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THE HUMBLE COMPILATION

IS

AS AN HUMBLE TRIBUTE TO HIS

SOUND LEGAL ATTAINMENTS

AND

UNFAILING DEVOTION TO HIS JUDICIAL DUTIES

BY KIND PERMISSION

MOST RESPECTFULLY DEDICATED.

CORRIGENDA

Page.	Line.	For.	Read.
12	21	Not reported	
15	22	4 O. C.	4 O. C. 372
18	9	gumbler	gambler
36	2	26	62
38	34	S C. 135	1 O C. 214.
64	31	4 B C	4 O. C.
68	30	217	227
70	29	47, 297, 299	45
73	15	993	293
91	5	app. 7 O. C. 292	off 27 I C 768
104	26	*adjusticata*	*adjudicata*
109	21	exhance	enhance
127	21	O C. O C.	4 O C
130	12	Rule	R.
137	28	on a	On a
139	36	be	he
139	25	62	6
141	16	in O. C	in 2 O. C.
145	27	compass	can pass
146	25	patyr	party
147	25	315	345
148	25	9 O C. 199	9 O. C. 159.
159	21	5 applies	S. 244 applies
163	8	12	12 I. C.
186	12	decreed	deemed
190	32	139	137
193	12	184	180
244	16	decree against	decree appealed against
270	19	3 O C.	6 O C
280	5	simply	imply
289	15	S. 322	S. 522
307	3	S 15	S. 51
312	20	16 O. C. 38	16 O C. 45
336	20	24 S. C.	24 I. C.
359	33	defend	depend
372	11	claimed	cloud
383	29	practitions	practitioner
386	25	108	168
396	8	qorum	forum
400	32	1 O. C.	10 O C.
400	32	388	318
437	14	11 O. C.	12 O. C.
438	1	13	B
438	9	88	188
446	2	pre-emption	pre-emptor
446	2	and	at
479	26	40	410
506	18	21 C.	21 I. C.
509	30	guardian his	guardian during
524	29	prosection	prosecution
540	2	hewat	*khewat*

5 O C.

1—R. 19 O. C. 136.
94—R. 24 I. C. 871.
116—R. 14 O. C. 85.
118—R. 24 I. C. 381.
127—Dist. 40 I. C. 581.
146—Dist. 42 I C. 424.
155—R. 20 O. C. 79.
176—R. 29 I. C. 401.
197—R. 18 O. C. 34.
225—R 20 O C. 265
266—F 1 O L J 405—R. 17 O. C. 339.

6 O C

18—Dist 19 O. C 328—See 11 O. C. 89.
81—R. 20 O. C. 350
94—R. 19 O C. 339
104—Dist. 19 O. C. 314.
110—R 2 O L. J. 161.
223—Dist. 40 I. C. 381.
255—R. 17 O. C 210.
289—R 24 I. C. 281.

7 O C.

8—R 2 O L. J. 109
22—See 15 Cal 224.
108—R 19 O C 49—18 O C 380
134—R 1 O L. J. 532
146—Dist 4 O. L J 514.
158—R 18 O C. 256.
176—Dist 33 I C. 516.
181—See 9 O. C. 97—11 O C. 1—15 O C 49.
187—R 20 O. C. 126.
215—R. 30 I. C. 249
238—R 20 O C. 182.
248—R 18 O. C. 188.
275—F. 1 O L J. 405.
330—R 2 O. L. J. 73.
359—See 16 O. C. 5—13 O. C. 28, 27—I. C. 419
369—Ril. 18 O. C. 282—42 I. C. 116.
372—Dist. 42 I. C 194.

8 O. C.

5—R. 34 I C 387.
13—R. 24 I C. 381.
30—R 24 I. C. 381—4 O. L. J 577.
33—Dist. 9 I. C. 431—Exp. 17 O. C. 347.
45—R. 18 O. C. 188.
61—R 24 I. C. 381.
94—R. 32 I C. 734—42 I. C. 199.
121—Dist. 17 O C. 299.
132—R 32 I C. 740.
145—Dist. 19 O C 27—R 32 I. C 376—34 I. C. 768—See 4 O. C. 31
155—R 21 I. C. 8.
161—R. 18 O. C. 359.
177—Exp 4 O. L J. 354—See 19 O C. 374—R. 42 I. C 196
227—R 32 I. C. 740.
233—Exp. 18 O. C. 95.
290—R. 1 O. L. J. 334.
317—R. 30 I. C. 234—1 O. L J. 204—18 O. C. 188—F. 40 I. C. 555—R. 19 O. C 290—8 O. C 289.
339—R. 20 O. C. 265.
349—R 30 I. C. 234
370—R 2 O. L. J. 57.

9 O. C.

33—R. 42 I C 196.
86—R. 20 O C. 249.
109—R 32 I. C 368
167—F. 19 O. C 27—4 O. L. J 577.
196—R. 19 O C. 192.
230—See 18 O C. 289.
249—R. 18 O C. 138.
292—R. 24 I C. 381.
296—R. 33 I. C. 770—Dist. 37 I. C. 27.
331—R. 20 O. C. 249.
362—Dist 37 I. C. 27—R 3 O. L. J 5.
373—F 12 O. C 84—See 29 All. 471—31 All. 300.
377—Exp. 4 O. L. J. 75.

10 O. C.

17—R. 2 O. L. J. 500.
23—R. 18 O. C. 48.
29—R. 18 O. C. 10
49—R. 19 O. C. 153—Dist. 13 I. C. 508.

69—R. 18 O. C 280.
108—F. 18 O. C. 340.
117—R. 1 O. L J. 475—19 O C 122.
132—See 5 O. C. 203—9 O. C. 69—10 O. C. 168.
136—F. 1 O. L. J. 421—19 O. C. 115.
193—See 10 O C. 356, 81 13 O C. 50—2 O. L. J. 73.
196—Dist. 19 O C 18.
257—R. 19 O C. 110.
280—R 36 I C 732.
314—R. 20 O. C. 13.
348—R 17 O C. 299—Dist. 14 O C 41.

11 O. C

1—R. 17 O C 294
15—See 1 O C 289
69—R 19 O C. 171
78—R. 20 O C 232
89—Dist. 19 O C 328
114—4 O L. J 553
144—R. 2 O. L J. 151
169—R. 19 O. C 36.
176—R. 20 O. C. 249.
180—R. 19 O C. 357.
212—R 20 O. C. 265.
217—R. 34 I. C. 387.
238—R. 20 I. C. 73.
248—Dist. 17 O. C. 303—37 I. C. 438—38 I. C. 480.
256—R. 9 I. C. 76—19 O. C. 299.
264—Diss. 24 I C. 633
285—R. 42 I. C 119
290—F 3 O L. J. 309—Dist. 19 O. C. 110—153 F. 20 O. C. 160—R. 17 O. C. 242—20 O. C. 196
310—R. 22 I. C. 702.
323—R. 18 O. C. 10.

12 O. C.

1—F. 25 I. C 718.
31—See 6 O. C. 255.
74—R. 19 O C. 64.
84—Not F. 29 I. C. 403.
90—R. 4 O. L J. 577.
124—R. 30 I. C. 218—F. 22 I. C. 125—R. 23 I. C. 231.
129—R. 17 O. C. 242—13 O. C. 260.
133—R. 18 O. C. 347.
164—R. 24 I C 381—Dist. 4 O L. J. 68.
197—R 1 O. L. J. 86.
229—R 14 O. C 156—17 O. C. 242—19 O C. 153—20 O. C. 196, 160.
275—R 30 I C 224—F. 39 I. C. 540
293—R. 2 O. L J. 131
304—R. 1 O. L. J 532—F 4 O. L. J. 233.
320—R. 20 O C. 208.

13 O C.

1—F. 17 O C. 276.
28—See 7 I C. 36—8 I C. 812—11 O C 144—R. 17 O. C. 377—18 O C 58
50—R 2 O L J 73—18 O C. 369
62—See 16 O C. 354
74—R. 30 I. C. 249
79—R. 30 I C 249
90—R. 18 O. C 374.
94—Dist. 17 O C. 138
114—See 28 I. C. 920.
125—R 18 O C. 10.
148—R. 37 I C. 351.
163—R. 1 O L. J. 532—19 O. C 1.
179—R. 42 I. C. 119—183 R. 19 O. C. 131
188—R. 2 O. L. J. 145—F. 3. O. L J. 67—4 O. L J. 577.
202—F. 1 O. L J. 405.
260—R 17 O. C 242, 339—19 O C. 185.
265—R. 17 O. C 69.
303—F. 19 O. C 17.
316—Exp. 4 O. L. J. 233—19 O. C 290—18 O. C. 289—18 O. C. 188.

14 O. C.

6—Over—19 O. C. 55.
10—Exp. 17 O. C. 347—R. 19 O. C. 30.
41—Dist. 17 O. C. 299—19 O. C. 339.
45—R. 18 O. C. 154.
62—R. 34 I. C. 48.

65—R. 1 O. L. J. 548
68—R. 19 O. C. 221.
70—R. 18 O. C. 345.
80—F. 19 O. C 23.
129—Dist. 18 O. C. 86
153—R. 1 O. L. J. 81—Dist. 20 O. C. 115.
156—See 37 I. C. 170—Diss. 37 I. C. 181—19 O. C. 183, 185.
193—R. 17 O C. 250.
196—R. 30 I. C. 218—34 I. C. 304.
244—F. 3 O L J. 29.
295—Diss. 20 O C 72
299—R. 3 O. L J 214—Exp. 17 O. C. 318
308—See 17 O. C 120.
335—R. 30 I. C. 218—28 I. C. 919, 929—23 I C. 231
356—R. 19 O C 192

15 O C.

49—R 18 O C 168
58—R. 3 O. L. J 473
67—R. 30 I. C 388.
91—R. 24 I. C. 780 and S. D 2 of 1914.
111—R. 17 O. C. 294.
127—R. 18 O. C. 263.
159—See 4 All. L. J. 60—29 All. 222—All. W. N. 1892, P. 77.
202—Dist. 2 O. L. J. 259.
211—F. 30 I. C. 238—R. 36 I. C. 732.
239—R. 2 O. L. J. 291, 276.
257—Dist. 18 O. C. 263.
271—R. 16 O. C. 378—1 O. L J. 466—2 O. L J 214.
278—R 2 O. L. J. 498.
295—R. 2 O. L. J. 299—F. 19 O. C. 32.
304—R. 24 I. C. 871.
311—Dist. 17 O. C. 343.
351—R. 19 O. C. 229.
364—R. 30 I. C. 220.
389—R. 19 O. C. 185.

16 O C.

5—R. 17 O. C. 377.
9—R. 18 O. C. 109.
45—R 32 I. C. 551—20 O C 132
56—R. 18 O. C 105.
76—R. 2 O. L J. 259.
90—R 18 O. C 105.
105—Exp 33 I C. 270—4 O L J. 577.
129—R. 20 O C 211.
148—Dist 4 O L J 135.
161—Exp 41 I. C 413.
178—F. 19 O. C. 69.
216—Exp. 19 O. C. 290.
225—Dist. 4 O. L. J. 135.
233—R. 33 I. C 345.
267—R. 17 O. C. 313—38 I C. 480—3 O. L J. 643.
277—R. 2 O. L. J 758
290—R. 19 O. C. 290.
378—R. 1 O. L. J. 466—25 I. C. 861—17 O. C. 318—35 I. C. 395—1 O. L. J. 67—18 O. C. 147.

S. C. 1.

S 21 Act IX of 1871 (Limitation Act)=S. 20 IX of 1908—" *Meaning of the words prescribed period*"—*Payment of interest.*

Held, that the words prescribed period in S. 21, Act IX of 1871, refer to the period of limitation prescribed by the Act. **Held,** also, that any payment on account of the interest due on a debt, whether such payment represents the whole of the interest due on the date of payment or not, which satisfies the Court that the payment amounts to " unqualified admission of the liability as subsisting," takes the case out of the statute of limitation.

S. C. 2

S. 296 Cr P. Code (X of 1872)=S. 438 Act X of 1882—*Revision—Appeal.*

Held, to be inadvisable to take action under S. 296, Criminal Procedure Code, in a case in which the term for appeal had not expired.

S. C. 3.

Land—under-proprietary tenure—Sale for arrears of rent

Held, that in the absence of an express contract, *Sir* or an under-proprietary tenure cannot be considered hypothecated for arrears of rent due on account of land other than that comprising the under-proprietary tenure.

S. C. 4.

Detention of crop until payment of rent—Suit for damages—Malice

Held, that a land-lord is justified by usage amounting to law in refusing to allow his tenant to remove his crops until he has paid or given security for the payment of his rents. In a suit for damages brought by the tenant proof of malice on the part of the land-lord is essential.

S. C 5.

S. 351 C. P. C =(*Repealed by* the Provincial Insolvency Act of 1907)

Decision of the Court of first instance on a preliminary point—Reversal of that decision by the Court of first appeal and remand of the case—No appeal from the order of remand—Decision of the Court of first appeal not to be questioned in second appeal against the final decree in the suit.

Held, that when a Court of first instance decides a case on a purely preliminary point without taking evidence on the issues affecting the merits of the case and a Court of appeal reverses that decision and remands the case for trial on its merits, a second appeal should be prefferred to the Judicial Commissioner against the order of remand ; otherwise, the Judicial Commissioner will not allow the decision of the Court of first appeal on the preliminary point to be called in question, in the event of the case coming before him on appeal from the order of the Lower Appellate Court passed on the remand decision.

Notes.

Dif. S C. 90—Right of appellant in second appeal to question order of remand of First Appellate Court

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S. C. 6.

Execution of decree—S. 243 Act VIII of 1859—S. 125 Act XIX of 1868 (Oudh Rent Act) *Duties of Courts.*

Duties of Courts in respect of enforcing the provisions of S. 243 and S. 125 Oudh Rent Act, defined.

S. C. 7.

Powers of Court to set aside sales.

Held, that the Civil Procedure Code undoubtedly limits the powers of Courts to set aside sales, and that when these powers are exceeded the orders of the Courts are liable to appeal or revision But it does not necessarily follow that an order must be set aside because it is illegal or because its legality is not apparent Before reversing the order it should be ascertained whether greater injury would not accrue from setting aside than from confirming it

S. C. 8.

Partition S. 39 Act XIX of 1863—Tanks, wells &c

Held, that when the paper of partition referred to in S. 39, Act XIX of 1863, does not expressly specify that tanks, wells etc., are to continue joint property, they must be held to be attached to the land for the benefit of which they were originally made.

S. C. 9.

Land lord and Tenant Land held by a tenant with a right of occupancy—Land lord's right to the subsoil products—Damages for land lord's entry on the land to procure the products.

A tenant with a right of occupancy has a right to the surface land only, and not to the subsoil products, unless such a title can be established by a right of user. Although there is no provision of law regulating the rights of enjoyment of landlord and tenant as to subsoil products, still the landlord's entry on the land to procure the product is an act of trespass which gives the occupant of the land, should he have a right of occupancy, a cause of action for damages sustained.

S. C. 10.

S. 22 cl (I) to (II) Oudh Estates Act.—Estate conferred upon a female Taluqdar—Estate of an ordinary Hindu widow—Right of transfer and bequest—S 31 Succession Act XXXII of 1871

Held, that the estate conferred upon a taluqdar when such taluqdar was a Hindu widow, must be held to be an estate differing from that of a Hindu widow under ordinary law, inasmuch as it bestowed on her an absolute right of transfer during her life and of bequest at her death Whenever it is necessary to enforce the provisions of S. 22, Act I of 1869, and there is a failure of all the heirs specified in cls. 1 to 10 of the section, conflicting claims to the succession must, under cls II of the section, be determined by the law by which the Civil Court are ordinarily bound to decide questions regarding succession inheritance, etc, that is in this Province the ordinary law set forth in S. 31 Act XXXII of 1871, and the persons entitled to succeed must be sought amongst the heirs of the husband and not of the widow. If it had been intended that an estate for

which a Hindu widow was admitted to engage as a taluqdar should be held to be her acquired property, some specific provision to this effect would have been inserted in Act I of 1869.

S. C. 11.

Policeman enlisting under false name—S. 177 Penal Code.

That a police recruit is legally bound to enlist under his own name and is liable to the penalty provided in S 177 Penal Code, if he gives a false one.

S. C. 12.

Debt—Pledge—Simple money decree—Bona fide purchaser.

Held, that a party to whom property is pledged for a debt, if he contents himself with a simple money-decree against his debtor, cannot execute his decree against the property pledged to the prejudice of a subsequent *bona fide* purchaser.

S. C. 13.

Auction purchaser—Sale in execution of a simple money-decree—Sale of hypothecated property—Right of purchaser.

Held, that when the decree is a simple money decree the auction purchaser acquires only the rights and interests of the judgment-debtor at the time of the sale; but when the decree is against the property hypothecated for the debt, the auction-purchaser acquires the rights and interests of the judgment-debtor at the time of the hypothecation.

S. C. 14.

Redemption—Ss. 29 and 30 Limitation Act (XXXII) of 1871.

Held, that in a district in which the settlement is no longer in progress, the period of limitation for the redemption from mortgage of immoveable property is that laid down in Ss. 29 and 30, Act XXXII of 1871. Semble—Act IX of 1871 does not revive suits that have been barred, but merely provides terms of limitation for suits that have not been barred.

S. C. 15.

Pleader agreement to pay indefinite reward—Public policy

An agreement entered into by a client with his pleader to remunerate such pleader by the payment of an indefinite reward, contingent on the amount of the decree which may be passed is opposed to public policy.

S. C. 16.

S. 494 Penal Code—Infant marriage—Bigamy

If a marriage is solemnized during the infancy of the parties, which has never been consummated by co-habitation, either party contracting a second marriage is not punishable criminally for bigamy

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S. C. 17.

Arbitration—agreement to refer to—Revocation of arbitration.

When parties agree to arbitration unless the provisions of the Code are expressly excepted by the parties to the agreement, it must be taken as having been agreed by them that it was subject to the Civil Procedure Code When persons have agreed to submit the matter in dispute to the arbitration of one or more persons, no party to such an arrangement can revoke it unless for good cause, and no mere arbitrary revocation will be permitted.

S. C. 18.

Attachment before judgment—Attachment in execution of decree.

Held, that an attachment before judgment cannot stand good against an attachment in execution of decree, whether the attachment issues from the same or from different Courts.

S. C. 19.

Officer Commanding Cantonment—Police powers—Performance of duty—Damages.

Held, that an Officer Commanding in cantonments is vested within Cantonments with all the police powers which a Magistrate of a District may exercise within his District That as there was a duty imposed on the defendant, as Officer Commanding in Cantonments, to take action in consequence of his *bona fide* belief that plaintiff was dangerous by reason of lunacy, actual or impending, and that as the action taken was in perfect good faith and in performance of the duty thus imposed,

defendant is not liable at Law for damages in consequence of any wrong that may have been unintentionally done to plaintiff.

Notes.

Over—9—Cal 341 (P. C.)

S. C. 20. (Not reported)

Over-ruled—S C. 35.

S. C. 21.

Mesne profits—Separate suit—S. 2 Act XXIII of 1861.

Held, that when a person has been dispossessed by a decree which is afterwards reversed in appeal, a separate suit will not lie for the recovery of the mesne profits which accrued during the period of such dispossession, but that the question of such mesne profits must be determined under the provisions of S 11 Act XXIII of 1861, by the Court, charged with the execution of the decree of reversal, even though such decree is silent on the question

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Notes.

Diss—S C. 124—Separate suit for mesne profits.

S. C. 22.

Legal Practitioner—Duties and responsibilities.

That every legal practitioner in Oudh is bound to take ordinary precautions to satisfy himself that the instructions he has received are correct.

S. C. 23.

Rules prescribed for a Civil Court.

That every Civil Court is bound by the rules of procedure authoritatively prescribed for its guidance, and has no concern with the rules of procedure prescribed for some other Court.

S. C. 24.

Pleader's fee—Declaratory suit.

Held, that Pleader's fees in the suit for declaratoay decrees not followed by consequential relief should be calculated on the subject-matter of the suit; but that it is within the discretion of a Court to modify this rule on good cause shown.

S. C. 25.

Arbitration—Reference to, by Appellate Court—An Appellate Court has power to refer a case to arbitration, with the consent of the parties.

S. C. 26.

Adoption—Bania Class—Religious ceremonies.

The absence of the ceremonies of *Hom and Putrasti jog* does not render invalid an adoption, by a person of the Bania class, which is otherwise valid.

S. C. 27.

Dhardhura Custom—Taluqdars.

Held, that the custom of *dhardhura* does not apply to Taluqdars who come under Act I of 1869, and that such Taluqdars cannot in equity claim the benefit of the rule, as against a riparian proprietor on the opposite bank

S. C. 28.

S. 309, Cr P. Code—Imprisonment in default of payment of fine.

Held, that the general result of S. 309, Criminal Procedure Code, is that when a fine alone is inflicted, imprisonment may be awarded in default of payment of the fine, (1) by a Court of Sessions or by a Deputy Commissioner; under S. 36 of the Code for a term not exceeding one-fourth of the maximum term provided for the offence; (2) by a Magistrate for any term allowed by Law provided such term does not exceed the term awardable by the Magistrate under the Criminal Procedure Code.

S. C. 29.

Dying declaration—Evidence—Dying declaration taken by a Magistrate other than the Committing Magistrate.

There is no authority for the admission as evidence of what purports to be the dying declaration of deceased person, when such declaration has not

been taken by the Committing Magistrate, without proof or solemn affirmation that the deceased actually made such a declaration.

S. C. 30.

Statements made before a Magistrate other than the Committing Magistrate—Signature of the Magistrate.

Held, that the admission, as evidence in a Sessions Case, of the statements of persons made before Magistrate who was not the Committing Officer was illegal, in the absence of any proof that they were made, the mere signature of a Magistrate not being sufficient in law to authenticate such statements, they not being the records of the evidence given by a witness in a Judicial proceeding.

S. C. 31.

Private party's counsel—Prosecution of a criminal case permission of the District Magistrate.

Held, that a counsel instructed by a private person cannot conduct a prosecution on behalf of Government in a trial before a Court of Sessions without being specially empowered by the Magistrate of the District.

S. C. 32.

S. 7, cl X (d) sch II Art 1 (b) Court Fees Act—Application for filing an award, claim for possession of land in terms of award—Court fees.

Held, that an application under S. 327 Act VIII of 1859, that an award be filed in Court is liable to a stamp-fee of annas eight under Sch. ii, Art 1 (b), and the claim for possession of land in terms of the award is chargeable under S. 7, cl X (d) of the Court Fees Act

S. C. 33.

S. 28 Stamp Act—Unstamped receipt—Maker—acceptor.

The maker of an unstamped receipt is punishable, but the acceptor is not punishable unless it can be shown that he abetted the making of the receipt.

S. C. 34.

S. 7 Court Fees Act—paras i and iv cl. (c)—Suit on a mortgage-deed for declaration of lien on, and sale of, hypothecated property.

In a suit on a mortgage-deed where plaintiff seeks for a declaration of his lien on the immoveable property hypothecated and of his right to bring the same to immediate sale as well as a money decree.

Held, that the Court-fee should be calculated under S. 7, para IV, cl (c), Court Fees Act, together with S. 7, para 1.

S. C. 35.

Perscriptive right—Establishment of rival market—Wrong, when actionable.

Held, that to make the wrong actionable, the party complaining must show that the act complained of would cause serious mischief to the common weal, or that the disturbance of the existing *bazar* was violent or malicious, or that the holding of the new *bazar* had been prohibited by competent authority.

Notes

App. 5 O. C. 380—Right of Zamindar to hold market on his land, declaration as to Court has no power to curtail right.

S. C. 36.

S. 53 (Oudh) Land Revenue Act—*Grant to a "Guru"—Resumption—Valuable consideration—Limitation.*

Held, that a grant to a *guru* by a Hindu under a Native Government, is a grant for a valuable consideration. Held, also, that S. 53 Act XVII of 1876, was not intended to override the general law of limitation.

Notes.

Aff.—S. C. 37—Religious service amounting to valuable consideration.
Dist.—S. C. 163—Resumption of grant for 'loyalty.'
Diff.—S. C. 174—Limitation in resumption cases.
Not F.—S. C. 244—Valuable consideration.
Diss.—S. C. 288— " "

S. C. 37.

S. S. 52 to 55 Oudh Land Revenue Act—Grant for spiritual services—Resumption—Valuable Consideration.

Held, that the grant having been made in return for spiritual or *quasi* spiritual services, which under native rule was valuable consideration, it is not liable to resumption under Ss. 52 to 55, Act XVII of 1876.

Notes.

Dist.—S. C. 163—Resumption of grant for "loyalty."
Rel.—S. C. 207—Resumption 'in part.'
Not F.—S. C. 244—Valuable consideration.
Diss.—S. C. 288— „ „
Not ap.—2 O. C. 295—Resumption 'in part'
App.—3 O. C. 375—Inapplicability of Ss. 52 and 53 to revenue free lands.

S. C. 38.

S. 312 C. P. C. of 1859—Sale in execution of decree—Auction purchaser—Party.

Held, that Act X of 1877 does not consider the auction purchaser a party to the suit, or one having an interest in the question whether or no the sale should be confirmed or set aside under S. 312.

Notes.

Diss—S. C. 289—Necessity of making auction purchaser party to application under S. 311 C. P. C of 1882

S. C. 39.

S. 28 Oudh Civil Courts Act of 1871—Fyzabad Settlement Courts—Suit for land—Jurisdiction.

Held, that the special provisions of S. 28, Act XXXII of 1871, having ceased to have effect in the *Fyzabad* Settlement Courts from the 31st October 1878, a suit for land, which was barred by limitation and otherwise, could not be legally entertained on the 21st December 1878.

S. C. 40.

Pre-emption—Price—Fraud.

Where there is no fraud or collusion to injure others, the Court should not reduce the price alleged to be paid when decreeing a right of pre-emption.

S. C. 41.

Hindu Law—Daughters—Daughter's sons—Succession—Custom—Wajib-ul-arz as evidence.

A daughter's son would not succeed in preference to the collateral heirs. The legal value, as evidence, of entries in the administration paper (wajib-ul-arz) prepared by the settlement departments has been declared by statute law and defined by the Privy Council; and where such entries are attested by the co-sharers of an estate they must be entitled to very considerable weight, requiring very strong proof before they can be rebutted. The duty of the Courts in administering Hindu Law is to ascertain whether a particular doctrine has not only been received by the particular school which governs the country, but also whether it has been sanctioned by usage.

S. C. 42.

SS. 28 and 33 Oudh Estates Acts—Maintenance for the relatives of the taluqdars—Award under Anjuman-i-hind rules.

Held, that S. 28 of Act I of 1869, has not retrospective effect, but merely provides for the annuities to be made for the relatives of taluqdars and grantees who might die, and does not affect awards already made and decreed under S. 33 · nor does the proviso at pages 79 and 80 of the *Anjuman-i-hind* rules, operate against awards made previous to the passing of the Act; as it provides that if by any law made subsequently other provision is made for those whose cases were considered, then the taluqdars shall not be bound to continue the maintenance assigned under the rules. Unless the contrary is expressly stated in the award, whether the maintenance consisted of land originally or of cash now converted into land on an assumed total rental,

the then first incumbent, should hold rent free for life, the next generation should pay 25 per cent. or half the ordinary rent, whilst on the third generation 50 per cent. or the ordinary rent, should be leviable by the taluqdar.

Notes.

Diss 7 .O C. 90—Construction of award of British Indian Association as being considered made subject to their rules.

Dist. 7 O. C. 218—(Not approved as *obiter dictum*).

S. C. 43.

Hindu Law.

Jain custom—Sonless Jain widow-succession to moveable property-Personal jewels.

There being sufficient evidence of custom amongst the Jain sect in Oudh to modify the *Hindu Brahmanical* law; *held*, that the sonless jain widow succeeds to her childless husband's ancestral or self-acquired moveable property, with the same rights as he possessed and therefore with the right to have his share partitioned and brought absolutely under her own control. Also *held*, that the jewels worn, by such a widow during her husband's life-time are her special property, and cannot be taken by any kinsman in her life-time.

S. C. 44. (Not reported.)

S. 8 of Act I of 1869—Taluqdar in the second list—Estate descending to single heir—Primogeniture.

Notes.

Reversed—10 Cal. 511 (P. C.)—On a question whether or not a *taluqa* to which the Act was applicable descended according to the rules of lineal primogeniture, held, that when a taluqdar's name was entered in the second, but not in the third, of the lists, the estate although it was to descend to a single heir, was not to be considered as passing according to the *rules* of lineal primogeniture.

S. C. 45.

S. 25 Oudh Laws Act—Occupancy right—S. 9 Act XVIII of 1873.

Held, that the provisions of S. 25 Oudh Laws Act (XVIII of 1876) and S. 9, Act XVIII of 1873, are not identical; the right of occupancy reserved under the former is intended for the permanent maintenance of ex-proprietors in Oudh.

S. C. 46.

Jurisdiction—Suit for mutation of names in revenue registers.

Held, that no suit lies in the Civil Courts of Oudh for the mutation of names in the Deputy Commissioner's register of landed proprietors.

S. C. 47.

SS. 52 and 53 Oudh Land Revenue Act—Resumption in part payment of rent.

Held, that the land has not been held rent-free under a judicial decision, although it has been decided that the landlord could not resume physical possession of the holding. Plaintiff therefore is in the position of the zemindar, who after the passing of Act XVII of 1876, would have been entitled to demand rent; consequently Ss. 52 and 53 are not inoperative, and the grant is resumable in part, and is declared to be held subject to the payment of rent

Notes.

App.—2 O. C. 295—Resumption in "part".

S. C. 48.

Mortgage—Redemption—Insufficient tender—Declaration of accounts.

In a suit for redemption of mortgage, the condition of redemption being that if the whole of the principal and interest due shall not have been realized by the mortgagee from the mortgaged estate, nor paid in cash by the mortgagor within the time fixed, then at its expiry the mortgagors shall be entitled to redeem on payment of the entire principal and interest due, *held* that ordinarily, when the tender was not sufficient to redeem the lien, the plaintiff was not entitled to recover possession, but that; the state of the accounts between the parties up to the latest date, to which evidence had been adduced, ought to be declared.

S. C. 49.

Ss. 467, 470 Cr. P. C. of 1872—Sanction to prosecution.

Held, that the sanction by a Court under Ss. 467, 468 469 and 470 declares that in the opinion of the Court a criminal offence

has been committed The complaint of a private person prosecuting under S. 140, cl. (c) must receive special sanction by the Court under the above sections. But the sanction would be sufficient ground for the Magistrate to proceed *proprio motu* on suspicion that an offence has been committed.

S. C. 50.

S. 598 C. P. C. of 1877—Appeal to Privy Council.

Held, that an application, filed under S 598, is an appeal to Her Majesty in Privy Council, no other petition of appeal to the Crown being required by the Civil Procedure Code.

S. C. 51.

Suit for possession of land—Jurisdiction of Civil Courts.

Plaintiff sued to recover possession of land from defendant, who has successfully contested a notice of ejectment on the ground that he had rights beyond those of a tenant. *Held*, that the suit was properly brought in the Civil Court, and that the onus was on the defendant to prove his title. That a decree for possession of land does not necessitate the ejectment of the tenant.

Notes.

Exp—S. C. 135—Jurisdiction of Civil and Revenue Courts—Occupancy rights;

„ **Not app**—S. C. 167—Form of decree against tenant in Civil Court, who has unsuccessfully set up superior rights.

Diss and mod—S C. 254— „

S. C. 52.

Ss 10 and 13 Oudh Laws Act—Pre-emption—Tender of purchase money—Notice of Sale.

Held, that plaintiff-respondent was not bound to make the tender of purchase-money till the issue of the notice. That as the vendor did not issue the notice required by S. 10, Act XVIII of 1876, plaintiff-respondent had a ground of action under S 13, cl. (a) of the same Act.

Notes.

App—1 O. C. 254—Estoppel and necessity of notice;
F—3 O. C. 110— " " "

S. C. 53.

Jurisdiction—Rights of occupancy created by the Oudh Rent Act.

Held, that a Civil Court has no jurisdiction to enquire into rights of occupancy created by the Oudh Rent Act.

Notes.

Exp.—S. C. 135—Occupancy rights—Jurisdiction of Civil and Revenue Courts.
Dist.—1 O. C. 210— " "
F.—3 O. C. 365— " "

S. C. 54.

S. 21 Civil Courts Act (Oudh) of 1879—Second Appeals in the Civil Courts of Oudh—Chap. 42 C. P. C.—Mistakes or irregularities of—Resumption.

Held, that the law regarding second appeals in the Civil Courts of Oudh is to be found in S. 21 of Act XIII of 1879, and not in Chap. 42 of the Civil Procedure Code. Held, also, that an appellant has no right to presume that mistakes or irregularities in the proceedings of the Lower Court are due to the judges' wish to favour the other party.

Notes.

R.—4 O. C.—Form of appeal.
R.—2 O. C.—133

S. C. 55.

S. 21 Civil Court Act (Oudh) 1879—Court of first appeal modifying the decree of the Court of first instance as to cost only. Second Appeal—S. 622 Act X of 1877 Objection to Jurisdiction—Jurisdiction of a Subordinate Judge.

The Lower Courts concurrently decreed a suit, but the Appellate Court modified the decree of the Court of first instance as to costs, and it was contended that as the Courts below have concurred on the main issues of the case and differed only as costs, no appeal lies to this Court. Held that the contention

is not valid for the wording of S. 21. Act XIII of 1879, allows a second appeal when the decision of the Lower Appellate Court reverses or modifies the decree or order of the Court of first instance; that the order as to costs forms part of a decree and therefore an order modifying the costs modifies the decree.

Notes.

Diss—10 O. C. 65—No right of appeal when the two Courts differ only as to costs.

S. C. 56.

S. 230 C. P. C. 1859—Application for execution—Art 179 Limitation Act.

Held, that S. 230 of the Civil Procedure Code, does not lay down that every application for execution made within twelve years from the date of the decree shall be granted. Held, also, that the period allowed under Art. 179 Sch. II, Act XV of 1877, for application for execution begins to run from the date of the last previous application and not from the date on which the last previous application was consigned to the record room.

S. C. 57.

Restitution of Conjugal right—Non payment of prompt dower.

Held, that a woman entitled to prompt dower may even after consummation deny her husband excess to her person or her society, while it remains unpaid.

Notes.

F—10 O. C. 11—Decree for restitution conjugal rights subject to payment of dower—Dower not paid but demanded.

S. C. 58.

Evidence—Insanity.

Held, that the mere written opinion of a Medical Officer that a convicted prisoner was insane at the time of his trial is no sufficient ground for setting aside the conviction.

S. C. 59.

S. 562 C. P. C. of 1882=O XLI, R. 23 (V of 1908)—Remand for decision after recording evidence of certain witnesses—New documentary evidence—Record of the depositions of witnesses—S. 19 Act XVIII of 1876—Joint family—Settlement record.

That the case having been remanded under S 542, Code of Civil Procedure, for decision after the evidence of certain witnesses had been recorded, the Judge correctly refused to receive new documentary evidence. *Held*, also, that in Oudh, the depositions of witnesses are to be recorded in the manner prescribed in S. 19, Act XVIII of 1876, and that no separate record is required in addition to the Judge's notes, *Held*, further, that the fact of the share of each member of a family being recorded in the Settlement papers does not necessarily prove separation

S. C. 60.

S. 521 Cr. P C. of 1872—Removal of nuisance—Disobedience of order promulgated by a public servant—S. 188 Penal Code.

Held, that S 521, Act X of 1872, though it authorized the suppression of a trade of occupation injurious to the health or comfort of a community, did not empower a Magistrate to order pig styes to be built at a certain distance from the *abadi*, and that the disobedience of such an order cannot be punished under S 188, Indian Penal Code.

S. C. 61.

S. 52 (b) Oudh Land Revenue Act—Valuable Consideration Resumption.

Held, that a *marwat grant* not having been obtained for a valuable consideration, cl. (*b*), S. 55, Act XVII of 1816, does not bar its resumption.

Notes.

Diss.—11 O. C. 240 (244).

S. C. 62.

Suit to enforce registration—Deed not properly presented for registration. Specific performance of a contract.

Plaintiff sued to enforce registration of a deed executed by the Defendant *Held*, that the deed having never been properly presented

for registration the provisions of part XII of the Indian Registration Act did not apply; and as that enactment does not impower a registering officer to call for any document that has not been presented to him, that the Plaintiff was right in applying to the Civil Court; *Held*, further that the Plaintiff having violated an essential term of the contract could not compel specific performance.

S. C. 63.

S 13 Gambling Act--Public place—Money found with the gumbler—confiscation of instruments of gaming.

Held, that gambling is not punishable under S. 13, Act III of 1867, unless it be shown to have been carried on in any public street, place or thoroughfare, *Held*, also, that though a Magistrate is empowered by S. 13 to order any instruments of gaming that may have been seized by the police to be destroyed forthwith he is not authorized to confiscate all the money the gamblers may have about them.

S. C. 64.

SS. 147, 203, 437, 438 *Cr. P. C. of* 1882—*Dismissal of complaint—Further enquiry—References apprehension of breach of peace.*

Held, that the District Magistrate should himself take action under S. 437, Code of Criminal Procedure, if he considers that further enquiry should be made into a complaint that has been dismissed under S. 203, Code of Criminal Procedure. *Held*, further, that when a case is reported under S. 438, Code of Criminal Procedure, the order of reference should set forth the point on which orders are required. *Held*, also, that a Magistrate can take action under S. 147, Code of Criminal Procedure if he be satisfied that a dispute regarding the right to irrigate from a tank is likely to cause a breach of the peace.

S. C. 65.

SS. 65 and 188 Penal Code. Order promulgated by a public servant. Minimum term of imprisonment in default of payment of fine.

Held, that a notice intimating that tenants will not be liable to pay a Patwari cess is not an order directing land lords to abstain

from a certain act. Where an offence is punishable with imprisoment as well as fine, the term of imprisoment to which the offender is sentenced, in default of payment of fine, must not exceed one-fourth of the maximum term of imprisonment which is fixed for the offence

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S C. 66.

Appointment of Commission for local investigation—S. 392 C. P C. of 1882= O XXVI, R 9 Act V of 1905.

Held, that the appointment of a Commissioner to make a local investigation as to whether Defendant abused Plaintiff was irregular, as all that the Commissioner could do was to examine witnesses, which unless the witnesses were unable from illness or infirmity to attend to be personally examined, or were exempted from personal attendance in Court, should have been done by the Judge himself. *Held,* also, that mere verbal abuse is not actionable unless it causes material loss.

Notes.

F.—S. C 217—Consideration of report and evidence recorded by Commissioner when Commission improperly issued.

S. C. 67.

Grounds for Review—S. 622 C. P C of 1882=S. 115 (V of 1908).

Held, that the mere fact that a Judge does not concur in a decision of his predecessor is not good ground for submitting the case for revision under S. 622, Code of Civil Procedure

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S. C. 68.

Suit against Military officer—Small Cause Court—Jurisdiction.

Held, that a claim for Rs 45 against a Military officer serving at Shajahanpur cannot be heard in the Court of Small Causes, Lucknow Cantonment

Notes

Over—*S. C. 113—Cause of action against Military officer—Territorial Jurisdiction.*

S. C. 69.

Injunction—Construction of well—Proper remedy.

Defendant, without Plaintiff's consent, entered on Plaintiff's land and there commenced the construction of a well. Plaintiff sued for a decree forbidding defendant to complete the well, and ordering him to demolish such work as had been done and to level the ground *Held*, that the Court could not grant the injunction prayed for Plaintiff's proper remedy was a suit for possession and damages

S. C. 70.

S. 411 Penal Code—Dishonestly receiving stolen property—Security.

Held, that when a person has been acquitted on a charge of dishonestly receiving stolen property, he should not be ordered to give security under S. 118, Code of Criminal Procedure, on the evidence taken on that trial An order should be made under S 112 and a proceeding held under S 117 of the Code *Held*, further, that the amount of security demanded should be reasonable; and that the Court should state whether the imprisonment in default of security is to be rigorous or simple. *Held*, also, thst the fact of a person having been convicted on a former occasion or occasions will not justify his being treated as a habitual offender under chap. VIII, Act X of 1882, unless it be shown that since his release he has indicated an intention of returning to a dishonest course Chapter VIII, Code of Criminal Procedure, is not intended to enable a Magistrate to punish a person who has been tried on a specific charge and acquitted, but whom the Magistrate nevertheless believes to be guilty.

S. C. 71.

Reference by Provincial Magistrate to High Court.

Held, that Provincial Magistrates are not authorized to refer questions of law that may arise before them for the decision of the High Court.

S. C. 72.

S. 617 C. P. C=S. 113, O. XLVI, 21 (V. of 1905)—Reference by Deputy Commissioner.

Held, that the appeal could not by any possibility lie to the Deputy Commissioner's Court, and that he was not empowered to make this reference under S 617, Civil Procedure Code, to this Court

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S C. 73.

SS. 109 *and* 110 *Cr P. C.—Security for good behaviour.*

Held, that the power conferred by S. 109, is for the summary disposal of cases of Vagabondism, where sturdy rogues are found lurking about. *Held*, further, that the power conferred by's 110, is a preventive not a punitive power and should be used only by the Deputy Commissioner himself or by a specially qualified and careful officer vested by Government with power under the said section.

S. C 74.

SS. 335, 338 *Penal Code—Grievious hurt—When compoundable.*

Held, that grievious hurt is only compoundable when it falls under the provisions of S 335 or S. 338, Indian Penal Code.

S. C. 75.

S 147 Penal Code—Riot.

Held, that in charges of rioting the attacking and the resisting party ought never to be treated as an unlawful assembly and tried together, for each party constitutes an assembly, having an object totally distinct from that of the other party.

S. C. 76.

Penal Code—Preparation and attempt to commit offence.

Held, that the difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination in attempt as compared with preparation only.

S. C. 77.

S. 107 Cr. P. C.—Religious processions

Held, that no one has a right to molest others in the orderly and decent exercise of their religion, in the edifices of religion, or

in private houses, or in such public places as the Magistrate permits so to be used.

S. C. 78.

Offences not under Penal Code not compoundable.

Held, that offences punishable under laws other than the Penal Code are not compoundable, *vide* last page of Sch. ii, Criminal Procedure Code.

S. C. 79.

S. 75 Penal Code—Extent of punishment

Held, that the Deputy Commissioner could not lawfully pass a sentence of more than double the amount of punishment to which the prisoner might have been sentenced on a first conviction of theft

S. C. 80.

Resumption—Estoppel of landlord who formerly sued defendant as trespasser.

Held, that a proprietor of a village having unsuccessfully sued for possession of land, alleging that the defendant was a trespasser is debarred from having recourse to S. 53 of the Oudh Land Revenue Act with regard to the same land.

S. C. 81.

Confession inadmissible where no fact discovered

Held, that where fact was deposed to as discovered in consequence of information received from the accused person when in custody of the police, a witness ought not to have been allowed to describe a "confession" made by the accused.

S. C. 82.

Jurisdiction—Suit for amount of revenue paid by plaintiff for defendant.

In consequence of a mistake made by the revenue authorities as to the amount of Government Revenue due by the plaintiff and by the defendant respectively, the plaintiff was compelled to pay money due not by him, but by defendant. *Held*, that the

jurisdiction in a suit brought for the recovery of money paid under the above circumstances rests with the Revenue Officers only.

Notes.

R—4 O C 379—Suit for arrears of revenue—Jurisdiction (not discussed).

S. C. 83.

Ss 10, 13 Act XVIII of 1876—Pre-emption—Notice Estoppel.

Held, that as the sale was openly made, and all the co-sharers were assembled before the sale was completed, they are estopped from raising the plea taken.

Notes.

F.—S. C. 305—Estopped by conduct.

Not F.—1 O. C. 254—Estoppel by conduct and necessity of notice.

S. C. 84.

Resumption—Condition against—Effect of.

S. 41, Act XIX of 1868 and S 52, Act XVII of 1876, distinguished, a grant evidenced by a written instrument in which there is an express condition against resumption, being the joint grant of four grantors, of whom two survive, remains incapable of resumption during the currency of the settlement of the District.

S. C. 85.

Foreclosure—Proceedings commended before Act IV of 1882—Form of decree.

Held, that in a suit for foreclosure in which proceedings had commenced before Act IV of 1882 (Transfer of Property Act) came into force, an absolute decree for foreclosure and sale should be passed and not a decree in the terms of S. 86 of the Transfer of Property Act

S. C. 86.

Practice—Examination of witnesses—Former statements.

To read the deposition of a witness recorded at some former trial to the witness and ask him if it is true, is not an examination of the witness in the presence of the accused, as to his knowledge

of the facts which form the subject-matter of the occusation. A trial where evidence is thus taken is not a legal trial In every trial, no matter how often the case has been before the Court, the witnesses must be examined *de no vo*, or they will be held not to have been duly examined, and a conviction founded on their evidence will be set aside

S. C. 87.

S 490 Penal Code—Abandonment of service.

The mere abandonment of service before an advance of wages has been earned does not constitute the offence made punishable by S. 490 of the Indian Penal Code. To found a conviction under S. 490, of the Indian Penal Code, it must be proved that the accused person omitted to perform some one of the specific acts named in that section, being bound by lawful contract in that behalf.

S. C. 88.

S. 437 Cr. P. C.—Revision—Powers of District Magistrate.

A Magistrate of a District can call for and examine the record of a proceeding before the Court of a Magistrate of the first class situate within the local limits of his jurisdiction.

S. C. 89.

S. 278 C. P. C.=6. XXI, 58 (V of 1908)—*Jurisdiction*

D who had preferred (S. 278, C. P. C.) a claim to certain property attached in execution of decree, and whose claim had been investigated and disallowed, sued the decree-holder and the judgment-debtor in the Court of the Munsif who dismissed the suit on the ground that it was one cognizable by a Court of Small Causes. *Held*, that inasmuch as D was a person against whom an order under S 281 of the Code of Civil Procedure had been passed and could not succeed in his present suit without clearing away the order of attachment, which the order passed against him left in force; the establishment of D's right to the property was of the essence of, and not merely incidental to his claim, and that the suit was not one cognizable in a Court of Small Causes, but was rightly instituted in the Munsif's Court.

S. C. 90.

S. 562 C. P. C.=6 XLI, r. 23 (V of 1908)—*Challenging order in second appeal.*

An appellant in second appeal can be heard against the correctness of an order of remand made under S. 562, Civil Procedure Code, by the lower Appellate Court.

S. C. 91.

S. 13 Act III of 1862—'Public place.'

A place to which persons are in the habit of going, even without having any strict legal right to do so, is a public place.

S. C. 92.

Plaint—Amendment of into suit of different nature.

If a Court allows a plaint to be so altered as to convert a suit of one character into a suit of another and inconsistent character it acts *ultra vires.*

S. C. 93.

S. 53 C. P. C.=6 VI, 2 17—6 VII, 2·11 (V of 1908)—*Use of forms*

The use of forms prepared by Subordinate Courts can be matter of recommendation only, and the provisions of S. 53 can be enforced against those plaints only which fall within the grasp of sub-sections (a) to (f) it is not for a Court to advise a plaintiff, nor can a plaint be rejected because the case upon which a plaintiff comes into Court is one which none of the forms of plaint set out in the Schedule to the Code of Civil Procedure will exactly fit.

S. C. 94.

S. 211 Penal Code—Opportunity to complainant to prove his case.

Before a person can be put upon his trial for making a false charge under S. 211 of the Penal Code he must be allowed an opportunity of proving the truth of the complaint made by him; and such opportunity should be afforded to him if he desires to take advantage of it, not before the police, but before the Magistrate.

S. C. 95.

Criminal Procedure Code (X of 1882)—Statement of accused—Mode of recording.

At a Session trial, if, at the close of a case for the prosecution the accused person makes any statement in his defence it should be recorded; if he does not voluntarily make any statement, and declines to answer any question put by the Court the fact should be noted.

Notes

R.—S. C. 98—Irregularity of procedure in examination of accused—No attempt to elicit defence.

S. C. 96.

S. 5 Oudh Laws Act—Amount of dower.

Held, that in deciding, under S. 5 of Act XVIII of 1876, whether the amount of dower is excessive, the husband's means at the time of entering into the contract of dower should be taken in consideration, and not his means at the time at which such contract is sought to be enforced.

Notes.

Diss.—S. C. 287—Time of consideration of means of husband in claim for dower.

S. C. 97.

S. 25 C. P. C=S. 24 (V of 1908).

A suit was instituted in a Court which had no jurisdiction to try it and a decree was passed in it The District Judge on appeal referred certain issues to a Court which was competent to try the suit *Held*, that even if the order of remand could be treated as an order of transfer the original defect of jurisdiction could not be cured by it. Only such suits can be transferred under the provisions of S. 25 of the Civil Procedure Code as have been properly instituted in a Court of competent jurisdiction.

S. C. 98.

Confession—Use of against co accused—Record of.

To render the confession of a prisoner jointly tried with another prisoner admissible in evidence against the latter, it must

appear that the confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used, in the commission of the offence for which the prisoners are being jointly tried. The evidence of a confession made by a prisoner to a police officer not in the immediate presence of a Magistrate is inadmissible. It is irregular to record as evidence the opinion of a police officer as to the points in the case under enquiry which he considers to establish the guilt of an accused person.

S. C. 99.

S. 174 Penal Code—Issue of warrant instead of summons.

A Magistrate when taking cognizance of an offence in which a summons should ordinarily issue may not issue a warrant for the arrest of an accused person, unless he has previously recorded in writing the reasons for so doing Actual service of the summons, notice, or order, must be strictly proved, or be admitted before a conviction can be had under S. 174 of the Indian Penal Code for non-attendance in obedience to such summons, notice, or order. A Magistrate can not try a case, under S. 174 of the Indian Penal Code, of disobedience to a summons issued by himself.

S. C. 100.

Ss. 52, 55 Act XVII of 1876—*Resumption.*

Held, that as the right to resume the rent-free grant in question first accrued on the passing of Act XVII of 1876, the application was not time barred; that dancing and singing are not valuable consideration; and unless the valuable consideration and prescription concur, the benefit of exception (b) S. 55, Act XVII of 1876, can not be successfully pleaded.

Notes.

Diss.—S. C. 170—Limitation applicable to resumption suits.

S. C. 101.

S. 108 Evidence Act applied to Hindus—S 3 (2) b. Act XVIII of 1876.

The rule contained in S. 108 of the Evidence Act governs the case of a Hindu who has been missing more than seven years when

the question of his death arises in cases to which, under the provisions of sub-section (*b*) cl. 2. S. 3, Act XVIII of 1876, the Hindu Law is applicable.

Notes.

Not ad.—S. C. 276.—

S. C. 102.

Record of Confession—Absence of Certificate.

The confession of the prisoner *Karim* having been taken down in narrative style by the Magistrate, instead of every question put to and answer given by the prisoner being recorded in full, in accordance with the law, and as the Magistrate has omitted to say whether he believes the confession to have been voluntary, the Court of Sessions is directed to examine the Magistrate as a witness as to whether he believes the confession to have been voluntary or not.

S. C. 103.

Mortgagee and Comortgagee deposit of money—Trust—Jurisdiction.

A sum of mortgage-money having been deposited in the Court of Deputy Commissioner, that officer desired the two mortgagees to take it half and half, one mortgagee sued his co-mortgagee so much as he said had been over paid to such co-mortgagee and the cause was tried in a Small Cause Court, it was contended that such a case falls within the description of claim arising out of a partnership account and was therefore not cognizable by Small Cause Court, *Held*, that the defendant held the monies equitably as a trustee for plaintiff, and was under an implied contract to pay them to plaintiff, and as matters of contract are cognizable by Small Cause Court, there was no usurpation of jurisdiction.

S. C. 104.

Act III of 1880—Sale of liquor to European soldier.

Jahangir Shah and *Gurdin* were fined by the Cantonment Magistrate, *Fyzabad*, for selling liquor for the use of a European soldier to wit *Private Harrison*, 2nd Battalion, Lincolnshire Regiment, *Held*, that as Private Harrison gets pay from the Civil depart-

ment for the discharge of Civil duties, as Telegraph Master, in which he is continuously employed, and lives in the Telegraph office outside Cantonment boundary and attends no drills, he is not a "European Soldier" within the meaning of S. 14, Act III of 1880.

S. C. 105.

Leave to appeal to Privy Council—Ss. 595, 608 C. P. C.=S. 109; O. XLV, R. 13 (V of 1908)—Final decree.

An application was made for leave to appeal to Her Majesty's Privy Council against an order of the officiating Judicial Commissioner of Oudh prescribing the manner in which, and the extent to which, the decree of his predecessor should be executed, *Held*, that an order prescribing under S. 608, Civil Procedure Code, the manner in which, and the conditions, under which, execution of a decree was to be had is not a "final" decree or order within the meaning of S. 595, C. P. C.

S. C. 106.

Receiver—Refusal to appoint—Appeal.

Held, that though an order by a Civil Court appointing a receiver would be appealable under S. 588, cl. (24) C. P. C. an order refusing to exercise the power conveyed to such Court by virtue of S. 503 C. P. C, is not an order under S. 503, and is therefore not appealable.

S. C. 107.

Master and servant Contract—Custom.

Held, that the contract between a master and an ordinary domestic servant is a monthly contract, *i. e*, a whole month's work for a whole month's wages. If during the month the contract is broken on either side, the remedy lies in a suit for damages. But such contracts are subject to the custom that either party may terminate the contract by giving fifteen days' notice to the other side, or, in default of notice, fifteen days' pay as damages.

S. C. 108.

Ss. 551, 574 C. P. C.=O, XLI, rr 31, 31 (V of 1908)—Appeal—Procedure—Particulars in Judgment.

Held, that where the order in appeal is avowedly passed from the merits of the case the Court is bound to follow the procedure

laid down in S 551 of the Civil Procedure Code, *i. e*, a date should have been fixed for hearing the appellant or his pleader, and after hearing him in support of his appeal the Court should have written a judgment confirming the order of the Court below, and such judgment ought to contain the particulars required by S 574, C P. C.

S. C. 109.

Sub-Proprietor—Act XVI of 1966—Cadet of family.

The plaintiffs claimed possession as sub-proprietors of certain villages which form half of the *chauwar khata* estate now incorporated in the *Balrampur* estate *Held*, that as the plaintiffs are cadets of the family of the *Maharaja* of *Balrampure*, that as the estate to which they lay claim was under the native rule incorporated in the larger taluqua or *Raj Balrampure* for protection, and that in such cases it was well understood that the *vassal* must contribute to make up any sudden or extraordinary emegencies, however arising, the plaintiffs hold under the *Maharaja* of *Balrampure*, as sub-proprietors by virtue of hereditory right, and they have held under contract with the degree of continuousness required by Act XXVI of 1866.

S. C. 110.

Evidence recorded by predecessor—Trial of case by successor S. 191 Cr. P. C.

Held, that though under S 191, Cr Procedure Code, the evidence taken by his predecessor may be used by the Judge who finally decides the case if he thinks fit, this permission in no wise authorizes a Court to decide a case which it has not really tried.

S. C. 111.

Cause of action—Jurisdiction.

Held, that cause of action means "a substantial part of the cause of action and that, therefore, a Court will have jurisdiction not only where the whole cause of action arises, but also where a substantial part thereof, such as breach of the contract, arises,

S. C. 112.

Ss 268, 273 C. P. C.=O. XXI, r. 46; 53 (V of 1908).—Procedure under wrong section—Loss to Judgment-debtor—Compensation

A decree-holder proceeded under S. 268, Civil Procedure Code, instead of under S 273, and caused the sale of certain property which entailed an unnecessary loss to the judgment-debtor *Held*, that a judgment-creditor, who improperly puts the law in motion, is liable for any loss to the judgment-debtor that may thereby ensue.

S. C. 113.

Military Officer—Cause of action—Jurisdiction.

Held, that if a cause of action has arisen against a Military Officer (other than a soldier of the Regular forces) within the territorial jurisdiction of a Mofussil Small Cause Court, and such officer afterwards reside in another place where a Small Cause Court exists, such person may be sued in the Small Cause Court where the cause of action occurred.

S. C. 114.

S. 9 Specific Relief Act—S. 108, (10) Act XXII of 1886 *(Oudh Rent Act)*

S. 108, cl (10), Act XXII of 1886, does not bar the remedy provided by S 9, Act I of 1877. S 9, Act I of 1877, is only intended to apply in cases where the plaintiff has been in physical possession of property and has been forcibly dispossessed there from without his consent and otherwise than in due course of law, and not in cases where his possession has been purely constructive by virtue of the receipt of rent from the ryots who are in physical possession

S. C. 115.

S. 145 Cr. P. C.—Meaning of "then".

Held, that the time referred to by the word "then" in the second and third paragraphs of S. 145, Criminal Procedure Code, is the time when the Magistrate "received the information" which leads him to exercise his powers under S. 145, Criminal Procedure Code.

S. C. 116.

Adoption—Proof of—Religious ceremonies—Onus of proof.

Held, that though the proof of certain religious ceremonies having been performed is not necessary to prove the factum of adoption (except among Brahmans), yet their absence in the case of a member of the thrice born castes would give rise to a great suspicion as to the factum of adoption; *held* also, that where a plaintiff has a *prima facie* title as heir and his right is challenged by one claiming to be an adopted son, the onus of proof will ordinarily lie upon him who alleges adoption.

S. C. 117.

Resumption of rent free grant—Old grant.

Held, that in case of a very old "grant" the object of which is peculiar, it being partly intended for charitable objects, resumption in part can be properly granted.

Notes.

App.—2 O. C. 295—Resumption in part.

Doubt—6 O. C. 232—Antiquity of rent-free grant being an obstacle to its resumption in whole.

S. C. 118.

Insufficient stamp on plaint—Question when to be decided S. 54 C.P.C.=O. VII, r. 11.

