R., 1 Bom., 477.

[2] 1 C. M. & R., 193.

[3] 25 L. J., Q. B., 25.

bonâ fide upon any subject in which the party communicating has an interest or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which without this privilege would be slanderous and actionable." Cockburn, C. J., also went on to define duty not only to include legal duties which may be enforced by indictment, action or *mandamus*, but also moral duties and social duties of imperfect obligation. Green, J., thereupon held that for a defamatory statement to be privileged, it must be *bonâ fide*, *i.e.*, made with an honest belief in the truth of what was stated, whether in itself it be true or false. If true, there was an answer to any suit to recover damages for libel; if untrue, but made with an honest, fairly grounded belief in the truth, and if made on an occasion and under circumstances which would of themselves make it what is called a privileged communication, then the statement though false was not malicious, and there was a good defence on that ground, unless the plaintiff could show that the defendant was actuated by express malice in making the statement. On the facts he found that the publication in question was privileged, the defendants acting *bonâ fide* in discharge of a public duty, and that the plaintiff had failed to prove the express malice he had alleged. He therefore dismissed the suit.

A recent case on the subject is that of *Leishman* v. *Holland*,[1] in which the plaintiff was a brewer, recently employed by a brewery company, and the defendant was the local manager of the company. The defamatory statements complained of consisted of a remark in a letter addressed to a brewer subordinate to the defendant, telling him that "Mr. Leishman had failed most utterly," and directing him to take charge of his duties, and

[1] I. L. R., 14 Mad., 51 [1890].

of statements in letters addressed to directors of the company imputing mismanagement and neglect of orders to the plaintiff. It was held that all these statements were in the nature of privileged communications.

Privilege of Judges.

An action for defamation cannot be maintained against a Judge for words used by him whilst trying a cause in Court, even though such words are alleged to be false, malicious, and without probable cause. *Raman Nayar* v. *Subramanya Ayyan*.[1]

Privilege of witnesses.

A suit to recover compensation for defamation (libel or slander), contained in defamatory statements made by witnesses in a judicial proceeding will not lie ; if their evidence be false, they must be proceeded against by an indictment for perjury. This was held by the Privy Council in *Ganesh Datta Singh* v. *Magniram Chaudhri and others*,[2] and according to English law, an action for defamation will not lie for anything sworn or stated in the course of a judicial proceeding before a Court of competent jurisdiction, such as defamatory bills or proceedings filed in Chancery or in the Ecclesiastical Courts or in affidavits containing false and scandalous assertions against others : *Ram* v. *Lamley*,[3] *Weston* v. *Dobniet*,[4] *Astley* v. *Younge*,[5] unless the Court has no jurisdiction in the matter and no right to entertain the proceeding, and the charge be made recklessly and maliciously, under which circumstances it will not be absolutely privileged : *Buckley* v. *Wood*,[6] *Lewis* v. *Levy*.[7] (Addison on Torts, 7th Edn., p. 181.) A suit is not allowed to lie in these cases, because, as the High Court, Madras, put it in *Hinde* v. *Baudry and others*,[8] "considerations of public policy overcome the private right,"—that is to

[1] I. L. R., 17 Mad., 87.
[2] 11 B. L. R., P. C., 321 ; 17 W. R., 283.
[3] Hutt, 113.
[4] Cro. Jac., 432.
[5] 2 Burr., 809.
[6] 4 Co., 14 b.
[7] 27 L. J., Q. B., 282.
[8] I. L. R., 2 Mad., 13.

say, such communications are absolutely privileged on grounds of public policy. In other cases, the party sued must fall back on the qualified privilege the High Court, Madras, speak of as enjoyed by persons acting in good faith and making communications with the fair and reasonable purpose of protecting their own interests.

In the case of *Bhikambar Singh* v. *Becharam Sirkar*,[1] the Calcutta High Court, following *Seaman* v. *Netherclift*[2] has laid it down as the law that :—"a witness in a Court of Justice is absolutely privileged as to anything he may say as a witness, having reference to the enquiry on which he is called as a witness." The Allahabad High Court in *Dawan Singh* v. *Mahip Singh*,[3] has held the same, Mahmud, J., in his judgment pointing out that insulting and abusive statements when made in the witness-box are privileged and protected, even though made maliciously and falsely, so long as they are relevant to the enquiry, or have reference to the enquiry in the broadest sense of the phrase, and that even where they have no reference to the enquiry, the defendant may prove the absence of malice, and that such statements were made in good faith for the public good. The Madras High Court has held that this rule applies in criminal as well as in civil cases, and that in both classes of cases witnesses are free from any other consequences with respect to statements made by them as such, except that of indictment for perjury : *Manjaya* v. *Sesha Shetti*.[4]

Privilege of parties.

Whether in India, however, this absolute privilege extends beyond witnesses (for their exemption must now be looked upon as settled law in India), is doubtful.

In *Hinde and others* v. *Baudry and others*,[5] the defendants had presented a petition to the Court, where a suit

[1] I. L. R., 15 Cal., 264.
[2] L. R., 2 C. P. D., 53.
[3] I. L. R., 10 All., 425.
[4] I. L. R., 11 Mad., 477.
[5] I. L. R., 2 Mad., 13.

between the plaintiffs and an absconded debtor, *B*, was pending, containing statements to the effect that the plaintiffs had prejudiced them by suing *B* for sums greatly in excess of their just claims against him. The plaintiffs brought a suit to recover damages for libel, and the lower Court found that there was no malice in fact, but that the statements were untrue and calculated to injure; so the plaintiffs got a decree. On appeal this decision was reversed, for the Court held that, as the defendants were the creditors of the absconded debtor, *B*, and were deeply interested in seeing that his estate was not swept off in satisfaction of an excessive claim made by the earliest suitor, they, in presenting a petition to the Court, pointing out what they considered to be suspicious elements in the plaintiffs' case, were at all events entitled to the qualified privilege of persons acting in good faith and making communications with the fair and reasonable purpose of protecting their own interests. The Court doubted whether the defendants could be looked upon as parties to the suit against the absconded debtor or not. If they could, and were rightfully making an application in that suit, the Court said, "the principle of public policy which guards the statement of a party or witness against an action would protect them, whether the statement was malicious or not." If they could not, then the Court considered it clear that they were entitled to the qualified privilege of persons acting in good faith and making communications with a fair and reasonable purpose of protecting their own interests. The Court concluded their judgment with the following valuable *dicta*: "The law regards statements of certain kinds as libels *primâ facie*. If made maliciously in the common understanding of the term, they render all makers of them liable to compensate, unless they stand in a position (such as a party to, or witness in, a suit) in which considerations of public policy

overcome the private right. Even those who make them in good faith, but wrongfully, will be liable, unless entitled to the more qualified privilege of which this case is an example. If entitled to such qualified privilege, they will not be bound to pay compensation, even if the statements are erroneous, because they are guilty of no injury, unless they have used the occasion, not for the fair protection of interests of their own or for the satisfaction of duties, moral or legal, but for the gratification of private ill-will."

Another case is that of *Venkata Narasimha* v. *Kotayya*,[1] in which the plaintiff was a zamindar who had applied to a tahsildar, praying that a certain village Munsif might be removed from his office. Upon this the defendants, who were raiyats of the village, presented a petition to the tahsildar praying that the Munsif might be retained in his office. This petition contained statements reflecting on the plaintiff's character, and so the zamindar brought an action for libel. It was, however, held that the petition was a privileged communication. The questions of when in the case of a defamatory communication malice is to be presumed, and when express malice may be proved and the privilege is at end, were all discussed in this case,—the Judges generally following the English law as expounded in *Harrison* v. *Bush*.

But in *Abdul Hakim* v. *Tej Chandra Mukharji*,[2] where the defendant presented a petition to the Magistrate by way of defence to a charge of criminal trespass brought against him by the plaintiff, containing matter defaming the plaintiff, the Court said that the English law was not suited to the circumstances of the country, and that they ought to appeal to the principles embodied in the Penal Code to supply the tests by which the liability or otherwise

[1] I. L. R., 12 Mad., 374. [2] I. L. R., 3 All., 815.

of defendants to civil suits should be decided. They therefore held that the fact that the petition had been filed in a judicial proceeding in a competent Court by way of defence did not make the defamatory matter complained of absolutely privileged, and that all the defendant could claim was the qualified privilege which the Madras High Court speak of. Again, in *Gurdutt Singh* v. *Gopal Das*,[1] where the defendant had with sinister motives and malicious intentions presented a petition to the Magistrate in his administrative capacity containing statements defamatory to the plaintiff and irrelevant to the occasion, it was held that such petition could not be looked upon as a privileged communication made in the course of judicial proceedings. In *Shibnath Talapatro* v. *Sat Kauri Deb*,[2] where the defendant had petitioned the District Judge to transfer his case from the Court of the plaintiff, who was a Munsif, and accusing the plaintiff of borrowing money from his adversary and falsifying the evidence in another case, it was held that the communication was not privileged in the absence of any proof of reasonable ground for believing these charges to be true, though as a matter of fact there was abundant reason for applying for the transfer of the case. The subject came before the Bombay High Court in *Nathji Muleshvar* v. *Lalbhai Ravidat*,[3] in which the plaintiff claimed to recover damages from the defendants for publishing defamatory matter in an application they had filed in a suit brought against them by one M, in which the plaintiff was described as a person "whose occupation was to obtain his living by getting up such fraudulent actions," and that he was induced to make a false claim by the plaintiff. The application appeared to have been made with the object of having other persons made parties to that suit. The Court in this case following the

[1] All. H. C. Rep., 1866, 33. [2] 3 W. R., 198 [1865].
[3] I. L. R., 14 Bom., 97 [1890].

English law on the subject, and the Madras Court's ruling in *Hinde* v. *Baudry*,[1] expressly dissented from the Allahabad view and decided that the defendants were privileged against a civil action for damages for what they had said of the plaintiff in the application they had presented in the suit.

No absolute privilege in criminal prosecutions.

In a criminal prosecution for defamation, there is of course no such absolute privilege, as was decided in *The Queen* v. *Delauney*,[2] where it was held that the act of filing a petition containing imputations concerning a person calculated to harm his reputation with the intention that it should be read by other persons, amounted to making or publishing that information within the meaning of sec. 499 of the Indian Penal Code.

Damage from libel.

Actual pecuniary damage need not be proved in libel, as the actual damage caused by the injury to the reputation of the person complaining of the libel is damage in legal contemplation : *Ramjiban Mukharji* v. *Uma Charan Hajra*.[3] But a Civil Court is not bound to give damages for defamation when the plaintiff has suffered no actual damage, and the defendant has already been convicted and fined for the offence in a Criminal Court : *Uma Charan Mazumdar* v. *Girish Chandra Banarji*.[4]

The Calcutta High Court have now adopted the view taken in Allahabad, dissenting from that of the Bombay High Court. In *Angada Ram Saha* v. *Nemai Chand Shaha*,[5] the defendants in a suit for recovery of money against the second plaintiff designated him as *Brojo Mohun Sho* with the object (as the plaintiffs contended) of disgracing them in society. The first Court passed a decree for one-anna damages, which was upheld on appeal by the District Judge. On appeal to the High Court, Mr.

[1] I. L. R., 2 Mad., 13.
[2] 14 W. R. Crim. Rul., 27.
[3] 7 W. R., 117.
[4] 25 W. R., 22.
[5] I. L. R., 23 Calc., 867.

Justice Hill observed : "The weight of authority appears to be in favour of the absolute privilege accorded to such statements in the English cases, and the reasoning of the learned Chief Justice in the case of *Nathji Muleshvar* v. *Lal Bhai Ravidant*[1] commends itself to me rather than that employed by the learned Judges, who decided *Abdul Hakim* v. *Tej Chandar Mukerji*."[2] But this opinion was overruled by Petheram, C. J., and Rampini, J., in Letters Patent Appeal. Their Lordships holding that it was doubtful whether any remedy for defamation was known to the Indian Law before the passing of the Penal Code, and that with reference to the Privy Council decision in *Gonesh Dutt Singh* v. *Mugneeram Chaudhry*,[3] although their Lordships of the Judicial Committee did not mention the Penal Code, yet it might have been present to their minds, as the statement of a witness would fall within exception 9 to sec. 499. In the result therefore the Calcutta Court has held that an irrelevant defamatory statement in a pleading is not absolutely protected and that the party making that statement must allege and prove good faith.

A convenient summary of the law of libel is to be found in the case of *Shepherd* v. *The Trustees of the Port of Bombay*,[4] which is a leading Indian authority on the subject. The questions as to whether the matter in that particular case was libellous, whether it was published, whether it was privileged, whether there was express malice, and whether the libel was true, were all raised and decided. A thorough insight, therefore, into the depths of the actionable wrong of libel will be obtained by a careful study of this case.

Slander, when actionable according to English law.

Verbal slander next claims our attention. It consists in abuse or vituperation by word of mouth, and according to the English law, no action will lie for it, unless special

[1] I. L. R., 14 Bom., 97.
[2] I. L. R., 3 All., 815.
[3] 11 B. L. R., (P. C.) 321.
[4] I. L. R., 1 Bom., 477.

damage be alleged, except where it is spoken of a professional man or tradesman in the course of his profession or business, where it imputes an indictable offence or a loathsome disease, or where it imputes official misconduct to a person in an office of profit or trust. Defamatory words concerning professional men and tradesmen spoken of them in the way of their trade or profession will sustain an action, when such words would not be actionable if spoken of a person having no trade or profession: *Harman* v. *Delaney*.[1] To call a man 'a thief' would *prima facie* be actionable without allegation of special damage; but if it be in evidence that the words were used merely as abuse and not as conveying the imputation of actual theft having been committed by the plaintiff, there is no cause of action: *Thompson* v. *Bernard*,[2] *Cristie* v. *Cowell*.[3] To impute to a man that he is afflicted with a contagious disease is actionable *per se*: *Bloodworth* v. *Gray*,[4] *James* v. *Rutlech*.[5] To say publicly of a man who is in the enjoyment of an office of honour, profit, or trust that he is wanting in integrity in his office, or that he habitually neglects his official duties, or that he is a corrupt man and takes bribes is actionable, but if the words merely impute to him want of ability and general unfitness for his post, the words are not actionable without proof of special damage. In cases other than the above, where special damage has been sustained by the plaintiff in consequence of the utterance of slanderous words, an action is maintainable but not otherwise. (Addison on Torts, 7th Edn., p. 174 *et seq.*)

In India a suit for damages for verbal abuse lies without proof of actual damage.

In India, however, as pointed out in Chapter I (*ante*, p. 4), the rule is different. No doubt in the cases of

[1] 2 Str. 898; 1 Barnard, 289.
[2] 1 Campb., 47.
[3] 1 Peake N. P. C., 5.
[4] 7 M. & G., 334.
[5] 4 Rep., 17*b*.

Phulbasi Koer v. *Parjan Singh*,[1] *Chandra Nath Dhar* v. *Issari Dasi*,[2] and *Nil Madhab Mukharji* v. *Dukhiram Kottah*,[3] it has been held by the Calcutta High Court that an action for slander does not lie without proof of special damage, and in *Uma Charan* v. *Grish Chandra Banarji*,[4] it was said that a Civil Court is not bound to give damages for defamation, when the defendant has been convicted and fined for the offence in the Criminal Court, and the plaintiff has suffered no actual damage; but a contrary rule has been laid down in the following cases:—Calcutta: *Mir Hussein* v. *Mir Bakir Ali*,[5] *Kanu Mandal* v. *Rahamullah Mandal*,[6] *Ghulam Hussein* v. *Har Govind Das*,[7] *Taki* v. *Khushdil Biswas*,[8] *Osimudin* v. *Fatteh Mahomed*,[9] *Gaur Chandra Patitandi* v. *Clay*,[10] *Kali Kumar Mittra* v. *Ram Gati Bhattacharji*,[11] *Srimath Mukharji* v. *Kamal Karmokar*,[12] *Srikant Rai* v. *Sat Kauri Saha*,[13] *Ibin Hussain* v. *Haidar*,[14] *Trailokhya-nath Ghosh* v. *Chandra Nath Datta*;[15] Bombay: *Kashi Ram* v. *Bhadu Bapuji*;[16] Madras: *Parvathi* v. *Mannar*,[17] and Allahabad: *Dawan Singh* v. *Mahip Singh*.[18] In all these cases it has been held a suit will lie for damages for verbal abuse without proof of consequential damage. In *Parvathi* v. *Mannar*, the subject was fully discussed by Turner, C. J., who observed: "The English law recognizes that defamatory words are actionable, even without proof of special damage, although they may not impute a felony nor affect professional character, provided

[1] 12 W. R., 369.
[2] 18 W. R., 531.
[3] 15 B. L. R., 161.
[4] 25 W. R., 22.
[5] W. R., 1864, 302.
[6] W. R., 1864, 269.
[7] 1 W. R., 19.
[8] 6 W. R., 151.
[9] 7 W. R., 259.
[10] 8 W. R., 256.
[11] 6 B. L. R., App., 99; 16 W. R., 84, note.
[12] 16 W. R., 83.
[13] 3 C. L. R., 181.
[14] I. L. R., 12 Calc., 109.
[15] I. L. R., 12 Calc., 424.
[16] 7 Bom. H. C. Rep., A. C., 17.
[17] I. L. R., 8 Mad., 175.
[18] I. L. R., 10 All., 425.

that they are written or printed and published, although the same words are not actionable, if uttered *viva voce.* This distinction has been defended on the ground that the committal of the words to writing implies more deliberation and that their publication in writing or in print is likely to be more extensive than a publication by oral utterance. Legitimate exception may be taken to both these grounds . . . . . The civil law does not recognize the distinction, nor does the law of Scotland, and the recommendations of Lord Macaulay's Commission were approved and accepted by the British Indian Legislature. We, therefore, feel justified in giving effect to our conviction, that the rule we are considering is not founded on natural justice, and should not be imported into the law of British India. . . . . Mere hasty expressions spoken in anger or vulgar abuse, to which no hearer would attribute any set purpose to injure character, would of course not be actionable, but when a person either maliciously or with such carelessness to enquire into truth as is sometimes described as legal malice, deliberately defames another, we conceive that he ought to be held responsible for damages for the mental suffering his wrong-doing occasions. Without accepting the very wide rule of the Scotch law that anything is actionable which produces uneasiness of mind (Starkie, p. 30), we consider the action should be allowed where the defamation is such as would cause substantial pain and annoyance to the person defamed, though actual proof of damage estimable in money may not be forthcoming."

A recent case of an action for slander is that of *Vallabha* v. *Madusudanan*, in which the plaintiff sued certain persons for damages for defamation for having in the course of a caste enquiry declared him an outcaste. In this enquiry the plaintiff had not been heard, and it was

[a] I. L. R., 12 Mad., 495.

therefore held that the belief in which the imputation was made was not formed with due care and caution or *bonâ fide*, and so the plaintiff was held entitled to recover. But in the case of the *South Indian Railway Company* v. *Rama Krishna*,[1] when a railway guard came to the carriage of the train in which the plaintiff was travelling and asked the plaintiff to produce his ticket, stating that he, the guard, suspected the plaintiff of travelling with a wrong or false ticket, it was held that no action would lie either against the guard or the Railway Company, as the words complained of were spoken *bonâ fide*, and were not in the circumstances defamatory. Moreover, the harm, if any, caused to the plaintiff's reputation, was very slight.

Making the effigy of a person and insulting it, beating it with shoes and the like, were held to be defamatory to the character of the person represented: *Pitambar Das* v. *Dwarka Prasad*.[2] No suit for slander or libel arises out of the omission of titles of courtesy in addressing the plaintiff: *Sri Raja Sitarama* v. *Sriraja Sanyasi, &c.*[3]

Inference of malice.

Malice is inferred in the same way, and communications are held to be privileged in the same way in slander as in libel, and if the slanderous matter be true, no civil action will lie on the same principle that none will lie for libel. In fact libel is written slander, and what is usually called slander is verbal slander, or slander by word of mouth.

Remedies for defamation.

As to the remedies for defamation, not only may a suit for damages be brought, but the publication of defamatory statements, which would be punishable under the Indian Penal Code, may be restrained by injunction, even though it may not be shown that they are injurious.

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[1] I. L. R., 13 Mad., 34.
[2] All. H. C. Rep., 1870, 435.
[3] H. C. Rep., 3 Mad., A. C., 4.

to the property of the plaintiff (Act I of 1877, section 55, ill. *e*).

Where the slanderous words were used by several persons, separate actions, not a joint action, must be brought: *Nilmadhab Mukharji* v. *Dukhiram Kottah and others*,[1] unless the special damage arising from the slanderous words used is the conjoint act of all the defendants: *Wazirunissa* v. *Mahomed Husein and others*.[2] Joint action for slander when maintainable.

Where female relatives were slandered, it was held that their male relatives had no ground for action: *Uda and others* v. *Bhowani Prasad*,[3] *Subbaiyar* v. *Kristnaiyar and another*.[4] If the rule were otherwise, the slanderer would be liable to as many actions as there are relations of the persons defamed: *Brahmanna* v. *Ramakrishnama*;[5] see also *Luckumsey* v. *Hurbun Nursey*.[6] So, in *Daya* v. *Param Sukh*,[7] it was ruled that a suit for defamation of his daughter could not be maintained by a Hindu father suing in his own right and not as general attorney or on behalf of the daughter: for, as said by Edge, C.J., an action for defamation can only be brought by the person actually defamed, if the person is *sui juris*, and if the person defamed is not *sui juris*, then under the provisions of the Civil Procedure Code, by the guardian or next friend. In *Basumati Adhikarini* v. *Budram Kolita*,[8] the above question does not seem to have been considered. Here the *guru* of a caste to which plaintiff belonged issued an *ajna patra* to the villagers to the effect that the plaintiff's wife had been guilty of improper conduct and should be outcasted. The High Court held that the conviction was wrong inasmuch as the statements were made in good faith for the protection of the Action must be brought by person defamed.

[1] 15 B. L. R., O. C., 161.
[2] 15 B. L. R., O. C., 166.
[3] All. H. C. Rep., 1866, 264.
[4] I. L. Rep., 1 Mad., 383.
[5] I. L. R., 18 Mad., 250.
[6] I. L. R., 5 Bom., 580.
[7] I. L. R., 11 All., 104.
[8] I. L. R., 22 Calc., 46.

community and was justified by the *guru's* position as its spiritual head.

Defamation of a deceased person.

An action for damages for defamation does not survive to the executors or administrators of a deceased person (sec. 268, Act X of 1865). A person may be liable criminally for defaming a deceased person (sec. 499, I. P. C., expl. 1), but not civilly, unless pecuniary loss has thereby been caused to the estate of the deceased person, in which case he would be liable under the provisions of Act XII of 1855, but the action must be brought within one year from the death. So, in *Luckunsey Rowji* v. *Hurbun Nursey*,[1] it was held that a suit brought by the heir and nearest relation of a deceased person for defamatory words spoken of such deceased person could not be maintained.

Slander of title.

An action for slander of title, as defined by Tindal, C. J., "is not properly an action for words spoken or for a libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title :" *Malachy* v. *Soper*.[2] The plaintiff, therefore, to sustain such an action must prove special damage, and there must be an express allegation on the face of the declaration of some particular damage resulting to the plaintiff from the slander. (Addison on Torts, 7th Edn., p. 259.) In *Sini Thiruvengadathiengar* v. *Sangiliviveerappa Pandya and others*,[3] it was held that the issue of proclamations and orders by the defendant to the raiyats of the plaintiff's estate to pay their rent to him as the rightful owner of the estate, and an application by him to the Collector to be registered as the owner and other like acts of pretension to the title and threats on his part, were not sufficient to entitle the plaintiff, who was in possession and enjoyment of the estate as rightfulowner, to a

[1] I. L. R., 5 Bom., 580.
[2] 3 Sc , 737—739.
[3] I. L. R., 1 Mad., 65.

declaratory decree that he was the rightful owner. This is the nearest approach to slander of title that I have come across in the Indian cases, and is described under that head in the Indian Law Reports Index. Maule, J., defined slander of title ordinary to mean, "a statement of something tending to cut down the extent of title, which is injurious only if it is false. It is essential to give a cause of action that the statement should be false. It is essential also that it should be malicious, not as Lord Ellenborough observes malicious in the worst sense, but with intent to injure the plaintiff. If the statement be true, if there be really the infirmity of title that is suggested, no action will lie, however malicious the defendant's intention might be. The jury may infer malice from the absence of probable cause, but they are not bound to do so. The want of probable cause does not necessarily lead to an inference of malice, neither does the existence of probable cause afford any answer to the action:" *Pater* v. *Baker*.[1] (Addision on Torts, 7th Edn., p. 261.)