A plaint was filed in a Court on the 22nd January 1886 and a point as to what was the proper fee was not decided till the date fixed for the first hearing, the 23rd February 1886, when it was ordered that three rupees more be paid into Court by 24th February 1886. As the money was not paid, the suit was dismissed under S. 157, Civil Procedure Code. *Held*, that although the plaint was registered it is obvious that the question of the stamp should have been previously decided, that the case was in its initial stage on the 23rd February 1886, and therefore the Court had no option save to proceed under S. 54 C. P. C.

S. C. 119.

S. 211 I. Penal Code—Sanction to prosecute—Cross examination disallowed.

Jaggarnath, lodged a complaint of the theft of certain articles and named *Kali Charan*, as the suspected thief. The Magistrate

found that it was a trumped up case, discharged *Kali Charan*, and added that he would gladly sanction an application for the prosecution of *Jaggarnath* under S 211, Indian Penal Code. The application was filed and sanctioned by the Magistrate of the district *Held*, that the sanction of the Magistrate who took up the complaint of *Jaggarnath*, was perfectly complete and sufficient, but that the Magistrate who tried *Jaggarnath*, acted illegally in stopping the cross-examination of a witness, and in refusing to allow the recall for cross-examination of the witnesses for prosecution as soon as the accused was formally charged.

S. C. 120.

Rejection of plaint—S. 53 C. P. C.=O VI, r. 17, O VII, r. 11 (V of 1908)—

Plaintiff sold certain land to defendant and out of the consideration received therefor returned Rs. 1,518 to defendant. In the original plaint it is stated that "the defendant would, at Unao, execute in favor of the plaintiff a bond for Rs. 1,000 with interest at one per cent. per mensem, and would repay the remaining Rs. 518 after two days." In the amended plaint it is stated "out of the consideration money Rs. 1,518 were on the same date kept in deposit with the defendant at Lucknow. Next day when the plaintiff demanded the money the defendant promissed to pay it on his return to Unao." It was contended that the lower Appellate Court's order setting aside the order of the Sub-Judge, Unao, rejecting the original plaint, is in opposition to the provision to S. 53 Civil Procedure Code. *Held*, that the facts do not support the appellant's contention.

Notes.

Dist—S. C. 216.

S. C. 121.

S. 10 Act XVIII of 1876—Pre-emption—Notice.

No due notice of sales was given as required by S. 10, Oudh Laws Act, as the vendor assumed that the pre-emptor was fully aware of the sales in question. *Held*, that, as the prescribed notice was not given by the vendor, the Courts have no discretion to condone such disobedience to the pre-emptory provisions of the law.

Notes.

App—S. C. 148—Pre-emption among Muhammedans
Dist.—S. C. 305—Estoppel by conduct though no notice.
App.—1 O. C. 254—Estoppel and necessity of notice.

S. C. 122.

Pre-emption—Notice—Stranger joined as plaintiff—Forfeiture.

A member of a village community having joined with him a stranger claimed his right to pre-emption. *Held*, that a stranger who though resident in the village had no share whatever in the village property, could not be counted as a member of the village community and that when a claimant to pre-emption joins a stranger with him in his claim he necessarily *forfeits* his right of pre-emption.

Notes.

F.—S. C. 177—Meaning of members of village community in S. 9, Oudh Laws Act.
Diss—1 O. C. 308—Effect of plaintiff joining strangers with him in suit for pre-emption.
Ap.—3 O. C. 110—Members of village community.
Disc—5 O. C. 266— „ „
Cite.—7 O. C. 275—(As not deciding the point) whether residence in village a necessary qualification.

S. C. 123.

S. 304, Penal Code—Intention to cause death.

A man struck a woman, who had rushed waist-deep into a *sot* of a river, two blows on the head with a light bamboo. She fell and was never again seen. *Held*, that as intention to cause death or deadly injury was not proved and is not even likely the Court of Session was wrong in convicting the prisoner under the first clause of S. 304, Indian Penal Code.

S. C. 124.

Mesne profits—Suit for—Not a question under S. 244 C. P. C.=S. 47 Act V of 1908.

A claimant recovered possession of his share in a village which he had lost in a pre-emption suit, and then brought a suit to recover

mesne profits for the time that he had been out of possession, the Court of first instance held that the suit was cognizable and gave a decree which the lower Appellate Court reversed, holding that a separate suit for mesne profits would not lie. *Held*, that the question of mesne profits did not relate to the execution, discharge, or satisfaction of the decree, for possession for at that time no such question had arisen and therefore the decision of the Court of first instance must be restored.

S. C. 125.

S. 147 Penal Code—Riot—Hurt—Separate Conviction.

Held, that where proof of rioting is complete and where, besides such proof, there is also proof of the commission of hurt or of grievous hurt, not only separate convictions may be properly had for the separate offences but separate sentences for each may also be inflicted.

S. C. 126.

Pre-emption—Possession—Art 10 Limitation Act.

Held, that as the Mahal seems to have been divided and defendent-respont No. I got possession over the whole Mahal in April 1883, in execution of his decree for possession the difficulty as to delivery of physical possession does not arise in this case, therefore Art 10 Limitation Act is applicable.

Notes.

Not F.—3 O. C. 184.

S. C. 127.

S. 145 Cr. P. C.—Enquiry into title—attachment.

Held, that a lengthened and minut enquiry into questions of title, involving consideration of volumenous documentary evidence necessarily entails an expenditure of time and labour opposed to the intention of S. 145, Criminal Procedure Code, which is avowedly limited to the one issue of possession, the object aimed at being mainly the immediate avoidance of a breach of the public peace. The Magistrate was consequently directed to attach the property in dispute until the rights of the parties be decided by a competent Civil Court.

S. C. 128.

Arts 26, 116 Limitation Act—Breach of contract.

Appellants purchased portion of a share in a village, the whole of which was mortgaged to respondent who under a deed, dated April 1875, was to appropriate Rs. 125 out of rental in payment of his interest, and refund annually to the mortgagor Rs. 72 Appellants claim the yearly refund for six years. The lower appellate Court considers that Art 62, Limitation Act, applies to the case and not Art. 116. *Held*, that as there is an admitted contract which is in writing and has been registered, and breach of the contract is proved Art 116, applied to the case.

S. C. 129.

Mortgage—Irredeemable—Burden of proof.

Respondent sought to enforce redemption of certain land that appellant held by virtue of mortgage. Appellant pleaded that the mortgage was fifty years old and irredeemable. The Court of first instance dismissed the suit but the lower Appellate Court held that it lay upon the appellant to show that the mortgage was barred, and decreed the claim of the respondent, *Held*, that the *onus* of proof that the mortgage was redeemable lay but primarily on the respondent and though the proof adduced by him on this point was scanty it lay on the appellant to rebut that proof, Appellant failed to do so, therefore very slight proof on the part of respondent might be accepted in support of his contention.

S. C. 130.

Tenants' right to trees.

Defendants who were tenants at—will and had inherited one grove and planted others with permission of the landlord, claim possession of these groves though, having left the village many years ago, they are no longer his tenants. *Held*, that a tenant or his descendants only retain possession of such groves as long as he remains a tenant there.

Notes.

Diss.—1 O. C. 231—Tenants' right to trees.

S. C. 131.

Res judicata—Not applicable to execution proceedings—Set off—S. 233 C. P. C.= S 49 Act V of 1908.

This was an application for execution of decree by one *Parmanand* who purchased a decree obtained by *Ramzan Ali* against *Khem Karan*. *Khem Karan* prayed that he be allowed to set off a prior decree obtained by him against *Ramzan Ali* and three others, and the Court of first instance allowed the prayer, but the lower Appellate Court reversed the order on the ground of *res judicata*. *Held*, that the law of *res judicata* does not apply to execution proceedings, and that S. 233, Civil Procedure Code, clearly imposes upon the transferee of a decree, the equities that bound the original decree-holder, and in as much as *Khem Karan* was at liberty to have enforced his decree against *Ramzan Ali* alone, there was nothing to prevent *Khem Karan* from setting off his decree against *Ramzan Ali's*.

S. C. 132.

Redemption of mortgage—Res judicates—Ss. 13, 244 C. P. C.=Ss. 11 and 47 (V of 908).

Respondent obtained on the 30th November 1880, a decree for redemption of mortgage on payment of Rs. 860 within one month, but being unable to fulfil the condition upon which redemption was to be had no further proceedings were taken on this decree. Respondent now sues for redemption, lodging in Court the money declared payable on a previous occasion. Appellant pleads *res judicate*. *Held*, that suit was not barred by the former decree and that the respondent is entitled to redeem.

Notes.

Dist.—S. C. 238—Second suit to redeem.

App.—S. C. 256—Decree for redemption containing no bar—Remedy by second suit or execution.

" —1 O. C. 289—Effect of redemption decree where no foreclosure provided for.

Not F.—6 O. C. 367—Admissibility of second suit for redemption.

S. C. 133.

Mohammedan Law—Custody of minor—Wife.

This was a suit nominally for restitution of conjugal rights by a minor husband, through his father and guardian, against a minor wife, through her mother and guardian *ad litem*, but in reality for the custody of the little girl by the friends of the boy husband. The husband and wife were each 10½ years old in May 1886. *Held*, for reasons set forth that this appeal must be accepted and the plaintiff's suit be dismissed on the ground of the immaturity of the first defendant.

S. C. 134.

Lamberdar Sums recovered by when plaintiff was lamberdar—Trustee.

Defendant as lambardar realized from certain under-proprietors sums that were due for 1241 Fasli, the year when plaintiff was lambardar. Plaintiff sued defendant in the Rent Court and was referred to the Civil Courts, which however held that the suit was one solely cognizable by the Rent Courts, *Held*, that as defendant realized from the *pukhtadars* sums due by them for the year when plaintiff was lambardar, consequently the defendant is in equity to be held as a trustee for plaintiff for such sums which plaintiff avers were really had and received by defendant on his (plaintiff's) account.

S. C. 135.

Jurisdiction—Civil and Revenue Courts—Question of title.

Appellant sought to obtain possession of land by a suit in the Civil Court, but respondent pleaded right of occupancy in the land and the lower Courts dismissed the claim. *Held*, that a claim regarding occupancy rights is not such a claim as is cognizable by a Civil Court and that there is no contradiction in the rulings contained in Select cases Nos. 51 and 53.

Notes.

F.—3 O. C. 365—Jurisdiction of Civil and Revenue Courts where question of title involved.

App.—S. C. 135— " " "

S. C. 136.

Pleaders fee—Agreement.

The respondent recovered through Small Cause Court Rs. 150, being balance of Rs 200, which he agreed to accept in lieu of the full fee Rs 350. The applicant contends that Rs. 350/4 as. per Rule VI of Circular I of 1880 is the proper fee, that the agreement ought to have been in writing and as it was not so recorded the Lower Court had no jurisdiction. *Held*, that the former suit was decided on its merits and that Rs. 350 was *prima facie* the legal fee, therefore the respondent was not bound to prove the agreement to accept less than the ordinary legal fee and have it recorded in writing.

S. C 137.

Succession Certificate (Act XXVII of 1860)—Joint certificate to persons having antagonistic interests.

Held, that a Judge has discretion as to the person or persons to whom he should give a certificate, but was bound to use that discretion conformably to the spirit of Act XXVII of 1860, and that the main purpose of this Act is frustrated if a certificate, to collect debts is given jointly to persons having antagonistic interests in the estate.

S C. 138.

Ss. 302, 314 Penal Code—Conviction in alternative—Removal of body—S. 201 Penal Code.

When facts proved left it uncertain whether the victim had been intentionally murdered or had died from effects of an attempt to cause her abortion against her will, the Court held that the accused ought to be convicted in the alternative either of an offence under S. 302 or of an offence under S. 314, Penal Code, and sentenced her to ten years transportation. Mere secretly removing of a dead body under such circumstances is no proof of complicity in the original crime though good proof of an attempt to destroy evidence of the commission of a crime under S. 201, Penal Code.

S. C. 139.

Concurrent finding—Modification as to costs. Appeal S. 21, Act XIII of 1879.

The lower Courts concurrently decreed a suit, but the Appellate Court modified the decree of the Court of first instance as to costs, and it was contended that as the Courts below have concurred on the main issues of the case and differed only as to costs, no appeal lies to this court. *Held*, that the contention is not valid for the wording of S. 21, Act XIII of 1879, allows a second appeal when the decision of the lower Appellate Court reverses or modifies the decree or order of the Court of first instance; that the order as to costs forms part of a decree and therefore an order modifying the costs modifies the decree.

Notes.

Diss.—10 O. C. 65—No right of appeal when the two Courts differ only as to costs.

S. C. 140.

Pre emption—S 9 Oudh Laws Act.

S. 9, Oudh Laws Act, enumerates three classes of persons to whom pre-emption shall accrue and after these classes are exhausted it makes special provision that in the event of a portion of an under proprietary tenure being for sale and no one of the first three classes being ready to purchase, then the superior proprietor shall have the next preference. But no such provision is made in favour of an under-proprietor where a portion of the superior tenure is for sale. *Held*, therefore, that no such right exists to an under-proprietor.

Notes.

Dist.—S. C. 177 members of village community.

„ 3 O. C. 110 „ „ „

R. 5 O. C. 266 „ „ „

Not app—7 O. C. 275.—Effect of partition on members of village community.

„ „ 9 O. C. 271—That the superior proprietor and under-proprietor were members of village community.

S. C. 141.

S. 526 Cr. P. C.—Transfer of Case.

An application was made under S. 526, Criminal Procedure Code, for the transfer of a case under trial to another Court on the ground, among others, that the Magistrate would not grant the accused copies of the depositions and proceedings as the case proceeded. *Held*, that though the application had not yet been "affected by a judgment or order" for the case had not been decided, a Magistrate would do well to allow copies even of pending proceeding to be furnished, as far as practicable and as speedily as possible, to accused persons though they may not have a legal right to them then and there.

S. C. 142.

S. 200 Cr. P. C.—Applicable to maintenance cases—Appearance of parda-nashin.

Held, that the provisions of S 200, Criminal Procedure Code, are applicable to maintenance cases, but it is not necessary that a *parda-nashin* woman who is an applicant under S. 488, Criminal Procedure Code, must appear in open court out of *pardah*.

S. C. 143.

S. 30 Evidence Act—Abetment—S. 108 Ex. 4 Penal Code.

R. and K. were charged with the murder of A and B with abetment thereof, all three men were tried together. The Sessions Judge regretted that the evidence of B could not be used against the other co-accused and *vice versa* and was of opinion that in S. 30 Evidence Act it does not seem probable that the Legislature intended to regard abetment as a distinct offence from the offence abetted. *Held*, that it is in the highest degree unlikely that the Legislature having before it the definition contained in S. 108 (Exp. 4) Penal Code, should in framing S. 30 Evidence Act, have omitted to explain that the word "offence" contained therein was to be deemed to include "abetment of an offence" if it had really intended S. 30 to be so understood. In the present case the committing Magistrate omitted to notice that where the act abetted is committed in consequence of the abetment, and the abettor is present at the commission he shall be deemed to have committed the substantive offence itself.

S. C. 144.

Lease for right of sale in weighments—Unregistered—Admissibility of.

The claim was for money said to be due on a *theka* of *baiya* (toll on weighments) and *jheri* (collections of scatted grains) in a *bazar* on the basis of an unregistered *kabuliat*. The lower Appellate Court dismissed the claim on the ground that the *theka* was in respect of immovable property and consequently an unregistered *kabuliat* was inadmisible in evidence thereof. *Held*, that the case was one for the right of taking toll on weighments only, and therefore the *kabuliat* should have been received in evidence.

S. C. 145.

Certificates of administration—Filing of account

Held, that accounts should be filed by all persons, whether near relatives or not, who have been selected by the Court itself as being "fit persons" to hold certificates of administration and who therefore derive their right from the choice of the Court itself, and not from some will or deed appointing them.

S. C. 146.

S. 503 Penal Code—Threats to injure trade reputation.

Complainant stated that defendant and others trading in *Saadatganj Bazar* wanted him to pay one anna for every large cart-load of *gur* purchased by him in that *bazar* to a *Bhandara* fund applied to feeding the poor, and that on his refusing to make any contribution to the said fund the accused have advised other dealers not to trade with complainant till he gives in, *Held*, that to advise others not to deal with a man is no doubt a very injurious act but it is not a threat, and the harm caused is not to property already possessed by the applicant but rather to his opportunities of future gain. Therefore S. 503, Indian Penal Code, as it at present is framed, does not cover the facts of the present case.

S. C. 147.

Mortgage of groves—Sale of—Land lord's right in—Haq-i-Chaharrum.

Two groves were held by a mortgagee who finally got his mortgagors to transfer the groves in proprietary right for the amount which had been found to be due on his mortgage. It was admitted that this was a sale but the purchaser pleaded that the landlord can only look to his tenants, the vendors, for his *Haq-i-Chaharrum*, *Held*, that the vendors could only sell such rights as they themselves held in the trees and that the landlord was perfectly entitled to follow the property in the hands of the purchaser and obtain from the purchaser $\frac{1}{4}$th of the purchase money.

S. C. 148.

Pre-emption—Mohammedans—Application of Oudh Laws Act.

A claim for pre-emption was made by a Mohammedan resident in Oudh, and it was admitted that the sale of the property in question by a Mohammedan to the vendees (Hindus) was not made according to the provisions of S. 10 Act XVIII of 1876, which it was contended does not modify the Mohammedan law of pre-emption. *Held*, that in Oudh a Mohammedan pre-emptor can claim from a Mohammedan vendor his right of pre-emption if the vendor has failed to comply with S. 10, Act XVIII of 1876.

Notes.

F—1 O. C. 75—Non-observance of Mohammedan Law as to demand and invocation of witnesses.

F.—3 O. C. 110—Non-observance of Mohammedan Law as to demand and invocation of witnesses.

S. C. 149.

S. 248 C. P C.=O, XXI, r. 22 (V of 1908) meaning of "party."

The appellants having executed a security bond under S. 545 of the Code of Civil Procedure, in favour of the respondent could enforce the bond by suit and was not bound to proceed in the execution department.

S. C. 150.

S. 7 Local Rates (IV of 1878)—Principle of calculation.

The lower Appellate Court granted a decree on account of local rates but omitted to state on what principle the rate was calculated. *Held*, that the principle upon which such rate must be calculated is laid down in S. 7, Act IV of 1878 *viz.*, first, the *jama* or land revenue assessed on this particular land must be ascertained, twice the *jama* so ascertained is the annual value as defined by the Act itself. If the defendants pay rent equal to or greater than twice the revenue, it is clear that they have no share in the annual value so defined, but if they pay less, then their share in the annual value so defined is the difference between what they pay and such annual value. Their share so ascertained is to be taken as the numerator and half the annual value (that is to say the *jama* of the particular land) is to be taken as the denominator, and this fraction represents the under proprietor's share of the rate chargeable on his land.

S. C. 151.

Hindu Law—Liability of sons for father's debt—Immoral liability.

One *Mahesh Parshad* sued *Jawahir Lal* for half the family ancestral property, moveable and immoveable, and having got a decree for the share in executing it for costs and other monies, he attached the remaining 8 annas share of the estate. The four sons and the widow of the fifth son of *Jawahir Lal* prayed for release of their share of the estate, attached in the execution department, and that it might be divided and apportioned to them as being members of a joint undivided Hindu family living under the law of the *Mitakshara* and obtained a decree in their favour. *Mahesh Parshad* appeals against the decree and contends that the sons are liable for their father's debts (not being immoral debts) to the extent of their shares in the ancestral property, *Held*, that according to *Mahesh Parshad's* own statement, *Jawahir Lal's* act in dispossessing him was a wrongful act for which he was solely responsible, that the defence made by *Jawahir Lal* to *Mahesh Parshad's* suit was

distinctly adverse to the title of the present respondents, and therefore that the liability of *Jawahir Lal* now sought to be enforced against his sons was an immoral liability and not one which those sons could be properly called on to discharge.

S. C. 152.

Hindu Law—Partition—Shares—Wajib-ul-arz—Custom.

A son sued for the partition of his share of ancestral property from his father and three brothers. The *wajib-ul-arz* provides that on the death of a sharer his sons shall inherit as follows; the eldest son 3 shares, the second son 2 shares, the third son 1½ shares, and the fourth son 1 share, but the plaintiff sues for his share now under the ordinary law of the *Mitakshara* and claims one fifth of the property. *Held*, that in some cases, the father may have a double share when he has a wife living for whose maintenance he has to provide; more specially is such a claim tenable where, as here, the family custom is in favour of giving a preferential share according to seniority and therefore the estate should be divided into six shares of which two shares go to the father and one to each of the four sons.

S. C. 153.

Ss. 24 & 30 Evidence Act—Confession—Use of.

Sixteen days after a *dakaiti* occurred, one *Badal* made a statement before the Police, in the nature of a confession, which he has twice repeated before the Magistrate and in which he accused all the prisoners at the bar but alleged that much against his will he was induced to accompany the robbers to the spot of the crime which he witnessed, but in which he took no part. Before the Sessions Court *Badal* said he had been tortured by the Police until he agreed to denounce the persons whom they had named to him and that they promissed if he would do so that they would get him off. *Held*, that under Ss. 24 and 30 Indian Evidence Act, *Badal's* evidence must be held to be irrelevant as it would seem that inducement of some kind must have been used before *Badal* would make the statement which he did before the Magistrate. Further to render *Badal's*

evidence admissible it must implicate *Badal* substantially to the same extent as it implicates the persons against whom it is to be used, in the commission of the offence for which the prisoners are being jointly tried.

S. C. 154.

Restitution of Conjugal rights—Valuation of suit—Act VII of 1887.

A suit for restitution of conjugal rights was dismissed on the ground that as such suit is incapable of being valued and no rules under S. 9 of Act VII of 1887 having been framed by the Judicial Commissioner, the Court of first instance had no jurisdiction, *Held* that though S. 9, Act VII of 1887 empowers the High Court in concert with the Local Government to frame rules for the valuation of such suits it nowhere fixes a time within which the High Court and Local Government must frame such rules, and still less does it declare that until such rules are framed the Courts are to close their doors.

S. C. 155.

Construction of document—Perpetual lease.

The plaintiff alleged that she had obtained a perpetual lease from generation to generation from the defendant's grand-father and that this lease was afterwards confirmed by the defendant who, in a letter, stated that the lease was given to her always in perpetuity. *Held*, that the intention of the parties is the main point to be considered in the construction of documents, and that the words used do not convey any-thing more than estate for life

Notes.

F.—S. C. 209—Construction of maintenance grant.
Dist.—S. C. 291—Construction of gift.

S. C. 156.

S. 219 (d) Act XVII of 1876 (Land Revenue Act)—Partition appointment of Amin.

The heirs of one *Subdhan Singh* whose property consisted of divided off pieces of land measuring 57 bighas 3 biswas 17 biswansis and also a share in the undivided estate, quarrelled over a

division of the property. Plaintiffs came into Court praying for partition of the 57 bighas odd, and obtained a decree for 3/7th thereof aggregating to some 24 bighas, but there was no specification of the numbers which were to constitute the 24 bighas, and in execution it was prayed that the Amin of the Civil Court might specify the 24 bighas odd. *Held*, that to delegate to an Amin to select which 24 bighas out of 57 bighas should be allotted to a litigant appears to be committal into the hands of an ill-qualified and very subordinate official of functions essentially judicial in their nature, and as the words used in cl. (*d*) S 219, Act XVII of 1876, "the distribution, or partition, of the land", are very vide and seem to include a case like the present, the Courts below have improperly assumed jurisdiction which belongs only to the Revenue Courts.

S. C. 157.

Pre-emption—Extension of time by Appellate Court to pay money—S 214 C. P. C.=O. XX, r. 14 (V of 1908).

A pre-emptor got a decree and was ordered to lodge a certain sum of money by a certain date. Prior to the expiry of the period allowed by the Court of first instance for making such payment, the pre-emptor obtained an order from the Appellate Court enlarging the said period and accordingly delayed payment of the money beyond the term allowed by the Court of first instance. It was contended that such omission on the pre-emptor's part deprived him of all right to pre-empt. *Held*, that the power to stay execution of a decree includes power to stay any part of it and it may be exercised on behalf of any party who wishes such stay, provided the terms of the law be complied with.

S. C. 158.

Lamberdar—Suit for negligence to collect rent.

Plaintiff sued her co-sharer as lambardar for damages of rent that he did not take steps to recover from the tenants of the estate *Held*, that if a lambardar will-fully refuses or neglects to releize rent, a decree ought to be given against him in the Rent Court.

Notes.

F.—1 O. C. 183—Liability of lamberdar for neglect to collect profits.

S. C. 159.

S. 302 Penal Code—Murder—Circumstantial evidence—Medical evidence.

Dharmangal bade *Ganga* and his brother come with him to pay up balance of rent due by them. Shortly after starting, Ganga refused to go further, on whom *Dharmangal* threw two clods at him and Ganga threw a clod which struck Dharmangal who closed with and flung him down. The combatants were separated and Dharmangal went off, threatening to settle with Ganga that night. After night-fall the three accused forced their way into Ganga's house, out of which they dragged him by main force, and the next morning Ganga's corpse was discovered hanging from the bow of a tree close to his house, *Held*, that though there would be the greatest suspicion against the accused, there is absolutely no direct evidence of the actual fact of a deed by the accused, that there is no certainty whatever that Ganga was murdered and for reasons given it is very possible that Ganga did commit suicide. The medical evidence is distinctly in favour of the theory that this is a case of suicide though the medical witness was not properly examined on this point by the committing Magistrate nor did the Sessions Judge recall the witness as he should have done to supply defects in his deposition. The medical witness was therefore examined in the Judicial Commissioner's court with the result that in the witness's opinion the medical appearance on the corpse pointed rather to death by suicide than by murder.

S. C. 160.

Appeal—Cross-objections—Limitation—Art 156.

Appellant filed a cross-appeal on 8th March 1888, against portion of the decree of the District Judge *Rai Bareli* dated 26th November 1887, and urged that when an appeal has once been filed the Court only knows of cross-objections, and not of cross-appeals and that 90 days' limitation does not apply to the present appeal. *Held*, that the appeal being filed on full stamp

is clearly one to which the limitation of art 156, Limitation Act applies, and that where a party to a suit himself appeals on a full stamp such appeal lies on a totally different footing from any objection which he might urge as a respondent in an appeal brought by the other party.

S. C. 161.

Opium—Illicit possession of.

A man was convicted of attempting to smuggle 5½ seers of opium into the city of Lucknow for sale, and was sentenced to two month's simple imprisonment and fine of Rs. 50. The sentence was enhanced to two months additional rigorous imprisonment, and it was pointed out that although S 10. Act I of 1878, casts upon accused persons the onus of satisfactorily accounting for opium in their possession contrary to the provisions of the Act, Magistrates must be carefull to note: 1st. That the presumption against the accused person is only a presumption and may be rebutted; 2nd—That possession must be proved. Opium is not unfrequently maliciously placed in or upon a person's premises by an enemy who then brings down the police to the spot where the opium is found, such finding does not prove the possession which is contemplated by the law.

Notes.

F.—S. C. 236—Illicit possession of opium.

S. C. 162.

Decree for arrears of rent—Execution against holder of heritable subsettlement tenure.

Certain arrears of rent were decreed against Musammat *Sheoraj Kunwar*, widow of *Ramdin*, in July 1884, and she died in October 1886, leaving this decree unsatisfied. In November 1887, *Dakhil Kharij* was ordered in favor of respondents, as the proper heirs of *Ramdin*, who have been sued for the arrears of rent decreed against *Musammat Sheoraj Kunwar*. *Held*, that the respondents are holders of a heritable but not transferable tenure, that the decree of July 1884 does not declare the tenure itself liable for the satisfaction of the decree and that there being no section analogous to S. 105, Act X

1859, in the Oudh Rent Act, the decree of July 1884 is not capable of being enforced in the ordinary way in the execution department against the respondents.

S. C. 163.

Ss. 52, 53 Act XVII of 1876—Resumption—Valuable Consideration.

A *Shankalap* grant of land was made for "loyally," but it is not stated in what the loyalty consisted *Held*, that the terms of Ss. 52 and 53 of Oudh Revenue Act, XVII of 1876, are too stringent to admit of any exceptions other than those specially mentioned therein; and that though Mr Capper's Rulings have been maintained in all subsequent decisions of this Court, they relate only to grants for spiritual services. Further, that though the prevailing custom of the country is apparently adverse to resumption of *Shankalaps* land, and the *zimindar* seeking to resume must first prove his right to do so, the *resumption sections* of Act XVII of 1876 now shift the burden on to the grantee and the grant not being one for which valuable consideration was given the land in suit is liable to resumptien.

Notes.

F.—S. C. 244—Valuable Consideration.

S. C. 164.

Landlord and tenant—Jurisdiction—Civil and Revenue Courts.

The lower Appellate Court found respondent's position to be that of a tenant only and, as he was in cultivating possession of the land, gave the appellant symbolical possession under S. 264. Civil Procedure Code. Appellant states that when upon a decree of this description application is made to the Rent Court for ejectment of the tenant, the applicant is referred back to the Civil Court. *Held*, that when the owner of land is decreed a proprietory title with symbolical possession of such land, followed by execution, he must proceed under the provisions of the Rent Law, if he wishes to eject the tenant.

Notes.

Disc. and Mod.—S. C. 254—Form of suit for ejectment of tenant—Jurisdiction.

S. C. 165.

Court held in Camp—Notice to parties

Appellant whose appeal was struck off in default in Camp, was present in Lucknow on the date fixed for hearing the appeal.

Held, that Courts are bound to let litigants have clear intimation of the time and place where their suit is to be heard and decided and proof of service of notice on defaulter ought to exist on the record before a Court is justified in striking a case off in default.

S. C. 166.

Criminal Appeal—Memorandum of—Improper empressions.

The Sessions Judge declined to accept a criminal appeal presented by a legal practitioner on the ground that certain expressions made use of involved an unwarrantable reflection on the lower Court which might probably amount to contempt of Court. *Held*, that the Sessions Judge ought not to have declined to hear the appeal and it was obviously wrong to visit on the appellants the consequences of their counsel's supposed indiscretion

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S. C. 167.

S. 411 Penal Code—Second trial on other facts.

Several articles of property belonging to different owners were found in possession of applicant, the latter was sent for trial and convicted under S. 411, Indian Penal Code, of having had dishonest possession of stolen property belonging to one of the owners. He has been subsequently sent for trial and convicted on a similar charge in respect of articles belonging to another person, the charge being that he had dishonest possession of those articles at the same time and place as in the first trial *Held*, that the second trial and conviction were bad.

S. C. 168.

Penal Clause in Contract—Enhanced rate of interest Penalty.

It was stipulated in a mortgage bond that interest on the loan at Rs 1/12 per cent per mensum was payable half yearly and

that if the interest were not paid on the dates specified the rate should be altered to Rs. 2. per mensum from the date of the bond, and that interest at the same rate (Rs. 2 per mensum) should be payable on the unpaid interest. *Held*, that there is no question whatever as to what the contract between the parties really was, and there is no prefex for supposing that the execution of that instrument was one which it would be unreasonable for a Court of Justice to enforce.

Notes.

Not F.—3 O. C. 168—Increased rate of interest—Penalty.

S. C. 169.

Promissory Note—Duly stamped.

A suit was brought upon a promissory note chargeable with a duty of Rs. 3, written on an impressed *Hundi Stamp*. The Court of first instance, considering that the instrument was not "duly stamped," impounded it. The Appellate Court reversed the lower Courts finding. *Held*, that as the promissory note was not written upon the "impressed sheet" prescribed by the rules contained in the Notification No. 1,288 dated 3rd March 1882 issued by His Excellency the Governor-General in Council it was not "duly stamped."

Notes.

Over.—S. C. 183—Stamp on pronote.

S. C. 170.

Ss. 52, 55 Act XVII of 1876—Resumption.

An application was instituted before a District Judge to have it declared that a rent-free grant was liable to resumption. The grant was in existence on 10th October 1876, the date on which the Oudh Land Revenue Act became law. The application was instituted more than 12 years subsequent to the passing of the act. *Held*, (reversing the decision of the District Judge) (*a*) that the application was not time-barred and (*b*) that an appeal lies to the Judicial Commissioner from orders passed by District Judges on applications under S. 53 of the act.

Notes.

F.—S. C. 174—Limitation in resumption cases.

Diss.—S. C. 259—Appeal against the order of the District Judge in cases under S. 52.

Diss.—S. C. 276—Time of accrual of cause of action in applications to resume.

S. C. 171.

Intestate succession—Change of religion—Oudh Estates Act (I of 1869) S. 22.

A taluqdar died in 1880 intestate leaving a widow who had a life-interest in certain villages of the taluqa. The widow died in 1886, whereupon auction-purchasers took possession of those villages. On suit by sons of *Jagardeo Singh*, brother of the deceased taluqdar, to recover possession of those villages by setting aside the sale, it was contended that *Jagardeo Singh*, by becoming a convert to the Mohmmedan faith in 1843, had for-feited his rights to the succession, and that his claim was not saved by act XXI of 1850. *Held*, that S. 22 of the Oudh Estates Act contains a complete Code of succession *ab intestate* and that the person designated as next heir by that section does not forfeit his inheritance by having changed his religious faith. *Held*, also, that act XXI of 1850 was not first introduced into Oudh by act XV of 1874 but was in force there since 1856 when the spirit of the Bengal Regulations was declared to be law of Oudh

S. C. 172.

S. 193 Penal Code—Purjury

Held, that where a witness makes a statement before the Court of Sessions which contradicts that made by him before the committing officer and no evidence is given to show which statement is true it cannot under S. 477, Criminal Procedure Code, be said that an offence has been committed under the cognizance of the Court of Sessions.

Notes.

F.—S. C. 206—Purjury on an alternative charge—Trial by Sessions Court.

S. C. 173.

Hindu family—Suit for share against vendee—Arts 91, 127, 142, 144 *Limitation Act—Burden of proof as to legal necessity.*

A, a member of a joint Hindu family, sued to recover his share of the ancestral property from B to whom it had been sold by A's co-sharers. *Held*, reversing the decision of the lower Appellate Court (*a*) that Art 127 was not applicable; (*c*) that the limitation applicable was either Art 142 or 144, and (*d*) that the burden of proof lay on the vendee to prove that the sale had been made for a legal necessity and that he had made proper inquiries.

S. C. 174.

Resumption—No limitation applicable to.

Plaintiff applied for a declaration that certain land granted rent-free by her husband's father some 35 years before the institution of the suit is resumable. Defendant asserts that the land is part of a *muafi* grant conferred upon his ancestor by Nawab *Asaf-ud-daula* a hundred years ago and that the application is time barred *Held*, that there is no limitation applicable to resumption cases.

Notes

App.—2 O. C. 295—Resumption "in part."

S. C. 175.

S. 411 Penal Code—S. 75—Imprisonment in default of fine.

Held, that punishment for non-payment of fine which "shall not exceed one fourth of the term of imprisonment which is the maximum fixed for the offence" does not include punishment inflicted under S. 75, Indian Penal Code.

S. C. 176.

Landlord and tenant—Adverse title—Decree for possession S. 264 C. P. C.=O. XXI, r 36, Act V of 1908.

Appellant issued a notice of ejectment against the respondent, who successfully contested it on the ground that the land was his *sir*, the Civil Court declared respondent to be without any right and decreed actual possession to plaintiff. *Held*, that

where an adverse title is unsuccessfully set up the plaintiff is entitled to a decree for actual possession.

S. C. 177.

Pre-emption—S. 9 Oudh Laws Act.

The appellant, already an under-proprietor, purchased from the owner under-proprietory rights in certain plots in a village, whereupon the *talugdar* instituted a suit to establish his right of pre-emption. The Court of first instance dismissed the claim on the ground that appellant as one of the village community has under S. 9 of the Oudh Laws Act a preferential claim to the taluqdar, the lower Appellate Court reversed this decision on finding that the decrees obtained by the original owners were distinct, *Held*, that though the appellant can not claim pre-emption as "a co-sharer of the sub division of the tenure in which the property is comprised "or" as a co-sharer of the whole mahal" seeing that he is the owner of isolated plots only, still he is a member of the village community within the meaning of S. 9 of the Oudh Laws Act.

Notes.

R.—3 O. C. 110—Member of the village community.

R.—5 O. C. 266— „ „

Not App.—5 O. C. 399.—Co-sharer of isolated plots—Right to claim pre-emption.

R.—7 O, C. 275—(Not deciding the point.) Whether residence in village a necessary qualification.

R.—9 O. C. 271—Proprietor's suit for pre-emption against under proprietor.

S C 178

Pre-emption—S. 9 Oudh Laws Act—Right of superior proprietor to pre-empt.

The holders of $\frac{2}{3}$rd share in a village sold to one of the respondents, 40 bighas, 30 biswas of land. Thereupon appellant, the holder of the remaing $\frac{1}{3}$rd share in the village, established her claim to one-third of the land sold, upon which the sellers made up the deficiency to the purchaser from other land in respect of which land the appellant claims a right of pre-emption. *Held*, that as a sale took place the appellant as a superior proprietor has under cl. (I) S. 9, Oudh Laws Act, a right to

buy, her title in respect of that superior proprietary land being better than that of any under-proprietor.

S. C. 179.

S. 39 Excise Act—Employment of servant by licensed vendor.

The accused admitted having sold a quarter of a seer of liquor to a customer though she had no license in her name. *Held*, that the accused who is the aunt of the retail licensed vendor and sold the liquor during his momentary absence to a customer acted in every way as his servant; the license does not prohibit the employment of servant by a licensed vendor.

S. C 180

Landlord and tenant—A tenants' objection to notice of ejectment disallowed—Continuance of his possession—Suit in the Civil Court to eject the tenant—Jurisdiction—Ss. 60 and 108 Oudh Rent Act.

A tenant unsuccessfully objected to a notice of ejectment and retained possession of his holding. A suit was, therefore, instituted in the Civil Court for recovery of possession of the holding and for damages. *Held*, that a Civil Court has no jurisdiction to entertain such a suit, the cognizance of which has been reserved to Revenue Courts under the prohibition contained in the opening words of S 108 Oudh Rent Act.

S. C. 181.

Revenue Agent—Personal servant.

A revenue agent holding a certificate and practising as such appeared as the recognized agent of the appellant. *Held*, that a revenue agent should not be permitted to appear in Court under the guise of a personal servant of any party.

S. C. 182.

Amendment of decree after appeal.—S. 206 C. P. C. = S 52; O XX, r, 6 (V of 1908)

The Court of first instance dismissed a suit on the 15th March 1889, with all costs on plaintiff, but in the decree the full amount of

pleader's fee for the defendant was not entered. This decree was on appeal confirmed by the District Judge on 9th October 1889. On application being made under S. 206 C. P. C., the Court of first instance and the Lower Appellate Court ordered amendment of their decrees on 17th March and 3rd May, respectively. *Held*, that the Sub-Judge's order was *ultra vires*, for it distinctly varied the first order of the Lower Appellate Court dated 9th October 1889, that the amendment would have certainly been proper had the Lower Appellate Courts' first order not been in existence and that as the Lower Appellate Court's second order coincides with the second order of the Court of first instance to interfere now would only do harm.

S. C. 183.

Ss. 3 cl. (10), 9, 33, 34, and 37 Stamp Act (1879) Promissory notes not chargeable with duty of 6, 10 or 12 annas—'Duly stamped' if written on Hundi Stamp.

1. That a promissory note for Rs. 60, written on an impressed sheet of 2 annas in value, bearing the word *Hundi* on it, is not admissible in evidence.
2. That as the document was written on an impressed sheet, it therefore so far complies with the law, and that a rule which says that certain promissory notes shall be written on impressed bearing the word *Hundi*, can not be interpreted as enacting that other promissory notes shall not be written on impressed paper of the proper value, if it happens to bear the word *Hundi*.

Notes.

App.—1 O. C. 160.—Appeal being a "proceeding" within the meaning of S. 6 Act 1 of 1868.

S. C. 184.

S. 12 Limitation Act—Limitation for appeal—Enclusion of time between furnishing of estimate of costs of copy and compliance with the estimate.

Held, that the time between the date of furnishing the estimate of cost of copy to applicant and that of depositing the folios cannot be allowed in computing the period of limitation.

Notes.

F.—1 O. C. 47—Non exclusion of time from date of estimate to furnishing of folios.

S. C. 185.

Art 179 Limitation Act—Application to the proper Court for execution.

A decree-holder contended that his present application for execution, dated 20th June 1890, is not time barred though the last application for execution of this decree was dated 18th June 1887 ; that limitation runs from 20th June 1887, because (*a*) his agent *Debi Pershad* was present that day in the executing officer's court ; from 22nd June 1887 because (*b*) *Debi Prasad* on that date deposited *talbana* in Court ; and from 27th June 1887, because (*c*) *Debi Prasad* was on that date ready to accompany the Civil Court process server to point out the person of the judgment-debtor. *Held*, that it is straining not merely the intent but the words of the law to denominate the fact of Debi Pershad's presence in Court on 20th June 1887 the deposit of *talbana* on 22nd June 1887, and the presence of Debi Prasad along with the process server on the 27th June 1887 "an application to the proper Court etc.," within the meaning of Art 179, Limitation Act.

S. C. 186.

S 228 Penal Code—Intentional insult or interruption to a public servant.

On 24th February 1891, Mr. Boyle, Barrister at Law, moved the Judicial Commissioner to take action in the matter of a complaint which he brought against Mr. R. H. Niblett—M. A., Deputy Collector and 1st class Magistrate, Lucknow for allowing one *Permanand* Court, inspector, to use various insulting expressions and otherwise to annoy and interrupt him while conducting the defence in a criminal case. On the 2nd March 1891, a summons was issued by the Deputy Commissioner of Lucknow charging Mr. Boyle with an offence under S. 228 Penal Code. The Judicial Commissioner transferred the case to his own file, and having heard the evidence of the witnesses for the crown, *held*, that there was no proper justification whatever for the institution of criminal proceedings against Mr. Boyle, and that there was no intentional interruption of the Magistrate's proceeding on the part of Mr. Boyle.

S. C. 187.

Appeal—Decree of a Subordinate Judge in a suit valued at more than five thousand rupees—Forum for appeal—S. 40 Act XX of 1890.

An appeal was presented in the Court of the Judicial Commissioner, Oudh, against a decree of the Sub-Judge, Barabanki, in a suit the value of which exceeded Rs. 5,000. *Held*, that the appeal does not lie to the Judicial Commissioner but, if cognizable at all, to the District Judge.

Notes.

App.—S. C. 193;—Forum of appeal—Act XX of 1890—Proceeding commenced in S. 6. Act I of 1868, includes appeal.

F.—S. C. 211— " "

R.—S. C. 293—Change of forum of appeal with reference to Act XX of 1890.

R.—13 O. C. 152 (154)—(Not discussed)

S. C. 188.

Ss. 311 and 312 C. P. C.=O. XXI rr. 90, 92 (of 1908)—Execution sale—Proof of substantial injury.

The applicant asserted that his property fetched a low price because the profits were incorrectly stated in the sale proclamation and that he was damaged by the omission from the proclamation of any mention of his reversionary right in a house and some 22 bighas of *Sir* land. *Held*, that no substantial injury has been proved and that when a judgment debtor puts in an objection under S. 311, C. P. C., he should state all grounds of objection and should not be allowed at a later date to allege additional flaws.

Notes.

Exp.—4 O. C. 379—Right of judgment debtor to object to sale.

S. C. 189.

Copy—Statements of witnesses recorded by a Police officer—Right of the accused to inspect and obtain copies thereof.

That an accused person on his trial has a right to call for and inspect statements of witnesses recorded by a Police officer while making an investigation under S. 161 Cr. P. C., and that where

the law allows an accused person to inspect documents the right to obtain copies thereof from the proper officer will ordinarily follow as a necessary corollary.

S. C. 190.

Ss. 320 and 411 Penal Code—Theft commited during the mutiny of 1857—Dishonest retention of stolen property—Amnesty proclaimed by the Government after the mutiny.

The prisoner having been convicted of dishonest retention of stolen property having reason to believe the same to be stolen it was urged that as the theft referred to was committed during the mutiny it was among the offences pardoned by Government and that consequently retention of the property stolen was no crime. *Held*, that the amnesty proclaimed by the Government after the meeting is not tant amount to a perpetual indulgence to perpetrate fresh offences arising out of offences committed before or in the mutiny.

S. C. 191.

S. 439 Cr. P. C. Offence under S. 211 Penal Code—Notice to show cause against the institution of proceedings—Sanction to prosecution—High Court's power to remedy improper acquittals.

The Session's Judge, Lucknow, acquitted the respondent of an offence under S. 211 Penal Code, on the ground, (1) that he was not served with notice to show cause against the institution of proceedings against him; and (2) that the sanction was defective in form. *Held*, that prior notice to respondent to show cause was not necessary and that the sanction given by the Deputy Commissioner was amply sufficient. *Held*, also, that the last clause of S. 439 Cr. P. C., contains nothing to prevent the High Courts from remedying improper acquittals in the exercise of their jurisdiction under this section. For instance they may reverse an acquittal and order retrial.

S. C. 192.

S. 367 Cr. P. C.—Record of proceedings in pencil Initiating in lieu of signing—Writing of Judgment by the presidiny officer of a Court.

A Deputy Commissioner recorded the greater portion of his proceedings in pencil, the evidence of the witnesses was only initialed

by the Deputy Commissioner, and the judgment was not written by the Deputy Commissioner. *Held*, that although pencil writing is not precluded in so many words in the law, it is precluded by common sense and common usage; that initialling is not signing, and S. 367 Cr. P. C., prescribes clearly in whose handwriting a judgment must be.

S. C. 193.

Ss. 8 and 11 of Act XXII of 1886. Decrees passed in appeal by Commissioner before the date on which part II of Act XX of 1890 came into force—Second appeals from the decrees of the Commissioner presented after the said date—Forum for such appeals—S. 54 of Act XX of 1890—S. 6 of Act I of 1868—Meaning of the words "Repeal of an Act" and "proceedings"

The application of S 6 of Act I of 1868, to the provisions of Act XX of 1890, amending the Oudh Rent Act XXII of 1886, is not impliedly excluded by the wording of S. 54 of Act XX of 1890.

Notes.

F.—S. C. 211—Proceeding commenced in S 6 of Act I of 1868 as including appeals.

Dist.—S. C. 293—"Competent" in S. 25 Civil Procedure Code.

S. C. 194.

S. 332 C. P. C.=O. XXI, rr 100, 101, 103 (V of 1908)—Conflicting execution sales—Lis pendens—Art 12 and 13 Limitation Act.

On a suit by a judgment creditor of H for a declaration of her right to attach the property in suit as part of her judgment debtor's estate.

Held, (1) that the suit was not barred by limitation either under arts 12 or 13 of the Limitation Act;

(2) That in the case of rival purchasers of the same property at execution sales he whose purchase is earlier in time and in whose case the sale stands unreversed is to be preferred to the rival purchaser at a latter date even though the latter may have been put into possession;

(3) That the sale to M. was a nullity as nothing passed under it;

(4) That the doctrine of *lispendens* was applicable to the circumstances under which M. purchased, and (5) that at the time of that purchase the suit by H. had reached the contentious stage.

Notes.

(4) F.—S. C. 215—suit to set aside void sale.

S. C. 195.

S. 52 Oudh Land Revenue Act—Grant for an indefinite period—muafi grant not ripening into absolute proprietory right by lapse of time—applicability of S. 52 to existing muafi only—Regular suit for possessive of Muafi land.

1. That if a grant be made to a man for an indefinite period it enures, generally speaking, for his life time and passes no interest to his heirs, unless there are some words showing an intention to grant a transferable and heritable interest.
2. That the sons of the original muafidar held on the same tenure and had no proprietory right whatever, and that a *muafi* grant does not by lapse of time and undisturbed possession ripen into an absolute proprietory right.
3. That it was not necessary for the plaintiff to have proceeded under Ss. 52 etc of Act XVII of 1876, because those sections applied to an existing valid *muafi*, while the appellant's contention was that the *muafi* had ceased to exist and the respondents were trespassers.

Notes.

App.—S. C. 209—Construction of a maintenance grant.

R.—S. C. 291—Construction of gift.

S. C. 196.

Hindu Law—Possession of Joint family property by a widow after the death of her husband and of her sons—Exclusion of son's widow—Adverse possession of widow—alienation of property—Right of her husband's reversioners—Successions.

Held, that on the facts of J (widow) had acquired a prescriptive right to the property by adverse possession, thereby defeating the

the titles both of her husband's reversioners and of her son's widow, that her successors were to be looked for among her heirs and not among her husband's heir and that the plaintiff's not being her heirs had no *locus standi* to question any alienation she might have made.

S. C. 197.

Ss. 54, 74 and 78 Transfer of Property Act—Mortgage by conditional sale–Suit for foreclosure—Puisne mortgagor Priority—Fraud—S 65 Registration Act.

A suit for foreclosure by the holder of a mortgage by conditional sale (the mortgage being dated in August 1884) was resisted by the appellants who held possession under a consolidating mortgage deed, dated in June, 1886. The latter contended that as some of their encombrances bore date before August 1884, they were entitled to priority over plaintiffs' conditional sale in respect of them, and that their encumbrances, subsequent to August 1884, were also entitled to priority because plaintiffs' conditional sale deed had not been registered at the proper office. *Held*, that appellant's encumbrances of a date prior to August, 1884, did not merge in the deed of June, 1886, that appellants were entitled to use them against plaintiff that they had priority over plaintiff's mortgage by conditional sale, that appellants were members of an undivided Hindu family, and that as a condition precedent to foreclosure plaintiff must pay off appellants' encumbrances dating from before August, 1884.

Further held that the registration of plaintiff's conditional sale deed at a Sub Registrar's office, in the *Bahraich* District, was a good and valid registration—that plaintiff was not bound to satisfy himself that the subregistrar performed the duty imposed on him by S 65 Registration Act—that no fraud was to be inferred from the fact of registration at *Bahraich*, and that therefore plaintiff's mortgage by conditional sale had priority over appellants encumbrances subsequent to date in June, 1886.

Notes.

S C. 198.

Ss. 15, 22 *and* 24 *Oudh Estates Act—A taluqdars power of gift and bequest—Will of a taluqdar in favour of a maintenance holder.*

A Taluqdar bequeathed his taluqdari estate to his son's widow, such bequest to have effect in possession of the determination of a previous life estate in the Taluqdars own widow. The Taluqdar died within a short time after the execution of his will. On suit by the son's widow after his mother in law's death to recover the estate from the late taluqdar's nephew, *held* that the will was invalid under the last clause of S 13 of Act I of 1869, and that the fact that the plaintiff was entitled to a maintenance under S 24 of that Act did not bring a will in her favour within the exemption contained in Sub sec (1) of S. 13 of the Oudh Estates Act.

Notes.

Dist.—S. C. 22—Constructions of S 13 Oudh Estates Act.

S. C. 199.

Settlement Court decree—Under-proprietary, right. Decree obtained by fraud. Suit to set aside—Court of Wards.

1. That a decree of a Settlement Court in favour of an under proprietary right by *birt* is not an Act of State conferring on the *birtiya* a title direct from Government such a decree can be attacked on the ground that it was obtained by fraud and collusion.

2. Court of Wards having without due enquiry admitted a *birtiya* claim to an under proprietary tenure, *held* not have performed the duty incumbent on it under Regulation X of 1893.

Notes.

(1) **F.**—S. C. 200—Suit to set aside Settlement Court decree.

(1) **Dist**—S. C. 233— „ „ „

App.—4 B. C. 31—Impleadiug of minor.

S. C. 200.

Settlement Court decree—Suit to set aside—Minor—Court of Wards.—Dismissal of suit upon a compromise entered into by the Court of Wards.

1. A person on whose behalf a claim to the superior proprietary right in a village has been preferred in the Settlement Court and has been dismissed by a decree of that Court passed upon a compromise said to have been entered into on his behalf by the Court of Wards, has on attaining his majority a right to bring a suit in the Civil Court against the representatives of the decree holder to set aside that decree and recover possession of the village with mesne profits on the ground that the compromise had been entered into on his behalf without lawful authority. Such a decree is not equivalent to a grant of the superior proprietary right in the village by the Government to the decree-holder by name.
2. A judge who after having completed the hearing of a Civil case and fully made up his mind as to the judgment he will give on it, is relieved of his office as judge before having had time to write his judgment, may after being relieved of his office, write a judgment to be pronounced by his successor in office.

Notes.

(1) **Dist.**—S. C 233—Effect of Settlement Court decree obtained under para. 5 of Lord Canning's letter of 12th October 1858.

F.—8 O. C. 202.

S. C. 201.

S. 3, Cl. (10) Stamp Act, 1869.—Promissory note written on "Hundi impressed stamp"—"Duly stamped"—

Applicant was fined for accepting promissory notes payable on demand and written on *Hundi* impressed stamps instead of on paper to which adhesive stamps had been affixed. *Held*, that the promissory notes were "duly stamped" under S. 3 Cl. (10) Act I of 1879.

S. C. 202.

S. 108 (10), Oudh Rent Act—Suit for recovery of occupancy of land from which an underproprietor or tenant has been illegally ejected—jurisdiction.

Plaintiff applicant calling himself a perpetual lessee or under-proprietor sued for recovery of possession of land leased to him

alleging that he had been wrongfully dispossessed therefrom by the landlord. *Held*, that these are exactly the matters provided for by S. 108 (10), and that the suit was cognizable exclusively by a Rent Court.

Notes.

Dist.—10 O. C. 23 (27)—That the real question for decision in the case was whether the plaintiffs were entitled to succeed to the right of occupancy as heirs of the deceased tenant, that until such question was determined no relationship of landlord and tenant could be established to enable the plaintiffs to claim relief in the Revenue Court.

F.—12 O. C. 90 (92)—

S. C. 203.

Ss 3, 4, 5 *and* 6 *Gambling Act.*

That gambling is in itself not an offence and only becomes punishable as an offence when it takes place in a common gambling house or in a public place, and that it is an absolutely necessary preliminary to the issue of a search warrant under S. 6 of the Act, that the Magistrate or the District Superintendent of Police, should have reason to believe on credible information that the house which it is proposed to search is used as a "common gaming house."

Notes.

Disc. and Exp.—5 O. C. 37—Ground for issuing warrant under the Act.

S. C. 204.

S. 283 C. P. C.=O. XXI, r. 63 (V of 1908)*—S. 53 Transfer of Property Act—Claim to property under attachment—Benami transaction.*

1. *Burden of proof*—In a suit under S. 283 C. P C, where the plaintiff is impeaching the disallowance of her objection in the execution department, the burden is on her to prove that at the date of attachment the property in suit was her property and not the property of the judgment debtor.
2. *Execution of a registered conveyance and part payment of price*—Under such circumstances the purchaser has no right to a decree for immediate possession without previous payment of the balance.

3 *Effect of absence of mutation of names*—Such absence lends little, if any, support to the inference that a transfer is fictitious. Nor should the transferor leaving the transferee temporarily in possession be construed as shewing that the transfer was a mere sham, when the parties to the transfer are near relatives.

4. *S. 53 Transfer of Property Act.*—A transfer of property made by a judgment debtor merely to raise money to pay off other debts and to defray the costs of an appeal agaist the decree is not voidable at the option of the judgment creditor under S. 53. The words "good faith" in S 53, do not mean "without knowledge of the debtors liabilities," but "unaccompanied by any trust, express or implied, in favour of the transferor." When an attachment is made in execution of a decree, which is subsequently reversed on appeal, and is then restored on second appeal, a private alienation of the attached property made during the continuance of the attachment, before the reversal of the decree by the first Appellate Court is void against the decree holder's claim to sell the property, but only for the recovery of the amount for the realization of which the attachment issued.

Notes.

App.—S. C. 209—Conduct and acknowledgment of title—Construction of gift.

S. C. 205.

Pre-emption—Existence of right of, no defence to suit by purchaser for possession.

That the existence of a right of pre-emption in a person in possession of a property is not a good defence to an action brought against him by a purchaser of the property for possession. The only way to enforce such a right is by separate suit.

Notes.

App.—2 O. C 9—Effect of plaintiff pre-emptor denying title of vendor.

R.—6 O. C. 279—(Not discussed)—Pre-emption as defence to redeem.

S. C. 206.

Ss. 477 *and* 195 *Cr. P. C.*—*Sanction—Contradictory statement.*

When a witness makes a statement before the Court of Sessions which contradicts that made by him before the committing Magistrate, and there is no evidence to show which statement is true, a

Sessions Judge has no jurisdiction under S. 477, to charge the witness, in the alternative, with having intentionally given false evidence, either in his evidence before the Sessions Judge, or in his evidence before the Committing Magistrate and to commit and try the said witness on such charge.

Notes.

Cite—S. C. 232—(Not discussed).

S. C. 207.

S. 53 Oudh Land Revenue Act—Resumption "in part."—

That the words "in part" in S. 53 must be taken to refer to the area of the resumed *muafi* and not to the terms on which the land is, in future, to be held, and that a Civil Court has no power either to compel the land lord to retain the *ex muafidar* as a tenant, or to fix the rent at which the latter shall continue to hold as a tenant.

Notes.

Diss—2 O. C. 295—Resumption "in part"

S. C. 208.

Pre-emption—Presumption from omission to give notice to pre-emptor—Price fixed in good faith—Meaning of the words "good faith" Ss. 10 and 13 Oudh Laws Act.

That the enquiry as to the market value should not have been made unless and until the Court was satisfied on evidence before it that the price entered in the sale deed had not been fixed in good faith.

The pre-emptor must pay even a "fancy price," if that be the price agreed on and actually paid and received. Meaning of the words "good faith" explained.

Notes.

Exp.—1 O. C. 217—Market price and bad faith.

R.—4 O. C. 247— " "

S. C. 209.

Maintenance grant—Construction of.

Where a grant of an estate for the maintenance of the grantee purported to be "*hamesha ke liyee*, *Held* that these words do not imply the grant of an estate of inheritance and that grant enured only for the life time of the grantee.

Notes.

Doubt—S. C. 291—Construction of grant by Hindu,

S. C. 210.

S. 302 Penal Code—Murder with ferocity—Where murder, though not premeditated, is carried out with deliberate and persistent ferocity, sentence of death should be passed.

Notes.

R—S. C. 216—Practice and law as to severity of sentence, (distinguished on the facts.)

S. C. 211.

Appeal—Suit instituted before S. 11 of Act XIV of 1891 came into force admissibility of second appeal—

That a second appeal in the suit presented after April 1891, was a "proceeding commenced" within the meaning of S. 6 of Act I of 1868, (the General Clauses Act) and that its admissibility was governed by S. 21 of Act XIII of 1879, and not by S. 584 of the Civil Procedure Code.

Notes.

Dist.—S. C. 293—"Competent" in S. 25, C. P. C.

App.—1 O. C. 160—Appeals being "proceedings" within the meaning of S. 6 of Act I of 1868.

S. C. 212.

Partnership—Suit by a retired partner for accounts and distribution of assets of a firm. All members necessary parties Non-joinder—S. 22 Limitation Act.

That the ten additional defendants were necessary parties to the suit being members of the dissolved firm, that the suit against them was time barred and that the suit was therefore, bad for non-joinder, as it could not proceed against the original defendants only.

S. C. 213.

Arts 32, 120 and 142 Limitation Act—Suit for possession of land by removal of trees—Commission for local investigation.

1. It was an obviously appropriate course to appoint a Commissioner to hold a local enquiry for the purpose of ascertaining the age of trees.

2. The Commissioner was bound to record in writing the evidence of the witnesses he had examined and to return their depositions with his report to the Court, and that the Court was bound to take that report and depositions into its consideration as being a part of the record, and was not bound to examine the Commissioner as a witness unless it thought fit.
3. When to a suit for recovery of possession of immoveable property from a trespasser is joined with a prayer for permission to root up trees planted by the trespasser, the limitation rule is not thereby affected The article applicable is Art 142 Limitation Act.

S. C. 214.

Pre-emption—Omission to allege readiness to pay the price found to have been actually paid—Dismissal of suit.

That under the circumstances of the case, the plaint could not be amended in second appeal; and that a decree could not, without amendment of the plaint, be given for pre-emption on payment of a sum larger than the sum specifically offered in the plaint.

S. C. 215.

Suit to set aside auction sale—Art 12 (a) Limitation Act—Burden of proof—

That if the sale was null and void, then the suit was not barred by Art 12 (*a*).

Notes.

F.—S. C. 295—Validity of auction sale where certificate granted and sale confirmed but no regular attachment.

R.—8 O. C. 409 (413, 414)—That a sale without jurisdiction was a mere nullity.

R.—12 O. C. 47, 297, 299—

S. C. 216.

S. 302 Penal Code—Death caused by dashing a child on the ground.

Where a child 3 or 4 years old, threw a clod of earth at a man who then seized hereby the legs, swung her round his head and dashed her head three times on the ground, shattering her skull, and thereby caused her death within an hour, *held* that such a person was guilty of the offence of murder, for which the proper sentence was death.

S. C. 217.

S. 17 Guardian and Wards Act VII of 1890—Minor—Matters to be considered in appointing guardians—That the natural father should, under suitable safe guards, be appointed guardian of the minor's property but that the adoptive mother could not be deprived of the guardianship of his person.

Notes.

F—4 O C. 241—Qualification for guardian not depending on relationship.

S C. 218.

Landlord and Tenant—Private award directing tenant to pay to landlord a certain sum on certain agricultural land—Suit to recover the sum awarded Ss. 525 and 526 C. P C.=The second Schedule (V of 1908)—Jurisdiction.

1. That the party seeking to enforce the award was not restricted to the procedure allowed by Ss. 525 and 526 C. P. C., but might have recourse to a regular suit.

2 That the suit, being suit to recover compensation for breach of the contract to pay such sum as might be awarded, was cognizable by a Civil Court under S. 11 C. P. C. (1882).

S. C. 219.

Suit to eject a trespasser—Joinder of plaintiffs—Burden of proof. Under proprietory tenure—Jurisdiction

When the whole title to an estate is vested in one or both of two persons, they may join in a suit to eject a trespasser from parcels of land belonging to the estate, and a joint decree may be passed in their favour without determining the nature and extent of their respective interests in the estate.

Three such suits brought against the appellant, his father and grand father, respectively, were resisted on the ground that the defendants held the land in suit, some under mortgages made and others under an under-proprietary tenure granted by predecessors of the respondents. *Held*, that the burden of proof lay on the appellant, who on the deaths of his father and grand father had been brought on the records of the suits brought against them. The allegation as to the mortgages and grant not having been proved, and the defendants having been shown to have occupied the lands for their private cultivation during the subsistence of certain leases granted by a

predecessor of the respondents to the appellants father and grand father for the farm of the entire villages in which the lands in suit lay, *held* that no tenancy independent of the leases, having been created by the defendants occupation of these lands and their continuance in occupation of these lands after the determination of the leases being mere acts of trespass, the suit to eject them had been rightly brought in the Civil Court.

S. C. 220.

Small Cause Court suits—Notification of 14th April 1891, under S. 40 (3) Act XX of 1890 (N. W. P. and Oudh).

Suit of the nature cognizable by Small Cause Courts within the meaning of the Notification, are suits of the nature cognizable by Small Cause Courts, in which the value of the subject matter does not exceed Rs. 500.

S. C. 221.

Witness—Competency of child to testify—S. 118 Act I of 1872 Nature of doubt to which accused person is entitled.

The proper test of the competency of a child to testify is not whether it understands the nature of an oath, but whether it is able to understand and give rational answers to questions put to it. The doubt which entitles an accused person to an acquittal is a reasonable doubt and no other.

S. C. 222.

Appeal—Raising of new point in—S. 13, 22 (6), 8 Oudh Estates Act—Suit to set aside Will of a Talukdar—Art 91 Limitation Act—Doctrine of election.

1. That the appellant having in his plaint neither set up title as heir at law nor objected to the devise as invalid for want of registration could not be allowed to raise this new question in appeal.
2. That the suit, regarded as a suit by the appellant as heir at law to set aside the devise to the respondent, was not barred by limitation under Art 91 Limitation Act.
3. That the doctrine of election does not apply to the Wills of Taluqdars made under Act I of 1869.

4 That, if the doctrine did apply to such wills, no case of election would be raised by a will not duly executed.

5. That a presentation of a will and codicil by the testator to a Registering officer subsequently to their execution for the purpose of having them registered, and an acknowledgment of their execution at the time of such presentation do not constitute a fresh execution within the meaning of S. 13 of Act I of 1869

6. That a devise of a portion of a taluqa made by a *Taluqdar* entered in the second of the lists prepared by S 8, to the person who would have been the heir at law to the *taluqa*, if the Act had not been passed, does not require to be made by a will registered within one month from the date of its execution.

Notes.

(1) **F.**—S. C. 993—Construction of plaint as disclosing alternative claim.

(5) **F.**—5 O. C. 345—Construction of S. 13, Oudh Estates Act

(1) **R.**—8 O. C. 45 (51)—Opening a new case upon the Sanad was not allowed.

S. C 223.

Not published.

S C. 224.

Execution of decree—Devise of taluka to certain persons in succession for life and remainder in fee.

Grant by Crown to a life tenant of an absolute estate. Declaration of trust by grantee in favour of surviving devisee—Transfer by gift by grantee in breach of trust—Attachment of part of *taluka* in execution of money decree against grantee and transferee—Objection to attachment by heir of remainder man—Trust—Escheat—Property not saleable in execution of decree against transferee S. 56 Act II of 1882—S. 283 C. P. C.—Appeal.

Notes.

F.—S. C. 302—Construction of Will—Remainder by devise.

S. C. 225.

Ss. 42, 283 C. P. C.=O. II, r. 1 (V of 1908)—Suit seeking declaration that property is saleable in execution of decree. Frame of suit—S. 7 Court Fees Act (VII of 1870)—Meaning of "consequential relief is prayed"

1. That the suit was not open to the objection that it was not framed in accordance with the provisions of S. 42 C. P. C.
2. That the words "consequential relief is prayed" mean "is prayed from the Court trying the suit brought to obtain the declaratory decree"
3. That the suit in respect of the first declaration sought (that the deed of gift and sale be declared void) required a Court-fee of Rs. 10 and that in respect of the second declaration sought, (that the properties be declared liable to sale) it required a Court-fee of Rs. 10.

S. C. 226.

S. 42 Specific Relief Act—Effect in mutation of names in Collector's register.

Suit for declaration of right of ownership—Plaintiff, if in possession not bound to sue for possession, because defendant's name is entered in the Collector's register—Right to sue for arrears of rent and take proceedings to eject a tenant under Oudh Rent Act independent of entry of name in the register.

S. C. 227.

S. 145 Cr. P. C—Enquiry into question of title—Possession—Attachment of property pending decision.

That a lengthened and minute enquiry into questions of title, involving consideration of voluminous documentary evidence necessarily entails an expenditure of time and labour opposed to the intention of S. 145 which is avowedly limited to one issue of possession, the object aimed at being mainly the immediate avoidance of a breach of the public peace. The Magistrate was consequently directed to attach the property in dispute until the rights of the parties be decided by a competent Civil Court.

S. C. 228.

Benami purchase—Transfer to one person for consideration paid by another Resulting trust—Bare or quasi trust.

Certain properties were severally purchased by a father in the name of his minor son. The father paid the purchase money. There was nothing to show for whose benefit the properties were purchased. *Held*, that the presumption proper to be made in such a case was that the son's name was used benami for his father; and that on these purchases, therefore, trusts of the legal estates resulted to the father who supplied the purchase money, and the son, as a *bare* or *quasi* trustee was not entitled to resist an application by the holder of a decree against the father for sale of his judgment debtor's beneficial interest in the properties.

S. C. 229.

S. 288 Cr. P. C.—Use of the evidence of a witness taken before the Committing Magistrate.

That a Judge is bound to put to the witnesses whom he proposes to contradict by their statements made before the Committing Magistrate, the whole or such portions of their depositions as he intends to rely upon in his decision.

S. C. 230.

S. 203 Cr. P. C.—Dismissal of complaint—Case subsequently forwarded to the Magistrate by the Police—Magistrate competent and bound to entertain case.

A Magistrate is not only competent, but is bound, to entertain a cognizable case forwarded to him by the police notwithstanding he may have previously dismissed the same case, under S. 203 Cr. P. C. on a complaint.

S. C. 231.

S. 622 C. P. C.=S. 115 (V of 1908)—*Delay in applying for revision.*

That in as much as the Court executing the decree had carried out the District Court's order of remand and had set aside the sale and the applicant had appealed against that order to the District Court, and all these proceedings had been held in

consequence of the applicant's neglect to invoke the aid of the Court for *nearly a year*, there was an objection to interfere on revision.

S. C. 232.

Ss. 195 and 537 Cr. P. C.—S. 193 Penal Code—Sanction to prosecution giving false evidence—Alternative charges

1. S. 195 of the Code does not apply to the prosecution of a person on alternative charges of giving false evidence either before the Police Officer investigating a case under Chap. XIV of the Code, or before the Magistsate at the time of the Police investigation, and where therefore the accused can not be said to have given false evidence in relation to proceedings before the Magistrate.

2 If a case in which a complaint by the Court is required by S. 195, no such complaint is made, the defect would be cured by S. 537 Cr. P. C.

S. C. 233.

Settlement Court decree—Second summary settlement.

Settlement of a village with a person other than a Talukdar Lord Canming's letter, dated the 10th October 1859, para 5—Effect of settlement of village with same person at next settlement—Grant—Claim to village by person who was a minor during such settlement Jurisdiction of Civil Court—Fraud.

S. C. 234.

S. 307 Cr. P. C.—Trial by Jury—Reference to High Court under S. 307—Power of High Court.

The test ought to be applied whether reasonable and contious men might be disposed, on the evidence made before them in the case, to entertain a doubt as to the accused person's guilt. If such might be the case, then the Court should not interfere with the verdict, even though it should incline to conclusions different from those adopted by the Jury.

S. C. 235.

Hindu Law—Mitakshara—Inheritance—Kayastha—Sudra—Illegitimate son

1. Assuming that Kayasthas were Sudras, the illegitimate issue of a Kayastha by a Mohammedan kept woman are not entitled to inherit his estate, and that, if *Kayesthas* were not *Sudras* but members of a higher class, the estate of a *Kayestha* could not under the law devolve upon his illigitimate issue, it being only among Hindus of the *Sudra* class that illegitimate children inherit

2. That where a Hindu lived and died in caste, and associated with his relatives, the devolution of his property must be regulated by the law which governed him, and his illegitimate issue were not entitled to retain possession of his property, as against his collateral heirs, on principles of justice, equity and good conscience.

S. C. 236.

S. 9 Act 1 of 1878 (Opium Act)—Illicit possession of opium—Presumption.

A *prima facie* presumption of guilty possession arises from the fact that the opium was found in that part of a dwelling house which is in exclusive occupation of the accused.

S. C. 237.

Grant of land for maintenance—Condition against alienation S. 17 Oudh Civil Court Act—Valuation—Jurisdiction.

(1) *Held*, on the question whether the amount of or value of the subject matter in dispute exceeded Rs 10,000, the pecuniary limits of the jurisdiction of the Subordinate Judge, that whatever the amount of the mortgage money, principal and interest, might be, the value of the subject matter of the suit could not exceed the value of the plaintiff's interest in the land.

2. That the restraint being only partial, this condition was probably valid.

Notes.

Dist.—4 O. C. 163—Condition restraining alienation.

S. C. 238.

S. 244 C. P. C. = S. 47 Act V of 1908—Decree for possession of land on payment of a specific sum of money—Suit for possession of the land on payment of such sum.

C. in 1867 obtained a decree for possession of a share in a village subject to the payment of Rs. 185. In 1889 his heirs sued for possession of the share on payment of that sum. They sued as if the decree was a mortgage, and the relief they claimed was to redeem it as such.

(1) *Held*, that the decree was not a declaratory decree, but one capable of being executed.

(2) That the suit was barred by the provisions of S. 244 C. P. C.

Notes.

R.—S C, 256—Decree for redemption containing no bar—Remedy by second suit or execution of decree.

Dist.—1 O. C. 289.—Effect of Settlement Court decree for redemption.

Dist.—8 O. C. 361 (367)—Second suit for redemption not barred where a Settlement Court decree did not fix a time within which the mortgage money was to be paid.

S. C. 239.

Ss. 488 and 490 Cr. P C.—Mohammedan husband—Order for maintenance of wife—Divorce—Enforcement of order.

That the Magistrates were bound to enquire into the objection filed by the husband, and if they found that the husband had, as a matter of fact, validly divorced his wife, to refrain from enforcing their original order.

S. C. 240.

Ss. 10 and 111(G) Transfer of property Act—Permanent and heritable grant by way of lease—Condition against alienation—No proviso for re-entry in case of breach of condition—Forfeiture.

That the condition against alienation was not void merely by reason of the omission to add a proviso for entry in case of breach of the condition, but it could not give rise to a forfeiture determining the lease, and therefore the suit for recovery of the lands was not maintainable.

Notes.

R.—7 O. C. 265—Effect of condition against alienation by lessor.

S. C. 241.

S. 568(b) C. P. C. = O XLI, O. r. 27 (V of 1908.) Appellate Court—Additional evidence—Substantial cause.

Where an Appellate Court being of opinion that the plaintiff had prosecuted his case properly in the Court of first instance, allowed witnesses to be examined whom the plaintiff might have called, but did not choose to call, *held*, that this procedure was not authorized by S 568 (*b*), and the additional evidence so taken was not legal evidence and could not be regarded as relevant.

Notes.

App.—1 O C 199.—Grounds for admitting additional evidence.

S. C. 242.

Witness—Examination of a child without affirmation S. 5 Oaths Act (X of 1873)—S. 118 Evidence Act (I of 1872) Ss. 304, 304A and 323 Penal Code.

1. A child who is examined as a witness should be examined on oath or affirmation, whether he understands the nature of an oath or not.

2. Where two persons hurt another, who was suffering from congestion of the lungs, intentionally, but without the intention of causing death, or causing such bodily injury as was likely to cause death, or the knowledge that they were likely by their acts to cause death, and by their act caused the death of such other person, *held*, that they were improperly convicted of an offence under S. 304, that S. 304A was not applicable to the facts of the case, and that they had committed an offence punishable under S. 323.

S. C. 243.

S. 9 Specific Relief Act—Constructive possession by receipt of rent—S. 108 (10) Oudh Rent Act—Suit by a tenant for recovery of occupancy of land from which he has been illegally ejected by landlord.

S. 108 (10) does not bar the remedy provided by S. 9 Act I of 1877.

S. 9 *Specific Relief Act*, is only intended to apply in cases where the plaintiff has been in pyhsical possession of property and has

been forcibly dispossessed therefrom without his consent and otherwise than in due course of law, and not in cases where his possession has been purely constructive by virtue of the receipt of rent from the *ryots* who are in physical possession.

Notes.

Not F.—14 O. C. 60 (61).

S. C. 244.

S. 55 Oudh Land Revenue Act—Grant for Janbazi Resumption—"Valuable consideration."

That "valuable consideration" means "money or money's worth."

Held, that where land had been granted rent free in lieu of the grantee's *Janbazi*, that, the consideration for the grant not being money or money's worth, the land had not been acquired for valuable consideration.

Notes.

App.—S. C. 288.—Valuable consideration S 52 Oudh Laws Act.

S. C. 245.

House—Right of occupancy—Custom Burden of proof.

That it lay on the plaintiff to prove the custom under which he was entitled to eject such tenant at any time on payment of compensation.

S. C. 246.

(108(15) Oudh Rent Act—Jurisdiction of Civil and Revenue Court, Arts 62 and 127 Limitation Act.

Held, as regards the claim for half the money realized by B under the bonds, that the suit was not one of the nature described in S. 108(15).

Held, also, as regards such claim, that the bonds and the moneys which had been realized by B in respect thereof could not be treated as the joint property of a joint family, and therefore Art 62 applied to the suit.

S. C. 247.

S. 392 C. P. C. = O XXVI r 9 (V of 1908)—Commission for local investigation —Illegitimate use of the powers conferred by the section—Admissibility in evidence of report of Commissioner.

That the report of, and the evidence taken by, the Commissioner ought not to be regarded as evidence in this case.

S. C. 248.

Pre-emption.

1. *Limitation*—The law of limitation for pre-emption suits is to be found in Art 10 Limitation Act, and not in S. 11 Oudh Laws Act.

2. *Equity of redemption.*—An equity of redemption does not admit of "physical" possession within the meaning of Art 10 Limitation Act.

3. *Omission to give notice-fraud* —The mere intentional omission of a vendor to give a pre-emptor the notice of proposed sale does not amount to a fraudulent concealment of the pre-emptor's right to sue to enforce the right of pre-emption.

4. *S. 18 Limitation Act.*—A plaintiff claiming under S. 18 to have the time limited for instituting the suit computed from the time the fraud first became known to him, is bound to prove *Prima facie*, that he remained in ignorance of the fraud till the time when, according to his own admission, he became aware of it; otherwise the suit must be taken to be barred by time.

Notes.

App.—1 O. C. 263—Equity of redemption incapable of physical possession.

S. C. 249.

Appeal.

Notification of the Judicial Commissioner, dated the 14th April 1891 —S. 40 (3) Act XX of 1890, decree of Munsiff's Appealable to the Subordinate Judge.

S. C. 250.

Land Acquisition Act, 1870—Reference to Court of conflicting claims to whole compensation—appeal—

1. That the four distinct sets of confiicting claims respecting four distinct wells ought to have formed the subject of four distinct references by the Collector, and four distinct decisions by the District Court, and if necessary four distinct appeals.
2. That, the District Court's decision was appealable.

S. C 251.

Witness—Statements by witness inconsistent with his evidence—Witness to be cross-examined before proof of such statements.

Where, in order to impeach the credit of the complainant and one of his witnesses, the accused called witnesses to prove former statements orally made by the complainant and his witness inconsistent with parts of their evidence, without having cross examined them as to the alleged statements, *held*, that the Court below was quite right in refusing to attach any importance to the one sided account of the alleged statements.

S. C. 252.

Ss. 74, 75 Oudh Land Revenue Act—Partition of mahal—question of title.—

The decision of a question of title, and the decision passed in appeal from such decision, are not summary decisions liable to be questioned by the objector in a regular suit to be thereafter instituted in a Civil Court.

S C. 253.

Hindu Law.—Mother—Re-marriage—Right of inheritance to son's estate—S. 2 Act XV of 1856—Custom.

1. That Act XV of 1856 did not apply to the case.
2. That, even if it did apply, it would not debar the mother from inheriting her son's estate.
3. No tribal custom of exclusion proved.
4. That the mother was not excluded by Hindu Law from inheriting her son's estate by reason of such re-marriage.

S. C. 254.

Landlord and Tenant—Notice of ejectment—Cancellation of notice for possession of land—Jurisdiction—Ss. 51, 62, 108 (4), 124 (6) and 135 Oudh Rent Act—Res Judicata—Suit by a landlord for a declaration of title.

The plaintiffs' uncle served the father of defendant with a notice of ejectment The latter instituted a suit to contest the notice. This litigation finally resulted in a finding that the defendant's father was a tenant with a right of occupancy. Afterwards the plaintiffs sued the defendant in the Civil Court for possession of the lands alleging that the defendant's father had been a tenant not holding on special terms.

Held, that the Civil Courts had no jurisdiction to entertain the suit.

Notes.

App.—S. C. 261—Form of suit against tenant in Civil Court where notice cancelled in Revenue Court.

Diss—1 O. C. 172—Construction S. 124 A. B. D. Oudh Rent Act.

App.—2 O. C. 79—Form of suit by landlord against tenant where question of title involved—Jurisdiction of Civil and Revenue Courts.

F.—3 O. C. 365—Form of suit by landlord against tenant where question of title involved—Jurisdiction of Civil and Revenue Courts.

Diss.—4 O. C. 314—Construction of S. 124 B.

App.—4 O. C. 314—Amendment of plaint.

R.—5 O. C. 173—Amendment of plaint.

R.—O. C. 294—S. 264 C. P. C. of 1882 refers only to land in the occupation of a person not a party to the suit.

R.—12 O. C. 164 (167)

S. C. 255.

Partnership—Partner's power to bind co-partners—Authority to draw Hundi— S. 25 Act IX of 1887.

Held, that the plaint did not disclose a complete cause of action against the partners other than A, and the liability of such partners was not established.

Held, also, that, this being so, the decree of the Court below against such partners for the amount of the bill was not "according to law," and the case was one in which the High Court could interfere.

S. C. 256.

Mortgage--Settlement Court decree—Res Judicata—Decree for redemption on payment of a specific sum—Suit for possession on payment of such sum—Ss. 13, 244 C. P. C. = Ss. 11 and 47 (V of 1908).

1. That the suit was barred by S. 244 C. P C.
2. That if the wording of the plaint could be varied, and the suit be regarded as one brought to redeem it would be barred by S. 13 C. P. C.

Notes

Dist.—1 O. C. 289—Effect of Settlement Court decree for redemption, but containing no bar—Second suit to redeem.

F.—6 O. C. 239—Effect of Settlement Court decree for redemption, but containing no bar—Second suit to redeem.

R.—8 O. C. 261 (370)—(Not discussed)—

R.—14 O. C. 257 (263) and (264)—

S. C. 257.

Death of parties—Decree against dead defendant.

That a valid and effectual decree can not be passed by a Court against a dead man

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S. C. 258.

Execution of decree—Decree for possession of immovable property and mesne profits—Assessment of mesne profits in execution of decree—Costs of collection—Interest.

Held, 1. On the point whether, on assessment of mesne profits, the Judgment debtor was entitled to be credited with his costs of collections, that the judgment debtor, though an intruder must be considered a *bona fide* intruder, and, even if he were not entitled to be so considered, he ought, according to the sounder opinion to be credited with such costs.

2. That as the decree said nothing about interest, the decree holder's claim to such interest was not tenable.

3. That the costs of funeral could not be set off against the decree holder's claim for mesne profits.

S. C. 259.

Ss. 52 to 55 Oudh Land Revenue Act—Resumption of rent free grants—Appeal.

That orders made by the District Courts declaring grants to be liable to resumption or dismissing applications for such declarations are appealable.

A grantor applied under S. 53 Act XVII of 1376, for a declaration of the liability of the grant to resumption. The grant was held under a written instrument in which the grantor expressly agreed that the grant should not be resumed. After the applicant's death the application was continued by his son.

Held, that the provisions of S. 52 barred the application.

Notes.

Aff.—S. C. 263—Orders passed under S. 52 are appealable to the Judicial Commissioner.

Aff.—S. C. 276—Limitation in resumption cases.

F.—2 O. C. 67—Applications passed under S. 52 are suits, and orders passed thereon are decrees.

App.—3 O. C. 365—Inapplicability of Ss 52 and 53 Oudh Laws Act to revenue free lands.

App.—5 O. C. 97—Inapplicability of Ss. 52 and 53 Oudh Laws Act to revenue free lands.

S. C. 260.

Landlord and Tenant—Tenant without a right of occupancy—Suit to contest notice of ejectment—Denial of landlord's title—Forfeiture.

Where a landlord serves a notice of ejectment and the notice is contested on the ground that the relation of landlord and tenant does not exist between the parties, and the notice is cancelled on that ground, the landlord should not sue in the Civil Court for the ejectment of the tenant, but should bring a suit in that Court for a declaration of his title. Having obtained

such a decree, he should, if he desires to eject the tenant, institute fresh proceedings in the Revenue Court.

Notes.

Dist.—1 O. C. 210—Jurisdiction of Civil and Revenue Courts in suits between landlord and tenants.

Aff.—2 O. C. 79—Jurisdiction of Civil and Revenue Courts in suits between landlord and tenants.

F.—3 O. C. 105 and 365—Jurisdiction of Civil and Revenue Courts in suits between landlord and tenants.

R.—4 O. C. 175—Jurisdiction Civil and Revenue Courts in suits between landlord and tenants.

App.—4 O. C. 314—Jurisdiction of Civil and Revenue Courts in suits between landlord and tenants.

R.—5 O. C. 173—Jurisdiction of Civil and Revenue Courts in suits between landlord and tenants.

R.—12 O. C. (167)—

S. C. 261.

Suit for recovery of land demised.

Denial of demise—Affirmative case set up by defendant—Failure to prove demise—Taluqdari title—Plaintiff not entitled to attack affirmative case—Amendment of plaint—Tenants holding over. Suit for ejectment of tenant dismissed—Ss. 54 and 108 (4) Oudh Rent Act—Suit in the Civil Court for possession of the land not maintainable.

Notes.

R.—S. C. 293—Onus on plaintiff to prove his case.

App.—4 O. C. 314—Form of suit by land-lord against tenant in Civil Court where question of title involved.

F.—5 O. C. 97—Onus—Suit for possession—Adverse possession.

R.—12 O.C (167)—Suit for declaration by under-proprietor.

S. C. 262.

1. *Review of judgment.*

Where the grounds on which a review of judgment was sought were such as might have been argued on behalf of the applicant at

the original hearing of the case, and the application for a review of judgment was merely an attempt to have the case re-argued, held, that the application ought not to be granted.

2. *S. 206 C. P. C.=O. XX, r 6, S. 152 (V of 1908).*

The words "at variance with the judgment," mean at variance with the mandatory part of the judgment.

3. *An application for the amendment of a decree.*

On the ground that is at variance with the judgment cannot be amended, so as to convert it into an *application* for review of judgment where the time limited by law for such an application has gone by.

Party to begin.

That the party receiving notice to show cause against the application for a review of judgment is entitled to begin.

Notes.

(1) **F.**—3 O. C. 279—Grounds for review of judgment.

S. C. 263.

Resumption—S. 52 Oudh Land Revenue Act.

1. A grant of land, effected by a lease which fixes the rent of the land in perpetuity, is resumable if the rate of rent is a favourable one.
2. The term "rent" in S. 52 means "rent" and not "revenue".
3. The words "at a favourable rate of rent" in S. 52 mean at a rent which is not a "fair, reasonable and equitable rent."
4. The plaintiff must prove that the rent reserved is favourable.

Notes.

F.—3 O. C. 268—Construction of "grant of land at a favourable rate of rent" in S 52.

S. C. 264.

1. *Construction of written statement.*

It must be construed with reference to the entire document and not merely to parts of it, in order to ascertain what defence it contains.

2. *Duty of person defending suit on behalf of minor.*

It is his duty to put the plaintiff to the proof of all material facts, and to set up all the available defences.

3. *Muhammedan Law—Contract by guardian.*

A guardian who has the care of the person and property of a minor can enter into a contract which is advantageous to the minor.

4. *Suit for money lent to guardian for minar—Facts which the lender must ordinarily prove.* -

The lender is bound to prove.

(*a*) that he lent the money, and

(*b*) that he reasonably believed that the loan would be advantageous to the minor, or

(*c*) that the loan as a matter of fact was an advantageous loan, or

(*d*) that as a matter of fact the minor benefited by the loan.

5 *Proof of application of money, when required.*

In any case in which the lender has the control and actual application of the money, he is bound to prove the application.

S. C. 265.

S. 12 of Act XIII of 1879 (Oudh Civil Courts) Second-appeal.

Where the Appellate Court partly allowed and partly dismissed the plaintiff's appeal, and dismissed the defendant's appeal. *Held*, that a second appeal by the defendant against the decree of the Appellate Court dismissing his appeal was admissible under S 21.

2. *Plea of minority—Burden of proof*—The defendant admitted making a promissory note upon which he was sued, but set up the defence of minority. *Held*, that the burden of proving that he was a minor when he made the note lay upon the defendant.

3. A "*Wirasat-nama*" alleged to have been executed and deposited by minor's father in the Wasika office was admissible in evidence.

Notes.

8 O. C. 94 (103) —Admission of hearsay evidence upon the question whether a particular person survived another or upon the question whether a man was at the time of his death joint with or separate from other members of his family.

S. C. 266.

Landlord and Tenant—Suit for the removal of trees—Art 32 and 120 Limitation Act.

Such suit is governed by Art 32.

Notes.

F.—6 O. C. 130.—Calculation of pleader's fee—Suit for redemption.

S. C. 267.

S. 18 Act XIII of 1879 (Oudh Civil Courts Act.)

Redemption—Value of suit—In a suit to redeem a mortgage the value of the subject matter of the suit, for the purposes of jurisdiction, is the principal amount secured by the mortgage-deed.

Notes.

F.—9 O. C. 96—Appeal to the District Judge or to the High Court.

Dist.—10 O. C. 42(43)—Suit for recovery of property subject to certain charge. Forum of appeal.

R.—10 O. C. 291(293)—Forum of appeal doubtful.

S. C. 268.

Second appeal—Ground—Ss 574, 584, 585 C P. C. = Ss. 100 and 101 O. XLI, r. 31 —V of 1908.

It is no ground for a second appeal under S. 584, that the decision on which the decree appealed against is based is not one framed in the manner required by S. 574, unless it can be shown that the decision has failed to determine some material issue of law or usage having the force of law.

Notes.

R.—8 O. C. 290(291)—A substantial compliance with the provisions of S. 574 is imperative.

S. C. 269.

Security for costs—Appeal—S. 549 C. P. C. = O. XLI, r. 10 V of 1908.

Where it did not appear that an appeal was altogether groundless, the Court, refused to direct the Appellant under S. 549, to furnish security for the costs of the appeal on the ground merely of her poverty.

S. C. 270.

Joint land—Co-owners—Building erected on land by one co-owner without the consent of the other—Acquiescence—Injunction directing removal of buildings.

That, as there were no special circumstances justifying the removal of the building, the court ought not to direct its removal, but should leave the plaintiff to his strict remedy by partition.

Semble, that the mere fact that a co-owner of joint land allowed another co-owner to build on the land without objection would not constitute acquiescence on his part.

Notes.

App.—7 O. C. 336—Remedy of Co-sharer to have well built without his consent, demolished.

App.—7 O. C. 362— " " " "

R—11 O. C. 355.—The other co-sharers are entitled to have the building removed if they have objected to it at the first possible opportunity and no great injury will hereby be caused to the co-sharer who has erected the building.

S. C. 271.

Redemption—Suit by reversionary heir—S. 91 (b) Transfer of Property Act

The widow being alive, the plaintiffs as presumptively entitled to property on the death of the widow, if they survived her, sued to redeem the mortgage. *Held*, that they had an interest in the right to redeem, and were entitled to sue.

Notes.

R.—8 O. C. 349.—The plaintiff as the reversioner has an interest in the right to redeem.

S. C. 272.

Parda-nashin woman—Suit to set aside part of a deed executed by her—Burden of proof.

Held, that she was bound to give some evidence which showed that she was not conscious of the stipulation when she executed the deed. The mere fact that she was a parda-nashin woman was not sufficient to throw upon the defendants the burden of proving that she was aware of, and fully understood, the stipu-

lation. If such evidence had been given by her, the defendants, who relied on the stipulation, must show that she was fully conscious of the stipulation.

Notes.

App.—7 O. C. 292—Her position as a plaintiff creates a difference.

S. C. 273.

Application for stay of execution—S. 608 C. P. C.=O. XLV, r. 13 (V of 1908).

The High Court has no power under S. 608, to stay execution of a decree in respect of which an appeal to Her Majesty in Council has not been admitted.

S. C. 274.

S. 302 Penal Code—S. 289 Cr. P. C.—Power of Court to record a finding of not guilty—No evidence.

The "expression" in S. 289 Cr. P. C. means "no legal evidence or proof" and not "evidence worthy of belief."

Where the Sessions Judge disbelieving the evidence, recorded a finding of not guilty, professing to act under S. 289, *held*, that the order of the Sessions Judge was made without jurisdiction and was therefore illegal.

S. C. 275.

1. *The evidence as recorded by the Sessions Judge not interpreted to the witness.*
   This fact only did not invalidate the conviction of the accused.
2. *Right of prosecutor or accused to cross examine witness called by Court.*
   The Court should, as a general rule, give them leave to cross examine such witness.

S. C. 276.

Resumption of rent free grant—Ss. 53, 55 (b) Oudh Land Revenue Act XVII of 1876—Arts 120, 130 Limitation Act.

An application, *i. e.*, suit under S. 53, is governed by Art. 120. The right to sue first accrues when the liability of the rent free grant to resumption is first denied.

Notes.

F.—S. C. 288.—Condition necessary to bring case under S. 55(b) Oudh Laws Act

R.—2 O. C. 67.—Application under S. 52 of Act XVIII of 1876, being suits, and the application of S. 375, C. P. C., to them.

S. C. 277.

Ss. 164, 364, 533 Cr. C. P. Confession not recorded in language of accused.

That the error in the record of confession could be cured by the provisions of S. 533, which were sufficiently wide to include a failure to comply with the provisions of S. 364 regarding the language in which the accused's statement should be recorded.

S. C. 278.

S. 373 C P. C. = O. XXIII, r. 1 (V of 1908)—Appeal.

An order granting the plaintiff permission to withdraw therefrom, with liberty to bring a fresh suit, is not appealable.

Notes.

Rel.—6 O. C. 48—Permission to withdraw a suit is not a decree.

S. C. 279.

Jurisdiction—Under valuation of suit—Appeal to wrong Court S. 11 Suits valuation Act (VII of 1887).

That as the undervaluation of the suit had not prejudicially affected the disposal of the appeal upon the merits, the objection to the jurisdiction of the District Judge could not be entertained.

S. C. 280.

Suit by mortgagor for cancelment of deed of mortgage—Refusal of mortgagee to advance mortgage money—Fraud. Ss 39, 53 Act IX of 1872 (Contract Act)—Ss. 35 and 39 Specific Relief Act (I of 1877)—

1. That refusal to advance the mortgage money did not amount to *fraud.*
2. That such refusal did not entitle the plaintiff to put an end to the mortgage transaction, but that his proper remedy was to sue for the money agreed to be advanced;
3. That the instrument of mortgage did not become voidable at the instance of the plaintiff under S. 53 Contract Act, because the

defendant had refused to advance the mortgage money, assuming that such a refusal could be said to have prevented the plaintiff from performing his promise to deliver possession of the mortgaged property.

S. C. 281.

Redemption—Maintenance not a charge on the right to redeem Ss. 39, 91, 100 Transfer of Property Act

Held, that assuming that the Muhammedan concubine of a deceased Hindu belonging to one of the regenerate classes, and the illegitimate son of the deceased by such concubine, had a right to receive maintenance from the profits of the immoveable property left by the deceased, such maintenance was not a charge, within the meaning of S. 100 T. P. Act, upon the right to redeem the property, and they were not entitled to sue to redeem a mortgage of the property made by the deceased.

S. C. 282.

Settlement Court decree, construction of—"Perpetual lessees"—Tenants under decree of Court—Ss. 52, 108 (4) Oudh Rent Act—Jurisdiction of Revenue Court.

1. That the decree must be looked at as a decree and not as a grant by the taluqdar, and must be construed with reference to its terms, the decision on which it was based, the circumstances under which it was made, and the intention of the Court which made it, to ascertain what interest in the land it conferred on the lessees.
2. (On the construction of the decree) That the lessees did not acquire thereunder an under proprietary or quasi under proprietary right but a tenant right
3. That the lessees were tenants holding under a "decree of Court," within the meaning of S 52 Oudh Rent Act, and that the Revenue Court was competent to entertain a suit under S. 108 (4), for their ejectment, and to eject them under S. 52.

Notes

F.—6 O. C. 94—Construction of Financial Commissioner's decree for a "perpetual hereditary farming lease"

Cite.—7 O. C. 265—Effect of condition against alienation by lessee and right of entry.

S C. 283.

Mesne profits—Ss. 211, 244 (a) and (b) C. P. C.=S 2 (12), O. XX, r. 12; S. 47 (V of 1908).

1. *Decree awarding possession of immoveable property with mesne profits from a certain date. No inquiry directed by decree—Construction of decree*

That the Court, in decreeing "mesne profits from the date of the plaintiff's father's death," intended to grant such profits up to the time of possession.

2. That the Court executing the decree had power to determine the amount of mesne profits under S. 244 (*a*) C. P. C.

S. C. 284.

S. 476 Cr. P. C.—Preliminary enquiry.

1. The High Court as a Court of revision can interfere with an order under S. 476, sending a case for prosecution before a Magistrate.

2. That the order of the Magistrate was not bad by reason of there having been no preliminary inquiry under S. 476, or of there being no evidence on the record of his proceedings under S. 203, contradicting the case which he thought to be false.

3. That considering the contradictions in the statements not only of the two complainants but also of their two witnesses, the discretion vested in the Magistrate under S. 476 was not exercised on insufficient grounds, and the order passed by him was not bad by reason of the fact that he did not examine two of the witnesses of the complainants.

S. C. 285.

S. 9 Opium Act (I of 1878)—Sale by servant.

A sale by a servant of the licensee of opium on behalf of his master can not properly be said to be a sale of opium without a license, and punishable under S. 9 of that Act.

S. C. 286.

Mesne profits—Decree silent as to mesne profits—Claim by decree-holder for mesne profits from the institution of the suit until delivery of possession.—Whether or not mesne profits subsequent to the institution of the suit are claimed

For S. C. 290 read.

S. C. 290.

Regulation—1825—XI, s. 4, clauses (1) and (5)—Alluvial lands—"Gradual accession" meaning of, as used under s. 4, clauses (1) and (5), Regulation XI 1825. The plaintiff's case was that when the river *G*, by shifting its course to the east in 1880-1885, had transferred a parcel of land, measuring 700 bighas, situate at the south-west corner of his estate *M*, from *M*, on the eastern side, to *R*, the defendant's estate, on the western side of the channel of the river, the defendant took possession of this parcel; and again when the river, by shifting its course further to the east in 1884-1889, had severed another parcel of land measuring 1,314 bighas from *M* on the eastern side of the channel and transferred it to the western side, the defendant took possession of that parcel, and therefore, when the river, by gradually receding to the west in 1889-1891, retransferred the 1,314 bighas to the eastern side of the channel, and carried with that parcel of land, which had originally formed part of *M*, a strip of land measuring 2,058 bighas, which had until that time formed part of *R*, he, the plaintiff, was entitled not only to revenue possession of *M* land, but aslo to annex to his estate of *M* the strip of *R* land which had come to his side of the river.

Held, with reference to *Felix Lopez* v. *Muddun Mohun Thakur*, 13 M. I. A., 467, and *Nagender Chunder Ghose* v *Muhammed Esof*, 10 B. L. R., 406, that the process by which the 2,058 bighas belonging to *S* was said in the plaint to have been transferred from the western to the eastern side of the river was not a "gradual accession" within the meaning of the 1st clause of S. 4, Regulation XI of 1825

Held, also, that even if the land were a "gradual accession." and the river were a public river, on the rule laid down in *Lopez* case, and followed in *Nagendra Chander Ghose*, the title to it was to be decided not by the 1st clause, but by the 5th clause of the section.

Thakur Raghur Singh v. *Raja Narindar Bahadur* [Oudh Privy Council Rulings, compiled by M Rafique St George Jackson, p. 22] distinguished

Held, also, that possibly if it were shown that lands of one of the two estates, transferred by fluvial action, across the river to the other estate, had invariably been considered an increment to the latter estate, then on the ground of "established local usage," if not of "general principles of equity and justice," the dispute between the parties might have been decided in favour of the plaintiff under the 25th clause of the section, but that there were not sufficient materials before the Court to enable it to find such an invariable course of procedure in the determination of claims between the parties to lands gained by alluvial action as would warrant it in deciding the suit in favour of the plaintiff under the provisions of the 5th clause.

in a suit for the recovery of possession of land, they are not realizable in execution unless they are expressly included, and provided for, in the decree.

S. C. 287.

Muhammadan Law.—S. 5 Oudh Laws Act (XVIII of 1876)—Means of husband at the time of Contract.

For the purpose of deciding under S. 5, whether the amount of dower is excessive, the Court is not to take into consideration the means of the husband at the time he entered into the contract of dower, but his means at the time it is sought to enforce the contract.

S. C. 288

S. 55 Oudh Land Revenue Act Rent free grant—Liability to resumptian—"Valuable consideration"—

"Valuable consideration" means "valuable consideration in money or money's worth."

A grant of land, rent free to a *Guru* in return for spiritual services, is not a grant for a "valuable consideration."

S. C. 289

Execution of decree—Ss. 32, 311 C. P. C =O. I, rr 8 (2), 10 (2), (3), (5), 11—O. XXI, r. 90 (V of 1908)—*Application to set aside sale—Purchaser a necessary party—Limitation.*

1. The purchaser is a necessary party to an application under S. 311.
2. The mere service of notice upon the purchaser is not proof that he was made a party to the proceedings.
3. It is doubtful whether S. 32, applies to proceedings in execution.
4. The period of 30 days from the date of the sale having expired, the purchaser, who had not been made a party to the judgment debtor's application, could not be made a party to the same.

S. C. 290.

S. 4 (1) and (5) Regulation XI of 1825—Alluvial lands—Gradual accession. Notes.

Con.—27 Cal. 768 (P. C).

S. C. 291.

Hindu Law —Grant—Absence of express words of inheritance— Grant presumably heritable—Rebuttal of presumption —Effect of a recital that the grant is made for maintenance —Effect of a condition restraining alienation indefinitely.

1. In cases governed by the Hindu Law, a gift of lands made by an instrument not containing express words of inheritance, is presumed to carry an estate of inheritance.
2. That presumption may be rebutted by a conflicting context.
3. The words in 'perpetuity' and 'perpetually' do not *per se* extend the estate beyond the life of the grantee Nor does the reservation of a signiory and rent service necessarily restrict the estate to the life of the grantee.
4. A condition restraining alienation indefinitely goes to show that the estate given was not an estate in fee simple.

Notes

(1) Ap —3 O. C. 55.—Application of Hindu Law in construing Hindu gifts.
(1) R.—4 O. C. 31.—Presumption as to nature of grant by Hindu.
(1) K.—4 O. C. 61.—Presumption as to nature of grant by Hindu.
(1) R.—8 O. C. 61 (63)—Application of Hindu Law.

S C. 292.

S. 25 Provincial Small Cause Courts Act (IX of 1887)—Revision—S 622 C. P. C.=S. 115 (V of 1908).

The High Court should exercise the revisional power conferred on it by S 25, in cases in which it is manifest that some substantial injustice to the applicant has directly resulted from a material misapplication or misapprehension of law.

S. C. 293.

S. 25 C. P. C =S. 24 (V of 1908)—*Transfer of suit—Plaintiff not entitled to succeed upon a case not disclosed by his pleadings.*

S. C. 294.

Malicious Prosecution—Want of reasonable and probable cause. Burden of proof —Dismissal of complaint—Inquiry by prosecutor—Truth or falsity of charge—Absence of evidence of prosecutor.

1. In a suit for compensation for a malicious prosecution the burden of proof lies, in the first instance, on the plaintiff, who must

give some evidence for want of reasonable and probable cause on the part of the defendant for the prosecution, before the latter can be called upon to show the existence of such cause.

2. The dismissal of a complaint under S. 203 Cr. P. C., is no evidence whatever against the defendant of the groundlessness of the prosecution.

S. C. 295.

Execution of decree—Sale—Suit arising out of sale

1. *Absence of a regular attachment.*—Such absence is no ground for holding an execution sale to be void, after the sale has been confirmed and a sale certificate granted to the purchaser

2. *Objection by judgment debtor as to validity of decree and saleability of property.*—Neither the judgment debtor nor his representative is entitled to question the validity of the decree or saleability of the property.

3. *Termination of temporary injunction under 492 C. P. C.=O.* XXXIX, r. 1 (V of 1908)—Such temporary injunction comes to an end with the termination of the suit.

4. *Alienation in breach of temporary injunction.*—Such alienation is not null and void.

5. *Effect of dismissal of application.*—The dismissal of an application for the execution of a decree has the effect of raising the attachment which has been made on the application.

Notes

(5) R.—8 O. C. 152.—That the mere fact of an application for execution having been struck off the file does not necessarily imply that the attachment has been removed.

S. C. 296.

Mortgage.—S. 43 C. P. C.=O. II, r. 2 (V of 1908)—*S. 115 Evidence Act—Ss. 52, 58, 59, 60, Registration Act.*

Covenant to pay interest by instalment—Covenant that if instalments of interest were not paid they should be added to the principal and carry interest—Covenant that if instalments of interest were not paid the mortgagee should have the option of

recovering principal and interest from mortgaged property—Effect of certificate as evidence—Indorsement by registering officer on deed of statement purporting to be made by mortgagor.

S. C. 297.

S. 89. Transfer of Property Act—Ss. 2, 244 (c), 540, 584, 617 C. P. C.=Ss. 2 (2), 47, 96, 100, 113 (V of 1908).—*Reference of question to High Court.*

The order to be made on an application for an order absolute for sale will be appealable under S. 540 C. P. C., and a second appeal will be under S. 584, to the Court of the Judicial Commissioner.

Consequently no reference can be made under S. 617, as to this order because the section does not apply to cases which can come before the High Court on appeal.

Notes.

F.—1 O. C. 49.—Proceedings under S 89 T. P. Act being proceedings in execution of decree.

F.—4 O. C. 123.—Proceedings under S. 89 T. P. Act being proceedings in execution of decree.

S. C. 298.

Review of judgment—Appeal—Ss. 626, 629 C. P. C.=O XLVII, rr. 4, 7 and 9 (V of 1908).

Where the only objection to the admission of an application for a review of judgment taken on an appeal from the order granting the application was that the ground on which the application was admitted was not sufficient, *held*, that the appeal was not entertainable.

S C. 299.

S. 244 (c) C. P. C.=S. 47 (V of 1908) —*Question for Court executing decree—Separate suit—Delivery of possession of land in excess of decree.*

Held, that a suit by the representatives of R. against the representatives of H. to recover possession of Sir lands and groves on the ground that the *taluqa* only had been decreed to H, and

they did not form part of the *taluqa*, was barred by the provisions of S. 244 (c).

Notes.

F.—7 O. C. 213.—Jurisdiction of Court executing decree to determine if property covered by decree, where Court put decree holder into possession itself.

S. C. 300.

1. *Mortgage—Sale of benefit of—"Immoveable property"—S. 314 C. P. C.= O. XXI, 292 Act V of 1908.*

A mortgage which gives the mortgagee the right to take possession of the mortgaged lands and to realize his mortgage money, principal and interest, out of the rents and profits of those lands is "immoveable property."

2. *Auction purchaser.*

In the absence of a sale certificate, the purchaser at an execution sale of the benefit of such a mortgage, acquires, if the sale has been confirmed, and so become absolute under S. 314, only an equity inforceable against the judgment debtor or his representatives, or against subsequent auction purchasers, who may have bought the benefit of the mortgage subject to that equity, and not such an interest in the benefit of the mortgage as can be enforced against the mortgagor or a person in possession of the mortgaged lands, being strangers to the auction sale.

Notes.

(1) **F.**—S. C. 301—Rights acquired by a simple mortgagee being immoveable property.

S. C. 301.

Mortgage—Sale of benefit of mortgage—Simple mortgage—Immoveable property.

The benefit of a simple mortgage is immoveable property.

S. C. 302.

Ss. 32, 42, 622 C. P. C =O. I rr 8 (2), 10 (2), (3), (5), 11—O. II, r I—S. 115 Act V of 1908—Will—Estate for life—Remainder in fee—Suit to eject tenant for life—Parties to suit—Vested remainderman necessary party—Refusal of Court to add party—High Court's power of revision.

1. That the remainder devised to I was a remainder in fee simple;

2. that on the testator's death the estate for life devised to K and the remainder in fee devised to I both immediately vested;

3. that the subsequent death of the vested remainderman could not possibly enlarge the estate of the tenant in life;

4. that I's senior widow alone inherited, the remainder being impartible;

5. that R had community of interest with K, since both were interested in sustaining the settlement made by the will;

6. that R should have been allowed to come in and defend her title, which was necessarily impeached by the action;

7. that the Subordinate Judge, under a total misconception as to the nature of R's estate in the disputed lands, and also as to the scope of the action, and its effect upon her title, had failed to exercise the jurisdiction to add her as a defendant;

8. that the Court had jurisdiction under S. 622 C. P. C. for the purpose of correcting this mischievous error.

Notes.

(8) **F**—5 O. C. 91—Power of High Court to interfere in revision.

S. C. 303.

Ss. 195, 477 Cr. P. C.—Power of Court of Sessions as to offence referred to in S. 195 committed before itself.

It is intended by S. 477, Cr. P. C, that the person charged shall be committed for trial, or held to bail to take his trial, on the charge, and not that the Court of Sessions shall try offences referred to in S. 195 committed before itself summarily.

S. C. 304.

Mortgagee—Claim by mortgagee to retain possession of rest of security after expiry of term in order to realize deficiency of mortgage money.

Held, in a suit by the mortgagor brought after the expiry of the term to recover possession of the rest of security, which the mortgagee resisted on the ground that he had been prevented from realizing the mortgage money in full from the mortgaged property, by being deprived of part of the security, that the mortgagee had no answer to the claim unless he could show that he was entitled to it under the terms of the deed.

Notes.

F.—9 O. C. 144 (145)—Claim for interest, when mortgagee does not take possession of mortgaged property.

S. C. 305.

Pre-emption—Ss 10, 13 Oudh Laws Act (XVIII of 1876)—Estoppel.

A person, refusing to purchase the property and consenting to its being purchased by other persons, was estopped by his conduct from setting up his right of pre-emption, on the ground that the property had been sold without the notice required by S. 10, having been given to him.

Notes.

Dist.—1 O. C. 254—Estoppel by conduct and necessity of written notice by vendor.

S. C. 306.

Suit to establish right to annuity, and to recover arrears—Suit to establish a periodically recurring right—Arts 48, 49, 120, 123, 131, 132, Limitation Act.

A suit to establish a right to an annuity, bequeathed by Will, and charged upon the moveable property of the testatrix, and to recover arrears of the annuity, brought against residuary legatees, in possession of the estate of the testatrix, is governed by Art 131 Limitation Act.

1 O. C. 1.

S. 395 Penal Code—Possession of stolen property—Presumption

Where there was no evidence of identification of prisoner at the time of dacoity, but soon after the occurrence part of the stolen property was found in his possession: *held*, that the recent possession of property stolen at the dacoity justified the presumption, in the absence of rebutting evidence, that the prisoner took part in it.

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1 O. C. 2.

Haqi Chaharum—Zamindari right—Execution sales.

No Haqi Charum in execution sales without proof of special custom entitling to the same.

Notes.

Explained.—13 O. C. 366.—The *Wajib-ul-arz* forbidding sale of trees by tenant applied as much to sales in execution of decrees as to a private sale.

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1 O C. 4.

S. 366 Penal Code—Kidnapping of the two girls—Separate sentences.

That, the offences of kidnapping of two girls were separate and the accused should have been separately sentenced.

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1 O. C. 8

Additional Court fee on mesne profits—S 11 Court Fees Act.

Where an order for payment of an Additional court-fee on mesne profits has been made, the fee already paid on the sum claimed was also to be taken into account.

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1 O. C. 10

S. 32 C. P. C. = O I, r 10 (2) C. P. C. (V of 1908)—S 81 Indian Trusts Act (II of 1882) suit by a Benami-holder of a Promissory Note.

1. That under S. 81 Indian Trusts Act a Benami holder of a Promissory Note has an interest in the note and he consequently has a right to sue upon the note.

2. That the Court had jurisdiction to add the real creditor as a plaintiff.

1 O. C. 14.

Material irregularity—S 311 C. P. C. = O XXI, r. 90 C. P. C. (V of 1908) Substantial injury.

The revised encumbrances not notified—No fresh proclamation issued —inadequacy of price not proved.

Held, that the sale could not be set aside without proof of substantial injury to the judgment debtor by reason of such irregularities.

Notes.

R.—6 O. C. 61—The Court may infer that inadequacy of price was due to irregularities. No direct evidence required.

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1 O. C. 18.

Ss. 39, 42 Specific Relief Act (1 of 1877)—Secondary evidence of document, loss of which is not proved—Cancellation of leases, executed by mortgagor. Right of mortgagee in possession.

A mortgagee brought a suit under S. 39 for cancellation of the leases executed by the mortgagor. He filed a certified copy of the mortgage deed but having failed to prove the loss of the original could not prove the terms and conditions of the mortgage.

Held, that having failed to prove the conditions of the mortgage which would have entitled him to a decree for cancellation, the plaintiff was not entitled to a mere declaratory decree under S. 42.

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1 O. C. 22.

Res judicata—Ss. 13, 244 C. P. C. = Ss. 11 and 47 C. P. C. Act V of 1908— Estoppel.

1. It is not necessary that the matter in question should have been finally heard and decided in the previous suit.
2. Explanation II to S. 13 cannot be applied against a party successful in the previous suit.
3. Disclaimer of title will not *per se* operate as an estoppel.
4. Under S. 244 C. P. C. (s.47) the Court should construe the decree and give effect to it but could not retry the suit.

10 O. C. 28.

Suit for arrears of rent—Meaning of "occupied" in S. 127 Oudh Rent Act.

That S. 127, applies to the trespasser, and not to a person lawfully entering upon the land with landlord's consent, but remaining on it against his will.

Notes.

F.—1 O. C. 40.—"Trespasser" in S. 127 Oudh Rent Act.

F.—15 O. C. 311.—S 127 does not apply to a tenant who after being ejected continues to cultivate the holding without any break for any period.

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10 O. C. 30

Hindu Law.

1. *Adoption with consent of Sapindas.*—A Hindu widow adopted a son, and then jointly with him executed a mortgage. On the reversioner's suit for a declaration that mortgage should have no effect against him at the death of the widow, *held*, that adoption without husband's permission is invalid, and the consent of all the Sapindas would not amount to such permission.

2. *Act 118 Limitation Act*—The plaintiff could succeed without setting aside the adoption and his suit was not barred by Art 118.

3. *Actual existence of legal necessity.*—That actual existence of legal necessity was not a condition precedent to the validity of the mortgage.

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1 O. C. 40.

S. 127 Oudh Rent Act—Arrears of rent.

1. It is the duty of the rent court to adjusticate upon every issue raised before it as far as a decision on that issue is necessary for the decision of the suit.

2. That S. 127 does not apply to a case where the defendant occupies the land with the consent of the landlord but remains on it against the latter's will.

1 O. C. 42.

Redemption—Escheat—Grove-holder absconding.

The *Wajib-ul-arz* gave the tenants an absolute right of sale and mortgage of trees, but on his absconding from the village, the grove would come into the possession of the Zamindar, but if the tenant returned he could take back his grove with the consent of the Zamindar. *held*,

1. That the *escheat* was intended to cover the case in which property was left without any one to exercise any dominion over it.

2. That the stipulation could not be extended so as to cover the equity of redemption and that, therefore, there had been no *escheat*.

Notes.

Over.—12 O. C. 197.—A Zamindar has a right to redeem usufructuary mortgage executed by an absconding grove-holder.

Diss.—12 O. C. 201.—Where a grove-holder is alive and residing in the village, the Zamindar is not entitled to redeem.

R.—16 O. C. 341.—Maintainability of suit for recovery of possession when property in suit remained long as *bona vacantia*.

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1 O C. 43.

S. 47 cl. (I) and (J)—Act VIII of 1890—Appeal.

An order of the District Judge declining to enquire into the correctness of the account is not appealable.

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1 O. C. 45.

Pre-emption—S. 9 (1) and (2) Oudh Laws Act—Definition of a "Mohal"— S. 3 Act XIX of 1873 N. W. P. Land Revenue Act)—S. 68 Act XVIII of 1876. "Sub-division."

That an arrangement by which the co-sharers agree to collect portions of the rent of one tenant does not amount to a "sub-division of a tenure."

1 O. C. 47.

Appeal—S. 5 clauses (a) and (b) Limitation Act = Ss. 4 and 5 Limitation (IX of 1908). The time requisite for obtaining copy of judgment and decree.