[1] 3 C. B., 868.

CHAPTER VII.

ASSAULT AND BATTERY, WOUNDING, KILLING, INJURIES TO LIFE AND THE PERSON FROM NEGLIGENCE AND FRAUD.

Injuries to person—wilful—by negligence—by fraud—Assault—Definition in Indian Penal Code—Cases—Damages for assault—Cases—Battery—Cases—Other intentional injuries to person—Cases—Injuries by negligence—Cases—Cases under Act XIII, 1855—*Lyell* v. *Ganga Dai*—Adopted son—Case—Measure of damages—Case.

Injuries to person.

WE now come to actionable wrongs from injuries to the person caused either (*a*) wilfully and intentionally, (*b*) by negligence, or (*c*) by fraud.

Assault.

The first wrong under this head, cl. (*a*), which has to be considered is assault. To explain what an assault is, I cannot do better than give the definition of assault in the Indian Penal Code, sec. 351—"Whoever makes any gesture or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault. *Explanation.*—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparations such a meaning as may make those gestures or preparations amount to an assault."

In *Cama* v. *Morgan*[1] assault was considered and defined. It was held there that any gestures calculated to excite in the mind of the party threatened a reasonable apprehension that the party threatening intended immediately to offer violence, or in the language of the Indian

[1] 1 Bom. H. C. Rep., 205.

Penal Code, was 'about to use criminal force' to the person threatened, constituted, if coupled with a present ability to carry such intent into execution, an assault in law. Mere words were held not to amount to an assault, but the words which the party threatening used at the time might either give his gestures such a meaning as might make them amount to an assault, or, on the other hand, might prevent them being held to amount to an assault. In order to have the latter effect, the words must be such as clearly to show the party threatened that the party threatening had no present intention of using immediate criminal force. This clearly lays down all the law as to what is necessary to constitute an assault. There must be that threatening of it which would excite a reasonable apprehension of coming violence in the party threatened, coupled with an ability to carry the threat into immediate execution. The words used by the threatening party might show either that he was about to proceed to violence, or that such was not his intention, and it must be shown that the party threatened clearly was aware that such was not his intention.

In *Pratab Daji* v. *The Bombay, Baroda, and Central India Railway Company*,[1] where the plaintiff committed a trespass by riding in the train without a ticket and was assaulted and forcibly removed, the assault and forcible removal were held to be justified by the fact of the plaintiff being a trespasser. The conviction of the defendant for assault in a Criminal Court is no proof of the 'factum' of the assault in a Civil Court: *Ali Baksh* v. *Samiruddin*.[2] Where parties proceeded together and acted in conjunction as to time and place, an assault committed by them was held to be a single act, and a separate suit against each assailant not

[1] I. L. R., 1 Bom., 52.

[2] 4 B. L. R., A. C., 31; 12 W. R., 477.

necessary: *Rameshur Bhattacharji* v. *Shib Narayan Chakrabartti and others.*[1]

Male relatives cannot sue for damages for an assault committed by the defendant on their female relatives: *Udai* v. *Bhowani Prashad.*[2]

Damages for assault.

Special damage need not be proved in a case of assault; *Hussain* v. *Bakir Ali.*[3] Where there has been no serious injury, still damages commensurate to the injury and annoyance caused should be awarded: *Ramjai Mazumdar* v. *Russell.*[4]

But though compensation, commensurate with the injury of abuse and assault, should be awarded, that is no ground for giving a decree against the defendants for an amount beyond all possibility of their ever satisfying, simply on account of the plaintiff being a man of a somewhat high position in life: *Jaipal Rai* v. *Makund Rai.*[5] So, in *MacIver* v. *Shangeshar Datta Kunwar*,[6] as the damages awarded in compensation for an assault were beyond the means of the defendant, the Court reduced them on the defendant's tendering a written apology to the plaintiff expressing his regret for what had passed.

Battery.

A battery, as distinguished from an assault, is where the person of a man is actually struck or touched in a violent, angry, rude, or insolent manner: *Rawlings* v. *Till.*[7] "But every laying on of hands is not a battery. The party's intention must be considered, for people will sometimes by way of joke or in friendship clap a man on the back, and it would be ridiculous to say that every such case constitutes a battery:" *Williams* v. *Jones*,[8] *per* Lord Hardwicke. In order to prove a battery or beating, it must be shown that the person of the plaintiff

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[1] 14 W. R., 419.
[2] All. H. C. Rep., 1866, 264.
[3] W. R., 1864, 302.
[4] W. R., 1864, 370.
[5] 17 W. R., 280.
[6] 6 W. R., 95.
[7] 3 M. & W., 28.
[8] Hard, 301.

was actually touched or struck. But it is not the act of touching or striking that is to be regarded, but the act and intention together, for one man may push another merely in joke. (Addison on Torts, 7th Edn., p. 138.) In *Bhyran Prasad* v. *Ishari*,[1] it was held, that a plaintiff might be entitled to substantial damages for a beating with a shoe, notwithstanding that he may not have lost his caste or sustained a pecuniary loss, or even physical injury, by such beating.

Other intentional injuries to the person.

Intentional injuries to the person may, of course, be much more serious than assault or battery. They extend up to, and include, murder, but after passing beyond the phase of battery, become more usually subjects for the criminal law to deal with than the civil. But they are none the less torts, and it should be borne in mind that a civil action for damages will lie for any intentional injury to the person, grave or slight. Even murder is under the provisions of sec. 1, Act XIII of 1855, actionable by certain near relatives of the murdered man, as well as other cases where death results from injuries caused by a wrongful act, neglect, or default.

In English law the most serious kinds of wounding, attempts at murder, and murder are felonies. As we have seen before, in England, where the tort is also a felony, the civil remedy may be postponed till the criminal law has been put in force, but in India, there is no such rule. Where, therefore, an attempt has been made to murder a man in India, or where he has been robbed, he has a right to bring an action on tort in a Civil Court at once without waiting till criminal proceedings have been taken : *Shama Charan Basu* v. *Bholanath Datta*.[2] (See *ante*, p. 61.)

Injuries by negligence.

We now come to injuries to the person and injuries causing death owing to negligence. Negligence has al-

[1] All., H. C. Rep., 1871, p. 313.

[2] 6 W. R. (Civ. Ref.), 9.

ready been fully treated of in Chapter I, so that all that remains to be done is to give the Indian reported cases where negligence has caused injury to the person. We shall then deal more at length with injuries to the person causing death owing to negligence.

In *Woodhouse* v. *The Calcutta and South-Eastern Railway Co.*,[1] the plaintiff, who was a passenger by the train of the defendant company, received injuries to his person on alighting from the said train, and as those injuries were traceable to the negligence of the defendant company, he recovered damages.

Another case is that of *Evans* v. *The Port Trustees of Bombay and Diler Daulat Bahadur*.[2] The facts of this case are fully set forth in Chapter I (*ante*, p. 49). The plaintiff in this case was held entitled to substantial damages for injuries sustained by him in consequence of his having fallen by night into an excavation dug on the land of the first defendants by an employé of the second defendant.

Act XIII of 1855.

Act XIII of 1855 introduced a provision whereby, when the death of a person is caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable, if death had not ensued, shall be liable to an action or suit for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amounted in law to felony or other crime ; and it further enacts that such action shall be for the benefit of the wife, husband, parent, and child, if any, of the person whose death has been so caused, and shall be brought by, and in the name

[1] 9 W. R., 73.

[2] I. L. R., 11 Bom., 329.

of, the executor, administrator or representative of the person deceased, and that the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought, and that the amount recovered after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided among the before-mentioned parties or any other in such shares as the Court by its judgment or decree shall direct. Further, that only one action shall be brought for and in respect of the same subject-matter of complaint, and that within twelve calendar months after the death of such deceased person. Also that the word 'parent' shall include father and mother, grandfather and grandmother. and the word 'child,' son and daughter, grandson and grand-daughter and step-son and step-daughter.

Lyell v. *Ganga Dai.*

The best known case under this Act is that of *Lyell* (defendant-appellant) v. *Ganga Dai*,[1] Full Bench. In this case the plaintiff sued under Act XIII of 1855 to recover Rs. 9,360 damages for the death of her husband, Babu Ganpat Rai, under the following circumstances:— The plaintiff's husband was in the service of the East Indian Railway Company at Allahabad, and his duty was to despatch goods. On the 29th November 1872, the defendant, through his servant, W. H. Pollard, sent a box containing combustible and dangerous substances to the Allahabad Railway Station for despatch to Gwalior without notifying the contents as he was bound by law to do, and this box was placed near where the plaintiff's husband was at work. It suddenly exploded, and the plaintiff's husband sustained such injuries in consequence that he died from the effects of

[1] I. L. R., 1 All., F. B., 60.

them. The defendant pleaded that the box did not contain combustible or dangerous substances as alleged, and that the explosion of the box was a mystery to all experts in chemistry. That there was no reason to believe that even if the box had been marked dangerous, the plaintiff would not have lost his life, as there would be evidence to show that the box even if marked 'dangerous' would have been placed in exactly the same place before despatch by the Railway authorities, and that the deceased would have dealt with it presumably in no different manner than he did when the explosion unaccountably took place. Also, that the damages were grossly excessive. The Court of First Instance held it proved that the box contained some dangerous chemical preparation; that its dangerous character was fully known to the defendant and his servant; and that the omission of the defendant to mark the box 'dangerous' amounted to wrongful neglect or default which entitled the plaintiff to maintain the suit, and that the death of the deceased was due to such wrongful neglect or default; so it gave the plaintiff a decree for Rs. 5,253.

On appeal the Judges of the Division Bench (Stuart, C. J., and Pearson, J.) differed in opinion: Stuart, C. J., dismissing the appeal substantially, while modifying the decree of the lower Court by awarding Rs. 3,000 damages only, and Pearson, J., decreeing the appeal and dismissing the suit. The defendant accordingly appealed under cl. 10 of the Letters Patent to the Full Court.

It was there held (Pearson, J, dissenting) that a person who sent an article of a dangerous and explosive nature to a Railway Company to be carried by such Company without notifying to the servants of the Company the dangerous nature of the article, was liable for the consequences of an explosion, whether it occurred in a manner which he could not have foreseen as probable

or not. Also, (Pearson, J., dissenting) that such person was liable for the consequences of an explosion occurring in a manner which he could not have foreseen if he omitted to take reasonable precautions to preclude the risk of explosion. Turner, Spankie, and Oldfield, JJ., who concurred in a judgment, quoted the case of *Lynch* v. *Nurdin*,[1] which, they said, "establishes the principle that a person may be liable for the consequences of an accident resulting from his own negligence in combination with other causes which he did not contemplate. In that case the defendant left his cart and horse unattended in the street ; the plaintiff, a child of seven years old, got upon the cart to play, another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt ; it was held the defendant was liable to make compensation for the injury sustained by the plaintiff." They also said : "Furthermore, assuming the explosion was spontaneous, it could not have occurred had the appellant followed the practice he had hitherto pursued of sending the ingredients in separate bottles. With a knowledge of the highly explosive character of the preparation, he omitted a precaution which his own practice proves he considered reasonable to preclude the risk of accident."

In a recent case, *Kally Dass Mukerjee* v. *The East Indian Railway Company*,[2] an explosion of fireworks occurred in a passenger carriage, and it was held that the onus was upon the defendants to show they had exercised due care and caution to prevent them being carried. Because the carriage of fireworks in a passenger carriage is penal, and every man is presumed to know the law ; it cannot be presumed that a passenger would wilfully conceal the carriage of fireworks from officials of the defendant company.

[1] 1 Q. B., 29.

[2] 1 C. W. R., 609.

Adopted son can sue under Act XIII of 1855.

There are also two reported Bombay cases under this Act—*Vinayak Raghunath* v. *The Great Indian Peninsular Railway Company*[1]—where it was held that a son adopted by the widow of a deceased Hindu was the legal representative of the deceased, and as such was entitled to maintain a suit under Act XIII of 1855 for the benefit of the persons, if any, entitled to compensation for the injury occasioned to them by the death of the deceased against those whose negligence caused such death, but such an adopted son was not, however, entitled to have any portion of the damages awarded to him as a child of the deceased ; and a doubt was expressed whether a son adopted by the deceased in his lifetime even would be entitled to damages under the Act : and *Ratanbai* v. *The Great Indian Peninsular Railway Company*,[2] where the question of the measure of damages to be given to the family of a person whose death has been caused by wrongful act, neglect or default was considered. By the law of England (Lord Campbell's Act), the jury are to give damages proportioned to the injury ; and by the law of India, the Court must award damages proportioned to the 'loss' resulting from the death. In *Blake* v. *The Midland Railway Company*,[3] it was held, that the principle on which damages under Lord Campbell's Act were to be assessed was that of a loss of which a pecuniary estimate could be made, and that, therefore, compensation in the shape of a 'solatium' could not be given. In *Dalton* v. *London and South-Eastern Railway Company*,[4] and in *Franklin* v. *London and South-Eastern Railway Company*,[5] it was held, that the pecuniary advantage was not one only for which the deceased would be legally

Measure of damages.

[1] 7 Bom. H. C. Rep., O. C., 113.
[2] 8 Bom. H. C. Rep., O. C., 130.
[3] 18 Q. B., 83.
[4] 4 C. B., N. S., 296.
[5] H. & N., 214.

liable, but might be one of which the claimant had a reasonable expectation, and this was followed in *Pym* v. *Great Northern Railway Company*.[1] The Bombay Court thought that, perhaps, according to the Indian law, under very special circumstances, damages as a 'solatium' might be awarded, but not in the case then before them.

In another Bombay case, *Narayen Jetha* v. *Municipal Commissioner of Bombay*,[2] the plaintiff's unmarried daughter, a child between five and six years of age, fell into a manhole of a sewer in a lane in Bombay, and was killed. The sewer was vested in the defendants, and it was the duty of the Municipal Commissioner to see that open manholes were properly fenced. The hole had been fenced, but between the fencing being taken down and the hole closed for the night, the accident occurred. It was proved that the mother of the child was some four yards away at the time, and admitted that she knew the fence was down and said she would not have let the child go to it had she been playing beside her. On these facts it was held that the defendants were guilty of negligence, and that they were liable for the negligence of their servants, although the latter acted contrary to the express orders given by their superior, that though the mother might have been guilty of contributory negligence, yet it would not excuse them if the defendants could have averted the accident by the exercise of ordinary care, and that distinct evidence of the loss sustained or benefit expected was not necessary. In assessing damages the circumstances of the case and the position of the child and parents were to be looked at, but deductions might be made on account of the cost of maintenance during the years the child might reasonably expect to live. It was further held that in an action under Act XIII of 1855 no sum can be awarded for funeral expenses.

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[1] 32 L. J., Q. B. 377.

[2] I. L. R., 16 Bom., 254.

CHAPTER VIII.

MISCELLANEOUS.

Powers of Magistrates in preventing and removing nuisances—Whether a suit will lie in Civil Court to set aside order of Magistrate declaring place to be a public highway—Cases—Orders of Magistrate for removal of nuisances not duly made or made without jurisdiction can be set aside by Civil Court—Cases—Orders of Magistrate relating to tangible immoveable property cannot be set aside by Civil Court—Cases—Markets—Cases—Magistrate cannot issue perpetual injunction under sec. 144, Act X of 1882—Cases—High Court can set aside illegal order of Magistrate under sec. 144, Act X of 1882, by sec. 15 of its charter—Cases—Ferries—Cases—Suits against Municipalities—Suit lies in Civil Court to recover tax illegally imposed—Cases—Acts done by Municipal Commissioners cannot be set aside by Civil Court if they do not exceed powers conferred upon them—Cases—Civil Courts can set aside orders of Municipal Commissioners if they exceed their powers — Cases — Municipal Commissioners can be sued for a breach of their statutory duty, which results in an injury—Case—Limitation in suits against Municipal Commissioners—Cases—A suit will not lie to assert a mere dignity unconnected with emoluments—Cases—A suit will lie to determine question of right to receive emoluments or profits for religious services—Cases—A suit will lie to contest right to an office whether emoluments are attached to it or not—Cases—Suits relating to caste questions or religious ceremonies—Cases—Revenue sales—Cases—Omission to sue for bond-debt—Case—No action will lie for harbouring a person under contract of service—Case—No action will lie against witness for failing to attend or for giving false evidence—Cases.

BEFORE concluding the subject of Torts, I have thought it worth while in this, the last, chapter to discuss the remedies persons have whose rights are interfered with by Magistrates under the powers they possess to put a stop to nuisances, prevent breaches of the peace, and the like, and I shall consider these cases under the heads of (*a*) prevention and removal of nuisances, (*b*) orders relating to tangible immoveable property made with a view to prevent breaches of the peace, (*c*) markets, and (*d*) ferries.

I shall then conclude by giving miscellaneous rulings relating to suits against Municipal Committees, suits for usurpation of office, suits for dignities and suits about caste and religious ceremonies, and the like, and other miscellaneous topics which may interest the student.

Powers of Magistrate in preventing and removing nuisances.

With regard to the prevention and removal of nuisances, it is to be observed that the provisions of sec. 133 of the Criminal Procedure Code (Act X of 1882) invest certain classes of Magistrates with power to order (*a*) the removal of any unlawful obstruction or nuisance from any way, river or channel which is or may be lawfully used by the public, or from any public place ; (*b*) that any trade or occupation or the keeping of any goods or merchandise, by reason of its being injurious to the health or physical comfort of the community, shall be suppressed or removed or prohibited ; (*c*) that the construction of any building or the disposal of any substance likely to occasion conflagration or explosion shall be prevented or stopped ; (*d*) that any building in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by shall be removed, repaired, or supported ; and (*e*) that any tank, well, or excavation adjacent to any such way or public place shall be fenced in such a manner as to prevent danger arising to the public. It is further provided in the section that no order duly made under this section shall be called in question in any civil suit. Subsequent sections of the same code provide that a person to whom such an order is directed may either (*a*) comply with the order ; (*b*) show cause against it ; or (*c*) apply for the appointment of a jury to decide whether the Magistrate's order is reasonable and proper. Section 140 empowers a Magistrate to take steps himself for enforcing any final order that may be passed in the matter, if the party to whom it

is addressed neglects to comply with it ; and sec. 142 invests him with power to take immediate steps to prevent any imminent danger or injury of a serious kind to the public. Both these latter sections provide that no suit shall lie in respect of anything done in good faith by a Magistrate under their provisions.

Whether a suit will lie in Civil Court to set aside an order of Magistrate declaring a place to be a public highway.

A very important question upon which there have been numerous and conflicting decisions is how far, notwithstanding the provisions of these sections and of the corresponding sections of former Criminal Procedure Codes, a suit will lie in the Civil Court to set aside or to nullify the effect of an order absolute passed by a Magistrate under the powers which they confer upon him.

The law on this point has been summed up in the case of *Chuni Lal* v. *Ram Krishna Sahu*,[1] decided by a Full Bench of the Calcutta High Court, the judgment in which case was delivered by Wilson, J. In this judgment it is pointed out that both on principle and authority no suit will lie in the Civil Court directly to set aside the Magistrate's order : *Rooke* v. *Piari Lal Coal Co.*,[2] *Ujala Mayi Dasi* v. *Chandra Kumar Neogi*,[3] *Madhab Chandra Guho* v. *Kamala Kant Chakrabartti*,[4] and *Moti Ram Sahu* v. *Mohi Lal Rai*.[5]

Nor can a Magistrate who has passed such an order be sued personally ; for he has only acted in the discharge of his legal duty in a judicial character : *Ujala Mayi Dasi* v. *Chandra Kumar Neogi*,[6] *Michu Chandra Sirkar* v. *Ravenshaw*.[7] Neither can the person who has instituted the proceedings be sued for damages, for he only sets the law in motion : *Baksh Ram Sahu* v. *Chaman Ram*,[8] *Chinta-*

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[1] I. L. R., 15 Calc., 460.
[2] 3 B. L.R., App. 43; 11 W.R., 434.
[3] 4 B. L. R., F.B., 24.
[4] 6 B. L. R., 643 ; 15 W. R., 293.
[5] I. L. R., 6 Calc., 291 ; 7 C. L. R., 433.
[6] 4 B. L. R., F. B., 24.
[7] 11 B. L. R., 9 ; 19 W. R., 345
[8] 7 W. R., 11.

mani Bapuli v. *Digambar Mitra*.[1] But as to whether an order absolute by a Magistrate for the removal of an obstruction from a place held by him to be a highway is final and conclusive on the question of highway or no highway there has been considerable conflict of decision. Under Act XXI of 1841, in *Government* v. *Chuni Lal*,[2] *Pran Krishna Sarmah* v. *Ram Rudra Sarmah*,[3] and *Kedar Nath Mukharji* v. *Parbatti Peshakar*,[4] it was held that such a suit would not lie; while, on the other hand, in *Anando Mohan Khan* v. *Sambhu Nath Chakrabartti*[5] and *Sham Das* v. *Bhola Das*,[6] it was held that a civil suit did lie to establish that a place which the Magistrate had held to be a highway was not one. Again, under Act XXV of 1861, some observations of Peacock, C.J., in *Baroda Prasad Mustafi* v. *Gora Chand Mustafi*[7] are against the jurisdiction of the Civil Court. In *Hira Chand Banarji* v. *Shama Charan Chatarji*,[8] Norman, J., said the question of opening or closing a public road belongs to the Criminal, and not to the Civil, Court. And, in *Michu Chandra Sirkar* v. *Ravenshaw*,[9] Couch, C.J., expressed a decided opinion that a Magistrate's decision bars a civil suit. On the other hand, in *Baksh Ram Sahu* v. *Chaman Ram*[10] the question was treated as an open one, but it was said that if a suit lay, the Government must be a party; while in *Kadir Mahomed* v. *Mahomed Safar*,[11] *Azizulla Ghazi* v. *Banko Bihari Rai*,[12] *Ram Shadai Ghosh* v. *Jattadhari Haldar*,[13] and *Madhab Chandra Guho* v *Kamla Kant Chakrabartti*,[14] the jurisdiction of the Civi

[1] 10 W. R., 409; 2 B. L. R., s. n., 15.
[2] S. D. A. (1853), 929.
[3] Marsh., 214.
[4] 2 W. R., 267.
[5] S. D. A., 1858, 938.
[6] 1 W. R., 324.
[7] 12 W. R., 160; 3 B. L. R., A.C., 95.
[8] 3 B. L. R., 351; 12 W. R., 275.
[9] 11 B. L. R., 9; 19 W. R., 345.
[10] 7 W. R., 11.
[11] 1 W. R., 277.
[12] 7 W. R., 48.
[13] 7 W. R., 95.
[14] 6 B. L. R., A. C., 643; 1 W. R., 293.