1. The time between the date of furnishing the estimate of costs of copy and that of depositing the folios cannot be allowed in computing the period of limitation;
2. The error of subordinate official cannot save limitation.

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1 O. C. 49.

Ss 86 and 89 Transfer of Property Act (1) S 462 C. P. C. O. XXXII, r. 7 compromise effected by guardian ad litem without leave of the Court.

Held, that the propriety of the decree could be questioned in proceedings under S. 89 T. P. Act which are proceedings in execution of decree.

Notes.

F.—4 O. C. 123.—That an application under S. 89 T. P. Act is an application for execution of the decree.

App.—7 O. C. 199.—That the applicant was not entitled in the execution department to challenge the validity of the decree.

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1 O. C 51.

Jurisdiction—S. 16A C. P. C. = S. 18 C. P C. (V of 1908)—Appeal.

That no objection to the jurisdiction of the Court could have been successfully urged in appeal.

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1 O. C. 53.

Hindu Law.

Joint family—Mortgage by father—sons not made party—S. 85 Transfer of Property Act—S. 42 C. P. C = O. II, r. 1 C. P. C. (V of 1908).

In a suit brought by the sons of a mortgagor for declaration that their share out of the ancestral property was not liable to attachment and sale, on the ground that they were not parties to the suit by the mortgagee.

1. *Held*, that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditor's remedies for their debts, if not tainted with immorality, on the sole ground that they were not made parties to the suit by the mortgagee.
2. That S. 85 T. P. Act has introduced no change in the rights and liabilities of a mortgagee who ought to have been but was not made a party to the suit.
3. That a Court does not exercise a sound discretion in making a declaration in any suit which is brought in contravention of S. 42.

Notes.

Rel.—4 O. C. 93.—A Hindu son cannot set up his rights against a mortgage made by his father on the sole ground that he was not made a party to the suit by the mortgagee.

App.—4 O. C. 178.—The rule of law laid down in 1 O C. 53 applies with equal force, whether the sons come into court before the sale or after the sale of their interests, and whether the decree is a simple money decree or a decree for sale on a mortgage.

Dist.—6 O. C. 101.—That a son whose share in a joint family estate has passed under a sale in execution of a decree against his father or by means of a decree for foreclosure against his father could not re-open the decree merely because he was not a party thereto.

R.—7 O. C. 137.—The foreclosure of the fathers' interest having been made absolute, the suit by the son was not maintainable.

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1 O. C. 63.

Coercion, force and undue influence—S 111 Evidence Act—Burden of proof.

Facts showing real authority of the defendant over the plaintiff were proved, and that the former made use of his authority for the purpose of obtaining an advantage over the latter, which but for the authority he could not have obtained.

Held, that these facts constituted undue influence.

Held, that persons, taking a benefit from another over whom they stand in a position of commanding influence, must take upon themselves the whole proof that the thing is righteous.

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10 C. 71.

257(*A*) *C. P. C.*

(This section is omitted in Act V of 1908.)—Estoppel. That no question of estoppel arises when the previous warrants of attachment either proved ineffectual or were not executed.

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10 C 75.

Pre-emption—S. 3 (*b*), *and* 9 *Oudh Laws Act—Hiba-bilewaz—Muhammedan Law of pre emption—Meaning of "sale" and "price".*

1. That the statutory right of pre-emption was conferred on all classes of the community alike, and the language in which that right was conferred must be construed in a uniform manner without regard to the personal laws or usages of the persons concerned.
2. That the words "sale" and "price" are to be construed as these words are commonly understood.
3. That the word "price" in the Oudh Laws Act means "money".
4. That a "hiba-bil-ewaz" is not a sale and that it confers no right of pre-emption.
5. That parties, who deliberately adopt a form of conveyancing which gives rise to a right of pre-emption, and thus induce third parties to embark on expensive litigation, will not be permitted as against those parties to plead that the transaction was of a different nature

Notes.

(4) **R.**—3 O C. 110—It was the intention of the Legislature to alter the Muhammedan Law and to substitute for the *talabi mawasibat* and the *talabi istish had* a period of 3 months from the receipt of notice under S 10 within which the pre-emptor may prefer his claim. Hiba-bil-ewaz is no sale within the meaning of S. 9 Oudh Laws Act.

(3) **R.**—7 O. C. 31—That a deed relinquishing claim to property in return for benefits previously received from transferee is not a sale deed—Meaning of "price"

(5) **Diss.**—11 O. C. 176—That the parties to a deed are not estopped from proving that a transaction was in reality different from what it appeared to be.

(3) **R.**—16 O. C. 99—That where a sale is effected partly in lieu of money and partly in lieu of something computable in money or valued in money, a right of pre-emption would accrue.

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1 O. C. 78.

Arrears of rent—S. 38, 4 (1), 36, 37, 49, 50, 47 (1) Oudh Rent Act. Enhancement of rent—Ss. 23 and 24 Contract Act—Void contracts.

That an agreement under S. 47 by a tenant, admitted to the occupation of any land, the tenancy of which has been determined, to pay rent exceeding by more than one anna in the rupee on the rent payable by the tenant immediately preceding him, except in the case mentioned in Ss 49 and 50, is void.

Notes.

R.—5 O. C. 193—That S. 47 is not applicable to the case of an occupancy tenant being succeeded by a tenant not having right of occupancy—Extent of land-lord's power to exhance rent.

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1 O. C. 80.

Misjoinder of causes of action.

1. That when a plaintiff is in doubt whether the law or some special custom will be held binding by the Court, and if in that case he relies on both, there will be no misjoinder of causes of action
2. That a *Wajib-ul-arz* if not rebutted, is conclusive proof of custom.

Notes.

(2) **Diss.**—4 O. C. 71—That a single *Wajib-ul-arz*, even if not rebutted, is not sufficient proof of custom.

1 O. C. 83.

Arts 11, 12 Limitation Act.

That the plaintiff having made the auction purchaser a party, his suit is governed by art 11 and not art. 12 Limitation Act.

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1 O. C. 84.

Dacoity—S. 396 Penal Code—Ss. 289, 342 Cr. P. C.—Examination of accused.

Held, that "no evidence" in S. 289 Cr. P. C. means "no legal evidence or proof" and not "no evidence worthy of belief" that the accused should be examined under S 342 Cr. P. C. and called on to enter on their defence.

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1 O. C. 85.

Trial before Court of Sessions—Ss. 287, 289 and 342 Cr P. C. Acquittal without taking the whole evidence tendered by the prosecution—Retrial.

The order of acquittal, without taking the whole evidence tendered by the prosecution, is against law.

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1 O. C. 88.

S. 108 (2) and (5) Oudh Rent Act—Informality in plaint—Inconsistent allegations.

Suit framed either under cl. (2) or under cl. (5) of S. 108 is not to be dismissed on the ground of inconsistent allegations

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1 O. C. 91.

Redemption—Mortgage—Deposit after expiry of time fixed by the decree—Ss. 86 and 89 Transfer of Property Act = Order 34 rule 2 C. P. C.

The mortgagor judgment debtor deposited the mortgage money in Court after the expiry of the period fixed by the decree. The mortgagee decree-holder applied for an order absolute for foreclosure.

Held, 1. that the mortgagor could redeem the mortgage

2. That the decree under S. 86 T.P. Act is a decree *nisi*, and can have no final effect until completed by an order absolute.

Notes.

F.—14 O, C. 10 —A mortgagor had a right to redeem at any time before the passing of an order absolute for sale, without obtaining an extension of the time limited by the decree.

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1 O. C. 93.

Jurisdiction—Provincial Small Cause Court Act art. 38 sch. II (IX of 1887)—Suit for arrears of maintenance.

A suit for arrears of maintenance payable under a written agreement is a suit "relating to maintenance" within the meaning of art. 38, and does not lie in the Provincial Small Cause Court.

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1 O. C. 94.

1 *Interest—S.* 141 *Oudh Rent Act*—That S 141 does *not entitle* a *superior proprietor to recover interest upon arrears of rent due by* an *under-proprietor*;

2 *S. 37 Contract Act*—That where no contract is proved, interest by way of damages cannot be decreed.

Notes.

(2) **R**—1 O. C 270—That on proof of a breach of contract, interest by way of damages may be decreed.

F.—3 O. C. 108—That an under-proprietor was not liable to pay interest on arrears of rent.

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1 O. C. 97.

Res Judicata—Withdrawal of suit under S. 373 C. P. C.=O. XXIII, r. 1 C. P C. (V of 1908) Notice to defendant. Objection taken for the first time in second appeal.

Upon an application under S. 373 (O. XXIII, r. 1), the order passed by the Court was, "Let the plaintiffs' claim be *kharij* with costs, and let notice be given to the opposite party, the plaintiff has liberty to institute a fresh suit."

Held, 1. That the above order was one of withdrawal with liberty to bring a fresh suit, and not a decree dismissing the suit.

2. That though the notice was not issued, yet, the validity of the order, not having been objected to in appeal or revision, could not now be questioned.

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1 O. C. 100.

Set off—Thekadar's claim for—S. 140 Oudh Rent Act.

The provisions of S. 140 being applicable to suits for the recovery of arrears of rent from Thekadar, the thekadar was precluded from claiming a set off.

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1 O. C. 102.

Stay of Execution—Ss. 545, 546 C. P. C.=O. XLI, rr. 5 and 6 C. P. C. (Act V of 1908).

That the order under the above sections was appealable.

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1 O. C. 103.

Jurisdiction—Suit by a Lamberdar for share of weighing dues—Lease modified by a subsequent arrangement.

Held, that such dues do not come under the definition of rent, that the Civil Courts had jurisdiction to try the suit; and that there is nothing to prevent the parties from modifying the lease by a subsequent arrangement.

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1 O. C. 105.

Suit by second mortgagee—Sale without redeeming prior mortgage. Rights of prior and subsequent mortgagees—S. 58 Transfer of Property Act—Meaning of "property" in chapter IV. Transfer of Proporty Act.

1. That the second mortgagee could, in a case where the interests of the mortgagor and the first mortgagee were separate, have the property sold subject to the first mortgage and was not bound to redeem it.

2. That the term "property" in chapter IV of Transfer of Property Act includes the equity of redemption.

Notes.

(1) Dist.—3 O C. 254.—In a case, where the vendee of the mortgagor has acquired the rights of the first mortgagee, the second mortgagee must redeem the first mortgage before he can put the property up for sale

(2) R.—5 O. C. 335 (341)—Construction of "property" in Act IV of 1882 (T P. Act).

(1) F.—7 O. C. 330.—That the second mortgagee is not bound to offer to redeem the first mortgage before bringing the property to sale.

(1) R—10 O. C 145 (152).—The plaintiff was entitled either to sell the property subject to the prior mortgage as held in 1 O. C. 105 or to redeem the prior mortgage and sell the property free of it.

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1 O. C. 112.

Hindu Law.

Joint family—Son's liability to pay his father's debt—Non-joinder of parties—Sale of ancestral property—Bond debt.

That the sons can not claim to have their interests exempted from the sale, and the liability of the debt limited to their father's interest, except on establishing that the debt was contracted for illegal or immoral purposes.

Notes.

F.—1 O. C. 169.—Liability of son of joint Hindu family for father's debt.

R.—7 O. C. 137.— „ „

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1 O. C. 117.

Transfer of execution proceedings—Meaning of "suit" in S. 25 C. P. C.=S. 24 C. P. C. Act V of 1908—S. 4 Act VI of 1892—Jurisdiction.—

1. That S. 25 applies to execution proceeding; and that proceeding in execution, whether pending in a Court of first instance, or in a Court of appeal, may be withdrawn or transferred under the provisions of that section.

2. That the execution proceedings which were properly instituted before the Munsif who had pecuniary jurisdiction to deal with them were pending when he was succeeded by another Munsif whose pecuniary jurisdiction was limited to Rs 1,000, would not prevent an order of transfer being made under S. 25.

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1 O. C. 121.

1 *Jurisdiction—Suit in the nature of a Small Cause Court suit decided as a regular suit—Appendix No. 20 of the Excise Rules—Excise Act—Pecuniary relations of the farmer and the licensee.*

1. That when a case in the nature of a Small Cause Court suit was admitted as a regular suit by the Munsif who was not invested with the powers of a Small Cause Court, and was decided by his successor invested with such powers, without being transferred from the regular Civil Court to the Court of Small Causes, it must be held to have been decided as a regular Civil suit.

2. That the form given in Appendix 20 does not govern the pecuniary relations of the farmer and the licensee.

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1 O. C. 123.

S. 39 *Specific Relief Act—Declaratory suit—Court Fees Act. Sch. II, Art 17 (iii).*

Held, that cases under S 39 are in the nature of simple declaratory suits, and are chargeable with Court fees under Art 17 (iii).

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1 O. C. 124.

Arrears of rent—Suit by an under-proprietor against birt-holder.

1. *Meaning of "rental" in settlement proceedings*—It means the rental as ascertained by the Settlement Officer for the purpose of calculating the revenue payable by the proprietor to the Government and the rent payable by the under-proprietor to the proprietor.

2. *Rent fixed by the Settlement Officer.*—The order of such officer fixing the rent is conclusive between the parties; a Rent Court could not alter the amount of rent so fixed, and that the jurisdiction of the Civil Court to do so is barred.

3. *Presumption as to entry in Settlement Papers.*—A certificated copy, of any entry in Settlement papers, will be presumed to be a correct entry of the fact entered, until the contrary is proved.

4. Position of Birt-holders discussed.

Notes.

(4) R.—14 O. C. 41 (43).

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1 O. C. 141.

Costs—S 145 Oudh Rent Act.—

That in interpreting the words "unless the decree for a sum exceeding Rs. 500," in S. 45, the costs awarded in the decree to the decree-holder must be included in the calculation of the sum decreed.

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1 O. C. 143.

Suit by a co-sharer for profits—S. 108 (15) Oudh Rent Act Adverse possession.

1. That entry in the *Khewat* is sufficient proof of *prima facie* title to profits.

2. That no adverse possession can be inferred from the fact of the plaintiff having received no profits of his share, in the absence of evidence showing that it was owing to the denial of the plaintiff's title that he did not receive profits.

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1 O. C 152

Suit for profits by co-sharers against a Lambardar—S. 108 (15) Oudh Rent Act.
A Lambardar is not liable for profits of lands held by other co-sharers in excess of their proper shares.

Notes.

R—11 O. C. 75.—Tenant of lands in a joint mohal taking a mortgage with possession of a share therein, is liable to pay rent as tenant to the lambardar.

1 O. C. 155.

Execution of decree—Application to set aside sale—S. 311 C. P. C.=O. XXI, r 90 C. P C. Act V of 1908—Material irregularity—Substantial injury.

The grounds for setting aside the sale mentioned in the application were :—

(1) that the sanction as required by S. 20 Oudh Laws Act had not been obtained ;

(2) that the legal representative of the judgment-debtor had not been brought on the record ;

(3) That the order absolute for sale had not been obtained.

1 *Held*, that these grounds did not constitute any material irregularity.

2. That it was essential for the Judgment-debtor to prove that the substantial injury occurred by reason such irregularity.

Notes.

R.—6 O. C. 61.—No direct evidence required to prove that substantial injury was due to material irregularity but an inference might be drawn that the latter had been caused by the former.

Diss.—8 O. C. 409—That although the want of sanction possibly may not correctly be described as a mere irregularity in the conduct of a sale, it goes far deeper and takes away from the Court its jurisdiction to sell.

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1 O. C. 157.

Held, that *Nankar* is a *heritable* estate.

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1 O. C. 159.

Agent—Power of attorney.

A person holding power of attorney (not sufficiently stamped) jointly from 5 persons not authorizing him to act generally in any matter in which the executants were severally concerned, could not act in cases in which all the executants were not concerned.

1 O. C. 160.

Appeal—Act XX of 1890 (N. W. P. and Oudh Act)—S. 18 Oudh Civil Courts Act. S. 6 General Clauses Act.

1. That proceedings in execution of decree are part of a suit and are proceedings within the meaning of S. 6 of the General Clauses Act (1 of 1868).

2 That the Subordinate Judge's order having been passed in proceedings commenced before the passing of Act XX of 1890 was appealable to the Court of the District Judge and not to the Court of the Judicial Commissioner.

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1 O. C. 163.

Cash Nankar an under-proprietary right—charge on the Zamindari rights.

That cash Nankar granted in lieu of the surrender of *Zamindars'* rights is an under-proprietary right, and it is in equity charged in the Zamindari rights so surrendered.

Notes.

R.—12 O. C. 124(126).—The right to a cash *nankar* does not necessarily can note a right to possession of land as an under-proprietor.

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1 O C. 66.

Revision—S. 622 C. P. C. = S 115 C. P. C. (V of 1908.)—Notice of time and place to the parties.

That litigants are entitled to proper notice both of the time and of the place at which the Court is to be held; that in the absence of such notice the Court cannot proceed to decide the case *ex parte*, and that if it does—so, it acts in the exercise of its jurisdiction with material irregularity.

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1 O. C. 168.

Appeal—Receiver, appointment of—S. 503 C. P. C. = 6 XL, r. 1 and 3 C. P. C. (V of 1908)

An order appointing a Receiver is appealable.

1 O. C. 169.

Hindu Law—Joint family—Son's liability to pay father's debt Non-joinder of parties.

The sons cannot claim to have their interest exempted from the sale, except on proving that the debt was of such a nature that under the Hindu Law there was no pious obligation on them to discharge it.

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1 O. C. 170.

Execution of decree—Political pension—attachment.

That a pension awarded by the deed of trust, on the part of King Oudh, is a political pension, and as such it cannot be attached in execution of a decree against the pensioner.

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1 O C 172.

Ss. 108 (10), 124 (d) Oudh Rent Act—S 562 C. P. C. = 6, XLI, r. 23 C. P. C. (V of 1908) second appeal—Jurisdiction.

On appeal from an order of remand respondent objected that an objection, that the order of Subordinate Appellate Court had been directed to a Court which was not competent to entertain the suit, could not be taken in second appeal in view of S. 124 (*d*) Oudh Rent Act

1. *Held*, that S 124 (*d*) did not apply.

2. That where the right of succession is disputed the case, case cannot fall within S. 108(10) Oudh Rent Act and the case is cognizable by the Civil Court.

Notes.

(2) F.—10 O. C. 23.

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1 O. C. 174.

Pre-emption—Cancellation of sale-deed—Inconsistent reliefs.

Where the plaintiff sued for cancellation of a deed of sale and in the alternative for pre-emption of the property included in the deed.

Held, that the two reliefs prayed for by the plaintiffs were inconsistent with each other, and that under the circumstances the plaintiffs were not entitled to a decree for pre-emption.

1 O. C. 178.

Art. 91 Limitation Act.

A executed a sale-deed in 1883 in favour of his daughter K. On the death of A in 1883 his daughter K took possession of his property. In 1892, B another daughter sued for recovery of her share ignoring the sale-deed. It was found that the sale-deed had been obtained by unfair means and was invalid, that effect had never been given to it, that defendant had not obtained possession by virtue of it and had never relied upon it until the present suit.

Held, that the suit was not barred under Act 91 Limitation Act.

Notes.

F —1 O. C 229—Limitation for suit to set aside gift.

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1 O. C. 181.

Award, suit to set aside—Evidence recorded by umpire alone—Duty of arbitrators—Invalid award.

That until all the arbitrators and the umpire attend every sitting, hear all the evidence, bring their minds to bear on the points at issue, and give an award according to their judgment on the merits of the evidence, there can be no award, in fact, made by them.

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1 O. C. 183.

Lambardar's liability—gross negligence or misconduct.

That a Lambardar is liable for his co-sharer's share in the profits which through gross negligence or misconduct he has omitted to collect.

Notes.

App —4 O. C. 1 —Rule as to burden of proof.

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1 O. C. 184.

Appeal—decree remaining unsigned—Time requisite for obtaining copies—S 12 Limitation Act.

If after judgment the decree remains unsigned, such interval is not to be excluded from the period of limitation, unless application

for copy having been made, the application is actually unnecessarily delayed through the decree not having been signed.

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1 O. C. 186

S. 311 C. P. C.=O. XXI, r 90 C. P. C. (V of 1908)—Order of sale not proclaimed by beat of drum—Inadequacy of price.

It must be proved that the inadequacy of price resulted from the order of sale not having been proclaimed by beat of drum.

Notes.

Dist.—6 O. C. 61.—No direct evidence required, the Court may infer.

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1 O. C. 188.

Pre-emption—Fraudulent transfer by vendee's husband—Vendors estopped from denying the truth of the transfer—Estoppel.—

The defence of the vendor and the vendee was that the sale deed was fictitious. It was found that the plaintiff's father now represented by the plaintiff, was one of those actually defrauded by the fraudulent transfer made by the vendee's husband who was vendor in this case.

Held, that the vendee's husband was estopped from denying the truth of the transfer, and that the vendor's sale deed in favour of the vendee conveyed a title to her which gave rise to a claim for pre-emption on the part of his co-sharers.

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1 O. C. 191.

Second appeal—Suit of the nature cognizable in a Court of Small Causes—Jurisdiction—Construction of a hypothecation bond.

In a suit on a bond, which provided that in case of default the creditor would be entitled to recover his money from the boats pledged and also from moveable and immoveable property, *held*—

(1) that the plaintiff was entitled to a decree for sale of the boats only;

(2) that the suit was of the nature cognizable by the Court of Small Causes, and as the value did not exceed Rs. 500, no second appeal allowed.

1 O. C. 193.

S. 310 A. C P. C.=O. XXI, r. 89 C. P. C. (V. of 1908)—Extension of time.

Where insufficiency of deposit was due to the *wrong information* given by an officer of the Court, sale was set aside and time allowed to make good the deficiency

Notes.

R.—8 O. C. 241 (245)—Where the District Judge accepted the plaintiff's affidavit upon the point why he had been unable to present his application for letters of administration at an earlier date and extended the period for compliance of the condition laid down in the decree by two months from that date ; held, that the District Judge had power to extend the time laid down in the decree.

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1 O. C. 199.

S. 568 C. P. C.=O XLI, r. 27.—Additional evidence admitted by Court of First Appeal rejected in second appeal.

That such evidence is liable to rejection in second appeal, if this Court is satisfied that in admitting it the Lower Appellate Court has clearly acted on insufficient grounds, or has improperly exercised its discretion.

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1 O C. 205.

Application for leave to appeal to Her Majesty in Council—Ss. 562 and 595 C. P. C.=O. XLI, r 23 ; S 109 C P. C. (V of 1908).

That the order of remand was not a final decree and that the certificate could not be granted.

Notes.

R.—11 O. C. 169.—That an order of remand, which will not necessarily have any effect on the ultimate decision of the case, was not a final order.

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1 O. C. 210.

Jurisdiction—S. 108 (6) Oudh Rent Act—Determination of occupancy right

A Court of Revenue has exclusive jurisdiction to determine whether or not a right of occupancy exists in certain lands.

Notes.

R.—2 O. C. 96.—That the Civil Courts has no jurisdiction to entertain a suit for a declaration that the defendant is a mere tenant at will, the question of such tenancy being within the exclusive jurisdiction of the Revenue Courts.

R.—3 O. C. 87.—That a suit by a tenant, for a declaration that he was entitled to hold the land in perpetuity under the lease, was exclusively triable by a Court of Revenue.

App.—3 O. C. 96.— ,, ,,

F.—12 O. C. 164.—That a Civil Court cannot determine whether or not a lease has expired and make a declaration accordingly.

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1 O. C. 215.

Suit for settlement of accounts—S 108 (15) Oudh Rent Act—Misjoinder of parties—S. 28 C. P. C. = O I, r 3, 4 (6) C. P. C. (V of 1908).

1. That in a suit for settlement of accounts all the co-sharers, in the estate to which the suit relates and in respect of which accounts are to be settled, are necessary parties to the suit.

2. The period of limitation for a suit for settlement of accounts and for a suit for share of the profits is the same.

Notes.

(2) **Diss.**—7 O. C. 84.—That period of limitation in suits for a share of the profits (3 years) and a suit for settlement of account (one year) is not the same.

(1) **R.**—13 O. C. 251.—In 1 O. C. 215 it appears to have been assumed rather than decided that "estate" and "mahal" are convertible terms.

(1) **R.**—VIII I. C. 742.

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1 O. C. 222.

Suit for arrears of revenue—Land described in sale-deed 'bila lagan' but subsequently assessed—S. 108 (16) Oudh Rent Act.

The contract under the sale deed that neither the vendor nor his representatives should ever claim rent was held to exempt the vendor from the payment of either rent or revenue.

Notes.

Adop.—2 O. C 273 (275)—That the plaintiffs (vendees) could not recover more than the sum which the vendors had agreed to pay to the vendee, as rent of the *sir* land, excepted from the sale.

Dist.—3 O. C. 310.—In 1 O. C. 222 there was a contract the effect of which was held to be that the purchaser held the land exempt from the payment of either rent or revenue. The other observations in the judgment are dissented from.

„ —5 O. C. 70(74)—The decision in 1 O. C. 222 has no bearing upon the facts in 5 O. C. 70.

„ —6 O. C. 184(187)—In 1 O. C. 222, the plaintiff was a purchaser from the heirs of the person who had agreed not to claim lagan in respect of the land transferred but in 6 O. C. 184 some plots of land were sold by S to the vendee on condition of payment of rent if assessed and then S sold the remaining plots of his share to another vendee.

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1 O. C. 225.

Jurisdiction—Mistakes or omissions in orders regarding partition proceedings held in Revenue Court.

That the Civil Courts had no jurisdiction to correct mistakes or omissions of the Revenue Courts in partition proceedings.

Notes.

Over.—9 O. C. 76.

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1 O. C. 227.

Pre-emption—Price paid evidence of market value—Market value evidence in dealing with questions of bad faith.

1. That the sum actually paid was, in the absence of other facts, sufficient evidence of the fair market value.
2. That the market value may be ascertained and treated as evidence in dealing with the question of bad faith.

(2) F.—4 O. C. 247.—Consideration of market value in connection with price not fixed in good faith.

1 O. C. 229.

Possession, suit for—Art 91 Limitation Act.

A in 1876 executed a deed of gift in favour of his daughter B who was then a minor. A died in 1880. In 1884 mutation of names was effected in favour of B on the strength of the deed of gift, and possession was taken by her. In 1896, C another daughter of A sued for possession of half the property comprised in the deed of gift.

Held, that the suit was barred by limitation under Art 91.

1 O. C. 231.

Grove tenure, cultivators right to—Wajibul-arz—Custom—Court taking judicial notice of.

1. That the general custom of the country is that the tenant retains his right to the trees until he dies without heirs or absconds from the village with the intention of totally abandoning the trees, and that ejectment from the cultivatory holding or residing in a neighbouring village does not amount to an abandonment of the trees.

2. That the custom alleged by the plaintiff is not so notorious or general as to justify the Court in taking judicial notice of it and treating it as part of the Common Law of the Province.

3. The incidents of the grove tenure discussed.

Notes

(1) **Dist.**—2 O. C. 281.—In 1 O. C. 231.—The trees were not planted by the tenant on his cultivatory holding.

(1) **F.**—15 O. C. 33.—The possession of a grove-holder, who has been in possession of the trees from a long period, is not with respect to under-proprietary rights in any way different from any other person who claims those rights.

1 O. C. 252.

Pre-emption—Joint Hindu family—Attestation of sale-deed by father son's right to pre-empt.

1. That mere attestation of the deed of sale by the father did not necessarily import concurrence.

2. That the sons in a joint family are to be regarded as co-sharers for the purpose of pre-emption.

Notes.

(1) **R.**—5 O. C. 395.—No estoppel against right of pre-emption in the absence of written notice of proposed sale to the plaintiff.

(2) **Dist.**—7 O C. 61.—Sons not separately recorded as co-sharers are not entitled to pre-empt in respect of property sold by their father

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1 O. C. 254.

Pre-emption—Notice, inadmissibility of oral evidence of—S. 10 Oudh Laws Act—Oral offer of sale—Waiver.

1. That mere omission or refusal to accept an oral offer or, dispense with the performance of the obligation to serve a written Notice.

2. That oral evidence of notice is inadmissible.

Notes.

(2) **R.**—5 O. C. 395—No estoppel against right of pre-emption in the absence of written notice of proposed sale to the plaintiff.

Not adop.—7 O. C. 61.

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1 O. C. 262.

1. *Pre-emption—Notice, omission*—That an omission by the vendor to issue a notice with the intention of keeping the pre-emptor from a knowledge of his right will avail the pre-emptor under S. 18 Limitation Act against the vendor and also against the vendee; if the latter has been accessory to the fraud or claims otherwise than in good faith and for valuable consideration.

2. *Physical possession—Equity of redemption art 10 Limitation Act*—That an equity of redemption does not admit of physical possession.

3. *Fraud*—That where no specific allegations of fraud were set out in the plaint, the plaintiff could not succeed on general allegations.

1 O. C. 267.

Interest--S. 141 Oudh Rent Act—Interest Act (XXXII of 1839).

That although S. 141 does not entitle a superior proprietor to recover interest upon arrears of rent due by an under-proprietor, interest on such arrears was to be awarded under the Interest Act if the requirements of that Act are satisfied.

Notes.

Aff.—26 I. A. 41—Interest on arrears of rent by under-proprietor.

R.—3 O. C. 22 (29)—Discretion of Court in awarding interest.

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1 O. C. 270.

Arrears of rent—Breach of Contract—Damages.

The defendants who were under-proprietors had executed an *iqrarnama* in favour of the plaintiff, the superior proprietor in which they promised to pay him as rent, the Government Revenue plus 10 p c. In a suit by the superior proprietor for arrears of rent ;

Held, that on proof of a breach of contract by the defendants, the plaintiff was entitled to interest by way of damage.

Notes.

App.—3 O. C. 22—Interest on arrears of rent by under-proprietor—Non liability.

Rev.—7 O. C. 116 (P C.)— ,, ,,

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1 O. C. 272.

S. 14 Limitation Act—Mistake of law on the part of plaintiff as to proper forum— S. 283 C. P. C =O. XXI, r. 63 C. P. C. (V of 1908) Suit for declaration—Consiquential relief—S. 42 Specific Relief Act.

1.—That the mere fact, that the Subordinate Judge valued the suit at Rs. 800, was not sufficient to establish any bad faith on the part of the plaintiff, and that they were entitled to deduct the period spent in the Court of the Subordinate Judge, and the suit was not barred by limitation.

2. That a mistake of law, on the part of the plaintiff as to the proper forum, does not entitle him to ignore subsequent facts, materially affecting his cause of action, or to treat the plaitn

as one presented on the day on which it was first presented to a Court which had no jurisdiction.

3. That when the property is released or sold, and comes into the possession of private individuals, a suit for mere declaration without consiquential relief is one brought in contravention of S. 42 Specific Relief Act and is not maintainable

Notes.

Ap.—5 O. C. 304 (306)—There is nothing in S. 283 C. P. C. (XIV of 1882) to prevent the plaintiffs from making a claim in the former suit for the value of the property or compensation for its illegal attachment.

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1 O. C. 280.

Contentious suit—Transfer—Pendente lite.

That there was no contentions suit or proceeding in existence until the summons was served upon the defendant.

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1 O. C. 284.

Pre-emption—Ss. 7 and 9 Oudh Laws Act—Scattered trees or grove.

There is no right of pre-emption in a grove when a seller has neither a proprietary nor an under-proprietary interest in the land thereof.

Notes.

F.—O. C. O. C 26—Nature of interest giving rise to claim for pre-emption.

F.—13 O. C. 202—A grove-holder is not a member of village community.

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1 O. C. 289.

Suit for redemption—Decree of the Settlement Court.

1. Whatever be the wording of the decree, it was in its nature, merely declaratory of the rights of the parties, and was no bar to a subsequent suit.

2. That it would be contrary to justice, equity and good conscience to apply the technical rules now prevailing in the Civil Courts to the state of facts which existed 30 or 40 years ago, and to Courts specially created that they might be free from such

technicalities and which were as a fact free from such technicalities.

Notes.

(1) Dissented.—6 O. C 239 (243)—A decree of a Settlement Court ought not to be held to be merely declaratory in disregard and deficience of its terms.

(1) R.—8 O. C. 361.—Where a Settlement Court decree did not fix a time within which the mortgage money was to be paid, the decree was merely declaratory and incapable of execution and in such a case a subsequent suit for redemption was not barred.

R.—9 O. C. 301,—As to the procedure sanctioned for the Revenue Courts in Oudh.

R.—11 Indian Cases 291.—As pointed out in 1 O. C 289, the Settlement Courts then constituted stood on a totally different footing from the Civil Courts.

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1 O. C. 301.

Haq-qi-Jethwansi—Wajib-ul-arz—Custom—Oral evidence—S. 92 (3) Evidence Act.

1. A Wajib-ul-arz is not sufficient proof of custom. It may be presumed that it was regularly prepared, and that it is a correct record of a local custom.
2. It is of the essence of a valid custom that it shall be binding upon the parties concerned and not binding only to the extent to which one of the parties may choose to submit to it. A *wajib-ul-arz* must be taken to be as it stands, and it is not open to the Court to fix the amount of *Jethwansi* when the record of the custom shows that no amount has been fixed.
3. That the petition, stating that the matter had been compromised could not be said to contain the terms of a contract between the parties, but if it were such a contract, oral evidence as to the alleged conditions precedent would be admissible under proviso 3 of S. 92 Evidence Act.

Notes.

(1) Exp.—4 O. C. 71,—Value of *wajib-ul-arz* containing record of custom;

R.—6 O. C. 372.—That a memorandum of appeal under S 75 Oudh Land Revenue Act should bear a Court fee of Rs. 2.

1 O. C. 308.

Pre-emption.—Pre-emptor joining with himself one having no right of pre-emption—Joinder of parties Ss. 26 and 31 C. P. C.=O I, rr 1, 4 (a) 19 C. P. C. (V of 1908).

A, who was entitled to a right of pre-emption, sued to enforce that right joining with himself as co-plaintiff B, who had no such right

Held, that A did not thereby forfeit his right but could maintain his suit.

Notes.

R.—5 O. C. 266 (269).—Right of under-proprietor to pre-empt a mohal sold by a proprietor

Ad.—7 O. C. 22.—Effect of co-sharer joining stranger in purchase in suit for pre-emption.

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1 O. C. Sup. 1.

Suit for arrears of rent—Ss. 124, 124 A Oudh Rent Act—Jurisdiction.

1. When an objection to jurisdiction was taken in the first Court, and an appeal the appellate Court has before it "all the materials necessary for the determination of the suit," it shall decide the appeal without entering into the question of the jurisdiction of the lower Court.

2. That a suit for arrears of rent based on a lease, under the circumstances of the case, was cognizable in a Civil Court.

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1 O. C. Sup. 4.

Suit for declaration—Hindu Widow—Will—Relief—Ss. 39, 42 Specific Relief Act.

That the case was not one under S. 42, but that the prayer of the plaint came under S. 39, which empowers the Court without application by the plaintiff to order the impugned instrument to be delivered up to be cancelled.

1 O. C. Sup. 6.

Mahomedan Law.—Dower—Possession.—

Under the Shia Law, a childless widow has no right to succeed to any share—But if she has lawfully and without force and fraud obtained possession of her husband's property in lieu of dower, she is entitled to retain possession until her dower debt is paid, subject to a liability to account and without power of alienation; and a similar right would pass to her heirs. In the absence of any claim to hold in lieu of an unsatisfied debt, the widow's possession would be that of a trespasser.

Notes.

Rule.—15 O. C. 257.—Where a widow is proved to have obtained possession peacefully, quietly and without fraud in lieu of her unsatisfied dower debt, his legal heirs, are not entitled to oust her until that debt has been satisfied.

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1 O. C. Sup. 11.

Execution of decree—Objection by Judgment-debtor under S. 278 C. P. C. O XXI, r. 58, C. P. C. (V of 1908.)—Appeal—Revision.

An order on an objection under S. 278 is not appealable.

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1 O. C. Sup. 13.

Confession—Retracted.

It is unsafe to found a conviction upon a retracted confession which is not corroborated upon material points by credible and independent evidence.

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1 O. C. Sup. 18.

Value of suit for purposes of appeal to Her Majesty in Council Certificate for leave to appeal.

Question of misjoinder of parties and causes of action not sufficient ground for granting leave.

1 O. C. Sup. 21.

Order refusing to appoint receiver—Appealable S. 588 C. P. C. = O. XL III, r. 1 C. P. C. (V of 1908).

An order refusing to sanction the appointment of a receiver is not appealable.

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1 O. C. Sup. 22.

1. An order, rejecting application for filing award, not appealable.
2. Memorandum of appeal not treated as application for revision.
3. An application for the revision of the lower Court would not require two Judges to hear in the absence of the certificate under S. 8 cl. (c) Act XIV of 1891.

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1 O. C. Sup. 24.

Hindu Law—Joint family property, S. 53 and 8 Act I of 1869 (Oudh Estates Act).

Whether all or some of the villages in suit came within the meaning of "estate" as defined in Act I of 1869, there was a declaration of trust in favour of the joint family. *Held*, therefore, that the plaintiffs were entitled to their share under Mitakshara Law, in the villages which had been summarily settled with certain members of the family jointly, as well as in the villages acquired by purchase or mortgage by certain members, from the funds of the Joint family.

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1 O. C. Sup. 36.

Ss. 2, 3, 7, 8, 10, 14, 22 Act I of 1869—S. 74 cl. (2) Evidence Act.

1. That a Talukdar whose name was entered in list I and V was a taluqdar and a grantee under S. 10, and his estate devolved under S. 22 upon his eldest son.

2. That, although no *sanad* was granted to the Talukdar, the grant was a special one under S. 2.

3. That the engagements at the summary settlement as *mustajir*, did not amount to a summary settlement under S. 3.

4. That the word " transfer" includes a transfer by way of mortgage.

5. That an inventory deposited in the office of the Deputy Commissioner by a talukdar or grantee under S. 7 does not become a " public document" under S. 74 (cl. (2) of the Indian Evidence Act

1 O. C. Sup. 49.

Legitimacy—Declaration by father of son's legitimacy—Admission.

1. An admission by one defendant is not binding upon other defendants.

2. A declaration by the plaintiff's father that the plaintiff was his heir and representative was not sufficient and satisfactory evidence of his legitimacy

3. The term *Barkhurdar* does not necessarily import that the person to which it is applied is legitimate.

1 O. C. Sup. 58.

Execution of decree—Sale of immovable property situated outside jurisdiction of Court passing decree.

The decree directed that the judgment-debtor should have the option to pay the amount decreed within a certain time, and in default the decree-holder may obtain satisfaction by attachment, sale of certain immovable properties. *Held*, that the S. J. of Lucknow had power to sell the properties attached, notwithstanding that they were not situated within the local limits of his jurisdiction.

1 O. C. Sup 60.

Legal representative—S. 224 C. P. C. = S 47 C. P. C. Act V of 1908.

Whether the property formed part of the widow's estate or belonged to the estate of her husband was a question which ought to have been decided in execution, and could not be made the subject of a separate suit.

Notes.

Approved.—8 O. C. 405 (408)—That the provisions of S. 244 (S. 47), operated to bar, under the circumstances, a suit like the present.

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2 O. C. 1.

Exclusive right to offerings at a public tal.

The mere fact, that certain person have been in the habit of attending bathers and receiving offerings from them, does not give to those persons an exclusive right to all the offerings for all time.

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2 O. C. 3.

Suit for possession against trespasser.

Possession is good title against all persons except the rightful owner, and entitles the person so in possession to maintain an action in ejectment against any other person than such owner who dispossess him.

Notes.

R.—9 O. C. 161.—Possession of a trespasser is heritable.

F.—9 O. C. 273.—

F.—11 O. C. 337.—Possession is a good title against all except the rightful owner—and such possessory title is heritable and transferable.

R.—12 O. C. 130.—Possession good title against trespasser.—Suit filed after 6 months for dispossession maintainable.

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2 O. C. 5.

Order returning plaint—S. 588 cl. (b) C. P. C. (Act XIV of 1882) = O. XLIII r 1 Act V of 1908

An order of an appellate Court returning plaint for amendment is appealable to the Court of the Judicial Commissioner.

2 O. C. 7.

Pre-emption—Contract for sale—S 54 Transfer of Property Act.—S. 10 Oudh Laws Act.

A right of pre-emption is enforcible in the event of a person entering into a contract for the sale of the property and the enforcement of such right does not depend upon the existence of a sale of property in the mode provided by S. 54 Transfer of Property Act.

Notes.

Dist.—9 O. C. 169.—A mere proposal to sell does not entitle any one to claim for pre-emption. In 2 O. C 7 no notice was given according to the Act.

R.—13 O. C. 219.—The contract was conditional not absolute and did not amount to a denial of the plaintiffs right of pre-emption.

R.—XXI, Indian Cases 60.

2 O. C. 9.

Pre-emption—Art. 10 Limitation Act—Meaning of "Physical possession"—Ss. 9, 10, 11 and 13 Oudh Laws Act—Pre-emptors denial of vendor's title.—

1 Where the subject of sale was an undivided half share in an underproprietory holding; *Held* that the period of limitation must be computed from the date when the sale-deed was registered.

2 Where the person entitled to pre-emption denies the title of the person who proposes to sell, the law of pre-emption contained in Ss. 9, 10, 11 and 13 of the Oudh Laws Act of 1876 does not apply.

Notes.

(2) R.—7 O. C. 61.—Sons not separately recorded as co-sharer are not entitled to pre-empt in respect of the property sold by their father—Effect of pre-emptor denying title of vendor.

R.—9 O. C. 331.—Where the property sold was not in actual possession of the vendors it was not such a sale which could be the subject of pre-emption.

Dist.—14 O. C. 161.—The ruling in 2 O. C. 9, dealt with the meaning of "physical possession" and is no authority to the meaning of "tangible" and "intagible" in S. 54 T. P. Act.

2 O C. 12.

Transfer by lessee. S. 58 Transfer of Property Act—S. 5 Oudh Rent Act.

1. The holders of the heritable, non-transferable, lease were not competent to make a complete transfer of their rights, or a transfer which might by operation of law, become a complete transfer of their rights.
2. Sub-lease not prohibited.

Notes

Explained.—2 O. C 204.—That a usufructuary mortgage of a right of occupancy may by operation of law become a complete transfer of such right.

Dist.—2 O. C. 252.—In 2 O. C. 12, the case was between the transferee of a subordinate tenure, and the *taluqdar*.

2 O C. 17.

Cause of action—S. 43 of Act XIV of 1882=Or. 2—r 2 Act V of 1908 (C. P. C) Suit for a share of inheritance against administrator—S. 9 Act VII of 1889

1. Refusal to pay interest is not a denial of plaintiff's title.
2. That the cause of action in the second suit was not complete when the first suit was brought; and that the second suit was not barred by S. 43 C. P. C.
3. The cause of action against an administrator differs from the cause of action which arises against a trespasser.

2 O. C. 24.

Suit for possession by mortgagee—S. 68 Transfer of Property Act—S. 12 Specific Relief Act.

1. S. 68 cl. (b) provides alternative remedy and does not debar a mortgagee from bringing a suit for possession.
2. An undertaking in a mortgage-deed to put the mortgagee in possession was a contract to transfer property, breach of which can not be compensated in money.

Notes.

Diss.—10 O. C. 218.—That a suit for possession by mortgagee on default of payment of interest could not be regarded as a suit to enforce a contract to transfer immoveable property.

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2 O. C. 25.

Application to be made a defendant—S. 32 C. P. C. = O. I, r 10 (2) Act V of 1908.

The application, seeking to alter the character of the pleadings. was for too late and could not be granted.

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2 O. C. 28.

Conflicting Decisions of Civil and Revenue Courts.—Decree in terms of compromise Res-judicata.

1. The decision of the Civil Court must be accepted as conclusive.
2. The Decree in terms of a compromise constitutes a *res-judicata.*

Notes.

(2) F.—7 O. C. 169.—Effect of decree on compromise operating as *res-judicata.*

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2 O. C. 33.

A devisee, claiming under a will executed by a Hindu, need not take out probate or letters of administration before instituting the suit.

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2 O. C. 34.

Application for summonses too late.

The Court may refuse to adjourn the hearing, if application for summonses is too late.

Notes.

R.—8 Indian Cases 418.—

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2 O. C. 35.

Suit for declaration that defendant is liable to pay rent—In junction restraining defendant from cultivating.

1. As the defendant had acquired under-proprietory rights, he could not be restrained from cultivating the land.
2. Under S. 40 Act XVII of 1876 the Settlement Officer's duty is only to determine the rent.

3. Unless and until the plaintiff has been called upon to pay any extra sum as revenue, he is not entitled to obtain a declaration that the defendant is liable to pay rent.

2 O. C. 37.

S. 86 Transfer of Property Act—Interest on costs—S. 209 C P. C. = S 34 Act V of 1908.

1. That under S 86, the Courts are bound to give a decree at the rate of interest provided by the mortgage.
2. In making a decree for sale, the Court may order interest at a reasonable rate, for the period between the date fixed by the decree for payment and the date of realization.
3. Interest on costs allowed.

Notes.

(2) Ap—3 O. C. 129 (154)—Payment of interest after the date fixed for payment by decree.

2 O. C. 45.

Compromise by guardian or next friend.—Ss. 462 258 C P. C = O. XXXII, r 7; O. XXI, r 2 C P. C. (V of 1908).

1. Such compromise without the leave of the Court is voidable against all parties other than the minor.
2. The provisions of S. 462 C. P. C. (or 32 r 7) would apply to all proceedings subsequent to the decree.

Notes.

(1) F.—6 O. C. 175 (179).—Compromise by next friend of minor without leave of Court is voidable at the instance of the latter.

2 O. C. 51.

Res-judicata—S. 244 (c) C. P. C. = S. 47 C. P. C. (V of 1908).

A and B were co-sharers in a village. In 1880 B made a gift of certain lands in the village to C. on a suit by the latter for declaration of her title to the lands, a decree on the basis of a compromise was passed for certain other lands. After the death of B, C brought a suit against her heirs and A for possession of lands specified in the decree and also for certain lands specified in the deed of gift and obtained a decree for possession of lands specified in the decree In that suit A raised

the question whether any rights which he might acquire under a partition between himself and the heirs of B would be affected by any decree which C might obtain. The question was not tried. Before the last mentioned suit was brought, the heirs of B had applied for partition of the village as against A ; and under the partition and portion of the lands specified in the decree was allotted to A C in execution of his decree obtained possession of this land, A's objection having been dismissed.

In 1896, A instituted a suit against C and the heirs of B for possession of the lands allotted to him under partition.

1. *Held*, that the question of A's title to the lands was not *res-judicata*.
2. That as the decree was not passed against A, he was not party to the suit when C applied for execution.
3. That the suit was not barred by the provisions of S. 244 C. P. C.
4. That when the lands in dispute were allotted to A under the partition, C, ceased to have any interest in them.

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2 O. C. 57.

Declaration of legitimacy—S. 42 Specific Relief Act—Ss. 4 to 6 Act XXIII of 1871.

A suit for a declaration as to the plaintiff's legitimacy is maintainable, though no right to any property, or to the status of legitimacy is involved.

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2 O. C. 59.

Onus of proof, S. 101 Evidence Act.

The defendant having totally denied the facts, (basis of plaintiff's suit) the plaintiff was bound to prove.

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2 O. C. 62.

Jurisdiction—Court of Small Causes—Mahabrahman.

A suit to establish an exclusive right to discharge the duties of *Mahabrahman* is not cognizable by a Court of Small Causes.

Notes.

Dist.—2 O. C. 276 (278)—Suit for Mahabrahmani dues is not a suit for the possession of a hereditory office as to discharge the function of an office

2 O. C. 64.

S. 108 cl. (15)—Oudh Rent Act—Settlement of Account—Jurisdiction.

The word "co-sharer" includes mortgagee with possession.

Notes.

F.—2 O. C. 299—Mortgagee in possession being a "co-sharer".

R.—4 O. C. 369(370)—The point of jurisdiction was not decided in 4 O. C. 369.

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2 O. C. 65.

S. 448 Penal Code—House trespass—Execution of Warrent for attachment of property.

The warrant for execution issued by the Court was no authority for the decree-holder and his companies to enter the Judgment-debtor's house against his will and they were convicted of house trespass.

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2 O. C. 67.

Ss. 622, 591 C. P. C. = S. 115; S. 109 C. P. C. (V of 1908)—Appeal—Revision —S. 375 C. P. C. = 6, XXIII, r. 3 C. P. C. (V of 1908)

(1) The word "case" includes an interlocutory order.

An application for revision of the order of the District Judge was filed on the ground that the District Judge acted illegally in passing judgment in accordance with the compromise and on the ground that the District Judge had no jurisdiction to enter into the merits of the case. *Held*, that the objection could have been taken in appeal.

(2) That S. 375 C. P. C. = 62 XXIII r 3 is applicable to applications under Ss. 52, 53 Act XVII of 1876.

(3) That where one of the parties objects to the compromise being received, the matter can be decided by affidavit, and if necessary, by a special issue on oral evidence.

(4) That the Court can grant leave to the guardian of a minor to enter into a compromise at any time before finally accepting the compromise, *a compromise without leave of the Court* is voidable against all parties other than a minor; it is not voidable at the option of other parties against the minor.

Notes.

Dists.—12 O. C. 405—No application for revision will be against an interlocutory order which does not determine the case.

2 O. C. 73.

Resumption of grove land

The tenant is entitled to hold possession as long as it retains the character of a grove.

Notes.

F—9 O C. 109.

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2 O. C. 74.

Registered sale-deed—Priority—Definition of " tangible immoveable property."

1. No priority if possession delivered to the person holding an unregistered-deed.
2. That "*tangible property*" means lands, building &c., which immediately or through the medium of tenants may be subject of possession deliverable by the seller to the buyer.

Note.

(2) **R.** 14 O. C. 161—An undivided share in immoveable property is a "tangible immoveable property" and a sale of such property, if under Rs. 100 in value is not compulsorily registerable.

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2 O. C. 77.

Ss. 72, 73, 74 and 77 Registration Act—Appeal.

(1) That under S. 72 no appeal lay to the Registrar and the plaintiff should have proceeded under S. 73.

(2) Suit in the Civil Court for registration of the document dismissed as it was instituted one day beyond the period of limitation provided under S 77.

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2. O. C. 79.

Suit for declaration—Arts 120, 144 sch. ii Limitation Act

Notice of ejectment having been cancelled on 25th June 1885, the plaintiff brought a suit for a declaration that the defendant was only a tenant of the land. *Held* (1) that the suit having been filed 6 years after the 25th June 1885 was barred by time.

(2) That the Art 144 is applicable to a suit in which there is a prayer for dispossession.

Note.

R. 9 O. C. 292—Suit for proprietary possession where tenant sets up under-proprietary right is not maintainable. The proprietor ought to sue for a declaration.

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2 O. C. 83.

Jurisdiction—Civil and Revenue Court—Ss. 54, 55 and 108 (10) Oudh Rent Act.

The plaintiff sued the defendant in a Civil Court for possession on the allegation that he was the under-proprietor of it and had been illegally ejected from it through the Revenue Court *Held* (1) that the suit was not cognizable by the Civil Court,

(2) that the ejectment of an under-proprietor may be on illegal ejectment, although it was carried out under the proviso of that Act.

Notes

R.—8 O. C. 174—The facts in C. C 83 have no bearing on the facts in 8 O. C. 175.

(2) Dissented 9 O. C. 37—Suit for possession as under-proprietor was cognizable by a Civil Court

(1) **R.**—12 O. C 90—(1) Meaning of words "illegally ejected."

(2) In case no allegation is made as to possession, the suit is cognizable by a Civil Court.

(3) If the suit of an under-proprietor under S 108 (10) is thrown out by the Revenue Court, he can then sue the landlord for possession in a Civil Court and ask for a declaration of his right.

Point (2) **R.**—13 O. C. 188—When a suit contesting notice of ejectment is dismissed, the plaintiff cannot come straight to the Civil Court, but must first sue in the Revenue Court under S. 108 (10)

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2 O. C. 87.

Suit for redemption—Court-fee on memorandum of appeal, how computed Ss. 16 and 7 (9) Court Fees Act —

1 Where the mortgagor or mortgagee appeals challenging only the amount, the Court-fee should be computed *ad valorem* on the difference between the amount found to be payable and the amount which the appellant contends should be paid.

2 Where no question is raised in appeal as to the right to redeem, the nature of the suit is changed and subject matter of the suit is money only.

Notes.

(2) F.—9 O. C. 153.

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2 O. C. 90.

Restitution of conjugal right Mohammedan Law—Shias—Fazuli marriage, contracted by minor's mother—Evidence of puberty discretion.

1. The fact that a female has reached the age of 9 years is not conclusive evidence that she has attained either puberty or discretion.

2. The marriage of a female who has not attained puberty and discretion contracted by her mother is a Fazuli marriage and is incomplete, and requires the assent of the minor after attaining puberty and mature understanding to perfect it.

The attainment of puberty is not conclusive evidence of the attainment of discretion.

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2 O C. 96.

Jurisdiction—Civil and Revenue Courts—Suit for declaration that defendant is a mere tenant.

A suit for a declaration that the defendant is a mere tenant at will, is not cognizable by the Civil Courts.

Notes.

F.—3 O. C. 365.
F.—12 O. C. 164.

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2 O. C. 99.

Opium, unlawful possession of, S. 9 Act I of 1878—S. 103 Sub sec. (1) Cr. P. Code—Search by Police, New plea taken in appeal.

(1) It is for the prosecution to prove that the opium was in the exclusive possession of the particular member of the joint family.

(2) That no plea could be discarded merely because it was for the first time put forward in appeal.

(3) That the Police officer was bound to call some respectable inhabitant of the locality, to attend and witness the search.

2 O. C. 103.

Pre-emption—Jurisdiction—Appeal—S. 11 of Act VII of 1887—(Suits valuation Act) Interest—Costs—S. 10 Oudh Laws Act—Notice.—

1. *Jurisdiction* —What *prima facie* determines the jurisdiction of a Court is the claim as estimated by the plaintiff and the determination having given the jurisdiction, the jurisdiction itself continues whatever the event of the suit
2. *Price.*—The mortgagee could not recover more than that decreed in the foreclosure suit
3. *Interest.*—If the notice had been given the mortgagee could claim interest.
4. *Costs of foreclosure suit* —Costs of the suit in the decree for foreclosure suit is to be treated as part of the consideration.

Notes.

(4) Ap.—3 O. C. 184 (190) —Payment by pre-emptor of costs of mortgagee ;

(1) R.—6 O. C 255 (259).—The plaintiff's valuation determines the forum except in cases where it is proved that the plaintiff has misrepresented the true value or has acted recklessly or has adopted a wrong method of valuation.

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2 O. C. 110.

Application for execution—Revival—Renewal of proceedings in execution-Decree of Rent Court Limitation.

An application for execution was consigned to record on account of Government order prohibiting sale while the famine lasted ; *held* that subsequent application for execution was one for the renewal of the execution proceeding and was not barred.

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2 O. C. 112.

Res-judicata. Suit for share of profits Compromise—S. 375 C. P. C. = O. XXIII, r 3 (V of 1908).

Held that the previous decision based on the compromise operated as res-judicata as regard to the plaintiff's right to recover profits as co-sharer not only for the years included in the first suit but also for future years, and under the terms of the compromise he has relinquished her claim to profits as a co-sharer and in lieu thereof accepted on annual cash allowance.

2 O. C. 115.

Muhammedan Law.

1 *Legitimacy.*

That according to the Shia Law, whether the marriage is permanent or temporary, the child is affiliated to the man, the only distinction is that in the case of a permanent marriage, the child can not be repudiated by the man otherwise than by imprecation (lian), whereas in the case of a *muta* marriage, if the man repudiates the child such repudiation is sufficient.

2. *Declaration of relationship*—In case of a declaration of relationship it must be taken that legitimate relation was meant

3. That the word "*marriage*" in S 32 cl. (5) includes a "muta" marriage.

4. *Wakf.*—When the intention of the grantor is to create a wakf, whatever expressions he might have used, the dedication will take effect.

5. *A Wakf-bil-wasaiat.*—Which will take effect after the death of the grantor, is invalid.

Notes.

Over.—25 All. 236 (P. C.)—That a valid wakf can be created by will That statements as to heirs made in accordance with practice of public office are admissible in evidence in support of the legitimacy of such heirs

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2 O. C. 133.

S. 5 Indian Limitation Act—Mistake—Sufficient cause.

A *bona fide* mistake of law might amount to "sufficient cause" and want of due case and attention could not be attributed to a pleader who had not ascertained every possible authority bearing on a particular point.

Notes.

App.—4 O. C. 372.—Liberal Construction of "sufficient cause."

Dist.—5 O. C. 384.—In 2 O. C. 133 relief was sought although in the wrong Court but in 5 O. C. 384 no appeal was filed within time in consequence of having been erroneously advised by a legal practitioner not to prefer the appeal.

2 O. C. 135.

S. 138 Oudh Rent Act—Suit for arrears of rent—Third person alleging receipt of rent—Necessary party.

When a third party alleges that he has actually and in good faith received the rent, he should be made a party to the suit, and the question of the actual receipt and enjoyment of the rent by him should be enquired into and the suit should be decided according to the result of the enquiry.

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2 O. C. 137.

Suit for arrears of rent—S. 138 Oudh Rent Act.

1. *Burden of proof.*—The plaintiff must prove that he actually and in good faith received the rent; the intervenor is not bound to set out his title.

2. *Appeal.*—In such cases the intervenor is not barred from appealing.

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2 O. C. 139.

Res-judicata—Redemption suit—Previous suit for possession.

1. That the plaintiffs ought not to have made the mortgage they now sought to redeem, ground of attack in the former suit, and consequently the second suit was not barred.

2. A claim for possession of property as owner and as mortgagee are different matters.

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2 O. C. 143.

Jurisdiction—Court of Small Causes—S. 35 Provincial Small Cause Court Act.

That an officer not invested with the jurisdiction of a Court of Small Causes can by reason of S. 35 dispose of a pending Small Cause Court case as if he were so invested, and compass a final decree therein.

Notes.

Diss.—6 O. C. 81.—The order passed by a Court not invested with the powers, in the execution of a decree passed by a Court invested with such powers, was not final.

2 O. C. 145.

Suit for possession in lieu of mortgage money.

In a mortgage-deed the principal was repayable within 10 years; interest was payable year by year; and in default of payment of interest the mortgagor was to deliver possession. The plaintiff brought a suit for possession of the property in lieu of the mortgage-money then due to him.

Held that the suit so far as it related to any declaration concerning the mortgage money was premature.

Notes.

F.--4 O. C. 171 —

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2 O. C. 149.

Mis-joinder.

1. That the joinder of the plaintiff as the purchaser of ½ the property did not amount to a mis-joinder of parties.

Champerty 2. That specific English law of maintenance and champerty has not been introduced into India

That the agreement on behalf of the plaintiff to supply the assignor with the necessary funds was a fair agreement and was in no way contrary to public policy.

Want of consideration 3. That where an assignee sues on his assignment and proves it, an adverse party can not take objection.

Notes

(2 & 3) App.—8 O. C. 155 (P. C.)

(3) App.—7 O. C. 181 (183)—Resistence by third patyr on claim by assignee.

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2 O. C. 195.

Zamindar's right of Escheat—Meaning of complete ruin.

That so long as a tenant's house does not become a complete ruin, the zamindar cannot claim the right of *escheat*.

2 O C. 196.

Form of decree—*Redemption suit*—S. 92 Transfer of Property Act.

In a suit for redemption of a mortgage with possession, the Court, in default of payment of money was bound to decree that the property be sold.

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2 O. C. 199 (P. C.)

Sanad granted under Oudh Estates Act—Trust—Co-sharer's rights against Sanad-holder.

The *Sanad* was granted to K who in his application had stated that S who has absconded was his co-sharer and entitled to get his share on return.

1. *Held*, that K was, as to the extent of S's share, trustee for S. and the representatives of S were entitled to recover it.
2. That the fact that the Sanad was granted to K alone would not deprive S of his rights.

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2 O. C. 204.

S. 5 Oudh Rent Act—Usufructuary mortgage.

The *Usufructuary mortgage* of *occupancy holding* is invalid under S. 5 of the Oudh Rent Act.

Note.

Relied—6 O. C. 331—A person cannot be estopped from denying the validity of the transfer of a right which he is incapable of transferring.

App.—7 O. C. 265 (271).

R—11 O. C. 34—A temporary transfer in favour of his land-holder is valid.

R. 14 O. C. 144—The transfer which is forbidden by the Settlement decree is not illegal or unlawful and that the plaintiff is estopped from pleading that he has no power of transfer.

R—14 O. C. 225—A transfer, by a tenant holding occupancy rights under a decree of the Settlement Court forbidding alienation, is invalid.

2 O. C. 209. (P. C.)

Mortgage—Hindu Widow—Interest provided by unregistered rukkas—Plea taken for the first time in appeal.

1. That the mortgage executed by a widow on behalf of her minor sons is invalid.
2. That the *rukkas*, being unregistered, did not affect the mortgaged property.
3. Plea, taken for the first time in appeal, not allowed.

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2 O. C. 213.

Mohamedan Law—S. 22 Oudh Estates Act (I of 1869—Absence of Sanad-Entry of name in List III.

1. That in the absence of any sanad, the succession to the estate must be governed by the ordinary rules of Mohamedan Law.

The subsequent inclusion of name in List III is improper.

Notes

Affirmed—7 O. C. 254. (P. C) = 26 All 119.

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2 O C. 226.

Revocation of will—Widow's estate.

1. That a testator, notwithstanding his promise to do so, can revoke his first will.
2. That, the question, whether a Hindu widow has acquired, under a devise by her husband, a larger estate than a "widow's estate" is to be decided upon the terms of the devise.

Notes.

1. **R**—9 O. C. 199.—Having regard to the context and the rules for the construction of Hindu wills, the will under consideration conferred only a life interest upon the devisee.
2. **R.**—12 O. C. 157—That where property is given to a female, the use of the word "*malik*" imports full proprietary rights.

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2 O. C. 233.

Lease executed by guardian on behalf of minor—S. 18 Act XL of 1858—Compensation.

1. *Lease executed by guardian* without obtaining the order of the Civil Court is illegal.

2. *What amounts to negligence in the guardian of a minor* —There must be such negligence as leads to the loss, of a suit, which, if it had been conducted with due care, must have been successful.

3. That in the absence of any evidence as to the consent of the plaintiff to the construction of a well, the defendant were not entitled to get any *compensation*.

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2 O. C. 235.

Application for permission to appeal to Her Majesty—Art. 177 Sch ii Limitation Act.

The applicant applied for permission to appeal to Her Majesty in Council "from the decree of 13 May 1898 as amended by an order of 6th June 1898" The application was made more than 6 months after 13th May

Held, that the application was barred, under Art. 177 Act XV of 1877.

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2 O C 239.

Suit for mesne profits—Proof of title on plaintiff—Trespass—S. 3 (9) Oudh Laws Act.

1. That the plaintiff could maintain the suit, without proof of title, if he was in possession of the property, and was dispossessed by the defendant, but was subsequently again put into possession

2. The Court was justified in acting under cl. (g) S. 3 of the Oudh Laws Act by applying to the case the doctrine of the English Law.

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2 O. C 244.

Gift—Mohamedan Law—Ss. 8, 11, 12, 17 of Act I of 1869—Oudh Estates Act

Held, 1 that, the donor being a taluqdar and grantee, his power to create by gift *inter vivos* what in English Law is called an estate in remainder, was to be decided with reference to the provisions of Act I of 1869 and not the Mohamedan Law.

2. *The meaning of S. 17 of Act I of 1869*—is that it is requisite for the validity of a gift either that possession of the property should be delivered or that the gift should be registered.

3. That the donor was competent under Act I of 1869 to make a gift during his life time of an absolute interest in the share to vest at a future time.

4. That under the terms of the deed, the wife took an interest for life only and that on her death the absolute interest in the property vested in the donor's children by her.

Note

(2) Doubt 9 O. C 113—Delivery of possession to the life tenant within one month is a sufficient compliance with S. 17.

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2 O C. 250.

Res-judicata admissibility of letter reducing tenant's rent

That the question of the genuineness of the letter was directly in issue in the former suit

2 That the letter reducing the rent of tenant did not require to be registered.

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2 O. C. 252.

Suit to set aside transfer of a non-transferable holding maintainable—Suit by son against father's transferee—Decree of Settlement Court—Restriction on the right of transfer.

It was not open to the plaintiff to question the transfer made by his father in a suit against the transferee. The restriction on the right of transfer in the decree of the Settlement Court was intended for the benefit of the taluqdar and not of the decree-holders.

Note.

Dist.—6 O. C. 331—There is an essential distinction between a transfer which is forbidden by the Legislature and a transfer which is only contrary to the terms of a decree.

F.—14 O. C. 144—That the condition forbidding transfer contained in the settlement decree, was only for the benefit of the superior proprietor, and that the plaintiff was not entitled to the assistance of the Court in undoing his own act.

Rel.—15 O. C. 67—That the condition against alienation is imposed for the benefit of the superior proprietor who can waive it if he chooses.

2 O. C. 254.

Ss 36, 39 Oudh Rent Act

Enhancement 1 That the rent of a tenant who held possession at the time of passing the Oudh Rent Act could be enhanced only under S 39 Oudh Rent Act.

Commutation 2 That a Rent Court has no jurisdiction to commute the rent payable in kind to a rent payable in cash.

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2 O. C. 256.

Jurisdiction—Suit cognizable by Court of Small causes Art 31 and 11 sch. II Act IX of 1887.

A suit for the recovery of Rs 200, the value of *Jack fruit* forcibly and unlawfully taken was cognizable by the Court of Small Causes

Note

App. 4 O. C. 89—Nature of suit for share of profits of bazar.

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2 O C. 258

Hindu Law—Alienation by widow—Legal necessity

That the transfers made by the widow to pay a small debt due by the husband, or the Government Revenue, in the absence of actual pressure would not be binding upon the reversioners after her death.

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2 O. C. 261.

Res-judicata—Decision based upon points of law.

1. The decision of the District Judge in the first suit was res-judicata, notwithstanding that it was not appealable to the Judicial Commissioner.
2. Meaning of word competent in S 13 C. P. C. (=S 11 Act V of 1908)
3. That a decision upon a particular matter in dispute is conclusive, although it proceeds upon point of law, but the decision as regards the point of law is not conclusive, where a different matter is in dispute.

4. That the plaintiff was entitled to possession without setting aside the gift.

Note.

(3) **App.** 5 O. C. 181—Exparte decree—Res-judicata.

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2 O. C. 269.

Arrears of rent—Ss. 33 108 (2) Oudh Rent Act—Determination of Rent—Jamabandi rent entered in—

1. In a suit for the recovery of the arrears of rent from an occupancy tenant, the Court is not competent to determine the rent under the provisions of S. 33.

2. That the entry in the *Jamabandi* could not be accepted as evidence of the rent payable by the occupancy tenant.

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2 O. C. 273.

Suit for Rent—S. 108 (16) Oudh Rent Act—S. 40 Act XVII of 1876.

The defendants were the representatives of certain persons, who had sold a village to the plaintiff, excepting some *sir* land bearing a rent of Rs. 54, besides some grove and waste land. The vendors had covenanted with the purchaser to pay Rs. 54 to him as rent for the *sir* land in case they brought it under cultivation. At a re-settlement of the village, the excepted lands were formed into a *sub-patti* bearing a revenue of Rs. 93. In a suit by the plaintiff for recovery of that amount; *held*—

1 that the effect of the deed was to make the vendors under-proprietors

2 that the mere fact that the Settlement Officer had formed the lands into a *sub-patti* did not affect the agreement.

Note.

Dist.—3 O. C. 310—A co-sharer in the mohal was liable to the lambardar for the revenue assessed.

Disc.—5 O. C. 70—The defendant was under the terms of the deed an under-proprietor and therefore not liable to pay.

2 O. C. 276.

Suit for Mahabrahmani dues—Jurisdiction—Court of Small Causes.

A suit for the recovery of a share of the *Mahabrahmani* dues is cognizable by a Court of Small Causes.

Note.

ap. 4 O. C. 89—Nature of suit for share of profits of *bazar*.

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2 O. C. 281.

Trees—Ejectment—Mafroor—Wajib-ul-arz—Custom—Tenants right *in trees planted during continuance of tenancy.*

1. That the ejectment of a tenant from his holding extinguishes his right in the trees which he has planted in it during the continuance of the tenancy.
2. Meaning of *mafroor*—a tenant who has lost his cultivatory holding and leaves the village to reside in another village in which his landlord has no interest, cannot be held to be *mafrur* (run away) within the meaning of the *wajib-ul-arz*.
3. That the *wajib-ul-arz* was no evidence of the alleged custom.

Note.

R. 16 O. C. 341—There is nothing in the law to prevent an occupancy tenant from planting trees without the permission of the zamindar.

(2) **F.** 12 Indian Cases 409.

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2 O. C. 286 (P. C.)

Widow—Property in possession—Presumption—Burden of proof—property claimed through third person.

That there is, in the absence of evidence, no presumption of law that the property found in the widows' possession was originally that of her husband.

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2 O. C. 288 (P. C.)

Suit for arrears of rent—Interest—S. 141 Oudh Rent Act—Under-proprietor.

1. That the under-proprietors whose beneficial interest has been transferred by an unofficial Act to persons who thereby become

possessors of the whole mohal are not liable to pay rent so long as they remain out of possession.

2. That an under-proprietor is not liable to pay interest.

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2 O. C. 292.

Transfer—Lease by occupancy tenant—S. 5 Oudh Rent Act

That on transfer by way of sub-letting is not illegal.

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2 O. C. 295.

Resumption—Ss. 52 and 53 Oudh Land Revenue Act.

1. That the grant was not exempted from resumption because it was one by way of endowment to a religious institution.
2. The words "in part" in S. 53 refers to the terms on which the land is, in future, to be held.
3. That the grant, having been in possession of the grantee for nearly a hundred years, should only be declared liable, in part, to resumption.

(3) **Not F.**—6 O C. 233—In 2 O. C. 295, the long duration of the grant in combination with other circumstances affected the Judgement of the Court, but in 6 O C. 233, the grant being old is held not sufficient for holding it resumable in part only.

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2 O. C. 299.

Co-sharer—Mortgagee in possession—S. 108 (15) and (16) Oudh Rent Act.

That the mortgagee in possession is a co-sharer and can sue and be sued.

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2 O. C. 302.

Review of Judgment—Court Fees Act Sch i, Art. 4 and 5.

1. An application filed after the 89th day from the date of the decree required full fee.
2. In computing the period the applicant can not deduct the time which may have been spent in obtaining a copy of the Judgment

2 O. C. 303.

Res-judicata—Suit for contribution—Right of defendants inter se.

As the rights of the defendants *inter se* were not finally decided in the first suit, the second suit for contribution was not barred.

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2 O. C. 307.

Appeal Ss. 118, 123, 406 and 435 439, Cr. P. C.

1. That the orders under S. 118 include orders which require confirmation of the Court of Session as well as orders which do not require such confirmation, and under S. 406 are appealable to the District Magistrate.
2. That the accused had in no way been prejudiced by the action of the Court of Session, and that his case therefore did not require the interference of the Court of Judicial Commissioner.
3. That Sessions Judges before confirming orders passed under S. 123 Cr. P. C., should satisfy themselves that no appeal had been filed or was about to be filed from the order of the Magistrate under S. 118.

Notes.

(3) R.—13 O. C. 354—Procedure to be adopted by Sessions Judge.

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2 O. C. 311 (P. C.)

Account book—S. 34 Evidence Act.

That the account book, in which entries were not made from day to day, was admissible to corroborate the oral evidence.

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2 O. C. 315.

Separate suit—S. 244 C. P. C. = (S. 47 C. P. C. (V of 1908) *Jurisdiction.*

1. A separate suit, for the value of the crops forcibly carried away while under attachment, was not maintainable.
2. That no Court would be deprived of his jurisdiction by the mere fact that under S. 244 C. P. C., (S. 47) in deciding a question between the parties, he would have to award to one party something beyond the limits of his ordinary pecuniary jurisdiction,

2 O. C. 319.

Purchase of trust property—S. 3 Indian Trust Act (II of 1882)—Notice—Good faith.

1. Presumptions.
2. Purchaser is bound to make an inquiry as to the authority of his vendor to transfer.

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2 O. C 330.

Lis pendens S. 52 Transfer of Property Act—Compromise—Decree—Ss. 375 and 492 C. P. C. = O., XXIII, r. 35 O. XXXIX, r. 1 C. P. C. (V of 1908.)

1. That under S 375, the Court only could pass a decree on the compromise so far as it related to the suit, and could not in that decree include an additional consideration money.
2. The doctrine did not totally invalidate the transfer to the defendant, but merely to prevent a transfer which would affect the rights of the plaintiff under the decree finally passed in the case. On paying the mortgage money due to the plaintiff, the defendant could retain the property purchased by him.

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2 O. C. 336.

Ejectment—Thekadar—Construction of deed. S. 55 Oudh Rent Act.

1. A thekadar can be ejected only by the issue of a notice of ejectment under S 55.
2. The language used in the sale-deed usually intended to pass all proprietary rights, unless special mention is made of the lease hold rights.

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2 O. C. 337.

Execution of decree not made absolute—Ss. 88 and 89 T. P. Act.

That the decree having been partly executed on a previous occasion and no objection having been made to its form, it was capable of execution.

2 O. C. 340.

Trust—Mahant—removal of—Sangat—Presumption —

1. Where a person gives property like a village to the *Mahant* of such an institution as the *Sangat of Nanak Shahi fakirs*, there is a strong presumption that the property is given for the benefit of the institution.
2. *Held* that the *Sangat* in dispute was trust property.
3. The Court can, on the ground of mis-conduct, immorality or breach of trust, remove from his office the Mahant of a religious institution as being a trustee who is unfit for his office.

Notes.

(1) R.—6 O. C. 355 (358)—That trust property cannot be sold at the will of the trustee for the time being.

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2 O. C. 344.

Redemption of portion—Ss 60 and 74 Transfer of Property Act.

A mortgagee, by allowing his mortgagor to pay a portion of the mortgage-debt and releasing a proportionate share of the mortgaged-property, does not thereby entitle the mortgagor or his representative to redeem the rest of the mortgaged property piece meal

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2 O. C. 348.

Art 127 Limitation Act

1. A *suit for possession of ancestral property sold during plaintiff's minority* brought more than 3 years after attaining the age of majority was governed by art. 127 sch. II of the Limitation Act.
2. That the *onus is on* the defendant to prove that the exclusion became known to the plaintiff more than 12 years before suit.

Notes.

Diss.—15 O. C. 111.—That the case was governed by art. 144 and not by art. 127.

2 O. C. 351.

Partition proceedings—Ss. 74 and 75 Oudh Land Revenue Act—Question of title—Res-judicata

1. The decision of the Revenue Court on a question of title would be *res-judicata* in a subsequent suit instituted in a Civil Court in respect of the same matter.

2. The jurisdiction of the Revenue Court to decide any question of title commences from the date of the application for partition

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2 O. C. 355.

Award—Appeal when no objection taken within 10 days—Appointment of arbitrators by Court

1. The defendant was not precluded from appealing, because he had made no objection to the award within 10 days

2. In this case there being no clause that the difference should be referred to the arbitration of any person appointed by the Court, the court had no jurisdiction to appoint fresh arbitrators, nor could it reduce the number of the arbitrators fixed by the agreement.

3. Where the decree is in accordance with the award, an appeal will be on the ground that the award is no award in law.

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2 O. C. 359.

Appeal—Partition—objection raising question of title—Attachment before sale

The objection of the appellant, to the effect that he had attached the property, subject to partition, in execution of decree and that the mortgage-deed in which the respondent had obtained the foreclosure decree was subsequent to attachment, raised a question of title and the appeal lay to the District Judge.

Notes.

F.—6 O. C. 372.—Court-fee on memorandum of appeal—Effect of Revenue Court's decision on question of title—appeal to Civil Court—Partition—Decree.

2 O. C. 363.

Discharge—S. 437 Criminal Procedure Code Notice

1. No Court would be exercising a proper discretion, if before proceeding under S. 437 to order a further inquiry in the case in which the accused person may have been discharged, it did not first give him an opportunity by service of notice, to show cause against such an order being made.

2. The Court should not set aside the order of discharge without sufficient reasons.

Notes.

Dist.—11 O. C. 261—No notice necessary before ordering further enquiry under S. 437. In 2 O C. 363 there was an application against an order of discharge as that the person accused had been brought before the Court.

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2 O. C. 365.

Agreement for reward to procure wife to a Hindu—Public policy.

The agreement by a hireling or stranger to assist a Hindu for reward in procuring a wife is void as being contrary to public policy.

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2 O. C. 366.

Execution of decree—S. 244 C. P. C = S. 47 C. P. C. (V of 1908).

5 Applies as well to a dispute after it has been executed as it would to a dispute before it has been executed.

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2 O. C. 372.

Documents executed by Indian ladies—Interpretation of—

When it is said "I make S, the owner of my estate after my death," the only interpretation is that the writer was appointing S. to be heir in succession to herself.

3 O. C. 1.

Sale in execution—Sanction for—S 20 Oudh Laws Act—Ss. 88 and 89 Transfer of Property Act.

1. The sanction of superior authority is necessary for the sale of land in all cases of mortgage.
2. A sale in pursuance of an order under S. 89 T. P Act is a sale in execution of a decree

Notes.

R.—8 O. C. 409—Sale of ancestral land in excess of that sanctioned by Government is illegal.

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3 O. C. 8.

Joint mortgage—Right to sale of the whole mortgaged property Ss. 45 and 67 Transfer of Property Act.

One of two joint mortgagees in a suit to recover his share of the money advanced can pray that in default of payment the whole (not the half) of the mortgaged-property might be put up to sale.

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3 O. C. 13.

Sufficient cause—S. 5 Limitation Act—S 368 C. P. C.=O. XXII, r. 4 C. P. C. (V. of 1908)

That ignorance of law, unaccompanied by negligence, in action or want of bona fide is a sufficient cause.

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3 O. C. 18.

Actionable claim—S. 135 (d) Transfer of Property Act.

S. 135 (*d*) refers to the point of time at which the actionable claim is sold and not to the time at which the claim may be discharged. The claim or debt which has been affirmed by the judgment of a competent Court, or a claim which has been made clear by evidence and is ready for judgment is altogether excluded from the operation of that section.

3 O. C. 20.

S. 646 (b) C. P. C.=Order XLVI, r. 7 C. P. C. (V of 1908).

Reference—That a District Judge has jurisdiction to refer a case to the High Court, whether the case is or is not pending in his Court in appeal.

Jurisdiction—The Appellate Court is not empowered to order a fresh trial in a suit cognizable by a Court of Small Causes which was tried as a regular suit by a Munsif who had the powers of a Judge of a Court of Small Causes

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3 O. C. 22.

Arrears of rent—Res-judicata—Interest S 141 Oudh Rent Act.

In a suit by a superior proprietor against under-proprietors for arrears of rent, main points in dispute were (1) whether the defendants were jointly liable to pay rent; (2) whether they were liable to pay the Rs 10 per cent. mentioned in the *razinama*; (3) whether they were only liable in respect of half the Government revenue, (4) whether they were liable to pay interest on the arrears.

1. *Held*, that the questions (1), (2) and (3) were res-judicata. A decision upon a particular matter in dispute is conclusive so far as that dispute is concerned, although it proceeds upon points of law, but the decision as regards the point of law is not conclusive where a different matter is in dispute.

2. That the defendants were liable to pay interest on rent which was not paid on the date fixed for payment of revenue. The Court below did not exercise its discretion unsoundly in awarding interest on arrears of rent at the rate recognised by S. 141, Oudh Rent Act.

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3 O. C. 31.

S. 120 C. P. C. = order, X, r. 4 C. P. C. (V of 1908).

That an order for personal attendance under 1st para of S. 120 C. P. C. is not appealable.

3 O. C. 32.

Assignee of decree—Inconsistent position—Ss 2, 244, 244 (c), 232—Jurisdiction = Ss. 2, 47 Act V of 1908 order XXI r 16.

That a party in a litigation connot be allowed to take up inconsistent positions, that the defendant could not be allowed to take up the position that S 244 barred the suit

Notes

F.—4 O. C. 200 (201)—That the plaintiff, having been forced to take up the position which the defendant assigned to him, could not afterwards turn round.

R.—4 O. C. 408.—Inconsistent pleas—Estoppel by admission

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3 O. C. 37.

Sufficient cause—S. 5 Limitation Act.

That in coming to the conclusion that the applicant had sufficient cause for not making the application within time, on a ground not urged by him, the Court exercised its discretion in a way in which Judicial power and discretion should not be exercised.

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3 O. C. 42.

S. 305 C. P. C.

That an order under S. 305 C. P. C. = XXI, r 83 (V of 1908). is appealable.

2. That the provisions of S. 305 C P. C, are not inconsistent with those of S. 89, Transfer of Property Act, and are applicable where the decree is one for the sale of mortgaged-property passed under the T. P Act.

3. That the rules contained in Part (A), (B) and (C), Chapter XIX of the Code of C Procedure are generally applicable to sales of mortgaged-property.

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3 O. C. 48.

Resumptions of rent free grant., Ss 52, 53 Oudh Land Revenue Act.

That the heirs of a grantee for life, who enters on the land on the death of his ancestor, is not in possession under the title of

his ancestor, which was extinguished by the ancestor's death. The provisions of Ss. 52, 53 can only be applicable, when the persons in possession are holding under a grant.

Notes.

Dist.—5 O. C. 118—The view expressed in 5 O. C (pp. 123—124) is not in conflict with observations made as to a grantee for a term of years holding over in the Judgment in 3 O C. 48.

Rel.—12 2, C. 324 -A suit for possession of the land, after the death of the grantee, against the transferee of a non-transferable grant is a suit for ejectment of a trespasser and as such is cognizable by the Civil Court.

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3 O. C. 50.

Art 179 (2) Limitation Act—Final decree or order of Appellate Court

That the words "the final decree or order of the Appellate Court cannot be limited to a decree or order which is capable of execution, but include a final decree or order which is not capable of execution (*e g* an order on an application withdrawing an appeal and dismissing it)

Notes

App.—5 O. C.—145—Dismissal for want of prosecution is a final order under Art. 179 (2).

R.—6 O. C. 48—The order of the Court will only amount to a decree if it is the formal expression of an adjudication upon a right claimed or a defence set up in the suit.

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3 O. C. 55.

Suit for possession—Art. 120 sch ii Limitation Act—Agency—Jurisdiction of Civil Court—Notice of ejectment.

The plaintiff sued for possession and mesne profits or in the alternative for a declaration that the defendant had no right in the village other than that of a lessor and that he was liable to be ejected by a notice of ejectment. The defendant's father, in 1883 in a litigation pending between the plaintiff and himself asserted through his agents an adverse title in himself.

Held (1) That the plaintiff had constructive knowledge of the fact and that the suit for declaration was barred.

(2) That the *agent* fully represents his principal in dealings with other persons, and the knowledge acquired by him while acting within the scope of his agency must be held to be the knowledge of his principal.

(3) That the grant was substantially a gift of land to be held on a *zamindari* tenure, and under cl. 2 and 8 of S 3 of Act XVIII of 1876, the parties being Hindus, the law to be administered in the case was the Hindu Law

(4) That the word *zamindari* is well understood to convey an estate of inheritance.

(5) That the relief sought by the plaintiff for the declaration was exclusively within the jurisdiction of the Revenue Courts.

Notes.

(5) R.—12 O. C. 164—That a Civil Court cannot determine whether or not a lease has expired and make a declaration accordingly.

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3 O. C. 65

Suit for arrears of rent—denial of tenancy—Burden of proof—Res-judicata.—

1. That when the plaintiff sets up a tenancy which the defendant denies, the burden of proof is on the plaintiff to prove the tenancy and the amount of rent payable by the defendant.

2. Res-judicata—First suit for arrears of rent dismissed—Second suit for arrears of rent barred.

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3 O. C. 67.

Arrears of rent—S 132 Oudh Rent Act—S. 3, sub-section 5 General Clauses Act (X of 1897).

1. S. 132 Oudh Rent Act applies to cases when the date for the payment of rent has been fixed by a special agreement between the parties.

2. That the word "year" in S. 132, Oudh Rent Act, means calendar year.

3 O. C. 69.

Rent, determination of—S 25 Oudh Laws Act.

The tenant is not bound to pay a rent fixed by the Deputy Commissioner without notice to the tenant

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3 O. C. 72.

Identification of accused —

In cases triable by the Court of Session, the witness should be called on to identify each individual prisoner and the words in which the witness identifies should be recorded.

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3 O. C. 79.

Sale in default of excise revenue—S. 25 Act XXII of 1881—S. 135 Act XVII of 1876—Prior incumbrance

1. The sale under S. 25 is not a sale free from all prior incumbrances.

3 By S 135 Act XVII of 1876 when the land is sold on account of arrears of land revenue other than the land on account of which the revenue is due, no interest, save those of the defaulter alone, shall be proceeded against, and no incumbrance created or contract entered into by him in good faith shall be rendered invalid by such proceeding.

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3 O. C. 80.

Defamation—S 500 I. P. C.—S 132 Evidence Act "Privileged"

A witness cannot be prosecuted for defamation on account of statements made when giving evidence in the witness box. The statement was privileged under S 132 Evidence Act.

Notes.

Dist.—12 O. C. 308.—A person who was accused of an offence could not with impunity make a false charge against the presiding officer with the object of getting the case transferred to another Court.

3 O. C. 84.

A suit to set aside a *sulehnama* in execution of a decree—is governed by art. 13 sch ii of the Indian Limitation Act.

Proceedings in execution of decree are proceedings in suit as provided by S 4 of Act VI of 1892

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3 O. C. 87.

Jurisdiction—Revenue Courts—S. 108 (6) Oudh Rent Act.

A suit for declaration that the plaintiff was entitled to hold the share in perpetuity under a lease was exclusively triable by a Court of Revenue.

Notes

F.—3 O C. 365.—Jurisdiction of Civil and Revenue Courts in suits between landlord and tenant discussed.

Hindu Law—

3 O. C. 89.

Succession—Grandsons—Widow—Presumption regarding moveable property acquired by a Hindu widow

1. That the grandsons took *per capita* in preference to daughter's sons (by custom excluded).

2. There is no presumption that property acquired by a Hindu widow is acquired from the proceeds of her husband's estate in her hand

3 It was incumbent on the plaintiffs to prove by direct evidence or otherwise that the moveable property in suit was acquired by the widow from the profits of her deceased husband's estate.

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3 O. C. 94.

Patwari rate—Act IX of 1889—(N.-W. P and Oudh Kanungos and Patwaris Act).

That Act IX of 1889 did not refer to any case in which the land-holder and tenant may have contracted with each other to make any special arrangement regarding the pay of the patwari. The decree of Settlement Court could not take the case out of the purview of the Act.

Notes.

F.—9 O. C. 63.—

3 O. C. 105.

Suit for proprietary possession against under-proprietor—Jurisdiction—Civil Courts—Art 91 sch. ii Limitation Act.

1. That a power to grant pattas does not include a power to grant a perpetual lease at a uniform rate

2 That the plaintiff was justified in suing for proprietary possession in the Civil Court, for an under-proprietor with a transferable right could not be ejected by the Rent Court

3. That the plaintiff having sued only for proprietary possession, the Civil Court was not competent to decree actual ejectment.

4 That Art. 91 does not apply to a case where the substantive relief prayed for is not a declaratory decree, but simple possession of property, and where the instrument in question is executed wholly without authority.

Notes.

(2) **R.**—9 O C. 292—Under the circumstances he should sue for a declaration.

(4) **F.**—10 O C. 163—That Art. 91 Limitation does not apply to a suit for possession by a reversioner.

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3 O. C 108.

Interest on arrears of rent

A person holding a decree for a permanent hereditary farming lease was an under-proprietor and as such not liable to pay interest.

Notes

Dist.—5 O. C. 187 (188)—In 3 O C. 108, a decree was given for a permanent hereditary farming lease and nothing was said about the power of transfer, but in 5 O. C. 187, the defendant's predecessors claimed but were refused sub-proprietary rights.

Dist.—6 O. C. 94 (96)—In 3 O C 108, the attention of the Court does not seem to have been drawn to the decision in select case No. 282.

3 O. C. 110.

Pre-emption—S. 10 Act XVIII of 1876—Notice.
—S. 9 (3) ,, ,,

1. That upon the sale of an entire mahal, the holder of proprietary rights in a resumed muafi, which consisted of isolated plots in that mahal is entitled to pre-empt as co-sharer

2. That, a Mahomedan who institutes a suit under chapter II Act XVIII of 1876, is not required to observe the strict requirements of the Mahomedan Law; but that within 3 months from the receipt of notice the pre-emptor may prefer his claim

Notes

(1) Ap.—5 O. C 399—Right of co-sharer of isolated plot to claim pre-emption.
Cite.—7 O. C 275—Residence in village, a necessary qualification
Aff.— ,, ,, 284 (P C).

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3 O. C. 120.

Legatee—Ss. 11, 14, 15, 22 cl (6) Oudh Estates Act—Marginal notes in Indian Statute.
Bequest made prior to Act I of 1869—Brother—Interpretation of Statute.

(1) A person to whom property is bequeathed by a talukdar cannot be deemed to be his legatee unless the bequest was made after the passing of the act and in the exercise of the powers conferred by S. 11 of the Act

2. That the marginal notes which appear in the Indian statutes form part of the statute.

3 That any person mentioned in S 22 as a "possible heir" may be "a person who would have succeeded to the estate"...within the meaning of S. 14

4. That the word "heir" in the marginal notes to S. 14 refer to persons not enumerated as heirs in S. 22.

5. That the word "brother" in S. 22 includes brother of the half blood.

Notes.

R.—5 O. C. 345 (352)—Construction of Ss. 13, 14 and 22 Oudh Estates Act.
Rev.—7 O. C. 248=26 All. 393.

3 O. C. 129.

Hindu Law—Stridhan—Mitakshara—Benares school—Interest after decree—S. 209 C. P. C.=S. 34 (Act V of 1908).

1. Property inherited by a daughter from her mother must be held to be her stridhan devolving on the death of daughter upon her heirs.

2. Interest after the date fixed by the decree was in the discretion of the Court, notwithstanding that a fixed rate of interest was mentioned as payable " up to realization in the mortgage. "

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3 O. C. 156.

Suit by mortgagee on simple mortgage for sale, of mortgaged-property art. 147 sch. ii Limitation Act

A suit by a mortgagee on a simple mortgage for the sale of the mortgaged-property is governed by art 147.

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3 O. C. 164.

Court-fee—Appeal.—

The memo of appeal insufficiently stamped, on the ground that the other co-defendant has paid full court-fee on his memo of appeal, was rejected.

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3 O. C. 165.

Sanction of Court under S. 257 A. C P. C.—This section is omitted in Act V of 1908.

Note.

Diss.—4 O. C. 284 —Construction of S. 257 A, and 258 C P. C.—Agreement for payment of judgment debt and admissibility of second suit for an agreement.

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3 O. C. 168.

Penalty—Reasonable compensation Interest.—

The agreement to pay interest at the enhanced rate in case of default was in the nature of a penalty, and that the plaintiff respondent was entitled only to reasonable compensation.

Notes.

R.—9 I. C. 406.—3 O C. 168 can not be taken as a guide—It is a question for construction according to the terms of the deed and the circumstances of each case.

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3 O. C. 170.

Lis-pendens.

The doctrine of *lis-pendens* is inapplicable to purchaser at auction sale in execution of a decree

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3 O. C. 171.

Suit for recovery of money against receiver is governed by art. 120 sch ii Limitation Act.

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3 O. C. 173.

Mortgage—Burden of proof—Proof of mortgage relied on by plaintiff.

Where a plaintiff in a suit on a mortgage fails to prove the mortgage on which he relies, he can not succeed upon the mere fact that the defendant admits that he is a mortgagee of the land.

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3 O. C. 176.

Mis-joinder—Causes of action—Ss. 26, 31 and 34 C. P. C.—(O, I, rr 1, 4 (a)—O, 1, r 9—O, I, r 13.)

1. That the expression 'cause of action' in Ss. 26 and 31 should be interpreted in its limited sense, so as to include the facts constituting the infringement of the right, but not necessarily also those constituting the right itself.
2. That the provisions of S. 34 were not applicable to the case.

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3 O. C. 181.

Construction of Wajib-ul-arz—Hindu Law.

When a construction can be put upon a wajib-ul-arz which is compatible with rules of the Hindu Law, that is the proper construction to be placed on the *wajib-ul-arz*.

3 O. C. 184.

Pre-emption—Foreclosure decree—S. 12 Oudh Laws Act—Costs.

1. That a suit for pre-emption in respect of a foreclosure of mortgage is governed by art. 120 sch ii Limitation Act.
2. Costs—The mortgagee is entitled to be paid by the pre-emptor the costs properly incurred by him in obtaining a decree for foreclosure of the mortgage.

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3 O. C. 191.

Pardon—Revocation of—S. 337 Cr. P. C.—Power of Court tendering pardon.

The Dt. Magistrate had power to revoke the pardon tendered to the accused.

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3 O C 195.

Acknowledgement—Stamp Act S. 16 sch. i art. I.

That the note of hand is a mere acknowledgment of an account stated and consequently does not embody an independant contract affording a fresh cause of action.

Note

F.—6 O. C. 16.—Decree for money lent on promissory note when its execution is not proved, can be passed if the debt is proved.

Exp.—7 O. C. 166.—" account stated " in art 64 Limitation Act

Dist.—11 O. C. 152 —The words " and shall be paid " clearly distinguished the document from that in 3 O C. 195.

Dist.—21 I. C. 199.—Where a note given as a security for sums already due but not payable on demand, contained the words رقعہ عندالطالب—Held, that the note being a new contract, altering the terms and conditions upon which the money was previously payable, was a promissory note.

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3 O. C. 203.

Gharwara.

A suit for the recovery of *gharwara* dues is governed by art 120 Limitation Act.

3 O. C. 204.

Public documents—S. 74 Indian Evidence Act—Khasras.

That the *khasras* were public documents and certified copies of them were admissible in evidence.

Notes

R.—11 O. C. 195.—That the entries made by the Patwari in the remark column of the *khasra* are admissible in evidence.

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3 O. C. 213.

Pre-emption—Mortgage—sale —

That the fact, that the terms of the mortgage were such that redemption could be unlikely, could not alter the real nature of the transaction, and convert what was a mortgage into a sale.

Notes.

App.—9 O. C. 169.—The plaintiffs are entitled to pre-emption if there was a complete contract for sale but not so entitled if there was only a proposal by the vendor which was not accepted by the vendee.

F.—15 O. C. 1.—A document which on the face of it is a document of mortgage cannot be construed as a deed of sale merely because its terms are such as to render it improbable that redemption will ever take place.

Rel.—16 O. C. 9.—That improbability of redemption does not make it any the less a mortgage.

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3 O. C. 215.

Transfer by Hindu reversioner of a portion of his interest—Suit by vendor and vendee—Actionable claim—Misjoinder of parties.

1. That, although vendor was not in possession of his share, he was quite competent to convey it to the vendees, and that the sale of the said share was not the sale of an actionable claim.
2. That the vendees were properly joined as plaintiffs.

3 O. C. 229.

Certified purchaser buying benami—S. 317 C. P. C. = S. 66 Act V of 1908.

S. 317 C. P. C. should not be applied so as to assist the certified purchaser to enforce his claim by relieving him from the necessity of showing the justice of his claim, or excluding enquiry as to its fraudulent character.

Note

Dist.—8. O. C. 306.—In 3 O. C 229—the certified purchaser was plaintiff and in 8 O. C. 306, the suit was against a certified purchaser

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3 O. C. 231.

Registration Ss. 3, 47 and 75 Registration Act—Deed of gift.

1. The registration of a document does not depend on the consent of the person executing the same.
2. There is no exception to the rule laid down in S. 75, that registration shall take effect as if the document was registered when first presented for registration.
3. When the donor has made over the deed of gift to the donee giving authority to the donor to present the document for registration, the donor has done all that was necessary for him to make the deed legally complete.

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3 O. C. 234.

An Order, under S. 543 C. P. C. = O. XLI, r. 3 C. P. C. (V of 1908) Rejecting a memorandum of appeal, is appealable.

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3 O. C. 236.

Revision S. 310 A C. P. C = O, XXI, r. 89 Act V of 1908—Sale of superstructure of a house—Immovable property—Tender made by Judgment-debtor.

1. That the superstructure of the house was immovable property and a tender made by the Judgment-debtor should have been accepted under S. 310A, C. P. C.

2. That the Court, in refusing to accept the deposit made by the Judgment-debtor failed to exercise a jurisdiction vested in him.

Notes.

(2) **F**—22 I. C. 605.

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3 O. C. 238.

Suit for money—Rent before it becomes due.

A tenant is not liable for his rent before the date on which it becomes due.

Notes.

Dist.—12 O. C. 35—That the rent determined under S. 36 (2) Land Revenue Act took effect from the date on which the exproprietary tenancy arose.

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3 O. C. 240.

Ss. 294 and 307 C P C = Order XXI r 72 and Order XXI r. 85 Act V of 1908 Forfeiture of deposit not made within 15 days.

1. That it was not necessary that the application under S 294 (order XXI r. 72) should be made within 15 days from the date of sale and the provision of S. 307 (order XXI r. 85) does not apply when the decree-holders are the purchasers.

2. That as the decree-holder applied to have the balance of the purchase money set off against the amount due under his decree, the application should have been allowed and the deposit should not have been forfeited.

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3 O. C. 241.

Marriage—Suit for recovery of money paid in consideration of marriage which had not been performed lies, in the Civil Courts.

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3 O. C. 243.

Appeal—Stay of execution—S. 608 C. P C (= O. XLV r. 15 Act V of 1908.)

Where leave to appeal to Her Majesty in Council has been specially obtained, the Court, which previously refused the application for leave to appeal to Her Majesty in Council, has no power

under S. 608 to stay execution of the decree appealed against; but it has power to stay execution so as to enable the applicant to apply to Her Majesty in Council to pass an order staying the execution of the decree pending the disposal of the appeal.

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3 O. C. 245.

Pardon—Ss. 337 and 339 Cr. P C.

Conviction, of accused to whom pardon, was tendered, without any finding as to his non-compliance with conditions of pardon, was bad.

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3 O. C. 247.

Ss 110, 112 and 526 Cr P. C.—Transfer of proceedings

The expression 'Criminal Case's in S. 526 includes proceedings of a criminal nature other than inquiries into or trials of, offences.

Notes.

R.—11 O C. 61—S 526 Cr. P. C. applies to proceeding under S. 145 C. P. C.

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3 O. C. 250.

Hindu Law—Widow's Estate—Construction of sanad.

Held that the *sanad* simply maintained the previous tenure of the holding and that the widow had only the estate of a Hindu widow under that document

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3 O. C. 254.

Mortgage—Payment of prior mortgage by subsequent encumbrancers as against intermediate charge.—

1 That the vendee of the mortgagor, having acquired the rights of the first mortgagee was as much entitled to use it as a shield against the second mortgagee as is a first mortgagee who has acquired the rights of the mortgagor, and in such a case as this, the second mortgagee must redeem the first mortgage before he can put the property up for sale.

2 *New relief claimed for the first time in appeal*—Under a prayer for general relief contained in the plaint such permission might be granted to the plaintiff.

3 O. C. 258.

Hindu widow—Construction of wajib-ul-arz. That the provisions of the wajib-ul-arz were inconsistent with the possession by the widow of an absolute estate in the property of her husband, and did not confer on her unrestricted powers of alienation.

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3 O. C. 260.

Pre-emption—Fictitious sale-deed.

In the case of the sale being fictitious no suit for pre-emption lies.

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3 O. C. 263.

Dacoity—Ss. 34 and 397, I. P. C.—Enhanced Punishment.

That the punishment provided by S. 397 can be inflicted only on the person actually causing grievous hurt, and not on a person who might be liable only in virtue of S 34

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3 O. C. 265.

Sufficient cause—S. 5 Limitation Act—Appeal—Mistake of Law.

As the belief of the appellants that the appeal lay to the Board of Revenue was not shown to have been formed with due care and attention, there was not "sufficient cause" for not presenting the appeal within time.

Notes.

R.—34 Cal. 216.—That inasmuch as it was not established in the present case that the belief of the appellant, that the appeal lay to the District Court, was formed with due care and attention and that there was consequently sufficient cause for not presenting the appeal within time, the appellant was not entitled to an extention of time by virtue of S 5 Limitation Act, and that it was so barred.

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3 O. C. 268.

Resumption—Under proprietary grant—lease—Grant—Ss. 52 and 53 Act XVII of 1876.

Where the lessor stipulated in the lease that the lessee should pay to him the Government revenue, and should be entitled to enjoy the rest of the profits of the village and that the lessor and his descendants would not take back the village.

Held 1. that it was a grant of land under S. 52 Oudh Land Revenue Act.

2. That, although the grant was one of an under-proprietary right in the village, yet, as it was one at a favourable rate of rent it was resumable.

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3 O. C. 273.

Res-judicata—Questions in issue but not heard and finally decided

Held, that the question whether the respondent had a right of pre-emption in respect of the property was not heard and finally decided in the former suit and that therefore the present suit was not res-judicata.

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3 O. C. 277.

Registration—Nikahnama—S 17 (b) Act III of 1877 (Registration Act)

Assignment by husband in favour of his wife in discharge of dower debt.

A *nikahnama* purporting to be an assignment by a husband in favour of his wife in full discharge of the dower debt was not a composition-deed, but a document which is compulsorily registerable.

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3 O. C. 279.

Review of Judgment

An application for review of judgment on grounds abandoned in appeal is not maintainable.

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3 O. C. 281.

Hindu Law.—What constitutes trust—Succession to property of Hindu religious mendicant—Property left by Guru—Construction.

Held 1. that the terms of the deed were not sufficient to create a trust.

2. Unless a Hindu is a 'hermit' or an 'ascestic,' the property which he leaves will devolve upon his secular heirs.

Notes

Over an appeal (P. C.)—8 O. C. 297.—On the point that the money was advanced from the profits of the endowed property.

3 O. C. 287.

Suit for possession—Admission.—Succession to intestate talukdars and grantees Ss. 8 and 22 (b) Oudh Estates Act (I of 1869).—

(1) That the defendant's statement that W. was the owner of the property in suit did not amount to an admission on her part that W. was the legatee of F C.

(2) That the provisions of S. 22 are only applicable to a talukdar or grantee, or the heir or legatee of a talukdar or grantee and that the plaintiff having failed to prove that W. was the legatee of F. C, his suit, in so far as it was based upon that section, was not maintainable.

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3 O. C. 296.

Application to set aside ex-parte decree—Deposit of decretal amount.—Small Cause Court decree.—S. 17 Act IX of 1887.

That if an applicant makes deposit when permitted or directed to do so, although the deposit is not made at the time of making the application, the deposit should be accepted.

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3 O. C. 299.

Trust property—Suit against dismissed Mahant by his successor for possession S. 539 C. P. C.=Ss 92 and 93 Act V of 1908.

A suit against a dismissed mahant and his transferee, by his successor for possession of trust property was not barred by S. 539 C. P. C.

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3 O. C. 306.

Pre-emption—Ownership limited.

A woman in possession of a share in a village under certain conditions is not entitled to enforce the right of pre-emption on the sale of another share of the village.

Notes.

R.—18 I. C. 386.—That the mere fact that the plaintiff's name was entered in the revenue papers was not sufficient to constitute them co-sharers

3 O. C. 308.

Contribution of revenue. Jurisdiction S. 108 (16) Oudh Rent Act.

A suit by a co-sharer against the lambardars and co-sharers for contribution in respect of the payments, on account of arrears of revenue, made by him as lambardar, comes, under S. 108 (16) and is cognizable exclusively by the Rent Court.

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3 O. C. 310.

Suit for arrears of revenue against a co-sharer by lambardar—Under-proprietor Decree for foreclosure—S. 108 (16) Oudh Rent Act

1. Where the proprietor of a mahal sold it to another person, excepting from the sale certain plots not then separately assessed to revenue of which he retained proprietary possession, the vendor became a co-sharer of the purchaser, and there being no contract to the contrary, was bound, as between himself and the purchaser, to pay the revenue assessed upon the plots at a subsequent settlement.
2. That the effect of the foreclosure of the mortgage was not to constitute the mortgagor an under-proprietor.

Notes.

(1) Dist.—5 O C. 70 —The decision in 3 O C. 310 is based upon the terms of the sale-deed. A contract by which the purchaser binds himself to pay the revenue assessed upon the lands retained by the vendor, would not relieve the vendor of his liability to Government.

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3 O. C. 314.

Compoundable offence—alteration of conviction.

Where a person in appeal is acquitted of non-compoundable offence but convicted of a compoundable offence, he should be given an opportunity of effecting a composition of the offence

Notes

Dist.—13 O. C. 161.—In 3 O. C. 314—15 days were allowed to the accused within which to effect a composition of the offence In 13 O C. 161, the composition had been effected and it was held that the Court had power under S 439 read with S. 423 Cr P. C. to pass any order that may be just and proper.

3 O. C. 316.

Review of Judgment by another Judge—S 623 C P C = S. 114 O. XLVII, r. 1, 624 C. P. C. = O. XLVII, r 2—S. 7 Limitation Act.

(1) S. 7 of the Limitation Act applies when only some of the Judgment creditors, and not all, are affected by a legal disability.

(2) The expression of 'a clerical error' in S 624 is intended to mean an error in recording what on the face of the record was the decision which the Court had arrived at.

Note.

F.—9 O. C. 269—In the matter of an application under S 89 Transfer of Property Act, it was held that S 7 Limitation Act applied whether all or some only of the Joint Judgment creditors were under disability when time began to run

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3 O. C. 321.

Revision - S. 622 C. P. C. = S. 115 Act V of 1908—Sale in execution of decree.

That the District Judge had jurisdiction to decide the question whether the sale was a valid or invalid one If his decision was erroneous, it can not be said that he acted in the exercise of his jurisdiction illegally or with material irregularity.

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3 O. C. 323.

Pre-emption—Costs to be set off.

The decree-holder is entitled to attach a part of the amount on account of costs due to him under the decree.

Notes.

F.—6 O. C. 24—Setting off costs by decree-holder.

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3 O. C. 325.

Resumption of grant—Revenue free—Ss. 52 and 53 Act XVII of 1876, Oudh Land Revenue Act.—Cess.

1. That the word proprietor in S. 52 means one paying land revenue in respect of the land which is the subject of the grant.
2. That Ss. 52 and 53, do not apply to revenue free lands.
3. That a cess is not land revenue.

3 O. C. 330

Pre-emption—Ss. 9, 10 and 14 Oudh Laws Act—Several persons equally entitled.

1. Right of pre-emption to be distinguished by lot when several persons are entitled to pre-empt
2. That last clause of S 9 is applicable also to the case where two or more persons are equally entitled to buy the property and one or more of them has or have acquired it.

Note.

(2) **F.**—13 O C. 260—Effect of pre-emption of part of the property sold.

(2) **App.**—15 O C 389—Under the provisions of the Oudh Laws Act a right of pre-emption arises when the transfer is made in favour of a co-sharer, the rights of co-sharers *inter se* being regulated by the order of preference laid down in S. 9.

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3 O. C. 335.

Declaratory relief—Suit by next reversioner when nearer reversioner refuses to sue. Discretion of Court in granting such relief

1. That a strong case of inexpediency should be shown for refusing declaratory relief to classes of persons expressly recognized by the law as suitors for such relief.
2. Next reversioner can bring a suit, when nearest reversioner refuses to sue.

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3 O. C 340

Compensation for wrongful sale—Art 29 Limitation Act.

Held, (under the circumstances) that the suit was for *compensation in respect of wrongful sale of the timber* hence governed by Art. 29 Indian Limitation Act.

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3 O C 342.

Enticing away married woman—S. 498 I. P C.—Evidence of marriage.

When the marriage of a woman is an essential element of the crime charged, the marriage must be strictly proved by direct evidence (admission by the complainant and his wife not sufficient). In the absence of such evidence the conviction was illegal.

3 O C. 347

Pre-emption—S. 27 C. P. C. = O. I, r 10 (1) Act V of 1908.

The application, by plaintiff, disclaiming interest in the subject matter of suit, for substitution of name of another person as plaintiff, rejected and suit dismissed.

Notes.

Dist.—7 O C 193.—In 3 O. C. 347, the Court did not find that there had been any mistake in commencing the suit, the person proposed to be added had not signified his consent, and upon the plaint as drawn that person could not have carried out the suit.

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3 O. C. 351.

Suit by persons suing in their own names, for themselves and for others—Permission of Court—S. 30 C. P. C = O I, r. 8 (1)—Injunction—S. 42 Specific Relief Act—Art 131 Sch. (ii) Limitation Act

S. 42 Specific Relief Act does not authorize a person who claims a right common to him and other persons of the same class to sue in his own name for a declaration of the right in favour of such class, nor authorize the court, where the right claimed is common to a class of persons, to give a declaration in favour of the class at the suit of one of the class. This can be done only under S. 30 C. P. C, with the permission of the Court.

2. An injunction cannot be granted to compel a person to pay money which he is under a legal obligation to pay, but refuses to pay.

3. A suit against the manager of the Shrine for the declaration of the right of the plaintiff and the whole class to recover the offerings was a suit to establish a periodically recurring right and was governed by Art. 131.

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3 O C. 363.

Review of judgment—Before the Judge other than the one who delivered judgment —S. 626 (c) C. P C.=O. XLVII, rr. 2 and 4 That under S 626 (c) C. P. C.=O LVII, r. 4.

Where a application for a review of judgment upon grounds other than those mentioned in S. 624 C. P. C.=O XLVII, r 2 is

presented to the Judge who delivered it, and he has thereupon directed notice to be given to the opposite party, the application may be heard and disposed of by his successor.

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3 O. C. 365.

Jurisdiction.—

That the Civil Court could entertain the suit, the object of which was to establish that the relation of landlord and tenant did exist between the parties, although it could not take cognizance of claim to establish that the defendant was a tenant not holding upon special terms.

Notes

R.—5 O. C. 104 (106)—a suit, for a declaration that the defendant is not proprietor, is cognizable by the Civil Courts.

F.—12 O C. 164—A Civil Court cannot determine whether or not a lease has expired and make a declaration accordingly

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3 O. C. 371.

Redemption—Ss. 60 and 62 Transfer of Property Act—Ss. 13 and 244 C. P. C. =Ss. 11 and 147 C. P. C. (V of 1908)—Before passing Act IV of 1882 T. 7 P. Act

A second suit for redemption, after payment of mortgage money into Court in a previous suit is barred by Ss. 13 and 244 C P C.

Notes

Over—Vide Privy Council Judgment 9 O. C. 7.

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4 O C. 1.

Suit for profits, by co-sharer against lambardar—Burden of proof—S. 108 (15) Oudh Rent Act.

It lies on the co sharer to prove how much more, the lambardar has collected, or might have collected but for gross negligence or misconduct, than is admitted.

The fact that in a particular year the lambardar, on his own admission, collected a particular percentage less than 100 per cent. is not any evidence that he collected more than he has, admitted, or that he was guilty of gross negligence in not collecting more.

4 O. C. 6.

Construction of deed—Will, Adoption—Art. 91 sch ii Limitation Act.

1. That the deed was simply a deed of adoption and that it had no legal effect as a will.
2. That even if there was a bequest it being admitted that no adoption took place, the gift could not take effect.
3. That art 91 has no application to the case of will

4 O C 17

Arbitration without intervention of Court—Reference after institution of suit.—S. 21 Specific Relief Act. Revocation.

1. That contract to which S 21 refers is one in existence at the time when the suit is instituted.
2. When the parties have made a reference without the intervention of the Court, they can not revoke the reference, and if a valid award has been made, a decree can and should be made in accordance with the award

4 O. C. 23.

Remand—Ss. 562 and 566 C P. C = O. XLI, rr 23, 25 —

When a suit is decided on the merits on a particular point, the appellate Court should have remanded the case under S. 566 C. P. C.

4 O. C. 24.

Suit for rent by ordinary tenant against trespasser—S. 127 Oudh Rent Act.

That the meaning of 'landlord' in S. 127 is a person generally entitled to claim rent for the land itself, and the expression does not include an ordinary tenant.

4 O. C. 26.

Pre-emption—S. 7 Oudh Laws Act—Vendor having no proprietary or under-proprietary right in land occupied by house sold.

That the sale of the materials of the house gave the plaintiff, the proprietor of the village, no right to sue for pre-emption, under the Oudh Laws Act

4 O. C. 28.

Execution of decree—S 174 Act XVII of 1876 (Oudh Land Revenue)—Debt contracted by disqualified proprietor—Property under management of Court of Wards.

That, the provisions of S. 174 barred execution of decree against the property which at the time the debt was contracted, was under the superintendence of the Court of Wards

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4 O. C. 29.

Cause af action—Suit against Secretary of State.—Plaint—Cause of action.

Held, that as the plaint disclosed no cause of action against the Secretary of State or any person for whose actions he should be deemed responsible, the suit was not maintainable.

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4 O. C. 31.

Birt—Heritable and transferable right. Decree of Settlement Court when binding upon person against whom it was passed during minority—S. 68 (2) Oudh Rent Act.

That, the plaintiff, on becoming fully acquainted with the facts, and accepting the rent, elected to treat the decree of Settlement Court as valid.

(1) *Held*, that it was not open to the plaintiff to avoid the decree of the Settlement Court, which could be set aside on proof of fraud, collusion, and gross negligence.

(2) That, a person holding a *birt* has a heritable and transferable right

(3) That, the provisions of the Oudh Sub-Settlement Act of 1866 are not exhaustive, and a right to sub-settlement can be established other than under that Act.

Notes

Upheld by—P. C. in 10 O C. 318.

(2) F.—14 O. C. 41.—Meaning of Birt—Registration of Birt-deed.

(3) R.—8 I. C. 407.

4 O. C. 61.

Hindu Law.—Charge—Grant in favour of temple—Presumption of perpetuity.

1. Annuity granted to defray temple expenses is a charge upon village out of profits of which it was to be realised.
2. *Presumption as to perpetuity.*
3. Such words as 'in perpetuity' and 'always' and 'for ever' do not *per se* denote an intention to make a grant in perpetuity.

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4 O. C. 66.

Leave to appeal to Privy Council—Meaning of 'decree' in S. 596 C. P. C. = S. 110 Act V of 1908.

When the Court below has dismissed or decreed a suit on all of certain issues, its decision cannot be decreed to have been affirmed by the judgment of the Appellate Court, unless its decision as regards all those issues has been affirmed, as well as its decree.

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4 O. C. 69.

Confession of accused—Corroboration of confession—S 30 Evidence Act.

The meaning of S 30 is that, if there is other evidence, which if true, would establish the charge, the confession of a person being tried jointly of the same offence may be taken into consideration by the Court and be used for the purpose of corroborating the other evidence

Notes.

F.—6 O. C. 204 (209)—An accused person ought not to be convicted where the only evidence against him is the confession of co-accused.

Diss.—11 O. C. 328—A confession unsupported by other testimony is evidence of the weakest kind against the co-accused.

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4 O. C. 71.

Wajib-ul-arz—Value of—Custom—'Ek Jaddi'

1. The expression 'Ek Jaddi' in the *wajib-ul-arz* denotes other ancestors of the deceased besides his grand-father.

2. That a single *wajib-ul-arz* is not necessarily sufficient proof of a custom

Notes

R.—15 I. C. 247—It is open to an appellant in second appeal to show that evidence relied upon by the other side, even if believed and considered sufficient,, does not, in law amount to the proof of the alleged custom

4 O. C. 78.

Compromise—Decree in terms of compromise—S 153 Oudh Rent Act.