Court was expressly upheld. Under the present Criminal Procedure Code in *Khoda Baksh Mandal* v. *Manglai Mandal*,[1] Prinsep and Beverley, JJ., decided that a civil suit is barred by the Magistrate's order. On the other hand, in *Moti Ram Sahu* v. *Mohi Lal Rai*,[2] White and Field, JJ., held that the Magistrate's decision did not preclude a Civil Court from enquiring into the question of title. This view was also taken by the Bombay High Court in *Lalji Ukheda* v. *Jowba Dowba*,[3] *Nilkanthapa Malkapa* v. *Magistrate of Sholapur*,[4] and *Secretary of State for India* v. *Jethabhai Kalidas*,[5] *Balaram Chatrukalal* v. *Magistrate of Taluka Igatpuri*.[6] The opinion of the Full Bench of the Calcutta High Court in *Chuni Lal* v. *Ram Krishna Sahu* was that the decision of a Magistrate in a summary proceeding is not ordinarily final and conclusive on a question of title, and does not exclude the jurisdiction of the Civil Courts to enquire into the matter, unless the intention of the Legislature that it shall have effect is shown. But no intention to make a conditional order for the removal of a nuisance final and conclusive is expressly declared, and such indications of intention as are to be found point in the other direction. It is expressly said that a preliminary order under sec. 133 is not to be called in question by a Civil Court, and that no suit shall lie (which means no suit for damages) for anything done in good faith under sec. 140 or sec. 142. But nothing is said as to the order absolute which effects the title. It was therefore held that a suit would lie in the Civil Court to set aside an order absolute of a Magistrate, directing the removal of an obstruction, and thus finding a place to be a public high-way. It was further held that the

[1] I. L. R., 14 Calc., 60.
[2] I. L. R., 6 Calc., 291.
[3] 8 Bom., A. C., 94.
[4] I. L. R., 6 Bom., 670.
[5] I. L. R., 17 Bom., 293.
[6] I. L. R., 6 Bom., 672.

Secretary of State could not properly be made a party to such a suit. But in Bombay, it would appear to be necessary to make him a party under sec. 37, Bombay Act V of 1879 : *Nilkanthapa Malkapa* v. *The Magistrate of Sholapur Taluka*,[1] and *Balaram Chatrukalal* v. *The Magistrate of Taluka Igatpuri*.[2]

Orders of Magistrate for removal of nuisances not duly made or made without jurisdiction can be set aside by Civil Court.

It is to be noted that under sec. 133, Criminal Procedure Code, it is only an order duly made under the provisions of the section that cannot be called in question in a Civil Court. So in *Ashburner, Magistrate of Khandesh* v. *Keshav Valad Tuku Patil and others*,[3] it was held, that a Magistrate, who made an illegal order purporting to be made under sec. 308 (Chap. XX), Act XXV of 1861, but not made in accordance with the provisions of that section, was liable to be sued in the Civil Court in respect of such order, and to be restrained by injunction from carrying it out. Similarly, the Calcutta High Court has in several cases held that the Civil Court has a right to set aside the orders of a Magistrate for the removal of nuisances, not duly made under the provisions of the Criminal Procedure Code, as well as orders not strictly within the powers of a Magistrate under that Code. Thus, it has been held that a regular suit lies to the Civil Court to set aside an order of a Magistrate, ordering the removal of an encroachment, which he has not treated as a local nuisance : *Anand Chandra Chatarji* v. *Rakho Taran Chatarji*.[4] In another case, *Ishan Chandra Banarji* v. *Nando Kumar Banarji*,[5] in which a Deputy Magistrate had passed an order purporting to be under sec. 308 of Act XXV of 1861, restricting the plaintiffs from the free use of their share of a joint family dwelling-house, the Civil

[1] I. L. R 6 Bom., 670.
[2] I. L. R., 6 Bom., 672.
[3] 4 Bom. H. C. Rep., A. C., 150.
[4] 2 W. R., 287.
[5] 8 W. R., 239.

Court was held to have power to set it aside. Then, where a Deputy Magistrate in a case of wrongful restraint made an order directing the accused to open a road three cubits wide, the Civil Court was held to have jurisdiction, as there was nothing to show that the road was a public thoroughfare, that the order had been passed under the provisions of sec. 308 of the then Criminal Procedure Code: *Guru Prasad Rai* v. *Prabhu Ram Chattopadhya.*[1] A suit for ejectment was also held to lie on the allegation that the defendants had dispossessed the plaintiff of private property under colour of an order of a Magistrate not properly passed under sec. 308, Criminal Procedure Code: *Deb Chandra Das* v. *Jai Chandra Pal.*[2]

Orders of Magistrates relating to tangible immoveable property cannot be set aside by Civil Court.

Under the provisions of sec 145 of the Criminal Procedure Code, when a dispute likely to cause a breach of the peace exists about any tangible immoveable property or its boundaries, a Magistrate can decide which of the parties is in possession, and issue a declaratory order as to the possession of the parties, and forbidding all disturbance of possession until the question of the rights of the parties has been settled by the Civil Court. Under sec. 146, he can attach the subject of dispute, if he cannot determine which of the parties is in possession. It has been held that an order of a Magistrate under the former section cannot be set aside by a decree of the Civil Court, but is by terms good to retain the party in whose favor it is passed in possession of the land until the opposite party has established his right thereto by civil suit: *Kali Narain Basu* v. *Anand Mai Gupta.*[3] Moreover, the party against whom such an order has been passed cannot sue for restoration of possession on the sole ground of previous possession with-

[1] 19 W. R., 426. [2] 22 W. R., 461

[3] 21 W. R., 79.

out reference to title : *Ram Rattan Rai* v. *Farrakunnissa Begam*,[1] *Rajeshari Debi* v. *Brindabatti Debi*,[2] and *Lachman Prasad* v. *Maharani of Burdwan*.[3]

Where a decree has been obtained fraudulently, it would appear that no suit will lie for a declaratory decree to that effect. In *Kunhamed* v. *Kutti*,[4] where the plaintiff alleged that the defendant had bribed the Judge, the above was held to be the case. The remedy would appear to be by way of injunction restraining the decree-holder from executing the decree.

Markets.

With regard to markets in *In re the petition of Bykantram Shaha Rai and others*,[5] it was held, that a Magistrate has power under sec. 62, Act XXV of 1861 (sec. 518, Act X of 1872 ; sec. 144, Act X of 1882), to prohibit a particular landholder from holding a *hât* (market) on a particular spot on a particular day, at least for a temporary period, if he is satisfied upon reasonable grounds that the order is likely to prevent, or tends to prevent, a riot or an affray. In *Kedarnath* v. *Raghunath*,[6] it was held, that any person was entitled to establish a market on his own land, and that the owner of a neighbouring market had no right of suit for the loss which might ensue from the establishment of the new market. Also that the Civil Courts could question the legality of an order made under sec. 518, Act X of 1872, but were bound to respect the order of a Magistrate passed while he was acting within his jurisdiction, *i.e.*, within the powers conferred on him by law ; and if his proceedings showed due diligence in satisfying himself of the necessity of the order, they could not question his discretion. In a suit, therefore,

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[1] 4 Moo. I. A., 233.
[2] 7 W. R., 212.
[3] 17 W. R., 181.
[4] I. L. R., 14 Mad., 167.
[5] 10 B. L. R., F. B., 434.
[6] All. H. C. Rep., 1874, 104.

brought to establish a right to continue a market and to hold it on certain fixed days by cancelment of the order of the Magistrate, directing that it should not be held on those days for fear of riot and of loss to the owner of another market, the plaintiff's right to hold the market on the days named in the plaint was decreed, subject to the prohibition created by the order of the Magistrate. As to the order of the Magistrate being capable of being reversed by the Civil Court, the decision followed a previous one: *Thakur Singh and others* v. *Sheoprasad Ojha and others*.[1] *In re the petition of Bykantram and others*[2] was referred to in this case; and Spankie, J., said:—"The Magistrate is responsible for the peace of his district, and where, for the purpose of securing it, he makes an order under a particular section of an Act giving him large discretionary powers, and his proceedings show due diligence in satisfying himself of the necessity of his order, it appears to me that it is not for the Courts to question his discretion, but they should assume that the danger, which the Magistrate states did exist, existed. Such an order, if within the terms of the section, would be unassailable;" and he went on to say, that he did not think a Magistrate's order should amount to a perpetual prohibition, as the circumstances which led to its being made might cease to exist, when the prohibition would be no longer necessary. And Turner, J., said:—"The Civil Courts are bound to respect a Magistrate's order passed by him when he is acting within his jurisdiction, by which I mean within the powers conferred on him by law."

Magistrate cannot issue perpetual injunction under sec. 144, Act X of 1882.

In *Gopi Mohan Mallik* v. *Taramani Chaudhurani*,[3] it was held, that a Magistrate had no power under sec. 518, Act X of 1872 (sec. 62, Act XXV of 1861), to pass an order which was more than a temporary injunction, and

[1] All. H. C. Rep., 1873, 8.
[2] 10 B. L. R., F. B., 434.
[3] I. L. R., 5 Calc., 7; 4 C. L. R., 309.

that where the plaintiff alleged that he had held a market on his own lands for many years on Tuesdays and Fridays, and that the defendant had set up a rival market on his own lands on these days preventing people attending the plaintiff's market, whereon disturbances arose which ended in the Magistrate's prohibiting the plaintiff's holding his market on those days, whereby he suffered damage if these facts were true, the plaintiff was entitled against the defendant, declaring his right market on Tuesdays and Fridays.

One of the questions submitted to the Full Bench was, whether the Civil Courts could set aside the order of a Magistrate passed with jurisdiction under sec. 518, Act X of 1872? This the Court considered unnecessary to answer. They stated that the fifth question was the important one, *viz.*, whether the Magistrate was competent to pass the order complained of in this case under the provisions of sec. 518, Act X of 1872? The Court considered he had no jurisdiction to pass so wide an order as he had done, *viz.*, that the plaintiff should not in future ever hold his market on Tuesdays and Fridays as the grant of what was in effect a perpetual injunction was beyond his powers. He might have prohibited the holding of the market on any particular occasion or occasions, but he had no right to deprive the plaintiff for ever of a right to which he was by law entitled.

High Court can set aside illegal order of Magistrate under sec. 144, Act X of 1882, by virtue of powers conferred by sec. 15 of Charter.

This too is the keynote of the judgment in *Kedarnath* v. *Rughunath*,[1] but the Allahabad Court has gone further than the Calcutta Court, both in this case and in *Thakur Singh* v. *Sheoprasad Ojha*,[2] in ruling that under certain circumstances the Civil Courts can cancel an order made by a Magistrate under sec. 518, Act X of 1872 (sec. 62, Act XXV of 1861). The rule laid down in the case of

[1] All. H. C. Rep., 1874, 104.

[2] All. H. C. Rep., 1873, 8.

Gopi Mohan Mallik v. *Taramani Chaudhrani* was followed by the Calcutta High Court in *Sarat Chandra Banarji* v. *Bama Charan Mukharji*[1] and *Bradley* v. *Jameson*,[2] in both of which cases the order of the Magistrate was set aside on the ground that he had no power to pass a perpetual injunction. These rulings are not of so much practical importance now, as under the present law (sec. 144, Act X of 1882) the order of a Magistrate directing a person to abstain from a certain act or to take certain order with certain property in his possession or under his management shall not remain in force for more than two months from the making thereof, but they establish the principle that such an order, though not a judicial proceeding (sec. 520, Act X of 1872, sec. 435, Act X of 1882) yet when illegal and made without jurisdiction can be set aside by the High Court under the powers conferred on it by its Charter (sec. 15, 24 and 25 Vict., c. 104). The High Court in two other cases, *Empress* v. *Prayag Singh*,[3] and *Abhaiyeshari Debi* v. *Sidheshari Debi*,[4] has set aside similar orders passed by Magistrates ; so that now the question of the High Court's jurisdiction in such cases must be regarded as settled.

Suits as to ferries against Government.

With regard to ferries, in *The Collector of Patna* v. *Ramanath Tagore and others*,[5] it was held, that where a ferry having previously been held under private management had been declared to be a public ferry by the Government under sec. 3, Reg. VI of 1819, an individual claiming compensation for the loss alleged to have been sustained by him in consequence of the extension of the authority of the Government could not maintain an action in the Civil Courts to enforce his claim. This was

[1] 4 C. L. R., 410.
[2] I. L. R., 8 Calc., 580 ; 11 C. L. R., 414.
[3] I. L. R. 9 Calc., 109.
[4] I. L. R., 16 Calc., 80.
[5] 7 W. R., 191 ; B. L. R. Sup. Vol., 630.

because compensation could be claimed specially under the Regulation, and *Stevens* v. *Jeacocke*[1] and *Doe dem The Bishop of Rochester* v. *Bridges*[2] were quoted as authorities, the Court of Queen's Bench having ruled that if the Legislature creates an obligation to be enforced as a general rule, in a special manner, performance cannot be enforced in any other way. In *Ram Jewan Singh and others* v. *The Magistrate of Shahabad*,[3] it was held, that a suit to re-open a ferry which had been included in the settlement of an estate obtained by the plaintiff from Government, but which had been closed by the orders of the Magistrate under sec. 2, Act I (B. C.) of 1866 and Reg. VI of 1819, the ghat where plaintiff wished to re-open it being within two miles of the place at which a public ferry was established, was not maintainable. In *Ram Govind Singh* v. *The Magistrate of Ghazipore*,[4] it was held, that while the section (3) of Reg. VI of 1819 empowered the Government to invade rights of private ferry by establishing a public ferry, it did not debar the Civil Courts in giving relief in cases where a Magistrate might, without the sanction of Government, have invaded a private right of ferry, nor did the Regulation prohibit Civil Courts from taking cognizance of matters connected with public ferries. In this suit, which was one to maintain the old boundaries of a ferry, the plaintiffs did not assert that they enjoyed a right of private ferry which had been invaded by an order of the Magistrate extending the boundaries of a public ferry, but only that they had heretofore, without charging toll, transported in their own boats, or in boats hired by them, their labourers and cultivators, and that in the exercise of that right an order of the Magistrate was injurious to them. It was held that such damage was

[1] 11 Q. B. R., 731.
[2] 1 Barn. and Ado., 847.
[3] 15 W. R., 132.
[4] All. H. C. Rep., 1872, 146.

much too remote to entitle them to relief, and that the order of the Magistrate extending the boundaries of the public ferry was an invasion of their ancient right, inasmuch as by sec. 6, Reg. VI of 1819, persons are prohibited from employing ferry boats plying for hire at or in the vicinity of a public ferry without the sanction of the Magistrate.

Suits as to ferries against private individuals.

There are a few cases relating to disputes between rival owners of ferries and landholders owning the lands on which people embark and disembark, which will be in place here. In *Kishori Lal Rai* v. *Gokulmani Chaudhurani*[1] it was held, that there were proprietary rights in a private ferry of such a nature that another party might not interfere with the profits arising therefrom by running a boat almost in the same line. Preventing parties from crossing at a person's ferry and driving his men away, amounted to dispossession. But to justify the prohibition of the setting up of a rival ferry, it must have been set up under circumstances involving direct competition with an existing ferry : *Narain Singh Rai* v. *Narendro Narain Rai*.[2] In *Gopi Thakurani and others* v. *Sheo Sevak Misra*,[3] it was held, that the right to the *jalkar*,—that is to say, the produce of the water in a river, did not necessarily include a right of private ferry. Nor does the mere fact of being owner of both banks of a river give a right of ferry : *Sofir Mirdha* v. *Nabo Kishor*.[4] The right to ply a ferry may include also a right at certain seasons of the year to land upon or start from the side of the river belonging to another : *Brajo Kishori Chaudhurani* v. *Bilashmani Chaudhurani*.[5] But this is not necessarily the case, and where the starting point of a ferry is changed owing to a change in the course

[1] 16 W. R., 281.
[2] 22 W. R., 296.
[3] All. H. C. Rep., 1873, 95.
[4] 2 W. R., 286.
[5] 5 W. R., 195.

of a river, there is no right to follow the starting point, unless the new position is within the possessor's own land: *Gordon* v. *Gopi Sundari Dasi*.[1] In *Luchmessar Singh* v. *Lilanand Singh*,[2] the plaintiff, who was the owner of a ferry, granted him under a Government settlement, and on which he levied tolls, sued to restrain the defendant from running a ferry over exactly the same spot. The defendant levied no tolls on his ferry, but it was not shown that it was solely for the conveyance of his own servants and cultivators. So, the suit was held to be maintainable, because gratuitous ferrying over would cause damage to the plaintiff. In *Parmeshari Prasad Narayan Singh* v. *Mahomed Syed and others*,[3] it was held, that the right of establishing a private ferry and levying tolls was recognized in British India; and *per* Garth, C. J., and White, J., that twenty years was the shortest period within which such a right of ferry could be established by user. Mitter, J., held, that where the existence of a private right of ferry plying between the lands of *A* and *B* was admitted by *B*, no question of user arose, as the issue raised between the parties was not whether a private ferry existed, but whether the recognized private ferry which existed was the property of *A* or *B*; but, *semble*, supposing such question of user to arise, a right of private ferry cannot be established as an indefeasible right by long user. In *Nityahari Roy* v. *Dunne*,[4] which was a suit to establish the right to a ferry franchise and to restrain the working of a rival ferry, it was held that a monopoly of a right of ferry can be only by grant from the Crown and that the grant of such right would not be destroyed by mere non-user without waiver. The franchise would

[1] 25 W. R., 53.

[2] I. L. R., 4 Calc., 599: 3 C. L. R., 427.

[3] I. L. R., 6 Calc., 608; 7 C. L. R., 504.

[4] I. L. R., 18 Calc., 652.

continue as long as the grant continued, and until the person who set up an opposition ferry could show a Crown grant or give evidence from which a Crown grant could be presumed, the cause of action would remain.

Suits against Municipalities.

I will now give a few rulings relating to suits against Municipal Committees.

Suit lies in Civil Court to recover taxes illegally imposed.

Firstly, as to taxes, in *Bhimavarapu Balaramaya* v. *Hodson*,[1] it was held, that a suit could not be maintained to recover an assessment wrongfully levied by Municipal Commissioners under Madras Act X of 1865, as the plaintiff was bound to appeal under section 69 to a Board of the Commissioners ; and in *Manessar Das and another* v. *The Collector and Municipal Commissioners of Chapra*,[2] it was held, that a suit to set aside an order made on appeal under sec. 33 of the Bengal Act III of 1864 to the Municipal Commissioners to reduce the tax, on the ground that they had tried the appeal improperly and had exceeded their powers and had acted contrary to the Act, could not be maintained in a Civil Court, there being a special provision in sec. 33, that no person could contest an assessment in any other way than by the appeal provided in the section. But in a Madras case, *Leman* v. *Damodaraya*,[3] which was a suit by a pleader to recover a sum with interest collected from him as professional tax, it was held that the tax had no legal existence at the time when the amount was collected from the plaintiff, and that therefore the plaintiff was entitled to recover. In another case under the same Act, *Kamayya* v. *Leman*,[4] the result was different, as it was held the procedure for the imposition of the tax had been conformed to by the Commissioner, and that consequently the tax had a legal existence, and no suit would lie to contest its incidence. The Bombay High Court has also

[1] 3 Mad. H. C. Rep., 370.
[2] I. L. R., 1 Calc., 409.
[3] I. L. R., 1 Mad., 158.
[4] I. L. R., 2 Mad., 37.

held that when a tax has not been legally imposed, a suit will lie to recover an amount wrongfully collected : *Joshi Kali Das Sevakram* v. *The Dakor Town Municipality*.[1] In this case it was said that the jurisdiction of the Civil Court to decide as to the validity of any fresh tax or impost is well established, and that there is nothing in Act VI of 1873, the Bombay District Municipal Act, which afford sufficient ground for supposing that the intention of the Legislature was to take away that jurisdiction. The case of *The Municipality of Poona* v. *Mohanlal Lilachand*,[2] illustrates the same principle.

Acts done by Municipal Commissioners under powers conferred upon them cannot be set aside by Civil Court, if these powers are not exceeded.

As to acts done by Municipal Commissioners under the powers conferred upon them by the various Municipal Acts, no suit will lie against them as long as these powers are not exceeded. Thus, a suit will not lie to interfere with the *bonâ fide* exercise by a Municipality of its discretion to refuse permission for the excavation of a tank : *Bhairab Chandra Banarji* v. *Makgill* ;[3] and when Municipal Commissioners are invested with a discretion as to the necessity of cleaning and filling up tanks and wells, and are empowered on neglect of the owner to comply with a requisition to do the necessary work, to get the work done and to recover the costs, it is not open to the owner to prove in a suit brought by the Municipal Commissioners to recover the cost of draining and cleansing a tank, that the tank was not likely to prove injurious to the health of the neighbourhood : *The Municipal Commissioners of Madras* v. *Parthasaradi*.[4] So in *Moti Lal Basu* v. *The Howrah Municipality*,[5] when the Howrah Municipality had prosecuted the plaintiff for allowing a piece of land of his to be covered with jungle and night-soil, and had procured the infliction on him of a fine, which

[1] I. L. R. 7 Bom., 399.
[2] I. L. R., 9 Bom., 51.
[3] 17 W. R., 215.
[4] I. L. R., 11 Mad., 341.
[5] 23 W. R., 225.

had been realized by the attachment and sale of his moveable property, and the plaintiff thereupon sued the Corporation for the value of the goods sold and for damages, it was held that the suit could not be maintained. In a Bombay case, *Ollivant* v. *Rahimtulla Nur Mahomed*,[1] the plaintiff had, under Act III of 1872, been ordered to remove the eaves of certain buildings belonging to him, which projected over the public road, as being "a projection, encroachment or obstruction" within the meaning of the Act. It was held that these eaves were an obstruction, and that the Municipal Commissioner was entitled to remove them. In another case, *Nagar Valab Narsi* v. *The Municipality of Dhanduka*,[2] under Act VI of 1873, the plaintiff wished to make a balcony projecting over the public road, but the Municipality objected to the work as an encroachment on a public street. The plaintiff, accordingly, sued the Municipality to establish his right to build the proposed balcony. It was held in this case that the word "street" in the Act means and includes, not merely the surface of the ground, but so much above it and below it as is requisite and appropriate for the preservation of the street for the usual and intended purposes, and that so far as the column of space standing over the street was vested in the Municipality, the plaintiff had no right to occupy it with a balcony which by intercepting air and light would greatly impair the use of the area as a street; also, that the Bombay District Municipal Act gives the Municipality a discretion to issue such order as it thinks proper with reference to a building, and Civil Courts cannot interfere with such discretion unless it is exercised in a capricious, wanton, and oppressive manner; and that the authority of the Municipality was

[1] I. L. R., 12 Bom., 474.

[2] I. L. R., 12 Bom., 490.

not in any way affected by the circumstance that the proposed erection might be an encroachment on private rights, subjecting the plaintiff to an action by the person injured. There was a recent case in the Calcutta High Court, *Moran* v. *The Chairman of the Motihari Municipality*,[1] under the Bengal Municipal Act III of 1884, B. C., which is to the same effect. In this case the Municipal Commissioners of Motihari had refused to grant to the plaintiff a license for an ancient market situated within the town of Motihari, and had compelled him to close it. He thereupon sued them to compel them to grant him a license and for compensation, but it was held that the Municipality had acted within their powers, and that the action could not be maintained.

Civil Courts can set aside the orders of Municipal Commissioners when they exceed their powers.

On the other hand, when Municipal Commissioners exceed the powers conferred upon them, the Civil Courts have power to interfere and to restrain their actions. Thus, in *Brindaban Chandra Rai* v. *The Chairman of the Municipal Commissioners of Serampore*,[2] it was pointed out that the Bengal Municipal Act does not authorize Municipal Commissioners to close a burning ground which has been used for very many years, merely because they think that the burning of dead bodies is offensive. It allows them to interfere only when it shall appear to them upon the evidence of competent persons that any burning ground is in such a state as to be dangerous to the health of persons living in the neighbourhood thereof. In this case it was further said that the restraining and regulating jurisdiction of the Civil Courts of the country extends to municipal as well as to other public boards. It would be dangerous to leave the power conferred on Municipal Commissioners free of all control, and it is for the Civil Court to determine whether

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[1] I. L. R., 17 Calc., 329.

[2] 19 W. R., 309.

the Commissioners have acted in excess of the statutory powers entrusted to them.

Again, in *Sunder Lal* v. *Baillie*,[1] in which the plaintiff had obtained a license from the Secretary to the Municipality to burn a certain quantity of bricks, and the defendant, the Vice-Chairman of the Municipality, being of opinion that the license was granted without authority, had caused the plaintiff's bricks to be removed and many of them had been destroyed in the removal, it was said that, as there was nothing in Act III of 1861, B. C., which authorised the Vice-Chairman to remove the bricks, both he and the overseer who had acted under him were personally responsible for what they had done, as their acts were in no sense authorized by law or within the scope of their duty.