1. That, the compromise, in so far as the stipulation that the defendant should not transfer his 'share' until the payment of the money is concerned, was not embodied in the decree, and therefore was not judicially given effect to.

2. That, as the compromise was not registered, the stipulation was rendered ineffectual by the provision of S. 153.

Notes.

(2) **Exp.**—6 O. C. 364—A petition or pleading acted upon or given effect to by the Court becomes part of the Judicial proceeding and does not require registration.

(2) **R.**—13 O. C. 241—An agreement conferring a right of pre-emption is not exempted from the operation of the Registration law on account of its being embodied in a petition of compromise filed in a mutation proceeding before a Revenue Court.

„ 14 I. C. 29—That, the compromise not being registered could not operate to create any charge apart from the decree.

4 O. C. 82.

Award—Jurisdiction—Ss 206 C. P. C.=O. XX, r. 6 and S 152 Act V 1908.

Amendment of decree— $\left.\begin{matrix} 522\ C.\ P.\ C.= \\ 526\ C.\ P.\ C.= \end{matrix}\right\}$ The second schedule Act V of 1908.

The order having been made under S 526 C. P. C. and the formal order giving effect to it being in conformity with the same, the Court had no power to grant the application under S. 206 C. P. C.

4 O. C. 84.

Letters of administration—Application for—Order in proceedings—S. 86 (V of 1881)—Appealable.

That, the order that the Court fees must be fixed before any further proceedings on the application could be taken, was not appealable.

4 O. C. 86.

Will—Interpretation of will—Direction or wish contained in will.

1. That the provisions in the will that "G and B shall be the owners of the property for their lives" gave them jointly the right to the possession of it.

2. Direction or wish contained in the will is not binding on devisee

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4 O. C. 89.

Jurisdiction—Court of Small Causes—Suit for share of profits of bazar S. 15, art. 31 Act IX of 1887.

The suit being founded on the allegations that the parties were co-sharers in the profits of the bazar, that the defendant had collected the entire profits and had not paid the plaintiff his share of the same, the suit was one for the money had and received for the plaintiff, and was therefore cognizable by a Court of Small Causes, to which no second appeal lay.

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4 O. C. 93.

Mortgage of Joint family property—Liability of son—Partition—Interest and Costs.

1. That the son's share was liable to be sold under the decree obtained by the mortgagees against his father, and that the mere circumstance that the son obtained a decree for partition of his share before the mortgagees obtained their decree was immaterial.

2. That the son was liable for interest and costs payable under the decree.

4 O. C. 96.

Criminal Revision—Ss. 435, 476 Cr P. C

1. That, although the application was headed as one under S. 435 Cr. P C, yet it might be regarded as one under S. 622 C P. C.
2. That, in as much as in the order said to have been passed under S. 643 C. P C., the Lower Court did not state the reasons which led it to consider that, there were sufficient grounds for sending the charge to the Magistrate for investigation, it was illegal and should be set aside.

Note.

(1) R.—17 O C. 25—That where a Court of Small Causes had directed the prosecution of certain persons under S 476, Cr P C, *held*, that the order could not be the subject of revision under S. 435 Cr. P C. but that, an application for revision could lie under S. 115 C. P C. (V of 1908).

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4 O. C. 98

Application by next-friend—Leave to appeal—Privy Council

An application for leave to appeal may be made by any person as the next-friend of minor.

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4 O. C. 100.

Redemption suit by second mortgagee—Foreclosure—Mortgagee not representative in interest of mortgagor—Liabilities of second mortgagee when no party to suit for redemption of prior mortgage.

1. That, the mortgagee is not representative in interest of the mortgagor.
2. That, a second mortgagee, and all persons claiming under the mortgagor are entitled to redeem
3. That the plaintiff subsequent mortgagee, merely because he claimed under the mortgagor, was not bound by the decree made between the mortgagor and the first mortgagee in which the second mortgagee was not party, though the second mortgagee might have instigated the mortgagor to bring the suit against the 1st mortgagee.
4. That the second mortgagee was entitled to a decree for foreclosure.

4 O. C. 108.

Suit when may be said to be properly instituted—Plaint insufficiently stamped—S. 4 Indian Limitation Act—Amendment of plaint S. 54 (d) Cr. P. C. = O. VII, r.] [Act. V of 1908]—Res-judicata.

1. Where a plaint has been filed in time, the fact, that it was not duly stamped when the period of limitation expired, does not render it time-barred

2. In S. 4 Limitation Act, the Legislature used the expression "plaint" without reference to the law as to Court-fee.

3. That where a plaint has, under S. 54 (d) C P. C. been returned for amendment within a time fixed by the Court, the Court can extend the time both before and after it has expired.

4 A decision may be res-judicata between the parties on the same side, the mere circumstance of persons having been formally arrayed on the same side in a suit being immaterial. If a matter has been actively in issue between them, and if as to that matter they had an active controversy against each other, they will be estopped by the decision in that matter.

Note.

(3) **R.**—8 O. C. 241 (244). The time allowed for amendment of the plaint may be extended even after the period first allowed had expired.

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4 O. C. 119.

Criminal Revision—S. 435 Cr P. C.

That, the intention of the Legislature in enacting the last clause of S. 435 Cr P. C, was to prevent the Sessions Judge and the District Magistrate from simultaneously exercising their powers of revision and from exercising them in such a way as would amount to one of them, as it were, hearing an appeal from, or reviewing, an order passed by the other of them.

Note.

Not adop.—5 O C. 139.—The word "made" in S 435 Cr. P. C. meant "presented and considered."

4 O. C. 123.

Execution of decree—Order absolute for sale—S. 89 Transfer of Property Act—S 244 C. P. C.=S. 47 C. P C. (V of 1908)

An application under S 89 T. P. Act is an application for execution of decree.

Note.

Dist.—6 O. C. 114—That applications under Ss. 87, 89, 93 are applications for execution of decrees to which art. 178 Limitation Act applies.

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4 O. C. 127.

Dismissal of complaint without examining complainant—Sanction to prosecute—Ss 190, 200, 202 and 195 476, Cr. P. C.

1. The words "may take cognizance of an offence" in S. 190 did not mean that a Magistrate is not bound to take cognizance of an offence on receiving a complaint of facts constituting such offence.
2. That as the complaint was not tried out and was not dismissed on evidence recorded by the District Magistrate, the order passed under S 476 Cr P C. was illegal.

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4 O. C. 133.

Ss. 424, 416 C. P. C.=Ss. 80, 79, O. XXVII, r. 1 (V of 1908)—Suit against Government—Suit against State Railway—Compensation—Amendment of plaint—Notice.

1. A suit for compensation against State Railway should be brought against the Secretary of State.
2. That the suit would not be as against the Secretary of State, nor could the plaintiff be permitted to amend his suit by substituting the Secretary of State for the Traffic Superintendent, until the notice required by S. 424 C. P. C. was given.

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4 O. C. 139.

Lease executed in favour of Zamindar in consideration of surrendering, proprietary rights—Conditions in lease raising presumptions of perpetuity—Interpretation of lease.

That, it was highly improbable that a person having Zamindari rights, which entitled him to a lease at a favourable rent for

maintenance, would surrender them in consideration of a lease for a fixed term. The Court was justified in concluding that the lease was not for 28 years only, and that it was intended by the parties merely that the rent should be fixed for that period, the lease being a perpetual one, and that the appellant could prove that, that such was the intention of the parties to the lease.

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4 O. C. 143.

Lambardari dues—S. 229 of Act XVII of 1876—Rule XIII—Right of lambardar to receive dues from co-sharer.

Where each co-sharer collected rents and paid his own share of the revenue direct to Government, the Lambardar, who was one of the co-sharers, was entitled to receive *lambardari* dues.

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4 O. C. 145.

Res-judicata—Matters directly and substantially in issue—Will—revocation of will executed by Hindu widow in accordance with husband's wish

That, in the second suit the matters, whether H had expressed a wish that his widows should execute a will in favour of G, that the will which the widows had executed, was executed in accordance with such wish, and that the widows had not revoked the will, were matters which the Court was prohibited from trying, by reason of the decision of the District Judge in the former suit.

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4 O. C. 158.

Presumption—Price to be paid by pre-emptor when fictitious price entered in the sale-deed—Ss. 11 and 13 Oudh Laws Act.

Where the allegations, in the plaint as to the price entered in the sale-deed being fictitious, are denied, the Court has to determine whether the price stated in the deed is fictitious and if so, what the fair market value of the property is. If the plaintiff succeeds in showing that the price stated in the sale-deed is fictitious, he is not entitled to acquire the property for the price actually paid, but must pay for it a price equivalent to the fair market value

4 O. C. 163.

Condition in restraint of alienation—Compromise—S. 10 Transfer of Property Act.

In a suit for possession, the parties entered into a compromise, in which it was stipulated that the plaintiff and his heirs should always remain in possession of the village in suit, but should have no power to transfer to a stranger.

Held, that the condition in restraint of alienation was void

Notes

F.—10 O. C. 136—That where an estate is granted subject to a condition in absolute restraint of alienation the condition is void

Dist.—14 O. C 184—In 14 O C. 189—No property was transferred with a condition restraining alienation It was merely a sale under which the life interest in part of the property was reserved

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4 O. C. 168.

Meaning of "accepting" in S 62 Stamp Act (II of 1899)

A person does not become liable to punishment, merely because he receives from another a promissory note without the same being duly stamped.

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4 O. C. 169.

Pre-emption—A Hiba-bil-ewaz—is not a sale and confers no right of pre-emption.

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4 O. C. 171.

Mortgage—Premature suit for mortgage-money—Questions as to correct amount due on mortgage when to arise.

The suit was for mortgage-money with interest and as an alternative for recovery of possession. The deed contained a condition that, if the principal money was not paid within a year, the plaintiff would be competent to take possession of the mortgaged-property.

Held, that the suit so far as it referred to the amount of the mortgage-money was premature. The question as to the correct amount due on the footing of the mortgage, could arise only when the mortgagor was ready and willing to redeem the mortgage.

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4 O. C. 175.

Suit for possession against tenant—S. 108 Rent Act—Declaration that defendant has no under-proprietary rights—Jurisdiction.

The Civil Court has no jurisdiction to pass a decree for possession against the defendant or to eject him from his holdings, but it could grant the declaration that the defendant had no proprietary or under-proprietary right in the land.

Note.

F.—12 O. C. 164.

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4 O. C. 178.

Hindu Law—Liability of son's share in the Joint family property for father's debt.

Held, that in execution of a simple money decree against the father alone in a Joint Hindu family, the entire family property is liable except where the sons establish that the debt was not one which they would be under a pious obligation to discharge.

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4 O. C. 180.

Jurisdiction—Declaration of tenancy at will.

That a suit for declaration that the defendants are mere tenants at will does not come within the scope of S 108 of the Oudh Rent Act, and the Civil Court can take cognizance of it.

Note

Not F.—12 O. C p 174—A suit cannot be brought in a Civil Court for a declaration of the class of tenants to which the plaintiff or defendant belongs.

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4 O. C. 182.

Extension of period of limitation—S. 108(15) and S. 132—Oudh Rent Act—Oudh Judicial Calendar—Ss. 5 and 6 Limitation Act.

1 The provisions of the Limitation Act giving an extension of time to cover holidays do not apply to limitation under special Acts such as the Oudh Rent Act.

2. The "Oudh Judicial Calendar" is not compiled expressly for the purpose of showing corresponding dates in the different eras.

Notes.

R.—6 O. C. 68(71).—An act of the Court shall prejudice no man.

(1) **Aff.**—13 O. C. 103—S 5 Limitation Act did not apply to proceedings under the Oudh Rent Act.

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4 O. C. 192.

Transfer by benamidar—Mortgage by ostensible owner. Notice—

1. That under all the circumstances of the case there was no constructive notice which put the mortgagee to further inquiry.

2. That even if the mortgagor was merely the *benami* owner of the property in suit, the mortgage and the decree obtained by the mortgagee were not voidable

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4 O. C. 199.

Redemption. Inconsistent plea taken by defendant.—Suit to redeem part of property.

That the plaintiff having been forced to take up the position which the defendant assigned to him could not afterwards turn round and say that the plaintiff could only redeem a part of the mortgaged-property and not the whole property.

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4 O. C. 203.

Hindu Law.—Will—Authority given by owner of property to another to make bequest.

That under Hindu Law the owner of the property who dies intestate, can give no valid authority to another to dispose of his property after his death

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4 O. C. 207.

Declaratory relief sought against tenant—S. 42 Specific Relief Act. New plea for the first time in second appeal—Under-proprietary rights by prescription.

1. That as the suit was originally brought, the plaintiff in as much as he alleged that the defendant was a tenant, could not have claimed possession. When other defendants were joined they

did not plead in the lower Court that the plaintiff should sue for possession, and it was too late to take such a plea in second appeal.

2. That if the defendants had been in possession of the land for 12 years, claiming to be the under-proprietors of the same, and adversely to the plaintiff, the plaintiff would not be entitled to the declaration granted, in as much as the defendants would have acquired under-proprietary rights by prescription.

Notes

(2) R.—8 I C. 710—Structures of a purely temporary nature, made by a tenant for the convenience of his house, do not constitute such an assertion of right on the part of the tenant as would justify the conclusion that he meant by erecting such structures to set up an adverse title.

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4 O. C. 210.

Actionable claim—Redemption—Price paid for assignment.—S. 131 and 135 Transfer of Property Act.

1. A claim to a debt secured by a mortgage of immoveable property was not an 'actionable claim'

2. In order to redeem the mortgage, the mortgagors must pay the principal and interest under the terms of the mortgage and not the price paid for the assignment.

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4 O. C. 214.

Presumption of Talukdari estate being held in trust for joint family—Talukdari sanad in favour of single member of joint family—Lists I and II Act I of 1869.

That the defendants having failed to show that the plaintiff held the taluka in trust for the joint family as joint family estate, the plaintiff's claim was rightly decreed against them.

(Presumptions as to Talukdari estate being held in trust for joint family discussed).

4 O. C. 224.

Application for letters of administration Hindu Joint family—Widow—Ss. 4, 64 and 71 Act V of 1881 (Probate and Administration) art. 178 sch. ii Limitation Act.

1. That art 178 has no reference to an application by which a miscellaneous proceeding is instituted, and which is not made under the Code of Civil Procedure

2. That the petitioner being the widow of the deceased, the devolution of whose estate was governed by the Mitakshara law, would be entitled to the whole of the husband's estate if he died in separation from his brothers, to his self acquired property only if he died in union with them, and to no portion of his estate if he died in union with them and left no self-acquired property.

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4 O. C. 229.

Un-professional conduct of pleader.—Ss 13 and 28 Legal Practitioner's Act.

An agreement between pleader and client in respect of a suit for recovery of certain property for payment of fee was in the following words "if the clients win the case a sum of one lac of rupees shall be paid to the pleader, in consideration of his conducting the case, and if a decree be passed for a less amount than that in suit, the fee so fixed shall be reduced in proportion to the amount decreed"—

Held, that by the agreement the pleader became entitled to a share in the property in suit, and in accepting such an agreement the pleader was guilty of grossly un-professional conduct.

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4 O. C. 231.

Mortgage.—Sale of mortgaged-property in execution of decree for money—Mortgage executed before Transfer of Property Act—Decree subsequent to the Act coming into force. Ss. 2 (c), 67 and 99 T. P Act.

1. That S 99 disentitled the mortgagee to bring the property to sale, otherwise than by instituting a suit under S. 67, and that S. 2 (c) did not bar the application of the provision of S. 99 to the case.

2. That, the fact that the mortgagee had sub-mortgaged the property and a decree for sale had been made against him is immaterial.

3. That, even if the suit, required by S. 99, were one on the mortgages and even if such suit did not lie under S. 67, the mortgagee could not bring the property to sale, but could only proceed in a certain way before he could sell the property, and that if he could not proceed in that way, he could not sell, as S. 99 did not make any exception.

4 O. C. 234.

Application for leave to appeal to Privy Council—Ss. 595 (c) and 596 C P. C = Ss. 109, 110 Act V of 1908.

Held, (1) that the decree of the Court of the Judicial Commissioner involved indirectly a question between the parties respecting property above Rs. 10,000 in value.

(2) That a certificate should be granted, that as regards value and nature the case fulfilled the requirements of S. 596, C. P. C.

(3) That considering the circumstances of the case, it was not a fit one for appeal under S. 595 (c) C. P. C.

4 O. C. 238.

Order absolute for foreclosure—S. 87 Transfer of Property Act—S. 108 C. P. C. = O. IX, r. 13 C. P. C. (V of 1908).

The fact that the respondent was not served with notice gave him no right to have the order framed under S. 87 T.P. Act, set aside. The order of the Court making the decree for foreclosure was a proper order.

Note.

App.—4 O. C. 301—Decree for sale of moveable and immovable property. The decree for sale of movable property could be executed and did not require to be made absolute.

4 O. C. 241.

Guardian—Appointment—Revocation—Ss 7 and 17 Act VIII of 1890.

That the Court could not revoke an appointment, which appeared to be for the welfare of the minor, merely because it would be more agreeable for the opposite party if some one else were appointed.

The Court should make a selection consistent with the law to which the minor is subject, provided that the selection is for the welfare of the minor.

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4 O. C. 247.

Pre-emption.—

1. *Burden of proof*—Very slight evidence is required of the plaintiff to support his allegation, that the price entered in the sale-deed is fictitious, in order to shift the burden of proof on to the vendee.

2. *The opinion of a witness who is not examined as an expert*—Under S 45 Evidence Act, as to the market-value of the property, is not relevant.

Notes.

(1) F.—6 O. C. 327—The burden of proof of the market value lay in the first instance upon the plaintiff—Amount of proof necessary to shift onus from plaintiff, that price was not fixed in good faith.

(2) ,, —14 O. C. 1—That only very slight evidence is required to shift the the burden to the vendee.

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4 O. C. 250.

Suit by Pauper—Limitation—

A suit is instituted in the case of a pauper, who, before the inquiry into his pauperism is finished, pays the Court fee required on his plaint, when his application to sue as a pauper is filed, if he is found to be a pauper at the time he filed the application.

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4 O. C. 252.

Resumption of Grant—Judicial decision—Ss. 52, 53 and 55 (a) Oudh Land Revenue Act.

Land cannot be said to be held rent free under a Judicial decision unless it is by virtue of such decision that the tenure is rent free.

4 O. C. 255.

Appeal—Jurisdiction—S 18 Oudh Civil Courts Act

In a case where the value of the suit exceeds Rs 5,000, appeal lies to the Judicial Commissioner.

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4 O. C. 257.

Zar-i-peshgi lease—Suit for possession to be treated as one for redemption—S. 62 Transfer of Property Act

1. That the *Zari peshgi lease* amounted to a usufructuary mortgage.
2. Suit for possession ought to have been treated as one for redemption.

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4 O. C. 261.

Suit for arrears of revenue paid by one co-sharer for another—Appeal—Jurisdiction Ss. 108 (16), 124C and 124D Oudh Rent Act.

1. *Held* that the plaintiff not being *lambardar* at the time he paid the money, his suit was not cognizable by a Revenue Court.
2. But the suit whether instituted in a Civil or in a Revenue Court, was one in which the appeal lay to the District Judge, and that therefore the provisions of Ss. 124C and 124D were applicable.

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4 O. C. 264

Resumption—Grant—Suit for possession—Perpetual lease

Ejectment by notice of the grantee was illegal, and the grantee was entitled to recover possession and to retain it until the grant was resumed.

Note.

R.—9 O. C. 37.—Jurisdiction of Civil Courts in suit for possession as under-proprietor by one who has been ejected as ordinary tenant Suit for possession by under-proprietor.

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4 O. C. 269.

Guardian—Joint-Hindu family—Act VIII of 1890.

A guardian can not be appointed of the property of a minor, who is a member of a Joint Hindu family governed by Mitakshara Law, and possessed of no separate estate.

4 O. C. 273.

Redemption—By one of mortgagors—Charge—S. 95 T. P. Act. Joint decree against several mortgagors.

(1) One of the co-mortgagors had a charge on the share of each of the co-mortgagors for the latter's proportion of what the former had paid to redeem the mortgage and was entitled to separate decrees against each of them.

(2) As all the money by the payment of which the debt was discharged, was paid by the plaintiff, it must be held that they redeemed the mortgage.

(3) The words "obtain possession" in S. 95 T. P. Act may be interpreted to mean "obtain possession when the mortgagee had possession under mortgage."

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4 O. C. 277.

Hindu Law—Joint Hindu family—Son's liability to pay father's debt—Extravagant and profligate habits—Burden of proof.

1. That the burden of proving that the money was borrowed for immoral purposes was on sons.

2. The connection between the immorality and the debt must be proved. Proof of immoral habits is not sufficient.

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4 O. C. 281.

Limitation. S. 14 Limitation Act.

That the plaintiff's failure in his attempt to have set off in the suit for rent, the amount due on the bond in the present suit was not due to any cause connected with want of due diligence or good faith, and that he was entitled to have the period, during which previous suit was pending, excluded in calculating the period of limitation applicable to the suit.

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4 O. C. 284.

Sanction of the Court as to agreement relating to Judgment debt. Ss. 257, 257A C. P. C. (O. XXI, r. 1 Act V of 1908.

Held, that the agreement in the bond was not one for the satisfaction of the Judgment debt and providing for the payment, directly

or indirectly, of any sum in excess of the sum due under the decree. It was an agreement for payment of the amount by which the Judgment debt was satisfied with interest on that amount.

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4 O. C. 289.

Partition—Appeal—Court Fees Act, art. I schedule (ii) Ss. 70, 71, 74 and 75 Land Revenue Act.

1. That the proceedings of the Assistant Commissioner, when inquiring into the merits of the objections, could not be deemed to be a suit, and the memorandum of appeal was properly stamped as an application.
2. That as the order had adjudicated on a question of title it was appealable under S. 75, Oudh Revenue Act

Note.

(1) **F.**—6 O. C. 372—About court-fee on memorandum of appeal and practice of Court. Also effect of Revenue Court's decision on question of title—Partition. Decree—Appeal to Civil Court.

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4 O. C. 293.

S. 14 Limitation Act—Suits founded on separate causes of action.

1. That a suit by a mortgagee to recover the mortgage-money, because he has been deprived of his security by the wrongful act or default of the mortgagor, and a suit by him, after the principal money has become payable, for foreclosure or sale, would not be suits founded on the same cause of action.
2. That S. 14 was inapplicable, and that the respondent was not entitled to have the period during which he was engaged in prosecuting the former suit excluded.

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4 O. C. 298.

Partition—Ss. 74 and 75 Land Revenue Act—Appeal. Formal decree not drawn.

F.—A Deputy Commissioner or an Assistant Commissioner is not bound to have a formal decree drawn up; and whether such a formal decree has been drawn up or not, his order or decision is open to appeal.

4 O. C. 301.

Order absolute—Ss. 86, 87, 88 and 89 T. P. Act

That the provisions of Ss. 86 to 89, Act IV of 1882, applied only to mortgages of immoveable property, and that there was nothing to prevent execution as to moveable property upon the decree (which contained an express stipulation that it must be made absolute after the time fixed) before it could be made absolute.

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4 O. C. 303.

Ss. 5 and 5A Limitation Act.—Presentation of appeal by a pleader holding brief for another pleader. Mistake of law.

Held that, although the pleader acted as a matter of fact under the mistaken belief that he holding the brief of another pleader engaged in the case, could lawfully file the appeal, such belief was not formed with due care and attention.

That the fact of the appellant being *in jail* or the fact that he did all he could do to have the appeal properly presented were not sufficient cause—and the case was not covered by S. 5 A.

Notes.

Dist.—9 O. C. 65.—In 4 O. C. 303 the appeal was filed by a wholly unauthorized pleader but in 9 O. C. 65 it was argued by a pleader holding the brief of another pleader.

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4 O. C. 314.

Suit for possession by landlord against tenant setting up proprietary title. S. 124 B. Oudh Rent Act—Jurisdiction—Amendment.

1. That S. 124 B. applies only to suits in which an appeal lies to the District Judge.
2. The plaintiff was not entitled to ask for more than a declaration of his title.
3. As regards objection to form of relief claimed and to jurisdiction taken on the date of hearing the appeal *held*, that the Judge should have given him an opportunity of *amending the* plaint,

Notes.

(2) R.—9 O. C. 292.—When a tenant sets up under-proprietary right, the proprietor should sue for a declaration.

App.—12 O. C. 164 (167)—If the suit to contest notice of ejectment is dismissed on the ground that the plaintiff is a tenant, he can sue for a declaration that he is under-proprietor of the land.

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4 O. C. 318.

Admission of document insufficiently stamped.—S. 2 Stamp Act—S. 4 Negotiable Instrument Act.—Appeal.

When a document is held to be properly stamped and is admitted in evidence by any Court, that decision cannot be called in question in appeal.

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4 O. C. 320.

Redemption of mortgage by one having no title to mortgaged-property—Personal liability for mortgage-debt created by one having no title to mortgaged-property—Redemption—Liability of persons not parties to mortgage-deed—Transfer of Property Act].

M mortgaged his village for Rs. 16,000 by a deed, dated the 4th July 1873 in favour of certain mortgagees. After his death his widow *U. K.* executed on the 25th July 1881 another mortgage-deed for Rs. 24,000 in favour of the mortgagees for the money due on the former deed. On the death of *U. K.* the dispute among the reversionary heirs of *M* was settled in 1887 so far as the mutation proceedings went, by the entry of the name of the defendant's father as owner of 8 annas and of the father of *R* and his brothers and one *D* as owners of 4 annas each. On the 28th May 1893 *R* and his brothers deposited Rs. 24,000 in Court and had notice under section 83, Act IV of 1882, issued to *G* who had become assignee of the mortgage, calling on him to take the money and let the mortgage be redeemed.

On the 16th June 1893, the defendant executed a deed of mortgage of his 8 annas share for Rs. 12,000 in favour of the sons and a partner of the assignee, the terms of which were that the "mortgage should be redeemable at the end of ten years; if the mortgagor failed to pay the interest then after 5 years the mortgagees would be entitled to possession." It was further stated in the deed that the money was borrowed to pay off the debt due on the defendant's share under the deed of the 25th July 1881. The assignee after this intimated to *R* and his brothers that only Rs. 6,000 was due from them on the mortgage, the rest having been redeemed as he had also secured Rs. 6,000 from *D*. He therefore took out Rs. 6,000 of the Rs. 24,000 disputed by *R* and his brothers and returned the deed of the 25th July 1881 to *R* and his brothers. Thereafter the defendant *R* and his brothers and *D* got possession of the village according to their recorded share, subsequently *G* and his brothers obtained Civil Court decrees for the shares of the defendant and *D* and thus got possession of the whole village sometime in 1893.

The plaintiffs who are the representatives of the sons and partner of the assignee *G* brought a suit on the 7th October 1898 against the defendant and also *R* and his brothers and *D* for possession as mortgagees of the 8 annas share mortgaged by the deed of the 16th June 1893 on the allegation that the interest had not been paid for 3 years and they were entitled to possession and that if they could not have possession, for sale of the mortgaged property. The Court decreed the claim against the defendant personally and dismissed the suit as against the other defendants and as to possession or sale. The defendant appealed from this decree and the question at issue was simply whether the defendant had been properly made personally liable for the money due under the mortgage-deed of the 16th June 1893, or whether the decree should have been one capable of being enforced against the property by possession or sale and against the defendants actually in possession of the same.

Held, that the defendant was the sole person liable under the deed of the 16th June 1893; the other defendants (*R* and his

brothers, etc.,) were not parties to it nor they were his representatives. Though the debt for satisfaction of which the mortgage-money of the deed of 1893 purported to have been borrowed was no doubt an ancestral debt on the property, yet the defendant had no right to redeem any part of that debt or to create a further charge on the property for that purpose, as he had no title to any part of the property and was not in legal possession of it at the time and that therefore that property was not liable for the mortgage-debt due under the deed of 1893. The defendant must be held to have borrowed the money of the deed of 1893 to pay off his share of the mortgage-money of the deed of 1881 and he must be held to have received and applied the money to that purpose. The consideration received by the defendant was redemption in his favour and restoration of actual possession to him of the share he claimed, and he was therefore liable to fulfil his obligations under the deed.

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4 O. C. 329.

Ss. 287 and 311 C. P. C. } *Sale proclamation—Specification of pro*
= O. XXI, rr 66, 70, 90 (V. of 1908) } *fits.*

That the profits of land to be sold should be stated in the sale proclamation and when it has been once settled by the Court that the profits are correctly stated this question cannot be raised again under S. 311 C. P. C.

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4 O. C. 333.

Execution of decree—Transfer certificate—Suit-step-in aid of execution.

(1) The alteration of the application for execution by substitution of the appellate decree for the first decree is a technical and formal amendment only.

(2) That a fresh transfer certificate after the appellate decree was not necessary.

(3) That to prosecute a suit to set aside an order releasing property from attachment is a step-in-aid of execution by the decree-holder.

4 O. C. 341.

Suit for possession—By mortgagor.

A made a usufructuary mortgage of an entire village to B. and C.—Subsequently A executed a deed of further charge. B, in execution of a money-decree against A, caused an undivided half share of the village attached and put up for sale, which was sold subject to the entire mortgage-debt and purchased by B. Sometimes after B. paid his co-mortgagee C. what was due to him and obtained possession of the entire mortgage. On a suit by A against B for possession of the remaining half share of the village *held*, that A was entitled to recover possession of the other half share without being called upon to pay any thing.

Notes.

Dist.—10 O. C. 280.—The decision in 4 O. C 341 rested upon two grounds, namely, that the appellant had by paying off his co-mortgagee shown that he had understood that he had purchased the property subject to the entire mortgage-debt, and, secondly that the full amount of the mortgage-debt was paid to the appellant by his purchase. In 10 O. C. 280 there is no evidence of market value nor is there anything indicating that the appellant understood at the time of purchase that he took it subject to the entirely of the charges declared by the decrees.

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4 O. C. 345.

Pleader's fee—

In the absence of any agreement between himself and his client, a pleader can claim no more than a reasonable remuneration for his services. He has no right to payment at the rate fixed for determining the amount of pleader's fees payable as costs.

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4 O. C. 347.

New plea at the time of argument—Suit by reversioner for redemption—Compound interest—Commission money—Possession in Khali Fasil Jeth—Proportionate costs in redemption suit.

1. New plea at the time of argument not allowed.
2. Compound interest under the terms of the deed allowed

3. That the amount taken by way of commission was not for the benefit of the estate.

4. That, on payment of mortgage-money within the time fixed by Court, the mortgage would be redeemed, and the reversioners would be entitled to possession, any stipulation as to their taking possession in the *Khali Fasl of Jeth* notwithstanding.

5. In a redemption suit proportionate costs should be allowed.

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4 O. C. 355.

Valid deposit—Art. 105. Limitation Act—Claim in respect of trees—Suit by mortgagor to recover surplus collections made by mortgagee after mortgage has been satisfied.

On the 24th April 1899 the mortgagors separately instituted the present suit, alleging that from the 13th May 1890 (date of deposit) the mortgagee ceased to be entitled to interest and that consequently they were not entitled to appropriate the rents and profits from the date to the 7th January 1892, (date of obtaining possession) and from the 1st August 1893 to the 3rd November 1896 (the period during which the mortgagee had been in possession). They claimed the rents and profits for these periods and the value of certain trees alleged to have been sold by the mortgagee as part of the profits.

1. *Held*, that the claim in respect of trees was claim for surplus profits and governed by art. 105.

2. That the deposits were made in good faith with the intention that the mortgagee should take the amounts. All that the language of the application under which the deposits were made showed was that the plaintiffs reserved their right to dispute that the whole amounts deposited were due to the mortgagees.

3. That art. 105 was applicable to suits as regards both the period for which profits were claimed.

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4 O. C. 363.

Suit for profits against co-sharer.

A co-sharer in undivided *patti* is responsible for share of profits to another co-sharer.

4 O. C. 365.

Pre-emption suit—Co-sharer in S. 9 Oudh Laws Act—Mahal—S. 91, Evidence Act—Agreement to pay land revenue in mahal.

The suit was brought in respect of a village on the allegation that the plaintiff was a co-sharer of the *mahal* comprising 9 villages, one of which was the village in dispute. According to the *malguzari* and *mahalwar* registers, the parties were jointly and severally liable for the aggregate amount of the assessments on the 9 villages. But no agreement in writing to pay such aggregate amount was adduced in evidence.

1. *Held*, that the local area comprising the 9 villages did not constitute a *mahal* and that the plaintiff was not a *co-sharer* of the whole mahal.

2. That no oral evidence can be given of such an agreement.

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4 O. C. 369.

Land revenue—Suit for arrears paid by mortgagee—S. 108 Oudh Rent Act—Mortgagee without possession, not proprietor.

1. That the plaintiff, not being in possession of the share which had been mortgaged to him, was not one of the proprietors of the mahal, and was not responsible to Government for the arrears of revenue, but that he was a person interested in the payment of them

2. That the money having been paid because the mortgagor and not defendant (lambardar) was bound by law to pay it, the latter was not liable to re-imburse the plaintiff.

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4 O. C. 372.

Sufficient cause—S. 5 Limitation Act.

"Sufficient cause" in S. 5 Limitation Act should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of good faith is imputable.

Note.

Dist.—5 O. C. 384 (390)—In 4 O. C. 372 relief was sought although in the wrong Court but in 5 O. C. 390, the appellant did not seek relief in any Court as he was erroneously advised not to prefer the appeal.

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4 O. C. 376.

Jurisdiction—Accused triable where act is done or where consequence ensued—Jurisdiction—S. 179 Cr. P. C; S. 409 I. P. Code.

Held, that in 179 Cr. P. C, the words "anything which has been done" means some act constituting the offence and the words "any consequence which has ensued" mean some consequence modifying or completing the act. The accused were not charged with the commission of an offence by reason of any consequence which ensued at Fyzabad but solely by reason of what they were alleged to have done in Central Provinces, and, therefore, the charge against them was not triable at Fyzabad.

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4 O. C. 379.

Objection to sale—absence of witness—Right to object to sale after it has taken place.

1. That a Judgment-debtor can object to sale on the ground of alleged misdescription in the sale proclamation though he has taken no objection before the sale.
2. Where the absence of the witnesses is not due to any want of diligence on the part of the Judgment-debtor, the Court ought to have adjourned the case.

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4 O. C. 387.

Deposit of mortgage-money—Ss 60, 83 and 91 Transfer of Property Act—Interest subsequent to—Inconsistent passages in a document—Deposit.

1. That the deposit made in Court, (though not in the treasury at Nanpara as required by the terms of the deed) was a good deposit.
2. Where there are two inconsistent passages in a document, the first should be given effect to in preference to the second.

4 O. C. 397.

Pre-emption—Rival pre-emptors—Conditional decree—Pre-emption of part of property sold—Wife's position in the order of relationship—S. 9 Act XVIII of 1876—Suit for immovable property situate in different districts—Cause of action Jurisdiction—S. 19 C P. C.

1 *Jurisdiction.*—It depends on the allegations made in the plaint as to the causes of action and subject matter of the suit.

2. When the plaintiff has a right of pre-emption *as to a part only* he can obtain a decree for that part on payment of a proportionate part of the consideration.

3. The words the "*order of relationship*" relate to consanguinity from a common stock.

4. That in suits between *rival pre-emptors*, the claimant with inferior right should be granted a decree conditional on the claimant with superior right failing to avail himself of his decree.

Note.

(3) **F.**—7 O. C. 6.—The kind of relationship contemplated by S. 9 Oudh Laws Act is consanguinity from a common stock.

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4 O. C. 408.

1. *Adjournment of case.—Held* that, having fixed a period of time for the examination of the plaintiff's witnesses, and having summoned certain witnesses for certain days of such period, the Court could not properly refuse to adjourn the hearing from one of those days to another of them.

2. *Admission*—That the plaintiff's admission in the suit between her and C. B. regarding the genuineness and validity of the deeds, did not amount to an admission.

3. *Res-judicata.*—That in the former litigation there being no decision that the documents were genuine and valid, the question as to their genuineness and validity could not be held to be res-judicata.

4. *Wills before Act I of 1869*—That the provisions of Act I of 1869 were not applicable to the wills made before the Act came into force.

5. *Mohammedan Law—Ss. 68 and 69 Evidence Act.*—The Mohammedan Law does not require that a will shall be attested. The provisions of Ss. 68 and 69 Evidence Act were not applicable to the will.

6. *Codicil.*—That the Codicil having been executed after Act I of 1869 came into force, the provision of S. 19 of that Act, of S. 50 of the Indian Succession Act, and of S. 68 of the Evidence Act were applicable to it

5 O. C. 1.

1. *Criminal revision—Orders under S. 145 Cr. P. C.*—That the mere circumstance that the order purports to have been made under S. 145 Cr. P. C. does not debar the High Court from the exercise of its powers, and that it can interfere with the order, if it is really not an order under that section but is passed without jurisdiction.

S. 435 Cr. P. C.—The words "proceedings under Chapter XII" in S. 435 Cr. P. C. mean proceedings which are, as a matter of fact, under Chap. XII and not proceedings which purport to be under that chapter, although they are not really so.

5 O. C. 6.

1. *Suit for Joint possession of a share in Joint family property.*—A decree for Joint possession of an undefined share can be passed.
2. *Art. 142 Limitation Act.*—That the separation having taken place more than 12 years before the date of institution of the suit, the suit was barred under art. 142.

3. *Right of sons born after separation as to ancestral property.*—Such sons never acquire a share in the family property.

5 O. C. 9.

Decree—In a decree for money it was added that in case of default the judgment-debtor's share in certain village (outside the local jurisdiction of the Court) be sold according to law—On objections by the judgment-debtor *held*;

1. *Jurisdiction.*—That the Court had no jurisdiction to pass a decree for the sale of the property, as the suit was one for money, but that the decree could be transferred for execution as a simple money-decree.

Objection as to validity.—That a decree passed in a compromise is valid until set aside in a regular suit. Whether it was passed in a suit in which no guardian *ad litem* for the minor was appointed or on a compromise without the consent of the Court, are questions which can be considered on an application for execution or by a Court executing the decree.

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5 O. C. 13.

Award—Appeal—That a decree which is in terms of an award, is not appealable on the ground of the misconduct of the arbitrator.

Ss. 521 and 522 C. P. C. = The second schedule of Act V of 1908.

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5 O. C. 18.

Hindu Law.

Legal Necessity—Proof.—In such cases the transferee has to give some evidence either that he satisfied himself by *bona fide* enquiries of the existence of such necessity or that such necessity actually existed. Where the alleged necessity is the payment of the husband's share of a debt borrowed for the purposes of the joint family, the transferee must prove the extent of that share.

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5 O. C. 27.

1. *Review of judgment.*—That the Judge could not review the judgment passed by his predecessor.

S. 522 C. P. C. = *The second schedule Act V of 1908.*

2. That the original application to have the award filed was never fully disposed of, as effect was not given to it under the provision of S. 522 C. P. C, no decree having been drawn up in terms of it.

3. That the lower Court should have treated the application as one to have the procedure in the original application completed, and should have passed a decree in terms of the award.

5 O. C. 30.

Land Revenue Act (Oudh), S. 219, cl. (a)—Jurisdiction of Civil Court with regard to villages, settlement of which has been annulled for non payment of land-revenue—Contracts made by proprietor during term of annulment of settlement, effect of—Land-Revenue Act (Oudh), Ss. 124, 125.)

In 1879 the defendant mortgaged certain villages. Subsequently the mortgagee obtained a money-decree against the defendant for the amount secured by the mortgage. In 1888 an arrear of land-revenue having become due in respect of the villages, the settlement was annulled under the provisions of S. 124. Oudh Land-Revenue Act 1876, and the villages were let in farm to the mortgagee under S. 125 of the same Act for a term of 8 years. In 1883 the villages were attached and sold in execution of the mortgagee's decree and were purchased by the mortgagee, who subsequently sold them to the plaintiff. In 1885 the plaintiff's application to have his name brought on the revenue register was refused by the Revenue Court. In 1889 the period for which the villages had been let in farm having expired, a new settlement of the villages was made with the defendant with reference to the provisions of S. 131 of the Oudh Land-Revenue Act of 1876, despite the objection of the plaintiff who claimed to be settled with. The plaintiff then sued the defendant for the possession of the villages.

Held, that the jurisdiction of the Civil Court to entertain the suit was not barred by clause (a), S. 219, Oudh Land-Revenue Act. The mere fact, that the plaintiff raised objections to the settlement with defendant and desired that the settlement should be made with himself was not sufficient to debar the Civil Courts from entertaining a suit to try the title to the property.

Held further, that under the execution-sale the villages in suit passed to the plaintiff's vendor. Under the provisions of Ss. 124 and 125, Oudh Land-Revenue Act of 1878, the title of the owner of the property, the settlement of which is annulled, is not affected in any way by the annulment. His competency

to enter into contracts affecting the property after the annulment is not affected by the annulment. The effect of the annulment is merely to suspend the operation of such contracts as well as contracts affecting the property entered into before the annulment, that is to say, such contracts cannot take effect during the continuance of the term so as to affect the Deputy Commissioner, his agent or lessee. But they will take effect on the expiration of the term.

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5 O. C. 35.

Decree—Interpretation of—

1. When the language of a decree is plain and unambiguous, the Court cannot look at its judgment to interpret it.
2. Where the decree to be executed is the decree of an Appellate Court, and where such decree merely confirms the decree of the Court below, the terms of the decree of the Court below may and must be looked at for the purposes of the execution of the decree of the Appellate Court.
3. That the decree of the Appellate Court merely directing the dismissal of the appeal was not incapable of execution.

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5 O. C 37.

Presumption as to common gambling house—Judge importing his own knowledge.

1. A *Judge* can not import into a case his own *knowledge* of particular facts.
2. *Ss. 3, 5, 6 Act III of 1867 (Police Gambling Act)*—That the absence of circumstances, in which the presumption referred to in S. 5 can alone be drawn, is a ground for holding that the presumption cannot properly be drawn, but the absence of such circumstances has not the effect of making all the evidence taken in the case inadmissible and of vitiating and rendering the conviction illegal.
3. That the statement of the police officer in cross-examination did not necessarily convey the meaning that he gave the Magistrate such information only; and the presumption that the statement in the warrant was true was not rebutted by his statement.
4. It is illegal to sign search warrant with a pencil.

5 O. C. 43.

Local rates, Patwari rate, Chaukidari rate—Ss. 7, 8 and 14 Oudh Local Rates —Act 1894—S. 15 cl. (a) Act IX of 1889—S. 108 cl (2) Oudh Rent Act.

The plaintiff as superior proprietor could not collect the "patwari" "chaukidari" rates from the under-proprietor but he was entitled under S. 7 of the Oudh Local Rates Act to realise from the under-proprietor the share of the local rates therein specified.

5 O. C. 46.

Sanction to prosecute—Ss. 476 and 195 Cr. P. C, S. 206 I. P. Code.

1. That an offence punishable under S. 206 I. P. Code, may be said to be committed "in relation to a proceeding in a Court," although it is committed in relation to a *future proceeding.*
2. That the words "any offence referred to in S. 195" in S. 476 Cr. P. C. did not include the manner in which the offence might have been committed, but meant "any offence punishable under any of the sections of the I. P. C. mentioned in S. 195."

5 O. C. 49.

Procedure when one of the parties to a compromise objects to its being recorded by Court.—Ss. 375 C P. C. = O. XXIII, r. 3 C. P. C. (V of 1908)—S. 582 C. P. C = S. 107 (2); O XXII, r. II (V of 1908).

Under the above circumstances the other party should move the Court to have the compromise recorded and to pass a decree in accordance with its terms, and the matter can be decided on affidavits or if necessary by special issue on oral evidence.

5 O. C. 55.

Warrant issued by Political Agent against British Indian subject.

It matters not whether a charge was pending in the Political Agent's Court or not, the Magistrate to whom the warrant is directed is bound to execute it.

5 O. C. 59.

Review of Judgment—S. 623 C. P. C. = S. 114; O. XLVII, r. I, C. P. C. (V of 1908.)

The applicant has to show that, after the exercise of due diligence, such evidence could not be produced at that time.

The new and important evidence contemplated by S. 623 C. P. C. is evidence which itself might have had effect upon the Judgment had it been produced in the suit, and not evidence which it is very doubtful, would have had such effect, and which requires to be supplemented by oral evidence before such doubt can possibly be removed.

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5 O. C. 65.

Injunction, temporary—Receiver S 492 C. P. C.,=O. XXXIX, r. I, C. P. C. Act V of 1908.

That an injunction could not properly be issued unless the plaintiff showed that she had a case, founded an apparent title, for the appointment of a receiver.

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5 O. C. 70.

Suit under cl. (16) S. 108—Oudh Rent Act—Arrears of Revenue.—Estoppel.

The Appellant brought a suit against the respondent for recovery of arrears of revenue at the rate assessed by the Settlement Officer. The respondent contended that he was not a co-sharer but an under-proprietor, who, by reason of the terms of the deed of 1875 was not liable to pay rent at a higher rate than Rs. 5-10-0.

Held 1. That the respondent by his action in the Settlement Court was not estopped from denying that he was a co-sharer in the Mahal.

2. That under the provision of the deed the respondent was an under-proprietor.

Notes.

Dist.—15 O. C. 25—In 5 O C. 70 there was a rent reserved for a portion of some of the plots left in possession of the vendor. The fact that the plots in 15 O. C. 25 are discribed as *bila lagan* clearly indicates that it was not the intention of the vendor to carve out a separate property exclusive of that sold.

5 O. C. 78.

Damages for breach of statutory covenant for title—Suit for possession of certain other land—Ss. 55 and 88 Transfer of Property Act to replace the land from which the plaintiff has been dispossessed.

Held, that the plaintiff was not entitled to take any land from the defendant in lieu of the land of which he had been deprived by the defendant's brother, but in the absence of a contract to the contrary, the defendant is liable in damages.

5 O. C. 82.

Mortgage-money—Payment after time fixed—Mortgagor's right to pay—Ss. 92, 93, and 94, Transfer of Property Act.

Payment of the amount specified in the first paragraph of S. 93, before an order absolute has been made, entitles the mortgagor to be put in possession. On failure of the mortgagor, a right to apply for an order absolute accrues to the mortgagee but the accrual of such right does not stand in the way of payment by the mortgagor of the amount due.

Note.

F.—14 O. C. 10—

5 O. C. 89.

Gift—Delivery of possession—S. 123 Transfer of Property Act.

That under the provisions of S. 123, delivery of possession was not necessary to pass the title under the registered-deed of gift which was signed by the donor and properly attested

5 O. C. 91

Ss. 372, 622 C. P. C.=O. XXII, r. 10 and S. 115 Act V of 1908—Parties, joinder of—Assignment pending suit, application to make assignees parties in case of—Auction purchasers as parties in mortgage suit—Revision—Civil Procedure Code, S. 622.

The plaintiff held a first mortgage on the property of the defendant. He sued the defendant for possession of the mortgaged-property under a condition in the mortgage-deed. After the institution of his suit the rights and interests of the defendant

were put up to sale in execution of the decree obtained upon mortgages of later date than the mortgage in favour of the plaintiff. The plaintiff thereupon applied to the Court praying that the purchasers of the rights and interests of the defendant should be made parties to the suit. In his application the plaintiff referred only to Section 372 of the Code of Civil Procedure, but, after notice had been issued and all parties were before the Court, the plaintiff drew the attention of the Court to Section 32 also. The Subordinate Judge held that Section 372 did not cover the case of auction purchasers and on that ground he rejected the application without considering it on the merits. The plaintiff applied to the Court of the Judicial Commissioner for revision of the Subordinate Judge's order.

Held, that section 372 of Civil Procedure Code covered the plaintiff's case and that the auction purchasers should be added as parties.

Held further, that, inasmuch as the Subordinate Judge failed to exercise the jurisdiction which Section 372, Civil Procedure Code, gave him in not dealing with the plaintiff's application on its merits and to consider whether that application should be granted under Section 32, Civil Procedure Code, the Judicial Commissioner had power to interfere under Section 622, Civil Procedure Code. (Select Case No. 302 followed).

Note.

R.—18 O. C. 109—Revision of an order refusing to add parties—Meaning of "Case."

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5 O. C. 94.

Parties to a suit by martgagee—S. 32 C. P. C.=O. 1 rr. 8 (2), 10 (2), (3), (5), 11 C. P. C. (V of 1908) S. 85 T. P. Act.

In a suit for possession by a mortgagee certain persons applied to be made defendants on the ground that they were the owners of the mortgaged-property and the original defendant had no power to mortgage it.

Held, that the applicants were not necessary parties.

5 O. C. 97.

Res-judicata—S. 53—Oudh Land Revenue Act—Adverse possession.

1. That the question decided in the proceedings under S. 53, was res-judicata.
2. Where the defendant has been in exclusive possession for more than 12 years before suit, it is incumbent on the plaintiff to to prove that the defendant has been in possession on his (plaintiff's) behalf.

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5 O. C. 104.

Jurisdiction—Declaration that defendant was not proprietor, suit for—Jurisdiction to try question of competency of Court granting review of Judgment

1. That the plaintiff's suit for a declaration that the defendant has no proprietary right in the land in dispute was cognizable by the Civil Court.
2. That the Court had Jurisdiction to try the question whether the order granting the review by the Extra Assistant Commissioner was passed by a competent Court.

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5 O. C. 108.

S. 88, Transfer of Property Act.

An application to execute a simple money-decree, in execution of a decree for sale of the mortgaged-property, not allowed.

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5 O. C. 110.

Suit for removal of trustee—Jurisdiction.—Returning the plaint S. 539 C. P. C. = Ss. 92 and 93 Act V of 1908.

The suit as brought clearly related to a trust for public charitable or religious purposes and one which should have been instituted in the District Judge's Court, and, if the deed did not create the alleged trust, that circumstance was not a ground for returning the plaint to be presented to another Court.

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5 O. C. 113.

Lease determinable by notice.

Held, that the death of the lessee did not put an end to the lease, and that, as neither the lessee nor his representative either gave the required notice or paid a month's rent, his estate remained liable for the rent.

5 O. C. 116.

Pre-emption Suit —Deposit in Court—S. 15 Oudh Laws Act.

Mortgage by pre-emptor in favour of vendee as security for payment of money is not sufficient. The decretal amount must be deposited in Court under the terms of the decree.

Notes.

Ap—8 O. C. 57.—No payment except a payment made directly into Court shall be held valid.

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5 O. C. 118.

Jurisdiction.—Civil Court.

(1) When the alleged tenant does not admit the tenancy, and alleges that he holds as an under-proprietor, the Civil Courts are alone competent to decide finally.

(2) If the question as to proprietary title involves the interpretation of the decree, the interpretation is not one exclusively for the Revenue Courts.

Notes.

R.—7 O. C. 372—That the Civil Courts could deal with the question of under-proprietary right as apart from any rights created by the lease.

F.—12 O. C. 164 (170)—That a Civil Court can not determine whether or not a lease has expired and make a declaration accordingly.

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5 O. C. 127.

Redemption Suit.—S. 60 Transfer of Property Act—Absence of tender of amount due on mortgage.

When there is a real dispute as to the amount due and the mortgagor tenders what turns out to be an insufficient amount or makes no tender at all, his suit for redemption should not be dismissed on the ground that no tender was made.

Notes.

F.—6 O. C. 223.—This is not a case in which the suit should be dismissed merely because there has been no tender.

5 O. C. 130.

Suit for profits.—Jurisdiction—Art. 31 Sch. II Act IX of 1877.

That a suit for a share of the profits is not cognizable by a Court of Small Causes.

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5 O. C. 133.

S. 244 C. P. C = S. 47 Act V of 1908.

That the language of the last paragraph of S. 244 C. P. C., does not indicate that the determination of the question (as to who was legal representative of deceased decree-holder) is a determination not merely by the Court of first instance, but also where appeals are preferred, a determination by the Appellate Court.

That the Court having referred the parties to a regular suit had power to proceed with the execution, as soon as the question as to who was the legal representative of the deceased decree-holder had been determined in that suit.

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5 O. C. 137.

Ss. 310 A and 311 C. P. C. = O. XXI, r. r. 89, 90 Act (V of 1908).

An application to set aside a sale under S. 310A, after application under S. 311 C. P. C. is not allowed.

Notes.

Dist.—10 O. C. 141—When an application under S. 311 is presented to the Munsarim and withdrawn before any order is passed, the applicant is not debarred of his right to apply under S. 310A C. P. C.

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5 O. C. 140.

S. 219 cl. (d) Oudh Land Revenue Act—S. 113 Limitation Act—Possession of land as compensation for land allotted in partition—Specific performance.

1. Suit for *possession of land as compensation for land* allotted in *partition* was barred by S. 219 cl.(d) of the Oudh Land Revenue Act.

2. The suit for specific performance of the contract having been instituted after more than 3 years from the time the plaintiff had notice of the refusal of performance, was barred by article 113 Limitation Act.

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5 O. C. 143.

Execution of decree, application for—Final order or decree—Art. 179 Col. 3 cl. (2.)

As the defendant's second appeal to the Judicial Commissioner was dismissed for want of prosecution on January 14th 1898, the plaintiff's (decree-holder's) application for execution, dated 10th January 1901 was within time.

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5 O. C. 146.

Appeal—separate against two decrees passed in the same suit.

One appeal against two decrees is not permissible even though those decrees are passed upon cross appeals arising out of the same suit

Note.

Dist.—21 Indian Cases 264.

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5 O. C. 148.

Mortgage-money—Payment of, before expiry of term of mortgage—Mortgagor's right to redeem.

1. It is doubtful whether the suit can be treated as one for specific performance of a contract. There has been a transfer to the mortgagee of the right to possession. The mortgagee is entitled by virtue of such transfer to possession.

2. The morgagor had no right to elect whether possession should be delivered or the mortgage should be redeemed.

3. The mortgagor had no right to redeem within the term for which the mortgage was made.

Notes.

F.—10 O. C. 218 (221).—A suit for possession by mortgagee on default of payment of interest is not a suit for specific performance of contract.

5 O. C. 151.

S. 622 C. P. C.=S. 115 (V of 1908)—Revision.

The order of Court, directing issue of commission to examine female witness and refusing to decide preliminary issues of law, is not irregular.

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5 O. C. 153.

Suit against Railway administration.—For consignment lost in transit.

Held, that part of the consignment was lost within the meaning of the risk note, though the cause of loss was not proved ; and that the Railway administration was protected by the risk note

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5 O. C. 155.

Redemption—Estoppel—Construction of mortgage-deed. Interest on usufructuary mortgage.

1. *Held*, that B having admitted that the mortgage of 1838 was redeemable, and by that admission having induced the appellants to withdraw their suit, the respondents as his representatives were estopped from denying that the mortgage was redeemable in 1867.

2. *Held* further, that under the terms of the contract made on the 14th January 1867 the appellants were not liable to pay anything more than 2 p. c. on the principal for the whole term of the mortgage.

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5 O. C. 162.

Suit for rent—Ss. 108 (2) and s. 127 Oudh Rent Act—Rent for grove land let by grove-holder for cultivation.

Where the grove holder who has not right to cultivate the land cultivates it, he can not be said to occupy the land without his landlord's consent.

5 O. C. 164.

Sanction for prosecution—Irregularity in granting—Cognizance of offence by Magistrate on Police report. Ss. 192, 195 and 537 Cr. P. C. = Ss. 182 and 457 I. Penal Code.

1. *Held* that, the District Magistrate's order (asking the Sub-Divisional Officer to take cognizance of case under S. 182 I. P. Code) was not a sanction to the institution of proceedings, as the requirement of S. 195 Cr. P. C. had not been complied with.
2. *Held* further, that it was not a case to which S. 537 Cr. P. C. could be applied.
3. Though the notice may not be absolutely necessary, but it is usual to call upon him to show cause why sanction should not be granted.

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5 O. C. 168.

Appeal—Application for leave to appeal to Privy Council. S. 600 C. P. C. = O XLV, r 3 C. P. C. (V of 1908).

The fact that a substantial question of law is involved is not sufficient ground for granting leave to appeal. It must in addition be a question of general interest or of great public or private importance, or the like.

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5 O. C. 173.

Suit for declaration of title.—Ss. 13 and 43 C. P. C. = O. II, r. 2 C. P. C. (V of 1908)—Relief claimed in the subsequent suit which could have been claimed in previous suit.

The plaintiff had an opportunity of obtaining in the former suit the relief which he now sought; and having omitted to sue for it in the former suit, he could not sue for it now.

Notes.

F.—10 O. C. 44.—

Dist.—13 O. C. 19.—In 5 O. C. 173, the causes of action alleged in both the suits were one and the same while in 13 O. C. 19 they were distinct.

5 O. C. 176.

Mortgage of land part of which subsequently transferred by mortgagor to another.

S. 5 Oudh Rent Act applied only to ex-proprietors who had become mere tenants by August 24th, 1866.

Notes.

Dist.—7 O. C. 312.—That the ruling in 5 O. C. 176 does not throw any light on the question that land, in which occupancy right has been reserved is not on the same footing as land to which S. 5 of the Oudh Rent Act applies.

F.—8 O. C. 353.—That occupancy rights could only be claimed under S. 5, by persons who had become tenants by 24th August 1866.

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5 O. C. 181.

Res-judicata.

The previous *ex-partee* decree was final.

Notes.

App.—9 O. C. 243.—A decision *inter-partes* could not be avoided by showing that it was erroneous in law or based on a ruling which was subsequently over-ruled.

F.—14 O. C. 332.—There is general agreement among the High Courts on the point that an *ex-parte* decree can render a question res-judicata. But regard must be had to the rule that when the allegation on the record is uncertain there is no res-judicata.

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5 O. C. 183.