The Madras High Court has also held that a suit will lie against Municipal Commissioners, who, professing to act under the Town Improvements Act, 1871, had removed a projection which projected beyond the main walls of a house and abutted on a lane which was used by the public, but which was proved not to have been erected on the street but on private property, *Hanumayya* v. *Roupell*.[2] The case of *Kalidas* v. *The Municipality of Dhandhuka*[3] is to the same effect. In another case under the Bombay Municipal Act, VI of 1873, *Jafir Sahib* v. *Kadir Rahiman*,[4] in which the plaintiff prayed for an injunction restraining the defendant from erecting a privy so close to his house as to be a nuisance, and the defendant pleaded that he had acted under the orders of the Municipality, it was held that the defendant was not entitled to raise this plea, as the Municipality had on a proper construction of the law no authority to order the defendant to erect a privy irrespective of the plaintiff's rights. The injunction

[1] 24 W. R., 287.
[2] I. L. R., 8 Mad., 64.
[3] I. L. R., 6 Bom., 686.
[4] I. L. R., 12 Bom., 634.

prayed for was therefore granted: cf. *Krishnayya* v. *Bellary Municipal Council*,[1] *Srinivasa* v. *Rathnasabapathi*,[2] *Krishnaji Narayan Pokshe* v. *Municipality of Tasgaon*[3].

Municipal Commissioners can be sued for a breach of their statutory duty which results in an injury.

Municipal Commissioners are also liable to be sued for damages for any breach of their statutory duty which results in injury. The leading case on this subject is the *Corporation of the Town of Calcutta* v. *Anderson*,[4] in which the plaintiff Anderson when driving along a street in Calcutta by night had fallen into a hole opened in the road, which was left unfenced and insufficiently lighted, and had been badly injured. The road had been opened by an Engineer in the employment of the Government of Bengal, who had applied to and obtained permission from the Corporation to open the road, subject to the condition that he employed one of the contractors licensed by the Municipality to do such works—and such a contractor had accordingly been employed. The plaintiff sued for damages, making the Secretary of State, the Corporation and the contractor parties defendant. It was held that the Secretary of State was not liable, for he came within the established rule that one who employs another to do what is perfectly legal must be presumed to employ that other to do this in a perfectly legal way; but the Corporation were held liable, as they had a statutory duty imposed upon them to repair and maintain the roads and were consequently liable to the plaintiff for a breach of their statutory duty. Moreover, where there was a dangerous obstruction, and *à fortiori* where such dangerous obstruction resulted from a permission granted by the Commissioners, they were liable for damages caused by it. The contractor also was held liable: cf. *Narayan Jetha* v. *Municipal Commissioners of Bombay*[5] (*ubi supra*).

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[1] I. L. R., 15 Mad., 292.
[2] I. L. R., 16 Mad., 474.
[3] I. L. R., 18 Bom., 547.
[4] I. L. R., 10 Calc., 445.
[5] I. L. R., 16 Bom., 254.

Limitation in suits against Municipalities.

As to what rule of limitation applies to suits brought against Municipal Commissioners for tortious acts, there are a few cases which put the law very clearly.

In *Abhai Nath Basu* v. *The Chairman of the Municipal Committee of Krishnaghar*,[1] it was held that a month's notice was necessary where the plaintiff sued to restrain the Commissioners from interfering with a road which he claimed as his private road. But in *Gopi Krishna Gosain* v. *Rylands and others*,[2] it was held that Municipal Commissioners were entitled to one month's notice of action under sec. 87, Bengal Act III of 1864' only when they had been acting *bonâ fide* in the belief that they were exercising powers given to them by the Act, but not if their proceedings were not justified by the Act and were only colourably done under cover thereof. And in *Purno Chandra Rai* v. *Balfour*,[3] it was said by Phear, J., that sec. 87 would only protect Municipal Commissioners if they were sued for damages consequent on a wrong done by them in the reasonable belief that they were exercising their lawful powers, and not if they were sued by parties kept out of possession by their continued wrong-doing. This was followed in *The Chairman of the Howrah Municipality* v. *Khelat Chandra Ghosh*,[4] in which it was held, that in a suit to recover possession of a portion of land of which the Municipal Commissioners had deprived the plaintiff by heaping stones thereon and evicting his raiyat, the provisions of sec. 87, Act III (B. C.) of 1864, requiring suits under the Act to be brought within three months, applied to actions brought against acts of Municipal Commissioners done under that Act and for the purposes thereof, and that it was never intended to take away from individuals the right which they had

[1] 7 W. R., 92.
[2] 9 W. R., 279.
[3] 9 W. R., 535.
[4] 13 W.R., 461; 5 B.L.R., App.,50.

under the general law of the land of bringing suits to recover possession of immoveable property on proof of their title within twelve years.

The Allahabad High Court also adopted the same view:—*The Municipal Committee of Moradabad* v. *Chatri Singh*,[1] *Manni Kasaundhan* v. *Crooke*.[2] The question was subsequently referred by a Division Bench of the Calcutta High Court to a Full Bench, which in *Chandra Sikhar Bandopadhya and others* v. *Abhai Charan Bagchi*,[3] decided that sec. 87, Act III (B. C.) of 1864, was applicable only in those cases where the plaintiff claimed compensation or damages for some wrongful act committed by the Municipal Commissioners or their officers in the exercise, or honestly supposed exercise, of their statutory powers. The notice in the early part of the section was meant to give the defendants an opportunity of making some pecuniary amends for the wrong without incurring the cost of litigation. "We think," it was said in this case, "it could hardly have been the intention of the Legislature to allow the Commissioners (even by mistake) to appropriate the land of private persons without paying for them, and to hold those lands for ever as against the true owners, unless the latter should happen to be sufficiently watchful to discover the aggression in time to take steps to protect their property within so short a period as two months."

In a later case decided by the Allahabad High Court—*Brij Mohan Singh and others* v. *The Collector of Allahabad as President of the Municipal Committee*[4]—Duthoit, J., laid down the law as to this somewhat vexed question of limitation with great clearness. He ruled that the question whether the special limitation provided by

[1] I. L. R., 1 All., 269.
[2] I. L. R., 2 All., 296.
[3] I. L. R., 6 Calc., 8.
[4] I. L. R., 4 All., 102.

sec. 43, Act XV of 1873 (the N.-W. P. and Oudh Municipalities Act), applied or not was to be determined by deciding whether the suit was brought in respect of anything done under the aforesaid Act or not. If it was, then the limitation provided by sec. 43 prevailed; if it was not, the ordinary law of limitation was the one to be applied. As in the suit before the Court the act complained of was done under the Act, the special limitation of sec. 43 was to be applied, and the suit was held to be barred. So, in *Joharmal* v. *The Municipality of Ahmednagar*,[1] the Bombay High Court said that sec. 86 of Bombay Act VI of 1873 was not applicable to suits in the nature of actions of ejectment, but only to suits for damages, and in *Ranchhod Varajbhai* v. *The Municipality of Dakor*,[2] they further explained that this section was not confined to an action for damages, but was applicable to every claim of a pecuniary nature arising out of the acts of Municipal bodies or officers, who in the *bonâ fide* discharge of their public duties may have committed illegalities not justified by their powers. Hence, they held that a person suing a Municipality for a refund of money illegally levied from him as house tax was bound to serve a previous notice on the Municipality.

I now come to suits relating to the withholding of ceremonies or dignities, the usurpation of office, and the like.

A suit will not lie to assert a mere dignity unconnected with emoluments.

One of the earliest cases on record is *Sri Sankar Bharti Swami* v. *Sidha Lingayah Charanti*.[3] In this case the chief priest (Swami) of the Smartava sect of Brahmins had brought a suit against the chief priest of the Lingayats, claiming by virtue of a grant from the supreme power of the state the exclusive privilege of 'adavi palki,' or being carried on ceremonial occasions in a palki borne crossways,

[1] I. L. R., 6 Bom., 58J.
[2] I. L. R., 8 Bom., 421.
[3] 3 Moo. I. A., 198; 6 W. R., P. C., 39.

so that the poles traversed the line of march. Their Lordships doubted if such a suit could be maintained in the Civil Court, and remanded the suit to Bombay for this point to be ascertained with the following remarks :—"In England an action could not be maintained by the grantee of a dignity from the Crown against a person who without a grant should assume the like dignity, but it does not necessarily follow that this is the case in Bombay. The usurper of the dignity is guilty of a wrong which is to a certain extent prejudicial to every one who has a just title to the dignity, and the manner in which such a wrong is to be redressed must depend upon the Municipal law of each particular country." In *Namburi Setapati* v. *Kanu Kolanu Pullia*,[1] their Lordships expressed a similar doubt. After the remand in *Sri Sankar Bharti Swami* v. *Sidha Lingayah Charanti*, the Sudder Court of Bombay held on the 6th February 1845 that the suit would not lie.

It is settled law now, therefore, that a suit to assert a mere dignity unconnected with emoluments, or to obtain certain ceremonies unconnected with emoluments, wil not lie.

Thus, in *Striman Sadagopa* v. *Kristna Tatachariyar and another*[2] and in *Gosain Das Ghosh and others* v. *Guru Das Chakrabartti and others*,[3] it was held that no suit would lie to enforce religious ceremonies and tokens of respect which had been omitted to be paid to Hindu priests ; in *Sangapa* v. *Gangapa*,[4] that a suit to vindicate a mere dignity would not lie ; in *Rama* v. *Shivram*[5] that a suit does not lie for a declaration of the plaintiff's right to parade a bullock on the last day of Sraban of one year and of the defendant's right to

[1] 3 Moo. I. A., 359.
[2] Mad. H. C. Rep., 301.
[3] 16 W. R., 198.
[4] I. L. R., 2 Bom., 476.
[5] I. L. R., 6 Bom., 116.

parade it on the corresponding day of the next, for damages for the invasion of plaintiff's right in a given year, and for an injunction restraining the defendants from interfering with the said right; in *Karuppa Goundan* v. *Kolanthayan*,[1] that a suit would not lie for a declaration of plaintiff's right to receive before others sacred ashes, sandal, betel and nut, flowers, &c., at certain pagodas on festival and other days, and for an injunction perpetually restraining the defendants from receiving the same; and in *Narayan Vithe Parab* v. *Krishnaji Sadashiv*,[2] that no suit would lie to establish the plaintiff's right to certain *máns* consisting of the right to be the first to worship the deity on certain occasions and to receive trifling gifts made by the priest of rice, a cocoanut, and betel-nut on the occasion of worshipping the deity, and of a piece of venison on other occasions, as these *máns* were mere dignities to which no profits or emoluments were attached, being merely symbols of recognition and marks of respect of and to the holders of the *máns*. But there is one case, *Vengamuthu* v. *Pandaveswara Gurukal*,[3] in which a dancing girl's offerings to an idol having been rejected by the officiating priest on the ground that she had been guilty of misconduct, she sued for damages for loss of honor, and for a perpetual injunction against the defendants, and it was held that a suit would lie, and that if the plaintiff had been wrongfully prevented from taking part in public worship, she would be entitled to relief.

On the other hand, if there is a question of the right to receive emoluments or profits for religious services, a suit will lie: *Khedru Ojha* v. *Deo Rani Kumar*;[4] and if to determine the right thereto, it becomes necessary to determine incidentally the right to perform certain re-

[1] I. L. R., 7 Mad., 91.
[2] I. L. R., 10 Bom., 233.
[3] I. L. R., 6 Mad., 151.
[4] 5 W. R., 222.

ligious services, the Court has jurisdiction to do so : *Tiru Krishnama Chariar* v. *Krishna Sami Tata Chariar.*[1] Again, in *Kali Kanta Sarma* v. *Gauri Prasad Sarma Bardeuri,*[2] it was said that a suit claiming a right to goats sacrifice on certain days which were not the voluntary offering of pilgrims, but regular offerings made out of the temple funds, was a civil suit within the meaning of the explanation to sec. 11 of the Code of Civil Procedure.

A suit will lie to contest right to an office, whether emoluments are attached to it or not.