Sufficient cause.—S. 5 Limitation Act.

Want of funds to file appeal is not sufficient.

No evidence to prove legal advice.

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5 O. C. 187.

Interest on arrears of rent—Decree of Settlement Court—Under-proprietary right Ss. 3,141 Oudh Rent Act.

Held, that the decree of the Settlement Court was for a heritable non-transferable lease. The provisions that the rent might

be revised every 10 years told strongly against the view that the Settlement Officer intended to give the claimants an under-proprietary right.

Held therefore, that the defendants were not under-proprietors but tenants and as such liable to pay interest on arrears of rent due from them.

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5 O. C. 190.

S. 283 C. P. C. = O. XXI, r. 63 C. P. C. (V of 1908)—Jurisdiction.

The plaintiff who unsuccessfully objected to the attachment brought a suit for the recovery of the amount realized from sale of the property attached.

Held that as it was a suit under S. 283 C. P. C., it was not cognizable by the Court of Small Causes.

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5 O. C. 193.

Suit for arrears of rent—S. 47 Oudh Rent Act—Enhancement of rent of tenant succeeding occupancy tenant.

Held, that S. 47 Rent Act had no application to the case of an occupancy tenant being succeeded by a tenant not having right of occupancy, and that therefore the rent claimed by the plaintiff at the enhanced rate mentioned in the *kabuliat* was perfectly legal.

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5 O. C. 197.

Muhamadan Law—Transfer by mother of her minor children's property.

1. *Held*, that a minor on attaining majority is entitled to repudiate alienation of his share by mother.
2. That the minors not having been represented in a suit upon the mortgage by a properly appointed guardian were not bound by the decree and sale obtained therein and were not required to ask for setting aside the decree.
3. That the suit was not barred by art. 12 sch. ii of the Limitation Act.
4. That considering the equities of the case the plaintiffs should be compelled to pay the sum of Rs. 130 (the proportionate

amount for which the minors are liable for the mortgage debt due by their father and a sum which it is found that the mother borrowed for son's benefit) before being allowed to recover their share.

Notes.

(1) **R.** 9 O. C. 97—A sale by mother of her minor children's property conveys no title to the purchaser

(1) **R.** 10 O. C. 321—Suit by minor to set aside a decree passed against him with approvement of a guardian without enquiry as to his fitness is illegal.

(1) **F.** 10 O. C 367—Hindu Law. Transfer by mother as guardian of minor.

Dist. (2) 11 O. C. 319—Unless there is fraud, collusion or gross negligence the minor is bound by the decree.

Exp. 11 O. C. 347—A suit for possession of property mortgaged and sold during minority of plaintiff was not barred by art. 12 or 91 Limitation Act.

Dist. 13 O. C. 158—In 5 O. C. 197, the guardian (mother) put in no defence as she ought to have pleaded that the mortgage was invalid having been made by a person who had no power to mortgage the property and therefore the guardian was guilty of gross negligence. But in 13 O. C. 158, the guardian *ad litem* of the plaintiff was his father and natural guardian.

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5 O. C. 203.

General diaries of Police—S. 110 Cr. P. C.—Admissibility of special diaries.

1. That the circumstances that while Police officers were investigating cases they were told that the accused were suspected of having committed or had committed the offence which was under investigation could not be proved by the special diaries, but, if relevant, could only be proved by the Police-officers to whom the information was given; that the accused were therefore not entitled to have an opportunity of cross-examining the witness after inspecting the special diaries; and that the District Magistrate adopted the proper course when he excluded the list and all reference to it in the evidence from consideration.

2. That "evidence of general repute" means with reference to a man's character, evidence as to his general character founded on the general opinion of the neighbourhood in which he lives, and that evidence as to his general disposition, founded on the opinion of the particular witness, such opinion being the result of the witness's personal experience and observation, is also evidence as to his character. The evidence need not show that the general opinion of the neighbourhood is based on the personal knowledge of the man by his neighbours generally nor that it has been publicly expressed by his neighbours.

3. That the evidence as to the character of the accused given by those Police officers who did not speak from personal experience and observation, or depose as to what the neighbours of the accused generally thought of the accused, but gave evidence as to what some of their neighbours said of them or as to what was said of them in official papers was not admissible.

Notes.

(2) **App.** 10 O. C. 132—Observations upon the nature of evidence of general repute admissible in proceedings under S. 117 cl. (3).

(2) **R.** 10 O. C. 168—The evidence of general repute of a person includes what is generally said of him in the neighbourhood in which he lives.

(3) **R.** 12 I. C. 518—(Not discussed) statements of accused's caste fellows and neighbours.

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5 O. C. 213.

Appeal—S. 19 Succession Certificate Act (VII of 1889).

An *order* requiring security before granting succession certificate is not appealable.

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5 O. C. 217.

Appeal—Meaning of in Art. 179 Limitation Act.

(1) The word "appeal" in art. 179 means any appeal by any party

(2) The agreement that 'if the defendant judgment-debtors did not appeal against the decree, the respondent would not execute that decree against them' was not opposed to public policy.

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5 O. C. 222.

Arrears of rent—Compensation for use and occupation—Making new case for plaintiff not set up in plaint—Intention to occupy as tenant, a necessary condition in a suit for compensation for use and occupation of land—Lease—Registration—Ss. 107, 117 Transfer of Property Act—Oral evidence to prove lease for a term exceeding one year.

Held, that the alleged lease was a lease of the right to receive collections of a village and not a lease for agricultural purposes, that the provisions of S. 107 were applicable to it, and that oral evidence to prove it was inadmissible.

2 In order that a suit for use and occupation may be maintainable, one of the conditions which must be fulfilled is that the defendant is in possession intending to occupy as a tenant.

That as the plaintiff made no claim for use and occupation the lower Court was wrong in making a new case for the plaintiff.

Notes.

Not F.—7 O. C. 169—That the *kabuliat* was a lease within the meaning of S. 107 T. P. Act and that the relation of land-lord and tenant existed between the parties—S. 107 does not specifically lay down that the lease must be by a registered instrument.

(1) R.—9 O. C. 296—Oral evidence to prove an agreement to execute a lease for more than one year is inadmissible—The plaintiff was entitled to a decree as compensation for use.

(2) R.—12 O. C. 140—That the undertaking contained in the *kabuliat* could be enforced against the person in possession under the *kabuliat*.

Dist.—7 I. C. 864 (866)—A reclamation lease granted expressly for the purpose that the jungle and wild trees might be removed and the land brought under cultivation is a lease for agricultural purposes, and consequently such a tenancy can be created without a registered instrument.

5 O. C. 225.

Mahabrahmani collection—Suit for share in offerings—Cause of action—Contract

Where a third person makes a voluntary offering to one of the parties and the other party claims a share in it, that is not a suit in which a right to property is involved and the plaintiff is not entitled to recover any share of that offering except on the ground of a contract between the parties.

Notes.

Exp.—8 O. C. 339—That the right to receive offerings being a right of property, a suit for declaration and for perpetual injunction would lie.

R.—11 O. C. 212—Representatives of parties to the agreement not bound

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5 O. C. 228.

Trees—Receipt—Ss. 150 and 151 Oudh Land Revenue Act 1876.

1. The tree was immovable property.
2. That the Kurk Amin's receipt was neither the certificate referred to in S. 151 nor could it be treated as equivalent to such certificate.

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5 O. C. 232.

Forgery —

Production of a forged-certificate for obtaining employment is an offence under S. 471 I. P. C.

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5 O. C. 235.

S. 561 C. P. C. = O. XLI, r. 22 C. P. C. (V of 1908)—Cross objections, right of to file, within one month—Contract, enforcement of, by one not party to it—Pre-emption.

D executed 3 simple money bonds aggregating Rs. 290, in favour of M, the brother of H, plaintiff No. 1. D also mortgaged some land to H for Rs. 100. In 1890 D sold a share in a village to plaintiffs Nos. 2, 3 and 4, the sons of H In the deed it was stated that sums of Rs. 290 and Rs. 100, were left with the purchaser for the discharge of the debts due upon the four

deeds mentioned above. The present defendant then sued D and plaintiffs Nos. 2, 3, and 4 for pre-emption and obtained a decree for possession on payment of various sums including Rs. 100 to H and Rs. 290 to the heirs of M. As neither the heirs of M nor H were parties to the decree, the decree-holder managed to obtain possession without paying those two sums. H and his sons then filed the present suit for recovery of the sums.

1. *Held*, that the sons of H, not having been parties to the contract with D in the capacity of representatives of M in which they were sued, were strangers and could not enforce that contract. Further that neither the plaintiffs nor any other person as representative of M could have sued the purchasers of the property on the contract contained in the sale-deed.

2 That the suit was not maintainable by H, as he did not sue upon his mortgage but upon the decree for pre-emption to which he was not a party.

3. Right of respondent to file cross-objections within one month from service of summons and hearing of appeal.

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5 O. C. 240.

Penal Code, S. 211—Sanction to prosecute for making false charge—Invalidity of proceedings under S. 311, I. P. C.—Prosecution for making false charge —Criminal Procedure Code, [Act V of 1898], S. 195—Penal Code, S. 342.

The applicants charged S and C with having committed an offence under S. 392, I. P. C. On the 29th March 1901 the Deputy Magistrate recorded a *rubkar* in which he stated that the charge made by the applicants was false and that for the ends of justice it was necessary and desirable to prosecute the applicants under S. 211, I. P. C. He added that in consequence of this, the statements of the applicants as accused persons had been recorded in proceedings to be instituted against them. He then ordered that the *rubkar* together with the statements of the applicants and the record in the case against *S* and *C* might be submitted to the Deputy Commissioner, with the request that the case might be made over to another Magistrate for the purpose of proceeding under S. 211, I P. C.

The District Magistate passed an order making over the case to another Deputy Magistrate for disposal. Proceedings were taken against the applicants on charges under S. 211.

Held, that the proceeding taken against the applicants under S. 211, I. P. C, were invalid, inasmuch as the requirements of the law, before such proceedings under that section could be taken, complied with.

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5 O. C. 243.

Ss. 110, 112, 117, (4) and 537 Cr P. C.—Habituai offender—Joint trial.

No joint trial when the offenders have not associated together as habitual offenders, nor in the case in which there is no information or evidence to that effect. S. 537 would not cure the defect.

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5 O. C. 246.

Evidence of deaf-mute—Statement embodied in Police report or made to another person—Ss. 8 and 32 Evidence Act.

1. The signs made by deaf-mute were not admissible in evidence under Ss. 8 and 32 Evidence.

2. Statement embodied in first report to the Police or statements made by a witness to another person in the course of a Police enquiry are not ordinarily admissible in proof of the facts stated, though they may be admissible to rebut the suggestion of recent fabrication of a case or they may be admissible under S. 32 of the Evidence Act.

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5 O. C. 251.

Execution of decree —Ss. 88 and 89 Transfer of Property Act—Objection to execution taken after part of mortgaged-property sold under decree—Res-judicate.

The appellant was precluded from objecting to the sale on a ground which he might have raised but did not raise against the order of D for sale of one of the mortgaged villages.

5 O. C. 256.

Disqualified proprietor.—Ss. 173 and 174 Oudh Land Revenue Act 1876.—Unconscionable bargain—Undue influence—Ratification of such contract.

1. A disqualified proprietor is competent to borrow money while his property was in the charge of the Court of Wards.
2. Where the borrower of money is in the power of the lender and the lender uses such power to induce the borrower to enter into transactions which must be ruinous unless an event, the happening of which is uncertain, happens, he makes an unconscientious use of such power.

3 That the ratification of a contract caused by undue influence must be proved by the clearest evidence.

Notes.

Vide—(P. C. Judgment) 9 O. C. 188.

(1) **F.**—8 O. C. 210.—There was no provision in the Oudh Land Revenue Act of 1876 to present a disqualified proprietor from entering into a contract which did not involve a charge on his estate.

(3) **Dist.**—8 O. C. 210—On facts as to the proof of undue influence.

5 O. C. 266.

Pre-emption.—Right of under-proprietor to pre-empt a mahal sold by a proprietor—Ss. 7 and 9 Oudh Laws Act.

The under S. 9 (3) Oudh Laws Act, a person holding an under-proprietary interest in a portion of a mahal sold by the Court of Wards on behalf of the proprietor of the mahal was entitled to pre-emption in respect of such mahal as against the purchaser.

Notes.

App.—7 O. C. 1.—Effect of partition whether severing member of village community.

R.—7 O. C. 19.—Residence in village not a necessary qualification.

App.—7 O. C. 206.— „ „ „

R.—7 O. C. 275.— „ „ „

R.—7 O. C. 271.— „ „ „

F.—10 O. C. 49.—Right of under-proprietor to pre-empt

R.—12 O. C. 1 (10).—Meaning of the village community.

F.—13 O. C. 202.—Grove-holder is not a member of village community

5 O. C. 286.

Mortgage.—Usufructuary mortgage, suit for sale of property under—Conversion of simple mortgage into usufructuary mortgage by mortgagors taking possession of mortgaged-property—Interest, obligation of mortgager to pay, on mortgagees taking possession of mortgaged-property, when so stipulated in deed—Transfer of Property Act, [IV of 1882] Ss. 58 (d) and 67 (a).

The defendants owned a 3 annas, 7 pies, and 4 karants share in a certain village, out of which on the 15 March 1877 they mortgaged to *M* a 2 annas, 7 pies and 4 karants share; one of the conditions of the mortgage being that, if the principal and the interest secured by the mortgage were not paid within five years from the date of the mortgage, the mortgagee should be entitled to take possession of the mortgaged share. On the 27th June 1877, the defendant mortgaged the 3 annas, 7 pies and 4 karants share to the plaintiff. The material portion of the mortgage-deed was as follows:—

"Whereas we have borrowed Rs. 5,400 from *H* (plaintiff) and have fixed the interest of the said amount at Rs. 1-2-0 p c. a month payable from the date of the execution of the deed to the date of payment. It is therefore hereby declared that we shall pay the interest yearly; that we shall pay the entire principal and the remaining interest within eight years either in instalments or in one lump sum; that, in case of default in payment of interest, it shall be considered to be principal and we shall pay interest thereon at Rs. 1-2-0 p c. a month; that if the interest for any year is not paid then on the expiration of three years, the said mortgagee shall be at liberty to take possession of the mortgaged-property; hence these few words have been put into writing by way of a mortgage-deed without possession."

On the 20th July 1880, the plaintiff sued the defendants for possession of the share and, as he sought to establish that the prior mortgage was a fraudulent transaction, made *M* a defendant to the suit. The Subordinate Judge on the 24th August 1880 decreed possession of the share to the plaintiff, but held that the prior mortgage was not a fraudulent transaction.

On the 30th May 1881, the plaintiff obtained possession of the share in execution of the decree and retained possession of the same till the 21st November 1883, when he gave possession to *M* of the share which had been mortgaged to the latter and also of additional 7 karants. On the 12th April 1892, the plaintiff sued the defendant for Rs. 10,000 being the amount of principal and interest due on the mortgage and claimed to recover that sum by the sale of the share mortgaged to him on the ground that the term of mortgage had expired and the mortgage money had become payable. The defendants defended the suits upon the grounds, amongst others, that the mortgage was a usufructuary one at the time of the suit, and therefore the suits, as one for sale of the mortgaged-property, was not maintainable, and that, from the time the plaintiff obtained a decree for possession of the share, the defendant ceased to be liable to pay any interest.

Held, that the mortgagee was not debarred from suing for the sale of the share. The mortgage-deed could not be interpreted to mean that the mortgagee should lose that right on taking possession of the share. Therefore even if the mortgage was converted into a usufructuary one within the meaning of Section 58, (*d*). Transfer of Property Act, 1882, on the mortgagee taking possession of the share, the mortgagee was not precluded by the provisions of Section 67 (*a*) of that Act from bringing the share to sale under the mortgage; a usufructuary mortgagee being entitled when there is a contract that he may bring mortaged-property to sale if the mortgagor fails to pay according to his contract to sue for sale of the mortgaged-property.

Held, further, that the parties to the mortgage did not intend that on the mortgagee obtaining possession of his share the obligation on the part of the mortgagors to pay interest at the stipulation rate should cease, but they intended that, if the mortgagors failed to pay interest as agreed, the mortggees might further receive himself by taking possession of the share, and that if he did so he should account for the profits, which should be set-off against the interest agreed to be paid.

Held, further, that the plaintiff was entitled to interest at the stipulated rate from the 24th August 1890 to the date of suit, deducting from it the profits which the plaintiff admittedly received and also the profit of 7 karants which the plaintiff should have retained in his possession as part of the mortgaged property, which was not subject to *M's* prior mortgage, instead of placing the latter person in possession of the sale.

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5 O. C. 294

Appeal.—Plaintiff, declining to appear on the date fixed for argument.—Dismissal of case in default of Ss. 157 and 102 C. P. C. = O XVII, r 2; O IX, r 8.

Held, that the order of the Court must be held to have been made under Ss. 157 and 102 and was not appealable.

Notes.

Rel.—6 O. C. 50.—The order of the court on an application for withdrawing an appeal is not a decree.

F.—10 O. C. 171.—An order dismissing an application under S. 311 C. P. C. in default is not appealable.

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5 O. C. 298.

Jurisdiction.—Suit by *lambardar against co-sharer for share of costs of litigation is not maintainable by a Civil Court.*

Such costs are covered by cl. 16 S. 108 Oudh Rent Act.

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5 O. C. 301.

Art. 179 Limitation Act.

That where there has been an appeal, the decree which should be executed is the decree of the Appellate Court.

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5 O. C. 304.

S. 43 C. P. C. = O. II, r. 2 C. P. C. (V of 1908)—Omission to sue for one of several remedies.

1. Previous suit for a declaration that the property was not liable to attachment and sale in execution of the decree dismissed. Subsequent suit for value of the property as compensation for its illegal attachment was barred by S 43 C. P. C.

2. Meaning of "Cause of action"—The expression as used in S. 43, is generally understood to mean every material fact which, if denied, the plaintiff must prove to entitle him to succeed; and it does not include the relief claimed.

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5 O. C. 307.

Negotiable instrument—Presumption—S 16 Indian Contract—Burden of proof. Consideration.

1. *Held*, that under S 118 of the Negotiable Instrument Act, until the contrary is proved the presumption is that a negotiable instrument is made for consideration.

2. That the transaction was not one in the ordinary course of business and the burden of proving that it was not induced by undue influence was by sub-section (3) of the amended section 16 of the Indian Contract rightly cast upon the plaintiff.

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5 O. C. 313.

Security to keep the peace. Omission of substance of information in the order directing to give security—Ss. 107, 112, 115, 117, 118, 537 Cr. P. C.

That the omission on the part of the Magistrate to set-forth in his order the substance of the information which he received, and the omission to serve the applicant with a copy of an order containing the substance of such information, did not vitiate the Magistrate's order.

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5 O. C. 316.

Ss. 435, 438, 488. Sub-sec. (3)—Cr. P. C, Maintenance to wife, non-payment of by person ordered by Magistrate to pay—Wilful neglect to pay maintenance to wife, evidence of—Imprisonment on non-payment of maintenance to wife, order of—Reference by Sessions Judge to High Court, on point of law.

P was ordered on the 10th July 1901 to pay his wife a monthly allowance of Rs. 4 for her maintenance. On the 21st July 1902, the Magistrate issued a warrant under Sub-section (3) Sec. 488, Code of Criminal Procedure, for levying the amount due from the 10th October 1901 to the 10th January 1902, but nothing was realized under the warrant. On the 4th August 1902, a warrant was issued for *P's* arrest and on the

12th August, the Magistrate sentenced *P* to four months simple imprisonment. He took no evidence on the point as to whether *P* wilfully neglected to comply with the order. *P* applied to the Sessions Judge for revision, who reported the case under Section 438 Code of Criminal Procedure to the Court of the Judicial Commissioner. He referred to two conflicting rulings of the Calcutta and Madras High Courts, expressed his opinion that the view taken by the latter was more in accordance with the language of Sub-Section 3 S. 488 of the Code, and said that the referred the case to the Judicial Commissioner's Court "in order that it may lay down a rule for Magistrate to follow in future in dealing with similar cases."

Held, that an order for commitment to prison for default in payment of a wife's maintenance allowance cannot be made without proof that the non-payment was due to wilful neglect of the person ordered to pay and that the Magistrate's order was therefore illegal.

Held further, that the Sessions Judge could properly report the case to the Judicial Commissioner's Court if he was satisfied that the Magistrate's order was illegal or if he was doubtful as to its illegality but not if he was satisfied that it was legal. Section 438 Code of Criminal Procedure empowers Sessions Judges and District Magistrates, on examining under Section 435 or otherwise, the record of any proceedidg to report for the orders of the High Court "the result of such examination" which means that the Sessions Judge or District Magistrate is to report the incorrectness, illegality or impropriety if in his opinion such exists of the finding, sentence, or order recorded or passed by the inferior Court or the irregularity, if in his opinion such exists, of the proceedings of such Court and not that he is to refer abstract points of law to the High Court.

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5 O. C. 319.

Revision.—

An order *rejecting a plaint* on the ground of *deficiency* of Court-fee is appealable and therefore no revision lay.

5 O. C. 321.

Evidence—Conspiracy, evidence of—Confession made to Police officer—Reasonable ground for believing in existence of conspiracy—Inadmissible evidence—Sessions Judge, duty of, in examining witness as to previous statement &c., —Evidence Act., ss 10, 25, 145 and 155, cl [3]—Murder.]

The prisoner was convicted of the abetment of the murder of *J* by his wife *R*. Previous to his trial *R* had been convicted of having administered arsenic to her husband *J*, and having thereby intentionally caused his death. The Sessions Judge said in his judgment that the evidence in the case consisted of the "statement" of *B* [a witness for the prosecution], and the "statements" of certain persons. The Sessions Judge referred to the witnesses, the Thanadar being one of them, proving actions and statements of *R* in reference to the common intention of herself and the prisoner, which he said were admissible in evidence, as "the statement" of *B* gave "reasonable ground for believing that *B* and the prisoner had conspired together." The Sessions Judge referred to the provisions of Section 10, Indian Evidence Act, but he did not say what portions of the evidenre of *B* afford a reasonable ground for believing that the prisoner and *R* had conspired to murder *J*. The Sessions Judge, in the present case, in which the prisoner was undefended, did not question *B* as regards her former deposition under the provisions of Section 145 and 155, clause [3] of the Indian Evidence Act.

Held that, under the provisions of Section 10, Indian Evidence Act, there should have been reasonable ground for believing that the prisoner had conspired with *R* to poison *J* before anything said or done by *R* could be a relevant fact as against the prisoner; and that, unless such reasonable ground existed, things said and done by *R* when the prisoner was not present were not relevant facts as against him. The circumstances that the prisoner wished that *R* should live with him as his wife, that he gave *R* a paper with some stuff in it, twenty days before *J's* death, and that he was not to be found during the police-investigation into *J's* murder and did not satisfactorily explain why he had left his village at that particular

time of the year, did not afford a reasonable ground for believing that the prisoner had conspired with *R* to poison *J*.

Held further, that the statements made by *R* to the Thanadar were in so far as she confessed that she had poisoned *J*, inadmissible under Section 25, Indian Evidence Act, and could not be used as evidence against the prisoner under Section 10 of that Act. The criterion in Section 25 for excluding a confession is not to whom was the confession made and was it made by a person accused of an offence, but to whom was the confession made. If it was made to a Police-officer it is excluded.

Held further, that it is the duty of a Sessions Judge to prove the evidence in the interests of the prisoner as well as of the prosecutor, particularly where the prisoner is not defended.

5 O. C. 328.

Damages—Suit for Remote and indirect damages. Measure of damages.

1. The suit was not based on any loss or damage which naturally arose in the usual course of things from the delay in the delivery, but on the loss which plaintiff suffered from his failure to complete the contract of which the defendant had no knowledge. The damage alleged was too remote.
2. Measure of damages.

5 O. C. 332.

Jurisdiction—Appellate Court's order directing Civil Courts to receive plaint first returned by it for presentation to Rent Court—Ss. 124 A, 124 B, 124 C and 124 D Oudh Rent Act.

Held, that the order of the District Judge returning the plaint for presentation to the Munsif's Court must be treated as equivalent to a remand of the case to the Civil Court and was binding on the Munsif.

5 O. C. 335.

Redemption—Mortgage of joint property which subsequently became separate property of mortgagor—Right of mortgagee to redeem sub-mortgage—Ss. 43, 85, 86 and 92 Transfer of Property Act.

1. That the acquisition by the plaintiff of the under-proprietary right could not entitle him to redeem the mortgage of the superior right.

2. Mortgage and sub-mortgage of property which subsequently became separate property of the mortgagor were valid.

3. Sub-mortgagee is a necessary party in a redemption suit.

Note.

R. 9 O. C. 233—Sub-mortgagee's right to sale of his mortgagor's interest as well as that of the original mortgagor.

5 O. C. 345.

Gift by Taluqdar—Ss. 13 cl. (1) and 22 Act I of 1869.

1. *Presumption as to nature of estate taken by female under oral gift*—If the terms of the gift are not proved the gift should not be presumed to be of a heritable estate or only of a life estate.

2. *Section 13 cl. (1) Act 1 of 1869*—referred to a person who would in fact have succeeded and the daughter would have succeeded to the interest of his father and therefore could take under an oral gift by him.

3. That the donee took a heritable estate.

Note.

Dist. 9 O. C. 113—In 5 O. C. 345 the effect of S. 16 Act 1 of 1869 upon the case was not considered.

5 O. C. 355.

Amendment of plaint when plaintiff is held not a minor at the time of its institution.

Held, that, as the suit was instituted with the knowledge and by the authority of the plaintiff the plaint could properly be amended when the Court decided that the plaintiff was not a minor.

Note.

F.—7 O. C. 234—Amendment of plaint where plaintiff entered as minor by mistake.

5 O. C. 360.

Reversioner's suit—alienation by widow.

That the plaintiffs, as the nearest presumptive heirs could maintain the suit without proving that the daughter had refused to sue

or had precluded herself by her own act or conduct from suing, or had colluded with the widow, or was concerned in the alienation.

Birth of daughter's son subsequent to the institution of suit would not affect.

Note.

Dist.—15 Indian Cases 247—Where custom as to the exclusion of daughters is not established and the reversioners sue to set aside a deed of gift executed by the widow, the suit is not maintainable in the presence of a daughter and specially a daughter's son.

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5 O. C. 367.

S. 373 C. P. C. = O. XXIII r. I., C. P. C. (V of 1908)—Permission to institute fresh suit—Plaint returning of, for presentation to proper Court—Suit, frame of—Jurisdiction of Revenue and Civil Courts—Appeal.

The plaintiff brought a suit for possession of a village on the allegation that the husband of the defendant was the thekadar of the village; that on his death in 1896 he (the plaintiff) took possession of the village, but the defendant recovered possession of it by order of the Revenue Court, and that she had no sort of proprietary or under-proprietary right in it. The defendant pleaded that her husband was in possession of the village as *guzaradar*, and that she was not liable to ejectment. The first Court held that the defendant could not be ejected as she held the land at a favourable rate of rent and that the plaintiff could only take proceedings under S. 52, Oudh Rent Act. On appeal the lower Appellate Court held that on the allegations of the plaintiff the defendant did not become a trespasser on the death of her husband but was a tenant of the land and so could only be ejected by the Revenue Court. The plaintiff then appealed to the Judicial Commissioner and, when his appeal came on for hearing, asked the Court to dismiss the appeal and the suit with permission under S. 373 Civil Procedure Code, to bring a fresh suit or to return the plaint for presentation to a Revenue Court.

Held, that permission could not be granted to the plaintiff under S. 373, Civil Procedure Code, to bring a fresh suit.

Held, further, that the suit as framed was cognizable neither by the Revenue nor by the Civil Court, and the plaintiff therefore could not be allowed to withdraw it for filing it in a Revenue Court.

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5 O. C. 370.

Decree for execution of conveyance—S. 261 C. P C. = O. XXI, r. 34 (1) to (4) Act V of 1808.

Held, that, both the parties having considered the application as one under S. 261, C. P. C. it had not been disposed of according to law.

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5 O. C. 373.

Construction of decree

Where the appellate decree simply affirms the decree appealed against, or affirms a part of the decree against, in order to construe it the decree appealed against may and must be referred to.

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5 O. C. 377.

Revision S. 622 C. P. C. = S. 115 Act V of 1908 –S. 310A C. P. C. = O. XXI, r. 89 C. P. C. (V of 1908.)

An order dismissing an application under S. 310A is appealable, and an application under S. 622 C. P. C., was not entertainable.

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5 O. C. 380.

Declaratory suit by Zamindar—Market.

That a Zamindar is entitled to establish a market on his own land even in close proximity to a previously established market belonging to another Zamindar, and to hold it on the same days as the previously established market is held.

5 O. C. 384.

Pre-emption suit—Decrees determining exactly the same matter, one of which decree has become final—Sufficient case under S. 5 Limitation Act.

1. That the decree in suit No. 33, which determined that K had a right of pre-emption, having become final, the Court was debarred from trying that question in the appeal in suit No. 32, by the principle of res-judicata.

2. That the circumstance that the appellant did not prefer the appeal within time in consequence of having been erroneously advised by a legal practitioner not to file the appeal was not a *sufficient cause.*

Notes.

(1) **F.**—15 O. C. 22—The principle laid down in 5 O. C. 384 was followed.

(1) **F.**—14 I. C. 321—That the decision of the Judge on the issues tried and determined by him in the other case was *res-judicata.*

(1) **Dist.**—21 I. C. 264—Second appeal only against one of two decrees in cross appeals disposed of by one judgment when maintainable.

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5 O. C. 392.

Jurisdiction—S. 219 cl. (6) and S. 220 Oudh Land Revenue—S. 108 (16) Rent Act.

1. A suit by co-sharer for share of rent paid by him on behalf of other co-sharers is cognizable by the Civil Court.

2. By "lamberdar" or representative of a village community the person appointed under rules framed under S. 220, Oudh Land Revenue Act, is intended, and it is in this sense that the word "Lamberdar" is used in clause 16, S. 108, Oudh Rent Act.

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5 O. C. 395.

Pre-emption—Estoppel against right of pre-emption in absence of written notice of proposed sale to plaintiff.

In a pre-emption case although notice in writing is not given by the vendor, the plaintiff may be estopped from claiming pre-emption if it is proved that the property was offered to him at a certain

price, that he refused to purchase at that price and that he expressly consented to the purchase of the property by the defendant.

Note.

R.—10 O. C. 257—In order to establish a plea of estoppel it is necessary to prove that the property was offered at a certain price, that the plaintiff refused to purchase it at that price, and that he expressly consented to the purchase.

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5 O. C. 399.

Pre-emption—Under-proprietors—S. 9 Oudh Laws—Holders of separate holding—Member of village community.

That the parties to the suit being holders of separate lands and paying rents separately were not co-sharers in a tenure of any description but were *members of the same village community* and as such were equally entitled to pre-emption.

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5 O. C. 403.

Suit for damages for breach of contract against Secretary of State for India—Second Appeal—Suit in nature of Small Cause Court suit—S. 586 C. P. C. of 1882 = S. 102 (V of 1908) Art. 3 Act. IX of 1887.

Suit in consequence of some act done in capacity of Government officer fell within Art. 3 sch ii. of the Provincial Small Cause Courts Act, and the appeal was not barred by S. 586 C. P. C.

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5 O. C. 406.

Penal—under S. 74 Contract Act.—Penalty for breach of contract.

Stipulation to pay interest in default of payment of any instalment is penal.

Note.

R.—9 I. C. 406—5. O. C. 406 cannot be taken as a guide—It is a question for construction according to the terms of the deed and the circumstances of each case.

6 O. C. 1.

Sanction to prosecute—Ss. 157 and 173 Cr. P. C.—Complaint—Sanction—Meaning of "subordinate" in S. 195 Cr. P. C.

A report submitted in the usual way under S. 157 and S. 173 is not intended to be and could not be a complaint.

The report written by the Thanadar in the case which was not sent direct to a Magistrate was not intended to be a complaint and was not treated as a complaint, was a mere Police report and not a complaint. Similarly the Court Inspector's note and the District Superintendent of Police's order could not be regarded as complaints.

The only Magistrate to whom the District Police are "subordinate" is the District Magistrate.

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6 O. C. 9.

Registration—By duly authorised agent—Registration Act. (III of 1877) Ss. 32 33, 60 and 87—Period for application of execution of a registered decree—Art. 179 Limitation Act.

That the persons legally entitled to present a document for registration, the persons "having title" to move the registrar, are the persons specified in S. 32, and no others. The agent of the persons mentioned in S. 32, if he is not duly authorized by a power of attorney, is not a person legally entitled to present the document for registration.

As the registration was invalid the period of limitation for the application for execution was 3 years.

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6 O. C. 16.

Promissory note.

A decree may be passed for the amount which is proved to have been lent even if the execution of the promissory note is not proved.

Note.

R.—9 O. C. 315—Decree for the sum but when loan admitted although execution of the promissory note was not proved.

6 O. C. 18.

Mortgagee's suit for mortgage-debt against mortgagor's holding, mortgaged-property under lease executed in his favour—Jurisdiction.

That the mortgagees were entitled in the suit to recover from the mortgagors all sums payable to them under the two mortgage-deeds as modified by the contract for the reduction of interest contained in the *kabuliat* and were not bound to sue upon the *kabuliat* in a Court of Revenue.

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6 O. C. 23.

Execution of decree—Setting off costs awarded to decree-holder against sum payable by him to judgment-debtors in execution of decree.

The respondent was entitled to set off the amount awarded to him as costs against the sum payable by him to the appellant.

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6 O. C. 26.

Jurisdiction.

Suit for rent due under lease of mortgaged-property executed by mortgagee in favour of mortgagor was maintainable in a Court of Revenue.

Note.

F. 15 O. C. 291—A mortgagee can give a lease of mortgaged-property to the mortgagor and can sue for the rent of such mortgaged property in the Court that would ordinarily bear suits for arrears of rent.

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6 O. C. 30.

Application for recovery of balance due after sale—Art. 116 sch. ii Limitation Act—Application under S. 90 Transfer of Property Act.

(1) In considering whether the recovery of the balance due after the sale of the mortgaged-property was barred, regard should be had to the date of the suit and not to the date of the application;

(2) That art. 116 applied to suits and not to applications, and that an application under S. 90 was not a plaint in a suit and could not be regarded as the institution of a suit.

6 O. C. 34.

Application under Ss. 102, 103 C P. C.=O IX, rr 8 and 9 C. P. C. (V of 1908).

S. 103 C. P. C. may be construed as permitting a representative to apply at one and the same time for the substitution of his name in place of that of the deceased and for an order to set aside the dismissal of the suit.

Notes

R. 9 O. C. 35—That S. 623 C. P. C. is sufficiently wide to admit of an application being made by the representarive of a deceased party who would be materially affected by the decree.

F. 14 I. C. 711—

R. „ „ 221—Where an application for restoration is granted without any proof as to the allegations contained in the application, the Court granting the application acts without jurisdiction.

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6 O. C. 39.

Costs—Grounds of second appeal.

1 No second appeal against the order for costs.

2 Particulars to be observed in drawing up grounds of second appeal.

Notes.

Not F. 6 O. C. 52 }
„ 7 „ 49 } Second appeal against the order for costs allowed.
Disc. 8 O. C. 251 }

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6 O. C. 41.

Adjournment.

That the adjournments were conditional, and as the appellants failed to comply with the conditions which were not unreasonable, the Court properly refused to again adjourn the case and disposed of it.

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6 O. C. 44.

Objection to attachment—Art. 165 sch. ii Indian Limitation Act.

That the application of the appellants having been made more than one year after the date of their dispossession, was barred, by limitation.

Notes.

R. 17 O. C. 94—Art. 165 must be taken to cover any application which the judgment-debtor may be entitled to make.

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6 O. C. 48.

Application for execution—S. 145 Oudh Rent Act.

The decree prepared by the office contained the following words:—"Upon the hearing of the appeal it is ordered that the appeal and the objection be dismissed." The application for execution was barred by limitation as having been made after the lapse of 3 years from the decree. The order of the Court will only amount to a decree, if it is the formal expression of an adjudication upon a right claimed or defence set up in a suit. The order quoted above is not a decree.

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6 O. C. 52.

Second appeal—Costs—Ss. 220, 584 C. P. C.=S. 35, O. XX, r. 6 (3); S. 144 (1) Act V of 1908.

Second appeal against the order for costs allowed when discretion has been exercised in such circumstances as would justify the correction of the order by the Appellate Court, had it been passed by a Court of original jurisdiction.

Note.

Disc.—8 O. C. 251—Second appeal against costs only allowed when the order of the first Appellate Court is contrary to some specified law.

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6 O. C. 59.

Decree under S. 90—Transfer of Property Act.—S. 248 C. P. C.=O. XXI, r. 22 (V of 1908).

Where applications were made for issue of notices under S. 248 C. P. C. and property was attached in execution of a supposed decree for the balance of the mortgage-debt.

Held, that, as the decree-holder had not obtained a decree under S. 90, he could not attach and sell the property.

6 O. C 61.

S. 311 C. P. C.=O. XXI, r. 90, C. P. C (V of 1908)—Material irregularities in publishing and conducting sale—Evidence of substantial injury.

No direct evidence is required to prove that substantial injury was due to material irregularity but an inference might be drawn that the latter had been caused by the former.

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6 O. C. 68.

S. 310 A C. P. C.=O. XXI, r. 89 C. P. C. (V of 1908).

1. The decree having been adjusted, it was not necessary to deposit the amount specified in the sale proclamation as due under the decree.

2. Under S. 7, General Clauses Act 1887, the judgment debtor was entitled to make his application and to deposit the money on the day on which the Court re-opened

3. Mistake or fault of the officials of the Court would not injure the suitors.

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6 O. C. 73.

Cr. P. C. Ss. 356 and 537—Evidence not recorded in language of Court, effect of, upon Criminal trial.

That the defect in not recording evidence in the language of the Court amounted merely to an irregularity which would not vitiate the trial.

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6 O. C. 76.

S. 295 C. P. C. = S. 73 Act. V of 1908.—Sale of property subject to mortgage.

Before it can be said that the purchaser of immoveable property at a sale of execution of a decree has purchased it subject to a mortgage, it must be quite clear that the Court sold him the property subjeet to the mortgage.

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6 O. C. 81.

Ss. 27 and 35 Provincial Small Cause Courts Act.—

That an order, passed by a Court not invested with the powers of a Court of Small Causes in the execution of a decree passed by a Court invested with such powers, was not final under S. 27. S. 35 explained.

6 O. C. 86.

S. 244 cl. (c) = S. 47 Act. V. of 1908—Appeal—Art. (11) cl. (B) sch. ii Court Fees Act.

A memorandum of appeal against an order under S. 244 cl. (c) (S. 47 Act. V. of 1908) is chargeable under art. 11 (b) Court Fees Act.

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6 O. C. 89.

Interest—S. 108 (15) Rent Act—S. 73 Contract Act—Lambardari hak.

1. In a suit under S. 108 (15), a lambardar is not liable to pay interest. S. 73 Contract Act was not applicable to the case.
2. The "*lambardari hak*" is intended to remunerate the lambardar for his services, and not to defray costs of collection.

Notes.

(1) Exp.—6 O. C. 346 (349).—Where one, out of several under-proprietors is compelled to pay sums which are payable by the others he is entitled not only to the sums paid but also to interest upon those sums from the date of payment.

(2) R.—24 I. C. 15 —A lambardar is entitled to the expenses of collection in addition to his lambardari-fee.

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6 O. C. 94.

Under-proprietary right. Perpetual hereditary forming lease—Tenants holding under decree of Court—S. 52 Oudh Rent Act—S. 40 Oudh Land Revenue Act.

Held, that *B* did not by the decree of the Financial Commissioner obtain an under-proprietary right but became a tenant holding under a decree of Court, and that his rights were not transferable.

Notes.

Cite.—7 O. C. 265 (272)—Invalidity of usufructuary mortgage of occupancy right.

R.—18 I. C. 583.—Acquiescence in transfer by tenant—Estoppel.

6 O. C. 101.

Hindu Law—Joint family—Suit by son for redemption of property, a mortgage on which has been foreclosed—Non-joinder of son as party in a suit for foreclosure against father

A son whose share in a joint family has passed out of the family by means of a *decree for foreclosure against his father* cannot re-open the decree merely because he was not a party thereto.

Note.

R.—14 O. C. 257—On a second suit for redemption by sons of mortgagor *held*, that the sons were in no better position than the father who could not have re-opened proceedings in consequence of which property passed out of the family.

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6 O. C. 104.

Suit for rent by assignee of landlord—S. 132 Oudh Rent Act—Transfer of appeal by District Judge to Subordinate Judge—Jurisdiction of Civil Court, Ss. 124B and 124C Oudh Rent Act

T. being entitled to recover a certain sum from the applicant as rent assigned his right thereto to the respondent. The respondent sued the applicants for the money in Munsif's Court. An appeal by the applicant was transferred to a Subordinate Judge, *Held*;

1. That the suit was a suit for rent
2. That the period of limitation for it was 3 years
3. That the Subordinate Judge had Jurisdiction under S. 124C to dispose of the suit whether the suit was instituted in the right Court or not.

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6 O. C. 110.

S. 332 C. P. C. = O. XXI, r. 100, 101, 103 Act. V of 1908—Proof—Dispossession of grantee's mortgagee in execution of decree obtained by grantor against grantee.

1. In a suit under S. 332 C. P. C, the plaintiff must prove that he was entitled to retain possession when he was dispossessed and not merely that he was *bona fide* in possession and was not a party to the decree.

2. That a tenant or mortgagee of a muafidar could not claim to retain the land after the grant had been declared to be resumable in proceedings fairly conducted between the grantor and the grantee.

6 O. C. 114.

Application under S. 90 Transfer of Property Act—Art. 178, 179 Limitation Act.

An application under S 90 T. P. Act is an application in execution proceedings and art. 178 applies.

Notes.

R.—9 O. C. 288.—An application to set aside an ex-parte decree passed under S. 90 T. P. Act is not maintainable.

F.—10 I. C. 21.

6 O. C. 119.

Burden of proof—Suit by taluqdar for declaration of proprietary title and ejectment of tenant.

1. In a suit by taluqdar for declaration of proprietary title and ejectment of tenant in which the defendant asserted adverse title the plaintiff was bound to give some evidence that his title as taluqdar was subsisting when the suit was instituted.

2. The case ought not to have been departed from the substance and the merits of the plaintiff's case.

Note.

(1) R.—8 O. C 145.—Burden of proof in suit for declaration that defendant is not under-proprietor.

6 O. C. 130.

Pleader's-fee—how to be calculated—Suit for redemption.

In a suit for redemption the pleader's-fee should be calculated upon the principal sum expressed to be secured by the instrument of mortgage.

6 O. C. 132.

Hindu Law.—Meaning of "Aulad pisari" and "Aulad dukhtari"—Wajib-ul-arz.

In view of the ordinary Hindu Law the expression in a wajib-ul-arz *aulad pisari* held to mean "male issue" and the expression

aulad dukhtari in the same document held to mean "daughters and their male issue."

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6 O. C. 135.

Memorandum of appeal—Redemption suit. Costs—S. 578 C. P. C.=S. 99 C. P. C. (V of 1908).

1. That the plaintiff should have paid a Court-fee in respect of the first Court's order as to costs as well as in respect of his objection to pay interest.

The provisions of S. 578 C P. C. were a bar to the reversal of the lower Appellate Court's order on the ground of the memorandum of appeal being insufficiently stamped.

2. The mere circumstance that the mortgagee claimed more than what he was decided to be entitled to is not a ground for refusing him his costs.

3. The interest shall not cease on the part payment of the mortgage-money.

Notes.

(1) R.—12 O. C. 171.—Appeal praying for distinct relief as to costs—Court-fee on costs, when payable.

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6 O. C. 142.

Burden of proof—Arts. 91, 120 Limitation Act. Ss. 90, and 102 Evidence Act. Notice of adverse title given to Court of Wards—Document 70 years old—Suit for declaration.—

1. That the notice of the document obtained in 1893 by the Court of Wards was not notice of it to the plaintiff, and that the suit was not barred by art. 91 or by art. 120 sch. ii Indian Limitation Act.

2. That the suit being substantially one to have the document set aside and for a declaration that the defendant had not under-proprietary rights in the village, the burden of proof lay on the plaintiff.

3. That the document might be presumed to be genuine and to be document under which the defendant was in under-proprietary possession.

6. O. C. 151.

S. 67 Transfer of Property Act.

The mortgagee sued for a decree for sale of the mortgaged-property when a suit for possession under the terms of the deed was barred.

Held, that in views of the provisions of S. 67 as the mortgage was not an usufructuary one, the mortgagee had a right to institute a suit for sale.

Notes.

Dist.—6. O. C. 167.—That although the mortgage-deed in 6 O. C 151 and 6 O. 167, are similar in terms, they are not one and the same deed and the decision in 6 O. C. 151, seems to proceed on the ground that the mortgage was not usufructuary and to assume that it was a simple mortgage.

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6 O. C. 153.

Previous acquittal in a criminal trial upon the same facts—S. 26 General Clauses Act—S 403 (1) Cr. P. C.

1. That the accused's plea of previous acquittal was a valid plea and that effect should have been given to it.

2. That S. 26 of the General Clauses Act was only intended to enact that, provided that he is not twice punished for the act or omission, the offender may be prosecuted and punished at one and the same trial under either or any of the enactments, and the accused's case was not taken out of Ssb-section (1) of S. 403 Cr. P. C., by that Section.

3. It was failure to prove that the accused endorsed a false certificate with the knowledge that he was likely to cause injury to certain persons which brought about his acquittal, and not doubt as to whether the facts alleged against him constituted an offence under S. 81 Act. III of 1877.

Held, therefore that the last part of Sub-section (1) of S. 403 Cr. P. C., was not applicable.

6 O. C. 159.

Mesne profits.

R obtained a decree against M for possession of a village with mesne profits from September 1889 to the date on which he obtained possession, and obtained possession on the 7th March 1894. He subsequently obtained a decree against M for mesne profits for the period between September 1889 and the 7th March 1894. On the 6th September 1894 D obtained a decree against R for a share in the village.

Certain under-proprietors obtained a decree against M, R and D for possession of the land and for mesne profits. In their application to have the amount of mesne profits determined the decree-holders alleged that R was liable to pay mesne profits from the 4th November 1889 to the 7th March 1894.

Held, that R was not liable as has obtained possession on the 7th March 1894 and his obtaining a decree against M would not make him liable for mesne profits.

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6 O. C. 167.

Anomalous mortgage—Clog on the right of redemption.

In case of default in payment of principal and interest, the mortgagee was entitled to take possession for 20 years.

1. That, the mortgage being a simple mortgage and usufructuary mortgage from the commencement was an anomalous mortgage and the rights and liabilities of the parties must be determined by their contract as evidenced by the mortgage-deed.
2. That, the condition in the mortgage-deed; that the mortgagor should not be entitled to redeem within 20 years was not a "clog" on the right to redeem.

Notes.

App. 7 O. C. 11—Anomalous mortgage claim for recovery of interest by sale of mortgaged-property.

Dist. 10 O. C. 218—It was not urged in 6 O. C. 167, that a decree for possession should be refused with reference to the provisions of the Specific Relief Act.

Doub. 16 O. C. 90—The decision in 6 O. C. 167 in so far as laid down that a combination of a simple and usufructuary mortgage must be so from its very inception, has been practically over-ruled by the decision of their Lordships of the Privy Council in 8 All. Law Journal 594.

R. 18 I. C. 286 (not discussed).

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6 O. C. 175.

Compromise by Guardian ad litem—Leave of Court—Grounds on which compromise can be set aside in whole or in part.

A compromise entered into by a guardian ad litem *without the leave of the Court* is voidable and the minor need not prove that it was not beneficial to him.

Note.

Vide. P. C. Judgment 9 O. C. 219.

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6 O. C 184.

Suit for recovery of sum due on account of land revenue by lambardar against co-sharer—Transfer of proprietary right when vendor undertakes to pay land revenue—Transfer of Property Act S. 40.

1. That the vendors had parted with all his rights in respect of the land sold to the respondent and that the existence of an agreement by the vendor that he would pay any revenue that might be assessed on the land could not affect the completeness of the transfer of proprietary right.
2. That the vendors agreement was not binding upon the appellants who were vendees of his share and not of the plots to which the agreement referred and S. 40 of the Transfer of Property Act did not apply.

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6 O. C. 190.

Suit for enhanced rent of house—Liability to pay—Jurisdiction.

A suit for enhanced rent of house is not a suit for assessment or enhancement of rent under art. 7 sch. ii of the Small Cause Court Act and is cognizable by a Court of Small Causes.

In continuing in occupation after receipt of the notice that a certain enhanced rent would be taken if he failed to vacate the house, the tenant must be held to have impliedly accepted his liability to pay the proposed enhanced rent.

6 O. C. 192.

Procedure when part of evidence is recorded by one Magistrate and then it is transferred to another-consent of the accused Ss. 52 and 537 Cr. P. C. S. 387 I. P. Code.

1. That, the District Magistrate after withdrawing the case from the Subordinate Magistrate should have commenced the trial afresh and ought not to have asked the prisoner whether he wished to have the witnesses for the prosecution examined again.

2. That, the defect in the trial of the prisoner was not one to which the provisions of S. 537 were intended to apply, and the fact that the prisoner consented to the course pursued by the District Magistrate did not cure the illegality of that course.

6 O. C. 195.

Execution of decree—Application for resale of mortgaged-property—Limitation.

On the 23rd November 1894, the decree-holder applied to have the property sold and in January 1898 it was sold. In October 1898, the sale was set aside and on the 19th April 1901, the decree-holder applied for resale of the property. The judgment-debtors contended that the application was barred by limitation. *Held*, that the application was one to revive the proceedings on the former application and was not barred. The result of the order setting aside the sale was not to dismiss the application for sale but to annul the proceedings in the former application after they became invalid.

6 O. C. 197.

Mortgagee's right to put up for sale any portion of mortgaged-property—Where more than one property is subject to a mortgage-debt, the mortgagee in execution of his decree is entitled to put up for sale whatever portion of the mortgaged-property it is necessary to sell in order to realize the amount of the debt.

6 O. C. 199.

Ss. 112, 118 and 122 Cr. P. C. Security for good behaviour—Sureties being residents of a certain locality--Discretion of Magistrate.

It is not competent to a Magistrate to include in an order under S. 112 and 118, a condition that the sureties shall be residents of a certain locality.

No precise rule can be laid down as to the reasons for which a Magistrate may reject sureties under S 122 of the Code.

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6 O. C. 204.

Confession of co-accused.—Statement made by accused = S. 342 Cr P. C.—Court's personal knowledge.

1. An accused person ought not to be convicted where the only evidence against him is the confession of a co-accused and circumstantial evidence, which although true, would not itself support a conviction.
2. The Legislature did not intend that under colour of an examination under S. 342, an accused person should make statements such as he might make if he were being examined as an approver.
3. That, the Magistrate could not import his own knowledge into the case except as a witness.

Notes.

(1) Diss.—11 O. C. 328.—That the confession of a prisoner affecting himself and another person, who was being tried with him for the same offence, is, when duly proved, admissible as against both.

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6 O. C. 212.

Suit against reversionary heir for recovery of money paid to redeem mortgage of his predecessor in title.—Re-imbursement of person paying money due by another Ss. 69 and 70 Indian Contract Act—art. 61 sch. ii Limitation Act. Compensation for act done for the benefit of another—Suit for money payable to the plaintiff for money paid for the defendant.

Held, that unless the plaintiff's case fell under S. 69 or S. 70 he was not entitled to any decree against the defendant. His case

did not fall under S. 69, because the defendant was not bound by law to pay the mortgage-debt, and even if it fell, the claim would be barred by limitation under art. 61. S. 70 also was not applicable as it was found that the redemption of the mortgage was not an act done for the defendant.

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6 O. C. 216.

Sanction to prosecute.—High Court's power of revision. Cr. P. C. Ss. 195 and 439—I. Penal Code Ss. 109 and 110—S. 622 C. P. C. (S. 115 Act. V of 1908).

1. The application should not have been made under S. 622 C. P. C. The applications for sanction are not governed by the Code of Civil Procedure but by S. 195 Cr. P. C.

2. The words "any sanction given or refused under this section" in S 195 (6) Cr. P. C. mean any sanction given or refused upon an original application and the clause does not provide for interference by a third Court at all.

3. That S. 439 Cr. P. C. provides for the case of "any proceeding" and expressly authorises the High Court to exercise the power conferred upon the Court of appeal by S. 195, and that therefore the Court of the Judicial Commissioner had jurisdiction under S. 439 to revise the District Judge's order.

Note.

R.—17 O. C. 25.—High Court acting as a Criminal Court, power of, in revision.

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6 O. C. 223.

Redemption of the whole of mortgaged-property by owner of part of equity of redemption. Failure of plaintiff to tender the mortgage-money in the Khali fasl.

1. Under the circumstances the plaintiff could maintain a suit for redemption though he had made no tender in the *khali fasl*.

2. A person who owns a part only of the equity of redemtion can claim, and if the mortgagee so wishes, is bound, to redeem the whole mortgage, but when both the plaintiff and the defendant have acquired parts of the equity of redemption, the plaintiff cannot redeem the whole against the will of the defendant.

Notes.

(2) R.—9 O. C. 63.—When a mortgagee purchases a part of the property he can resist upon retaining the portion so purchased but he is not entitled to have the redemption restricted to the interest of the plaintiff who seeks to redeem.

(2) F.—10 O. C. 81.—

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6 O. C. 230.

Mortgage of moveable property—Delivery of possession.

A mortgage of moveable property is a valid transaction, and delivery of property is not essential to its validity.

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6 O. C. 232.

Resumption of grant. Compensation for improvement—S. 53 Act. XVII of 1876.

1. The mere circumstance that a grant is an old one is not sufficient reason for resuming it in part only.

2. A grantee is entitled to a *notice from the zamindar* declaring his intention to dispossess him and also reasonable compensation for improvements.

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6 O. C. 236.

Tender of pardon, withdrawal of trial illegal—

At the commencement of a trial upon a capital charge, the Sessions Judge tendered a pardon to one of the three accused, but after hearing a few words of the statement of C, the Judge withdrew tender and put C back into the dock and tried him with the other two accused.

Held, that the Code of Criminal Procedure does not contemplate the withdrawal of a tender of pardon, and that the trial of C was illegal and must be set aside.

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6 O. C. 239.

Declaratory decree—Construction decree—Res-judicata—Ss. 13 and 244 C. P. C. = Ss. 11 and 47 (Act. V of 1908).

Held, that the decree was not intended to grant consequential relief but was intended to be merely declaratory, and that the suit

was consequently not barred by the provisions of Ss. 13 and 244 C. P. C.

Notes.

R.—8 O. C. 361— A Settlement Court decree in mortgage cases is not necessarily a bar to a subsequent suit for redemption.

R.—15 O. C. 99—The mere addition of the direction that the *nankar* was to be realized on the execution side would not alter its character as a declaratory decree.

6 O. C. 247.

Pleadings.—

Plaintiff could not be permitted *to set up a new case which* he did not make in the plaint and that as he failed to prove the case upon which he came into Court, his suit should have been dismissed.

6 O. C. 252.

Purchase of property by guardian—Sale in execution of decree against minor Ss. 53 and 88 Trust Act (II of 1882).—Trustee purchasing trust property at auction sale without permission of Court.

If the guardian of the property of the minor was a trustee, on the property being attached in execution of a decree, he ceased to hold it in trust. There was nothing in S. 53 to bar the purchase of the property by the guardian and under S. 88 it could not be held that he held it after the purchase for the benefit of the minor.

6 O. C. 255.

Pre-emption—Value of subject matter of suit—Forum of appeal.

The plaintiff's valuation determines the forum except in cases where it is proved that the plaintiff has misrepresented the true value with the intention of getting trial in a different Court, or has acted recklessly in valuing his suit, or has adopted a wrong method of valuation.

Notes.

R.—12 O. C. 31—Where the plaintiff claims payment of the sum stated in the sale-deed and alleges that the value of the property

was greater, the value should be measured by the consideration stated in the deed.

F.—9 I. C. 414—The Jurisdiction of the Court is to be decided by the valuation set forth by the plaintiff in the plaint.

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6 O. C. 262.

Security for good behaviour—Second enquiry after discharge of persons called upon to give security—Ss. 112, 119 and 437 Cr. P. C.

It is altogether contrary to principle that when a competent Magistrate has held a full inquiry and decided that it is not necessary to call upon a person to give security for his good behaviour, the same or any other Magistrate should re-open the proceedings.

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6 O. C. 271.

Execution of decree against representative of deceased judgment-debtor. Joint family property—S. 234 C. P. C. = S. 50 Act V of 1908 C. P. C.

That the joint family property of a Hindu joint family cannot be considered in whole or in part as property of the father which has come to the hands of the sons as legal representatives, and that therefore the question of the liability of the joint family property in the present case could not be decided in execution proceedings.

Note

Doubt.—11 O. C. 334—That the death of a father does not give his creditor a fresh cause of action against his son for the recovery of the Judgment-debt binding up the sons

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6 O. C. 275.

Mesne profits—Agreement to determination of—in execution.

That the agreement of the parties as to determination of mesne profits in execution of decree was binding upon them though it was not mentioned in the Appellate Court's decree, and that it was the duty of the Court to proceed upon the application to ascertain the amount of mesne profits due to the plaintiff.

6 O. C. 279.

Redemption—Suit for—Right of person interested in part only of equity of redemption to insist upon redeeming whole property—Validity of mortgage signed by third party for mortgagor with his authority—S. 59—Transfer of Property Act.

In 1872 M and G (owners of $\frac{3}{4}$ and $\frac{1}{4}$ shares respectively) jointly mortgaged the whole to the defendant. G's share became vested in his 3 grand-children A. B. and C. Subsequently M in 1893 mortgaged his share again to the defendant by a deed which was signed for him, at his request by another person and which postponed the redemption of the mortgage of 1872 from 1296 F. to 1350 F.