With regard to offices, the same rule seems at first to have been held to prevail, *viz.*, that no suit for the usurpation of an office will lie when there are no emoluments connected with it : *Shankara Bin Marabasapa* v. *Hanma Bin Bhima.*[3] On the other hand, it has generally been held that such a suit will lie when there are emoluments connected with the office. Thus, in *Sitaram Bhat* v. *Sitaram Ganesh and another,*[4] and in *Vithal Krishna Joshi* v. *Anant Ram Chandra,*[5] where offices were usurped, the emoluments of which were not gratuitous, the usurpation was held to be an actionable wrong : *Sheo Sahai Dhami* v. *Bhuri Muhtan.*[6] In *Sitaram Bhat* v. *Sitaram Ganesh and another,*[4] Couch, C. J., said :—"It is settled law that if a person usurps the office of another and receives the fees of the office, he is bound to account to the rightful owner of them." The same rule was laid down in *Kamalam* v. *Sadagopa Sami,*[7] and *Raja Valad Shirapa* v. *Krishnabhat.*[8] In one case, however, *Murari* v. *Suba,*[9] it was said that a claim to a caste office and to be entitled to perform the honorary duties of the office, or to enjoy privileges and honours at the hands of the members of the caste in virtue of such office.

[1] L. R., 6 I. A., 120; I. L. R., 2 Mad., 62; I. L. R., 5 Mad., 313.
[2] I. L. R., 17 Calc., 906.
[3] I. L. R., 2 Bom., 470.
[4] 6 Bom. H. C. Rep., A. C., 250.
[5] 11 Bom. H. C. Rep., 6.
[6] 3 W. R., 33.
[7] I. L. R., 1 Mad., 356.
[8] I. L. R., 3 Bom., 232.
[9] I. L. R., 6 Bom., 725.

is a caste question and not cognizable by the Civil Court, and that this rule ought to apply even when there are fees appurtenant to the office. But there can be no doubt that under sec. 11 of the present Civil Procedure Code (Act XIV of 1882), a suit in which the right to an office is contested, is a suit of a civil nature, whether there are emoluments attached to the office or not. Accordingly, in *Mamat Ram Bayan* v. *Bapu Ram Atai Bura Bhakat*,[1] it was held that a suit for the establishment of a right to the hereditary office of musician would lie under sec. 11 of the Code of Civil Procedure, notwithstanding that the right sought to be established was one which brought in no profit to those claiming it. This was followed in *Hashim Sahib* v. *Husseinsha*;[2] in which it was said that under sec. 11 of the Civil Procedure Code a suit for an office would lie, even though the office were a religious one to which no fixed fees were attached. See also the *Advocate-General of Bombay* v. *David Haim Devaker*.[3]

Suits relating to caste questions and religious ceremonies.

As to caste questions, the Calcutta High Court has in one case held that a suit will lie for restoration to caste, and for damages and compensation for the cost of the restoration: *Gopal Gurain* v. *Gurain*.[4] But in a subsequent case, *Sudharam Patro* v. *Sudharam*,[5] which was a suit for a decree declaring the plaintiff's rights to membership of the *samaj* or society of which the defendants and he were members, it held that no right of action lay in such a case, as on principles common to English and Hindu law, Courts of law have no jurisdiction in matters of a purely social nature. The Calcutta High Court has also held that no suit lies to enforce the services of barbers, even though the plaintiffs

[1] I. L. R., 15 Calc., 159.
[2] I. L. R., 13 Bom., 429.
[3] I. L. R., 11 Bom., 185.
[4] 7 W. R., 299.
[5] 11 W. R., 457; 3 B. L. R., 91.

alleged they would lose their caste if the services were not performed : *Rajkrishna and others* v. *Naba Sil and others*;[1] and that no suit lies to compel Hindus against their will to ask other Hindus to their houses or entertainments : *Jai Chandra Sirdar and another* v. *Ram Charan and others*.[2] They have also held that no suit lies to compel a member of a Hindu sect to employ a particular priest to perform the ceremonies at the burning of Hindu bodies, unless there is a question of the right to enjoy the profits accruing from such ceremonies : *Becharam Banarji* v. *Thakurmani Debi*;[3] and that one priest cannot sue another newly appointed by a worshipper simply on the ground of hereditary right to perform the ceremonies of a particular family : *Magju Paudaen* v. *Ram Dayal Tewary*.[4] The Bombay High Court has, however, held that a village priest can maintain a suit against a worshipper who has employed another priest to perform ceremonies, and can recover the amount of the fee, which would properly be payable to him, if he had been employed to perform the ceremonies : *Dinanath Abaji* v. *Sadashib Hari Madhave*.[5]

The Calcutta High Court held in *Jagannath Churn* v. *Akali Dassia*,[6] that a suit was maintainable by certain *bhakats* or members of a religious fraternity who had been justly excluded from the Kirtanghar or prayer hall till certain fines due from them were paid, and that the rules applicable in England in cases as to expulsion from clubs or voluntary associations are not applicable to caste unions or religious fraternities in India.

In Bombay, by sec. 21 of Regulation II of 1827, the Civil Courts are prohibited from interfering in caste questions. The Courts in Bombay have, therefore, as a

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[1] 1 W. R., 351.
[2] 6 W. R., 325.
[3] 10 W. R., 114.
[4] 15 W. R., 531.
[5] I. L. R., 3 Bom., 9.
[6] I. L. R., 21 Calc., 463.

general rule, refrained from deciding disputes about caste : *Shankara Bin Marabasapa* v. *Hanma Bin Bhima*,[1]— as well as suits as to religious rites or ceremonies, which involve no question of the right to property or an office : *Vasudev* v. *Vamnaji*,[2] *Girdhar* v. *Kalya*,[3] *Nem Chand* v. *Savai Chand*.[4] On this ground in *Murari* v. *Suba*[5] they abstained from granting a declaration of the right to perform the duties of the office of *guru*, even when fees were appurtenant to the office, as well as from giving a decree for damages for withholding funeral presents, which was held to be a mere breach of social etiquette : *Mayashankar* v. *Harishankar*.[6] On the other hand, it has been held by the Bombay High Court that, where an exclusive right to worship has been infringed, a suit will lie to recover damages : *Narayan Sadanand Bara* v. *Balkrishna Shideshrar and others* ;[7] and that a suit for a declaration of the plaintiff's exclusive right of entry and worship in the sanctuary of a temple and for an injunction restraining the defendants from entering the sanctuary and worshipping therein, was within the cognizance of the Civil Courts : *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya*.[8] In this latter case it was said that the right of exclusive worship of an idol at a particular place set up by a caste is not a caste question, and that the meaning of sec. 21 of Regulation II of 1827 is that internal economy of a caste is not to be interfered with by the Courts, not that no possible matter of litigation in which a question of caste usage, or right, or privilege may arise, can be taken cognizance of. So in *Pragji Kalan* v. *Gobind Gopal*,[9] in which certain members of one division of a caste bor-

[1] I. L. R., 2 Bom., 470.
[2] I. L. R., 5 Bom., 80.
[3] I. L. R., 5 Bom., 83.
[4] I. L. R., 5 Bom., 84.
[5] I. L. R., 6 Bom., 725.
[6] I. L. R., 10 Bom., 661.
[7] 9 Bom. H. C. Rep., 413.
[8] I. L. R., 7 Bom., 323.
[9] I. L. R., 11 Bom., 534.

rowed vessels for use from the priest of that division, and then seceding to the other division refused to return them, it was held that a suit to recover possession of the vessels in question was cognizable by the Civil Court, notwithstanding that incidentally a question as to the relations of the caste divisions might arise for decision. Similarly, in *Mehta Jethalal* v. *Jamiat Ram Lalubhai*,[1] a suit for lands purchased by certain members of a section of a caste was held cognizable. In *Hashim Sahib* v. *Husseinsha*,[2] it was pointed out that sec. 21 of Regulation II of 1827 had no application to suits between Mahomedans, and that a dispute as to the right to an office, such as the office of *khatib* (or preacher) is said to be among Mahomedans, is not a caste question within the meaning of the term as used in the section.

In *Kanji Barla* v. *Arjun Shamj*,[3] the plaintiff, a Hindu and Kharva by caste, alleged that he, in accordance with the usages of his caste, called upon the defendants, his caste-fellows, to assist him, on the occasion of his child's death, in removing the body and performing caste ceremonies, that they refused and induced others to refuse, whereby he was injured in his caste status. The plaintiff prayed for an injunction against the defendants, and a declaration that these acts were unlawful and that he was entitled to exercise and enjoy all his caste rights and privileges. It was held that the plaint disclosed no cause of action.

The Madras High Court have decided that a claim to an exclusive right to perform certain portions of the religious worship in a Hindu temple and to restrain a rival sect from joining in such worship otherwise than as ordinary worshippers can be enforced by a decree of a Civil Court, but not a claim to damages for the loss of

[1] I. L. R., 12 Bom., 225. [2] I. L. R., 13 Bom., 429.
[3] I. L. R., 18 Bom., 115.

honors and voluntary offerings : *Krishnasami* v. *Krishnama*,[1] and if a dancing girl has been wrongfully prevented from taking part in public worship, she is entitled to relief in a Civil Court : *Vengamuthu* v. *Pandaveswara Gurukal*.[2] In another case, *Krishnasami Chetti* v. *Virasami Chetti*,[3] which was a case relating to the management of the common property of the members of a Hindu caste, in which the plaintiff's right to sue was denied on the ground that, having violated the rules of the caste he had been expelled from it, it was held that it was open to the Court to determine whether or not the alleged expulsion from caste was valid, and if the plaintiff had not in fact violated the rules of the caste, the expulsion was illegal, and could not effect his rights.

In conclusion, I note a few rulings on miscellaneous topics.

Revenue sales. The sale of a joint estate owing to default in paying up Government revenue by some of the co-sharers, gives no right of suit for damages by the other co-sharer or co-sharers against the defaulting co-sharer or co-sharers : *Odoit Rai and others* v. *Randha Pandey and others*[4] and *Ramessar Dayal Singh* v. *Bishen Dayal and others*.[5] In this last case it was pointed out that the plaintiff was himself to blame, for he might have saved his share by registering it as a '*mokarari*' tenure under the Act, or the whole estate by paying the arrears Rs. 100 only due. At a sale for default of payment of Government revenue, a Collector is bound to sell to the highest bidder, and can be sued personally if he fails to do so. In such a case in which the Collector sold the estate to the second highest bidder, because the highest bidder was the husband of the person in arrears, it was held that the

[1] I. L. R., 5 Mad., 313.
[2] I. L. R., 6 Mad., 151.
[3] I. L. R., 10 Mad., 133.
[4] 7 W. R., 72.
[5] I. L. R., 1 Calc., 406 : 25 W. R., 150.

proper measure of the plaintiff's loss was the difference between the two bids, and not the actual or probable value of the estate: *Cornell* v. *Udai Tara Chaudhurani*.[1]

Omission to sue for bond debt.

Where a bond is pledged as security for a loan, a suit will not lie against the holder for omission to sue, till limitation had barred the suit, unless there was a special contract that he should so sue: *Makand Lal* v. *Raghupat Das*.[2]

No action will lie for harbouring a person under contract of service.

An action will not lie for the mere harbouring or sheltering a person, who is under a contract of service to another even after notice of such contract: *Brukowsky* v. *Thacker, Spink & Co.*[3]

No action will lie against a witness for failing to attend, or for giving false evidence.

A plaintiff is not entitled to recover damages from a witness who has made default in attending in a former suit, unless he can prove he was endamaged by the omission of the defendant to appear and give evidence. The mere failure of the defendant to attend, is not *per se* a sufficient cause of action: *Dwarka Nath and others* v. *Anando Chandra Sannel*.[4] No action will lie against a witness for making a false statement in the course of a judicial proceeding, and the proper remedy is a prosecution for giving false evidence: *Bishonath Rakhit* v. *Ramdhan Sirkar*,[5] *Chidambara* v. *Thirumani*.[6]

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[1] 8 W. R., 372.
[2] All. H. C. Rep., 1867, 83.
[3] 6 B. L. R., O. C., 107.
[4] 5 W. R., S. C. R., 18.
[5] 11 W. R., 42.
[6] I. L. R., 10 Mad., 87.

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