M died having devised his share to B, after 1296 F, the plaintiff as purchaser of the right of A, B and C sued for redemption of the entire land.

Held, that the plaintiff so far as he represented G could not insist upon redeeming the entire land, that so far as he represented M could not as yet redeem M's share, but he was entitled to redeem G's share alone.

Under S. 59 T. P. Act a mortgage is signed by the mortgagor if his signature is affixed for him with his authority.

Notes.

R. 10 O. C. 81—Redemption, where mortgagor and mortgagee have both acquired interest in the mortgaged-property.

Dist. 11 O. C. 73—In 6 O. C. 279, the second mortgage postponed the redemption of the original mortgage until 1350 F and it was held that such a contract destroyed the joint character of the mortgage. In 11 O. C. 73 *held*, that the integrity of the original mortgage was not destroyed by the acceptance by the mortgagee of deed of further charge *executed by some only of the mortgagors* secured on their share.

6 O. C. 289.

Jurisdiction of Civil Courts—Ss. 56 and 108 (4) and (8) Oudh Rent Act—Suit by lessor for cancelment of lease, possession, declaration that lessee is liable to ejectment through Rent Court.

A suit for ejectment of the lessees and the alienees is a suit for the ejectment of a tenant. The Civil Courts have no jurisdiction

to decide whether the lease has been forfeited by reason of breaches of conditions of tenancy.

Note.

F. 14 O. C. 225—In 6 O. C. 289 as in 14 O. C. 225, the land was held under a decree of a Settlement Court. The only difference between the two cases is that in the former the decree provided that if the lessees alienated the land, the lessor might cancel the lease and take possession. In all other respects the two cases are identical.

6 O. C. 294.

Lis-pendens—Contentious suit—S. 52, T. P Act

That the alienee is only bound by the order which judicially decides the suit on the merits, and that he is not bound by an order which the Court makes at the request of the parties.

The suit brought by the defendants against N and C was finally decided by the District Judge when he struck off C's appeal, but he did not decide it judicially on the merits but merely struck off the appeal because he was asked by C to do so. *Held* therefore, that the transfer to the plaintiff was not a transfer during the pendency of a contentious suit.

Notes.

Diss. 13 O. C. 98—S 52 applies to a case in which a decree is passed upon a compromise.

6 O. C. 299

Suit by superior proprietor against under-proprietor for recovery of local rates—Oudh Local Rates Act of 1894 Ss. 7, 16 and 17—Res-judicata—Jurisdiction.

1. That the Oudh Local Rates Act of 1894 does not compel but authorises the superior proprietor to claim contribution from an under-proprietor.
2. The former case between the parties was decided by a Tahsildar, whereas the present case could not have been tried by a Tahsildar and therefore the dispute in the present case was not *res-judicata.*

3. The Settlement Officer had no power to decide the proportion in which the rates should be borne by superior and inferior proprietors and that no decision in the present case could interfere with the assessment.

6 O. C. 305.

Will—Construction of—Arts. 136, 144 Limitation Act—Champerty—Purchaser for value without notice.

(1) That the will did not create an executory trust.

(2) That no part of a will ought to be rejected as destitute of meaning if a reasonable construction can be placed on it.

(3) That the will in suit was to be construed according to justice, equity and good conscience.

4. That the daughter in whose favour the will was made, took an interest for life, and that on her death her sons became absolute owners of the property.

5. That the suit was governed by Art. 136 or 144 Limitation Act.

6. That the sale to the plaintiff was not champertous.

7. That the execution sale did not pass the absolute ownership of the property but merely life interest and that therefore the plea that the defendants were purchasers for value without notice was of no avail.

6 O. C. 324.

Suit for declaration of mortgagees' rights in land sold in execution of decree of third party. Amendment of plaint—S. 42 Specific Relief Act.

The mortgagee brought a suit in which he prayed for a declaration that the plots in suit—were not liable to attachment and sale or in the alternative, for a declaration that a had a lien on the property.

Held, that the relief prayed for might be taken to include a declaration that the plaintiff was entitled to possession of the plots under his mortgage and the lower Court should have permitted him to amend the plaint.

6 O. C. 327.

Pre-emption—Burden of proof of market value. - Decree in absence of proof of market value.

The burden of proof of the market value lay in the first instance upon the plaintiffs, and if the plaintiff and defendant praduce no evidence, the plaintiff could obtain a decree upon payment of the sum admitted by the defendant to be the market value, or, failing that, the sum mentioned in the deed, but he could not in any case be compelled to *pay more* than the latter sum.

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6 O. C. 331.

Mortgage of occupancy holding—Estoppel—S. 5, Oudh Rent Act.

(1) That the mortgage of occupancy holding is invalid.

(2) That the tenant was not estopped from denying its validity.

Notes.

(1) R—11 O. C. 345.—A temporary transfer by an occupancy tenant in favour of his landholder is valid.

(1) Rel.—15 O. C. 67.—There is an essential distinction between restrictions and transfers imposed by Legislature and restictions imposed by contract or decree. The opinion expressed in 6 O. C. 331 is sound.

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6 O. C. 339.

S. 68 Transfer of Property Act. Suit for recovery of mortgage-money by mortgagee dispossessed before expiry of term.

A suit by usufructuary mortgagee dispossessed before the expiry of term for recovery of mortgage-money did not fall within the purview of S. 68, T. P. Act, and that he was entitled only to sue for possession of the property.

6 O. C. 341.

Suit for rent or in default for possession of land under Settlement Court decree entitling landlord to demand any reasonable rent at his option.—Res-judicata, Cause of action—S 43 C. P. C.=O. II, r. 2 C. P. C. (V of 1908) Jurisdiction—Limitation

1. That the suit was cognizable by the Civil Courts, because the relation of landlord and tenant did not exist between the parties.
2. That the question as to whether the defendants were tenants was not *res-judicata*.
3. That the provisions of S. 43 C. P. C. did not apply, the notice which the plaintiff had served upon the defendants after the disposal of the former Civil suit was a part of the cause of action.
4. That the plaintiff was entitled under the decree of the Settlement Court to call upon the defendants to pay any rent which he might demand or to vacate the land.
5. That the rent not having been demanded till August 1898, the suit (instituted in July 1900) was not barred by limitation.

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6 O. C. 346.

Suit for amount of rent paid by under-proprietor on behalf of other under-proprietors—Interest.

That the defendants were bound to payment at the rate fixed by the Settlement Officer.

When all the under-proprietors in the village are jointly and severally responsible for the rent and one of them is compelled to pay sums which are payable by the others he is entitled not only to the sums paid but also to interest upon those sums from the date of payment.

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6 O. C. 351.

Court-fee on mesne profits accruing after institution of suit—S. 11 Court Fees Act—Interpretation of ambiguous order of Court.

(1) That no Court-fee is payable on account of mesne profits for the period after the institution of the suit for immoveable property whether such profits are claimed in the plaint or not.

2. That in cases of ambiguity an order of a Court must be interpreted so as to make it in accordance with law.

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6 O. C. 355.

Wakf property—Suit by seller for cancellation of—Estoppel.

(1) That the plaintiff was not estopped from proving that he held the property as trustee and that the transfer of it was invalid, but that as both parties were in *pari delicto* the position of the defendant could not be assailed by the plaintiff.

(2) The rule of estoppel by deed or by writing as now in force is this that if a distinct statement of a particular fact is made in a deed and a contract is made, with reference to that statement then the party who makes the statement cannot deny the truth of it.

Notes.

(1) **R.**—12 O. C. 236—There can be no estoppel against plaintiff where the defendant acted with full knowledge of the facts and where there was no misrepresentation on the plaintiff's part.

R.—16 O. C. 109—*to show the purpose for which* the wakf was created.

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3 O. C. 362.

Compromise, petition of relating to immoveable property—Registration Act—Transfer of mortgagee's rights to a third party, mortgagee's right to question validity of—Decree inconsistent with terms of compromise.

1. That a mortgagor is entitled to put to proof of his title any other than the mortgagee named in the deed who claims a right to sue upon the mortgage, and if it is shown that what purports to be a transfer of the original mortgagee's rights to the plaintiff or any person through whom the plaintiff claims is in law inoperative and if the mortgagor is not estopped from pleading the flaw in the plaintiff's title, the suit must be dismissed. The circumstances that both parties to an intermediate transfer choose to admit that it is valid does not give to the transfer an effect which is denied to it by law.

2. That a petition or a pleading acted upon and given effect to it by the Court becomes part of the Judicial proceeding and does not require registration but that as the transfer which the petition presented to the Court purported to effect was not only not given effect to by the decree but was inconsistent with it, the petition was not exempt from the necessity of registration as part of a judicial proceeding

Notes

(1) **Dist.**—7 O C. 181 (185)—The defendant can not challenge the validity of the assignment unless a trial of the question of its validity is necessary for his protection.

R.—14 I. C. 29.—That the decree did not create a charge but was a decree for money directing in what particular way the execution ought to proceed.

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6 O. C. 367.

Redemption.

That a *second suit* for redemption was not maintainable.

Note.

R.—14 O. C. 257—A second suit for redemption by the sons of the mortgagor was barred under Ss. 11 and 47 C. P. C. (V of 1908)

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6 O. C. 372.

Appeal—Order in partition proceeding—Jurisdiction—Ss 107, 111, 112 N. W. P. and Oudh Act III of 1901—Act I Sch. II Court Fees Act.

1. The order of the Assistant Collector holding in a partition proceeding that the appellant was not entitled to *haqq Jethwannsi* was appealable.

2. That the memorandum of appeal on a Court-fee label of Rs. 2 was sufficiently stamped.

Notes.

(1) **Dist.**—7 O. C. 161—It is only when the Assistant Collector goes into the merits of the objection that his order dealing with the objection is appealable as a decree.

6 O. C. 379.

Misjoinder—S. 28 C. P. C. = O. I., r. 3, 4 (6) Act V of 1908—Suit to establish a right to share in property against Co-sharers—Necessary parties.

That in a suit to establish a right to share in property all the alleged co-sharers are necessary parties.

Note.

App.—9 O. C. 339—Plaintiff no party in a previous suit—Decision in the previous case how far binding—Misjoinder.

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6 O. C. 383.

Resumption of rent-free grant—Jurisdiction.

A suit for possession of the land held rent free under the grant is exclusively cognizable by the Revenue Court.

Note.

R.—12 O. C. 225.—Suit for declaration of under-proprietary rights not cognizable by Civil Courts.

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7 O. C. 1.

Pre-emption—Art. 120, Limitation Act—Partition—part of land remaining joint.

1. *A suit for pre-emption on the basis of the foreclosure decree is governed by Art. 120.*
2. The right of a pre-emption cannot be defected by a decree obtained by another person in a suit to which the plaintiff in the second suit is not a party.
3. That under S. 9 cl. (3) of the Oudh Laws Act, the vendor, the plaintiff, and the first defendant (who had formerly brought a suit for pre-emption to which the present plaintiff was not made a party) were all members of the same village community, and they must draw lots.
4. That partition into separate mahals did not mean the creation of separate village communities.

Notes.

(4) **Ap.**—7 O. C. 206.—Effect of partition whether severing members of village community.

(4) **F.**—7 O. C. 275 —There was one village community, perfect partition notwithstanding.

7 O. C. 6.

Pre-emption—Relationship of vendor and vendee—S. 9 Oudh Laws Act.

The kind of relationship contemplated by S. 9 is consanguinity from a common stock

Note.

Rel.—14 O. C. 193 —The relationship is not confined to relationship through males. It means consanguinity from a common stock as opposed to affinity or relationship by marriage.

7 O. C. 8.

Pre-emption—Arts. 10 and 120 Limitation Act—A suit for pre-emption on the basis of a foreclosure decree is governed by Art. 120.

The words " physical possession " in art. 10 mean a personal and immediate possession and exclude any notion of constructive possession by a landlord through his tenants.

7 O. C. 11.

Anomalous mortgage—Construction of document—Interest—Art. 116 Limitation Act.

1. That having regard to the terms of the deed, the mortgage was an anomalous mortgage.
2. Interest by way of damages for 6 years under art. 116 allowed.
3. That the interest so allowed was not a charge on the land.

Notes.

F.—14 O. C. 106—The opinion expressed in 7 O. C. 11 is, that where the land is liable to be sold for the recovery of interest up to the date at which the principal sum is payable, interest awarded as damages for non-payment of the principal should be held to be charged on the land and included in the decree for sale.

7 O. C. 14.

Ss. 108 (16), 129, 132 Oudh Rent Act.

Suit for compensation for revenue paid by a lambardar on account of a joint lambardar is governed by S. 129 and should be instituted within one year from the date of the accrual of the cause of action.

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7 O. C. 17.

Jurisdiction of Court to which a case has been remanded. Representative of deceased appellant—Ss. 365 (O. XXII, r. 3 (1)) and 566 C. P. C.=O. XLI r. 25 (V of 1908).

That a Court to which a case has been remanded has jurisdiction to act under S. 365 C. P. C. to do any act which may be necessary to carry out the order of remand.

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7 O. C. 19.

Pre-emption—S. 9 (5) Oudh Laws Act.

1. *Partition—separate part of the grove. Members of village community.* That the plaintiff and the defendants being owners of a distinct and separate part of the grove were not co-sharers in the grove.

2. The expression "*Village community*" includes persons having under-proprietary rights, in land of the village, although they do not reside in the village.

Notes

(2) **App.**—7 O. C. 275—Whether residence in village a necessary qualification in a claim for pre-emption.

(2) **R.**—10 O. C. 225—An owner of plots of land in *abadi* is a member of the village community.

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7 O. C. 22.

Pre-emption—Sale to co-sharer and stranger with specification of each vendee's share in property sold

The shares of the vendees (one being a co-sharer and the other a stranger) were specified in the sale-deed and that therefore

the plaintiff was not entitled to a decree for pre-emption against a co-sharer but only to a decree against the stranger.

Note.

R.—10 O. C. 225.—Where a purchaser associates with himself a starnger without specification of shares, such purchaser loses his preferential right to purchase and the whole property sold is liable to pre-emption.

7 O. C. 31.

Pre-emption.

A deed relinquishing claim to property in return for benefits previously received from transferee is not a deed of sale.

7 O. C. 35.

Rural Police Rates, suit by proprietor against under-proprietors for recovery of—Ss. 13 and 14 N.-W. P. and Oudh Act V of 1894—Wajib-ul-arz.

1. The word "Contract" in S. 14 is not confined to an express contract between the superior and inferior proprietors.

2. That the *Wajib-ul-arz* was admissible as evidence of the arrangements made for the maintenance of the Chowkidar.

7 O. C. 43.

Pre-emption—Pleader's fee—Amendment of decree.

1, That the pleader's fees were rightly calculated on the value of the property at the rate of five times the Government Revenue assessed on the land.

2. That costs not having been calculated according to law, the decree was at variance with the judgment and the lower Court had power to amend it.

Note.

Vide the Oudh Civil Digest 1912 para. 272.

7 O. C. 46.

Personal liability of minor for money borrowed for his use by guardian— Limitation

It is settled law that although a guardian may under certain circumstances sell or charge his ward's property he cannot

bind his ward personally by a covenant or by a promise to pay money or damages.

The suit was instituted in the basis of a bond executed by the mother both for herself and as guardian of the minor. It was instituted more than 6 years after the date of the loan although less than 6 years from the date on which a cause of action accrued upon the bond.

Held, that the bond was not binding upon the minor and that therefore the suit was barred by limitation.

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7 O. C. 49.

S. 584 and S. 561 C. P. C. = S. 100; O. XLI, r 22 C. P. C. (V of 1908)—Objection filed in second appeal.

That the ground taken in an objection under S. 561 when filed in second appeal must comply with the provision of S. 584 C. P. C., and that the ground in question as drafted did not comply with the provisions of that section as it did not allege that the decision was contrary to any specified law or usuage having the force of law.

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7 O. C. 51.

Cantonment Code, 1899 Ss. 83 and 85—Notice for repairs of building—"Insanitary state" and "defects" meaning of—Presumption as to issue of notice by duly constituted authority—Criminal revision—Criminal Procedure Code, s. 439.

The Cantonment Magistrate issued a notice under S. 83 of the Cantonment Code to the applicant to the effect that a house belonging to the latter had been declared both ruinous and insanitary by expert opinion and that he was thereby directed to carry out the repairs indicated in an attached report which recommended general repairs. The applicant having failed to comply with the notice was prosecuted and convicted.

Held, that for the purposes of a prosecution under S. 85 read with S. 83 of the Cantonment Code, 1899, it is not necessary for the prosecution to begin by proving that the authority which issued the notice was duly constituted, and the Court ought to presume, until some evidence is given to destroy the pre-

sumption, that the Cantonment authority used the regular and lawful procedure, and that the common course of business was followed to its procedure, and it is for the person raising the objection to give some evidence to show that it would not be safe to make such a presumption.

Held that, the phrase 'insanitary state' in S. 83 does not mean an insanitary state generally, but an insanitary state as qualified by the preceding words, that is, an insanitary state resulting from the ill-construction or dilapidation of the building. The word 'defects' in that section means 'sanitary defects' and the repairs which the notice may require the owner to execute must therefore be such repairs as are necessary to remove the sanitary defects resulting from the ill-construction or dilapidation of the building. *Held* therefore, that the repairs which the applicant was required to carry out were repairs of such a nature as to to put the house into habitable order generally, and not merely repairs to remove sanitary defects of the nature contemplated in S. 83; that the Cantonment authority was not authorised by the provisions of S. 83 to issue a notice for general repairs; that it did not exercise a legal discretion in directing under that section such repairs to be carried out, and that the notice was bad and invalid in law.

Notes.

F.—7 O. C. 68.—Construction of Cantonment rules.

7 O. C. 61.

Pre-emption—Sons not recorded as co-sharers.

Sons not recorded as co-sharers were not entitled to sue for pre-emption in respect of property sold by their father.

7 O. C. 65.

Nazul land—Suit for possession—Burden of proof—Presumption as to power of attorney signed by Deputy Collector for Deputy Commissioner.

1. It must be presumed that the Deputy Collector had authority to sign for the Deputy Commissioner.
2. It was for the appellant to prove that they claimed title to the land in suit through the Government.

7 O. C. 68.

Ss. 83, 85 and 283 Cantonment Code—S 439 Cr P. C.—Penalty for failure to comply with notice for repairs.

1. That the Procedure adopted by the Cantonment Magistrate was not authorized by S. 83, and also the repairs ordered to be carried out were not the kind of repairs contemplated by S. 83 and that the notice was bad and invalid.

2. That a penalty being expressly provided for in S. 85, the conviction under S. 283 was illegal.

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7 O. C. 74.

Pre-emption—Meaning of "town."

1. In its popular signification a "town" means "the space which, for the time being, is covered by, or "occupied as accessory to, houses collected together in a mass, and in sufficient number to be ordinarily designated as a town; and includes unbuilt-on lands that may be within the ambit of such collected mass of houses; but not lands outside such ambit, though within a borough."

2. That the question whether any particular piece of land is situated within a "town" or not depends on whether it is part of an urban area or not, and it is a question of fact which has nothing to do with the contingency of its being included within the limits of a municipality for administrative purposes.

Note.

(2) R.—12 O. C. 1.—The land in suit is not within the municipal limits and is about 500 yards from the town of Sandila—Following 7 O. C. 74 *held*, that the land in suit is not contained in any town or city or sub-division thereof.

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7 O. C. 78.

Ss. 27 and 368 C. P. C.=O. I, r 10 (1)—O. XXII, r 4 Act V of 1908—Addition of names as plaintiff in a suit brought by one not entitled to bring it.

Held, that the appellant had no right to thrust himself as plaintiff into the suit for arrears of rent which was brought by a person who had no right to bring it. A defendant has a right to the

dismissal of a suit brought against him by an un-authorized person and the defect cannot be cured by the addition or substitution of the name of the person who might have brought the suit unless the case comes within S. 27 C. P. C.

Notes.

Dist.—7 O. C. 193.—Upon the facts of the case, the Court *held*, that the suit was commenced as it was through a *bona fide* mistake, on the part of the plaintiffs—Addition of plaintiff after commencement of suit allowed—In 7 O. C. 78, S. 27 could not by any possibility have been applied.

7 O. C. 82.

Seat of Court Inspector, when conducting cases.

No person conducting the prosecution or defence in a case should, under any circumstances, be allowed to occupy a seat on the dais of the Court.

7 O. C. 84.

S. 108 (15) Oudh Rent Act. Suit for share of profits—Suit for rendition of account.

If a plaintiff claims a share of the profits, whether he asks for a settlement of accounts or not, as a necessary preliminary to ascertaining what his share really is, that is a suit for a share of the profits, and that the only case for a settlement of accounts would be where the plaintiff asked for a settlement of accounts pure and simple, and did not claim a money-decree as the result.

7 O. C. 90.

Suit for possession of Guzara land—Grant for maintenance in perpetuity, how to be construed.—Award by British Indian Association—S. 33 Oudh Estates Act of 1869.

1. When the purpose of the grant is '*Guzara*' or the maintenance of the grantee, it is immaterial whether the words 'in perpetuity' or words to that effect appear, and the grant must be taken to be for life only.

2. That there had been no award by the British-Indian Association and that the rules of that body did not apply.

Notes.

(1) **R.**—12 I. C. 324—That the award did not confer any under-proprietary right; nor did the use of expression "in perpetuity" simply an extension of interest beyond the life-time of the granter.

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7 O. C. 96.

Hindu Law—Separate property of father.—Suit between sons for possession.

P. subsequent to his separation from his sons obtained a money-decree against a certain person, but died before the decree was executed, and the name of one of his sons was brought on the record as his father's representative, and at an auction sale in execution of the decree he purchased the property in suit.

In a suit by other sons and grand-sons it was held that the property not being the joint family property of the parties, they were entitled to sue for their share of it whether there was, or was not joint family property which remained to be partitioned.

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7 O. C. 98.

Pre-emption.—Sale of reversionary interest—S. 43 T. P. Act—Art. 10 Limitation Act.

(1) That the vendors (reversionary heirs after the death of the widow) had at the time of the execution of the sale-deed no saleable interest in the property, that they sold a bare possibility of succession, and that S. 43 of the T. P. Act did not apply.

2. That if the case could be regarded as one in which a widow had transferred her husband's property with the consent of the reversioners and a good title had passed at once to the defendant and a right of pre-emption accrued, the suit would be barred by limitation under art. 10.

Notes.

(1) **Diss.**—8 O. C. 349.—The reversioner has an interest in the property and is entitled to step into the shoes of the mortgagee. The widow if she wishes can redeem the mortgage from the reversioner.

7 O. C. 103.

Patent.—Injunction to restrain infringement of patent.

That as there was a danger of future infringement an undertaking not to infringe it was not sufficient and the plaintiff was entitled to the injunction granted by the Court.

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7 O. C. 108.

Malikana dues.—Jurisdiction. Arts. 65, 120 and 132 Limitation Act Ss. 13, 43 and 371 C. P. C. = S. 11; O. II, r. 2; O. XXII, r. 9 (1, 2).

1. That the money claimed as *malikana dues* was not rent and the suit was cognizable by the Civil Courts.
2. That the 10 per cent. on the Government revenue decreed to the plaintiff was a charge upon the village and the suit was governed by art. 132.
3. That the plaintiff's right to receive the money having been established by the settlement decree, he could sue for arrears for 12 years next before the suit.
4. That the suit was not barred by Ss. 13, 43, 371 C. P. C.

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7 O. C. 113.

Security for good behaviour—Ss. 110 and 117 Cr. P. C.

Magistrates should not reject sureties except for definite and good reasons.

When sureties are tendered, a Magistrate should not refuse to accept them simply on an unfavourable report by the Police, without giving notice to the person who has tendered them and giving the parties opportunity of adducing evidence.

Notes.

Re.—8 O. C. 245—The order of the Deputy Magistrate accepting the sureties should not have been arbitrarily cancelled by the Deputy Commissioner without notice to the applicant and the sureties.

R.—11 O. C. 267—A Magistrate ought not to reject sureties merely on the report of the Police without making any inquiry himself.

Ap.—15 O. C. 263—That the Magistrates have no authority to reject sureties merely upon an unfavourable report of the Police.

7 O. C. 116 (P. C.) = 26 All., 299.

Interest—Arrears of Rent—Under-proprietor.

That interest was not payable on the arrears of rent found due from under-proprietor, and neither the provisions of S. 73 Contract Act nor those of the Interest Act of 1839 were applicable.

7 O. C. 122.

Res-judicata—Judgment inter partes in a previous suit—S 13 Evidence Act.

A bare expression of opinion in a Judgment upon a question of possession which is not given effect to by the decree is not a *recognition of a right* and is not admissible in proof of possession either at the date of the Judgment or at any other time.

7 O. C. 126.

Suit to enforce customary right of privacy.

As the customary right of privacy was proved, the plaintiff was entitled to the relief prayed, and the fact that the houses of the parties were separated by public thoroughfare did not prevent the existence of a custom of privacy which could be enforced.

7 O. C. 129.

Pre-emption—Co-sharers of sub-division—Relationship with vendor—S. 9 (1) and (2) Oudh Laws Act—Rival pre-emptors.

A and B brought separate suits for pre-emption in respect of a village which was divided into two mahals, one of which was an imperfect pattidari and the other a pure Zamindari mahal. In the first mahal there were two *pattis*, A having a share in the one and B in the other. A was not but B was related to the vendors.

Held, that under S. 9 (1) the patti in which A had a share was a *sub-division* of the mahal and A had a right of pre-emption superior to that of B in respect of the pattidari mahal and the decree was passed in favour of A and that under clause (2) B had a better right than A in respect of the second mahal.

Clause (1) S. 9 means that amongst co-sharers in the sub-division who are related to the vendors or mortgagor priority is to

be determined by nearness of relationship, and that co-sharers in the sub-division who are not so related can claim under this clause after those who are related, thus, nearly related less nearly related—not related.

Note.

R.—9 O. C. 211—The word "sub-division" includes a part made by division of a whole mahal and is not confined to a part made by division of a part of a mahal.

7 O. C. 134.

Misl rawaj-i-am as evidence of custom.

A misl rawaj-i-am duly prepared and attested is admissible in evidence as an official record of custom.

Note.

R.—8 O. C. 94—The remarks made about the value of the Wajib-ul-arz in 7 O. C. 134 referred to.

7 O. C. 137.

S. 87 Transfer of Property Act—S. 244 C. P. C.=S. 47 Act V of 1908.

The plaintiff brought a suit for half the amount due upon the mortgage at the date of the previous decree and in default of payment, foreclosure of the defendant's right to redeem his interest in the property *Held*, that the suit was not barred by S. 244 C. P. C so far as regarded the questions whether the mortgage made by his father was binding upon the defendant (son), and whether the defendant (son) was bound to pay his father's debt out of the family property which had passed to him by survivorship; but that having regard to the provisions of S. 87 T. P. Act, the foreclosure of the father's interest having been absolute, the suit was not maintainable.

7 O. C. 142.

Transfer of Partition Case—Jurisdiction of Court of Judicial Commissioner S. 25 C. P. C.=S. 24 Act V of 1908. Ss. 191 and 192 Act III of 1901 (N. W. P. and Oudh Land Revenue Act).

The Court of the Judicial Commissioner can exercise no jurisdiction under S 25, in respect of partition cases to which Ss. 191 and 192 of Act III of 1901 apply.

7 O. C. 144.

Appeal—S. 27 Act IX of 1887—Trial of Small Cause Court suit as regular suit.

No appeal lay from Munsif's decree in a suit instituted as Small Cause Court and tried as regular suit.

7 O. C. 146.

Ss. 69 and 70 Contract Act—Re-imbursement of person paying money due by another.

The plaintiff was not entitled to recover the money paid on account of the land revenue for which the defendant was responsible and the defendant was given the benefit of the payments made by the plaintiff.

Note.

R.—11 I. C. 227—(Not discussed).

7 O. C. 152.

Ss. 7 clause (IX), S. 17—Court Fees Act Court-fee in a suit to redeem property subject to more than one deed of mortgage, how to be computed.

1. The Court-fee upon a plaint in a suit for redemption or for foreclosure should be calculated upon the sum total of the principal money payable under the deeds by which those moneys are secured.

2. S. 17 applies only where there are two or more distinct causes of action.

Note.

(2) F.—11 O. C. 173.—

7 O. C. 158.

Pre-emption—Widow's right of pre-emption.

A Hindu widow who held as widow's estate as well as under a will was entitled to a decree for pre-emption.

7 O. C. 161.

Partition.—Question of title—Jurisdiction of Civil Court—Ss. 111 and 112 Land Revenue Act of 1901.

It is only when the Revenue Court goes into the merits of the objection that its order dealing with the objection is appealable as a decree.

7 O. C. 163.

S. 401 Indian Penal Code.

To establish a charge under S. 401, it is necessary to prove that the accused belonged to a gang associated for the purpose of habitually committing theft.

Notes.

R.—10 I. C. 23 (25)—The fact that several members of a gang of a wandering tribe were dishonest and did commit thefts and other crimes is not in itself sufficient to show that the purpose for which they had combined was to habitually commit theft.

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7 O. C. 166.

Art. 64 Limitation Act.—Account stated.

Where an account showing reciprocal demands between two parties is made up, a balance is struck, and the debtor signs an acknowledgment that the balance is due, there is an *account stated* which evidences a new contract and upon which a suit may be brought.

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7 O. C. 169.

Arrears of rent, suit for—Kabuliat executed on stamp payable for lease and registered—Transfer of Property Act, S. 107—Res-judicata.

The plaintiff-appellant sued the respondent for arrears of rent alleging him to be a lessee of certain villages. The respondent admitted he had executed a *kabuliat* in favour of the appellant, that he had been placed in possession of the villages and had collected the rents. The claim however was resisted on the ground that the relation of landlord and tenant, or thekadar, did not exist between the parties inasmuch as there had been no registered lease executed by the appellant in favour of respondent as required by law. In a previous suit for arrears of rent brought by the appellant against the respondent on the lease now in question, the respondent never raised the defence that there was no valid lease and a decree was passed for an amount agreed upon by the parties.

Held, that the *kabuliat* executed by the respondent was a lease within the meaning of S. 107 of the Transfer of Property Act and that the relation of landlord and tenant subsisted between the parties. Section 107 does not specifically lay down that the lease must be by a registered instrument executed by the lessor, and having regard to the prevailing practice in these provinces, and S. 2 (16) of the Stamp Act, a duly stamped registered instrument executed by the lessee and accepted by the lessor either in writing or by his acts, constitutes a good lease and establishes the relation of landlord and tenant between the parties.

Held further, that the defence raised in the case was barred by the principle of *res-judicata*.

Notes.

(1) R.—8 O. C. 197.—Lease includes *kabuliat*.

(1) Not F.—9 O. C. 296.—That a *kabuliat* is not a lease or equivalent of a lease.

7 O. C. 174.

Attachment—S. 266 C. P. C. = S. 60 Act V of 1908.—Allowance of ward granted by Court of Wards.

A sum allowed by the Court of Wards, in respect of the expenses of a ward is not a debt, and cannot be attached in execution of a decree.

7 O. C. 176.

Disqualified proprietor—Heritable wasiqa to be taken into account in ascertaining husbands' property for fixing dower—S. 5 Oudh Laws Act—Disposal by will of dower fixed by Court—Mahomedan Law.

1. That the disqualified proprietor was the real defendant, that no new party was added when the name of the Collector was entered on the record, and that therefore the suit was not barred by limitation.
2. That a heritable *wasiqa* should be taken into account in ascertaining the means of the husband under S. 5 Oudh Laws Act.
3. That under the Mahomedan Law, a wife could not dispose by will of more than ⅓ of the amount of dower fixed by the Court.

Note.

(2) **F.**—10 O. C. 241—The income of the husband from *wasika* and *amanati* notes should be taken into consideration.

7 O. C. 181.

Minor.

1. A *contract respecting minor's* estate made by his *natural guardian* is not void but voidable.
2. Grounds on which defendant can question validity of contract between plaintiff and third party.

7 O. C. 187.

Limitation for declaratory suit by landlord against tenant alleging under-proprietary till after order of Revenue Court cancelling notice of ejectment.

That the period of limitation should run from the date of the order of the Revenue Court cancelling the notice.

Notes.

App.—7 O. C. 372—Necessity of declaratory suit by landlord against tenant arises not from mere assertion of titles but by an adverse decision of the Revenue Court.

R.—12 O. C. 15—Mere allegation does not *per se* set time running against the landlord, there must be a direction adverse to him.

R.—14 O. C. 196.—It is not necessary that the Revenue Courts must uphold the assertion of the under-proprietary right before the landlord can maintain a suit in a Civil Court. It is enough if the decision of the Revenue Courts is adverse to the title of the landlord.

F.—10 I. C. 11 (13)—Not discussed.

7 O. C. 191.

S. 194 and 364 Cr. P. C.—Statement of accused, recording of, before evidence for prosecution.

To record the statement of an accused person under S. 164 Cr. P. C. before any sort of evidence for prosecution has been taken is contrary to law.

In examining an accused under S. 364 Cr. P. C., it would not be fair to put him such a question as "if you did not commit the murder who did it."

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7 O. C. 193.

Plaintiff—Addition of, after commencement of suit—S. 27 C. P. C.=O. I, r 10 (1) Act V of 1908.

That the suit was commenced through a *bona fide* mistake on the part of the plaintiffs and the addition of the plaintiff was proper.

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7 O. C. 199.

Objection by minor to validity of decree—S. 244 C. P. C.=S. 47 Act V of 1908.

The minor was not entitled in the execution department to challenge the validity of the decree upon the ground that no guardian *ad litem* had been appointed for her in the suit.

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7 O. C. 202.

Second Appeal in a suit for less than Rs. 500—Art. 31 Act V of 1887 S. 586 C. P. C.=S. 102 Act V of 1908.

That the suit for profits of immoveable property belonging to plaintiff wrongfully received by defendant fell within the latter portion of Art. 31; that the jurisdiction of the Small Cause Court was barred, and that S. 586 C. P. C. did not apply.

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7 O. C. 206.

Pre-emption—S. 9 Oudh Laws Act—Proprietor in one mahal to pre-empt land in another mahal when there has been perfect partition.

Where there has been a perfect partition in a village, a proprietor of one mahal has a right to pre-empt property in another mahal as against a person who has nothing to do with the village.

Note.

F.—7 O. C. 275.—Effect of partition whether severing members of village community.

7 O. C. 208.

Appelllate Court, power of, to set-aside order of lower Court putting complainant in possession of land—Code of Criminal Procedure S. 423 cl. (d) and S. 522—Indian Penal Code S. 447.

The accused was convicted of an offence under S. 447 of the Indian Penal Code and sentenced to pay a fine of Rs. 51. An order was also passed at the same time under S. 522 of the Code of Criminal Procedure for putting the complainant in possession of the land in dispute and for removing certain fencings which had been erected by the accused. The Sessions Judge quashed the conviction and sentence and set aside the order under S. 522 of the Code of Criminal Procedure.

Held, that under S. 423, cl. (*d*) of the Code of Criminal Procedure, the Sessions Judge had power to set aside the order under S. 322 of the Code of Criminal Procedure.

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7 O. C. 210.

Security for due performance of Appellate-decree—Ss. 253 and 545 C. P. C. = S. 145 ; O. XLI, r. 5 Act V of 1908.

The appellants having executed a security bond under S. 545 C. P. C., it was held that the respondent could enforce the bond by suit and was not bound to proceed in the execution department.

Note.

R.—11 O. C. 345—S. 253 C. P. C. does not apply to a person who gave security after the decree had been passed.

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7 O. C. 213.

Execution of decree—decree-holder taking possession of property not comprised in the decree—Jurisdiction—S. 244 C. P. C. = S. 47 Act V of 1908.

That possession of the property in dispute having been obtained simply and solely through the acts of the decree-holder, the Court executing the decree had no jurisdiction to determine whether the property was comprised in the decree or not, and that consequently it has no jurisdiction under S. 244 to to entertain the judgment-debtor's application.

7 O. C. 218.

Award made by Financial Commissioner.

That the Financial Commissioner when making his award was acting as a private gentleman, and that his award should not be treated as made by the British-Indian Association.

Note.

R. 9 O. C. 179—Rules of the British-Indian Association mentioned in 7 O. C. 218 referred to.

7 O. C. 229.

Execution of decree—Application for execution by benamidar of purchaser of rights of decree-holder. Right of Judgment-debtor.

The appellant claiming to have purchased the rights of the original decree-holder applied to the Court for recognition of the decree and stated that he would present a separate application for execution. The Judgment-debtors objected that the appellant was the *benamidar* of the purchaser of the decree and was therefore not entitled to take out execution. The lower Appellate Court decided this question against the appellant.

Held, that there was evidence to support the finding of fact and that the Judgment-debtors were entitled to insist upon the name of the real purchaser being entered on the record.

7 O. C. 231.

Lease—for quarrying lime-stone—S. 17 (b) and (d) and S. 49 Registration Act (III of 1877).

Held, that the deeds were leases and as such required registration and that they were inadmissible in evidence ; and that under S. 49 they could not legally be held to "affect any immovable property comprised" in them, nor could other evidence be given of their contents.

7 O. C. 234.

Suit in the name of an alleged minor by next friend—Minority disproved—Amendment of plaint—Suit by next friend when plaintiff not a minor, an irregularity.—

In a suit instituted in the name of plaintiff as a minor by his mother and next friend, the defendants proved that he was not a minor

when the suit was instituted and urged that the suit should on this account be dismissed. It was proved that the plaintiff was cognizant of and approved of the institution of the suit and went with the next friend to instruct the pleader who drew up the plaint. *Held* that, under the circumstances there had been merely an irregularity which could be cured by amendment of the plaint and removal of the name of the next friend.

Note.

R.—11 O. C. 159—Suit instituted by minor without next friend should not be dismissed.

7 O. C. 237.

Pre-emption—Refusal to purchase—Sale of property more than that entered in the notice—Ss 10 and 11 Oudh Laws Act.

The plaintiff claimed pre-emption on the ground that the property sold was more than that entered in the notice.

Held that, the notice on the pre-emptor was not a good notice and he did not lose his right of pre-emption by refusal.

7 O. C. 239 (P. C.) = 26 All. 238.

Declaratory decree—Suit by reversioner against Talukdar's widow. S. 42 Specific Relief Act (1 of 1877)—Oudh Estates Act (1 of 1869).

A claim to a declaratory decree is not a matter of right but rests with the judicial discretion of the Courts.

Notes.

R.—8 O. C. 21 (22)—The facts in 8 O. C. 21 are different.

R.—8 O. C. 81 (82)—Where a more distant reversioner during the life-time of a nearer reversioner sued for a declaration that the alienation by a Hindu widow was invalid, *held*, that he was not entitled to the relief and that the death of the nearer reversioner after institution of the suit did not affect the case.

7 O. C. 243.

Suit for possession—Mortgaged-property sold twice in execution of decrees on prior and subsequent mortgages—Purchasers—S. 85 Transfer of Property Act.

A purchaser at a sale held in execution of a decree for sale on a *first mortgage* made by a person in possession of property, the

decree having been obtained in strict accordanoe with S. 85 of Act IV of 1882, is entitled to possession as against a purchaser at an *earlier sale* held in execution of a decree obtained on a *second mortgage in defiance* of the rule laid down in that section.

Note.

Vide—29 All. 339 (P. C.)—Irrespective of the doctrine of *lis pendens* it appeared from the circumstances of the case that the defendant was cognizant of the first mortgage, of the decree made on the basis of it and of the sale proceedings which took place in execution of the decree

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7 O. C. 248 (P. C.) = 26 All. 339.

Ss. 8. 13, 14, 15 and 22 (6) Oudh Estates Act (I of 1869)—Meaning of 'brothers'—Marginal notes and sections of Acts.

P a taluqdar, whose name was entered after his death in List I and II, made over his estate by will to his younger son B, who died intestate, leaving two widows. The sons of B's elder brother, the eldest male lenial descendants of P, sued the widows of B for proprietary possession of the estate on the allegation that on B's death intestate he came into the property under cl. (6) of S. 23. *Held* (1) that S. 14 did not apply and therefore the plaintiff was not entitled to succeed.

(2) The expression "would have succeeded" in Ss. 13 and 14, must be confined to persons in the special line of succession that would have been applicable to the particular case if the transferor or testator had died intestate and the death had occurred at the date of the transfer or, in the case of gift by will, at the time when the succession opened.

(3) That B was not a *legatee* as the bequest in his favour came into operation before that Act was passed.

(4) The word 'brother' in cl. (6) S. 22 includes brother born of a different mother.

(5) That marginal notes to the sections of an Act cannot be referred to for the purpose of construing the Act.

Notes.

(3) **F.**—8 O. C. 45.—According to the law as laid down in 7 O. C. 248, the plaintiff's case did not fall under the provisions of that Act, but was governed by Mahomedan Law.

(3) **F.**—8 O. C 317.—That the plaintiff having succeeded as legatee before the passing of the Oudh Estates Act was not a legatee within the meaning of that Act.

R.—XXII Indian Cases 577.—

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7 O. C. 254 (P. C.)=26 All. 119.

Ss. 8 and 10 Oudh Estate Act 1869—Succession to taluqdar's estate not held under Sanad by Government—Entry of taluqdar's name in lists prepared under Oudh Estates Act after his death—Mahomedan Law—Interpretation of statute.

Held that, the Court could not construe Ss. 1 and 10 so as to deprive the successors of the estate of a person who had died before those sections came into operation of rights which they acquired on his death. *Held* therefore, that when M (a taluqdar) died he had acquired a permanent hereditary and proprietary right recognised by the Indian Governmant in the estate in question ; but that the succession to them not having been altered by any *sanad* was governed by the ordinary Mahomedan Law which was the only law applicable to the case.

Notes.

Dist.—8 O. C. 45.—In 7 O. C. 254, the Talukdar had not received a Sanad at all and what was held was that retrospective effect could not be given to the Act so as to alter a succession which had already been effected under Mahomedan Law. In 8 O. C. 45, the succession was not certainly under Mahomedan Law. The whole estate was taken under a will. The devise was therefore under the Sanad.

R.—9 I. C. 83 (93).—A Court is bound to treat the entry of a taluqdar's name in the list prepared under S 8 of the Act as conclusive evidence of the fact that the person whose name is so entered is a taluqdar within the meaning of the Act—Vide 20 I. C. 73.

R.—26 A 393.—

7 O. C. 259.

Redemption, suit for—Decree of Settlement Court giving proprietary possession—Adverse possession art. 142 Limitation.

The defendants admitted that there had been a mortgage but they alleged that it was a mortgage by conditional sale for 4 years only and by it they had acquired an absolute title as the money was not paid within that term. At the regular settlement in Oudh, N, the predecessor of the defendants, applied for settlement. The plaintiffs' predecessor set up a counter claim. N's, claim was decreed by the Chief Commissioner in 1863, and formal possession was given to N in 1864 and her name was entered as proprietor in the *khewat*. Subsequently the plaintiffs' predecessor accepted the situation and obtained decrees for *sir* in 1865.

Held, that suit was barred by article 142 Limitation Act.

On the contention of the plaintiffs that the Chief Commissioner dismissed their predecessor's appeal in view of the rule of limitation then in force and that by Act XIII of 1866, their claim was revised and must be heard on its merits, it was *held* that the plaintiff's predecessors did not sue then for redemption of the mortgage so they could not say that such a suit of theirs was dismissed on the ground that it was barred by the rules of limitation then in force; and not having, while Act XIII of 1866 was in force, taken any steps to revive their former claim to settlement and have it heard on its merits, the plaintiffs could not now plead that the enactment had made the decisions of Settlement Court against them wholly in operative.

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7 O. C. 265.

Usufructuary mortgage by tenant having non-transferable right in land, Relinquishment of holding by tenant after transfer of it to a third party, Ss. 5, 20 and 36 Oudh Rent Act—S. 6 (i) T. P. Act.

A *qabzadar* mortgaged some of his land to the defendant and subsequently relinquished the holding to the plaintiff who was the owner of the village. The plaintiff brought a suit to eject the defendants in the Civil Court.

Held, by Wells, O. J C. that the defendant's mortgagors, not being under-proprietors, were tenants under the Oudh Rent Act; that as such, they were entitled under S. 20 of the Act to relinquish their holdings at the end of any agricultural year; that the relinquishment by them put an end to the tenancy; and that the plaintiff's claim should be decreed.

That the decree of the Settlement Court gave the mortgagors an occupancy right, not a right of the nature described in S. 5 of the Oudh Rent Act, which arises in a particular way, but a right to occupancy in the ordinary meaning of the word, and a transfer of such a right is of no effect with reference to S. 6 (i) of the Transfer of Property Act.

Held, by Chamier, A J. C. that under the decree of the Settlement Court, D obtained a non-transferable right to hold the land at a fixed rent and that the usufructuary mortgage of the land made by his successors in favour of the defendant was a transfer which as against the landlord was invalid and inoperative. A tenant with a right of occupancy or a tenant holdiug under a decree of Court in Oudh is in a different position from that held by a tenant for a term under a deed. The latter cannot relinquish his tenancy except in accordance with his lease whereas a tenant with a right of occupancy under S. 5 of the Oudh Rent Act or a tenant holding under a decree of Court, or 'statutory tenant under S. 36 may under S 20 of the Act relinquish his tenancy at the end of any year by giving his landlord notice on or before March 15th.

Notes.

Dist.—18 I. C. 383.—In 7 O. C, 265 there was no evidence to indicate that the landlord had consented to or acquiesced in the mortgage.

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7 O. C. 275.

Pre-emption—Perfect partition—Village community—S. 9 Oudh Laws Act 1876.

A village was by perfect partition divided into 4 mahals. One of these mahals was the property of B and was placed under the management of the Court of Wards which sold it to the respondents. Thereupon the appellant who was the owner of the other mahal brought a suit for pre-emption.

1. *Held*, That in the village in suit there was only one village community, *perfect partition* notwithstanding.

2. That residence in the village is not a necessary qualification for membership of a village community.

Notes.

(2) **R.**—12 O. C. 1—Meaning of "village community"—Inhabited sites not necessary for existence of village community.

(1) **F.**—13 O. C. 202—A grove-holder is not a member of the village community.

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7 O. C. 284 (P. C.) = 26 All. 574.

Pre-emption—Owner of separate chak in mahal, right of, to pre-empt—Co-sharer of mahal—Non-resident co-sharer—Oudh Laws Act 1876, S. 9—Oudh Revenue Act (XVII of 1876) Ss. 108 and 112 and 121.

In a suit for pre-emption, there was no question about the relationship of the plaintiff, and the only dispute was whether his connection with the village in suit was such as to give him the right of pre-emption. The material facts were that he was owner of a *chak* of 33 acres in the village, and, by the settlement under which he held, he paid his share of the revenue through the lamberdars of the village; but he did not reside in the village.

Held, that the plaintiff was a co-sharer of the whole mahal in the sense of S. 9 of the Oudh Laws Act, 1876; and that having regard to Ss. 108, 112, and 121 of Act XVII of 1876 (Oudh Land Revenue Act) the fact that the share of the plaintiff in the mahal consisted of a separate *chak* but did not make him the less a co-sharer in the sense of this Act, and the circumstance of his being non-resident did not make any difference.

Notes.

R.—10 O. C. 86—7 O. C. 284 is not an authority for holding that a person, who owns a plot of land on which revenue is not assessed is not a co-sharer.

Dist.—10 O. C. 225—The owner of plots of land in *abadi* is a member of the village community.

7 O. C. 287 (P. C.) = 27 All. p. 1.

Cancellation of deed—Fraud—Insanity, weakness, helplessness—Commutation of insufficient case of insanity into a case of weakness—Fraud.

In two suits for the cancellation of two mortgage-deeds granted to the respondents by F, the plaintiff's father, the ground of action was that F was insane and that the deeds were obtained by fraud. The evinence produced by the plaintiff went to prove insanity in its crudest and most palpable form. The court of first instance held that F was not insane, but that he was helpless and weak minded and that the respondent had defrauded him. The Court of the Judicial Commissioner dismissed both suits.

Held, that is is not legitimate to commute an insufficient case of insanity into a complete case of weakness when the type of insanity connoted in the evidence is something quite different.

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7 O. C. 290 (P. C.) = 26 All. 581.

Ss. 4, 32, 90 Evidence Act.

Held, that under S. 90 read with with S. 4, the Court has discretion to call for proof of a document, although it may be 30 years old and purports to come from proper custody.

(2) On a question of relationship, the statement of certain witnesses who were supposed to be speaking from information derived from others were sought to be made admissible under S. 32 Evidence Act The witnesses did not state the persons from whom they derived that information nor at what period of time they derived it. *Held* by the Judicial Committee that the Courts in India had properly applied the provisions of S. 32, in rejecting the evidence.

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7 O. C. 292.

Pardanashin women.

Rule regarding cases in which pardanashin women are sued upon deeds alleged to be executed by them. If she admits having executed the deed she must plead definitely that it is not binding upon her so as to give the plaintiff notice of the position which she intends to take. If she denies having executed the deed the

plaintiff must prove not only the factum of mechanical execution by her but also that she signed it with knowledge of its bearing upon her interest.

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7 O. C. 299.

Review of Judgment—Application for review filed before filing of appeal—S. 623 C. P. C.—S. 114, O. XLVI, r. 1, Act V of 1908.

1. S. 623 C P. C. means that a person considering himself aggrieved by a decree or order cannot apply for a review of judgment if either he himself has appealed or any other person has appealed on a ground common to the appellant and himself or any other person has filed an appeal to which he has been made a respondent and in which he can under S. 561 C. P. C. or otherwise present to the appellate Court the case on which he wishes to apply for review.

2. As a matter of practice however if after an application for review has been filed, an appeal is filed on a ground common to the appellant and the applicant or an appeal is filed in which the applicant can file objections under S. 561, C. P. C., the Court to which the application is made should decline to proceed with the application until the appeal has been heard and when the applicant has been made a respondent and can obtain the relief which he requires by means of objections under S 661 should require him to file such objections.

Note.

(2) **F.**—14 O. C. 108.

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7 O. C. 303.

Pleader—Refusal to accept notice of date of hearing—Ss. 36, 39 and 40 C. P. C. — (O. III rr. 1, 4, 5, Act V of 1908).

1. That service on a duly appointed pleader is equivalent to service on his client and that a pleader cannot withdraw merely by writing on a notice that he no longer appears in the case.

2. S. 40 C. P. C applies as much to advocates as to any other persons coming within the definition of pleader in S. 2 C. P. C.

7 O. C. 307.

S. 99 T. P. Act—S. 294 C. P. C. = O. XXI, r. 72 Act V of 1908—Ss. 88 and 90 Trusts Act—Purchase of mortgagor's rights by mortgagee at sale in execution of sale of third party—Fair price—Leave of Court to bid at auction.

1. That the purchase of the mortgagor's right by his mortgagee extinguished the mortgagor's right to redeem, and that therefore the mortgagor, had no rights which could be put up for sale in execution of the decree held by the appellants.

2. A mortgagee does not avail himself of his position as such merely by bidding at an auction for his mortgagor's property, nor does he gain an advantage for himself when he pays a fair price for the property; such a purchase has the same effect as a purchase made by a stranger Ss. 294 C. P. C. and S. 99 T. P. Act does not apply.

Note.

R.—8 O. C. 327.—A sale in contravention of S. 99 T. P. Act is not void but voidable.

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7 O. C. 312.

S. 25 Oudh Laws Act—Mortgage of right of occupancy sold in execution of decree S. 5, Oudh Rent Act.

A person to whom a holding has been reserved under S. 25 Oudh Laws Act, has nothing but a right to cultivate and occupy, and though his rights are not governed by S. 5 he is in no better position than an occupancy tenant to whom that section applies. *Held*, therefore, that the mortgage was invalid.

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7 O. C. 314.

Ss. 67 and 99 T. P. Act—Suit by mortgagee for sale of equity of redemption of mortgaged-property for amount due under a simple money-decree.

A suit by mortgagee for sale of equity of redemption of mortgaged-property for amount due under a simple money-decree is not maintainable.

The result of the enactment in S. 99 is that a mortgagee who has attached the mortgaged-property in execution of a decree for the satisfaction of a claim arising under the mortgage, *e. g.* a.

claim for interest may notwithstanding S. 43 C P. C. include that claim in any suit that he may be able to bring under S. 67 of the Act and that a mortgagee who has attached the mortgaged-property in execution of a decree for the satisfaction of a claim not arising under the mortgage must first sue on his mortgage under S. 67, if his mortgage admits of such a suit, so that the mortgagor may exercise his right of redemption. Then if such a suit is brought and the mortgagor or any other person redeems the mortgage it ceases to stand in the way of the execution of the money-decree and the erstwhile mortgagee may if necessary proceed to enforce his attachment by sale of the property; if on the other hand the mortgage is not redeemed then the property is put up for sale and the creditor may if necessary enforce his claim under the attachment against the surplus proceeds if any, or if only a portion of the mortgaged-property has been sold against the portion remaining unsold.

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7 O. C. 319.

Suit to set aside fictitious sale-deed—Art. 91 Limitation Act.

That as the sale-deed was not intended to be operative but was a mere fictitious transaction no suit to set it aside was necessary under art. 91 Limitation Act.

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7 O. C. 321.

Jurisdiction of a Subordinate Judge empowered to try appeals, as regards appeals preferred to his predecessor—Receipt unregistered

1. That power to hear and decide appeals conferred on B, under the Notification of 29th March 1901 included the power to hear and try and dispose of appeals preferred to his predecessors.

2. That as the receipt did not purport to extinguish the mortgage and was not relied on for any other purpose than to prove the payment of a certain sum of money, it did not require to be registered.

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7 O. C. 327.

S. 65 cl. (e) Evidence Act.

That a registered mortgage-deed is a public document and can be proved by a certified copy.

Note.

Over.—7 O. C. 365—A certified copy of a private document cannot be used to prove the contents of the original.

7 O. C. 330.

Redemption.—Second mortgagee bringing property to sale without offering to redeem first mortgage. Purchase of the equity of redemption by first mortgagee-merger.

That the rights of the first mortgagee did not, merge into those of the mortgagor by purchase of the equity of redemption and that he was entitled to have his mortgage redeemed

2. That the second mortgagee is not bound to offer to redeem the first mortgage before bringing the property to sale.

7 O. C. 334.

Ss. 145 clauses (1) and (3), 435 and 439 Cr. P. C.

In a Criminal Case it was contended that the Magistrate divested himself of jurisdiction by not having in his order, made under S. 145 (1), Cr. P. C., stated the grounds for his belief that there was likely to be a breach of the peace, and by not having under clause (3) of that section served a copy on the applicant. *Held*, that the matters referred to were mere irregularities in the proceedings and did not in the least affect the question of jurisdiction.

7 O. C. 336.

Suit by a co-sharer for demolition of well or building—Remedy of non-consenting co-sharer against the person building with the consent of other co-sharers.

When a co-sharer has constructed a building or a well on land jointly belonging to him and other co-sharers without their consent, they are not entitled to have the well or building removed unless they can show material damage or unless they have taken measures in time to prevent construction; but their remedy is by partition. And the same principle applies to the case of a person constructing a well on land jointly belonging to several co-sharers some of whom do not assent to its construction.

Notes.

R.—11 O. C. 355.—The other co-sharers will be entitled to have the building removed if they have objected to it at the first possible opportunity and no great injury will thereby be caused to the co-sharer who has erected the building.

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7 O. C. 338.

Security to keep the peace after conviction on a Summary trial—S. 106 Cr. P. C. —S. 323 Penal Code—Imprisonment in default of furnishing security not a part of a substantive sentence—Assault.

There is nothing in the law which prohibits the making of an order under S. 106 Cr. P. C. after a conviction under S. 323 Penal Code, on a summary trial, and the imprisonment to be undergone in default of furnishing security is not a part of a substantive sentence.

The sentence of imprisonment in default of furnishing security not being in itself appealable does not become so because the person convicted has been ordered to find security to keep the peace.

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7 O. C. 340.

Suit for rent of land occupied without consent of landlord—Jurisdiction as to question of title raised in a rent suit.

It is the duty of a Revenue Court to decide every question raised in a rent suit an adjudication on which is necessary for the decision of the suit, although its decision may not be binding upon the parties in the Civil Court.

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7 O. C. 342.

S. 50 Registration Act—Priority of mortgage executed subsequent to, over deed of gift executed prior to passing of Registration Act.

That a mortgage-deed executed and registered in 1892 could not be allowed to prevail against an unregistered deed of gift executed in 1865 before the passing of the Registration Act.

S. 50 of the Registration Act ought not to be construed with retrospective effect so as to disturb titles acquired at a time when there was no law of registration in force in the Province.

7 O. C. 345.

Review—Ss. 623 and 626 C. P. C. = S. 114; O. XLVII, rr. 1, 4, Act V of 1908 Appeal—Court-fee on appeal

1. When the admission of an application for review of judgment is not challenged on any of the grounds stated in S. 626 C. P. C., it can not be challenged in appeal at all.
2. A Judge who hears the case in review is not bound by the terms of the order admitting the review, and if the procedure adopted by him in hearing the case in review is irregular it is the duty of the Appellate Court on appeal to decide the case upon its merits
3. When appellant seeks to escape payment of a sum decreed against him and to recover a sum from respondent, the Court-fee should be calculated on the sum decreed against him plus the sum sought to be recovered.

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7 O. C. 351.

Suit for value of crops distrained for arrears of rent by sub-tenant against tenant—S. 108 (c) Transfer of Property Act—Damages caused by reason of contract.

On a suit by sub-tenant for value of the crops distrained.

Held, that as there was no damage caused to the plaintiff by reason of some contracts express or implied nor the plaintiff had at the time of the distraint paid the rent reserved by the sub-lease for the period for which the arrears realized by the distraint were due nor the landlord who had interfered was a representative of the lessor, the plaintiff had no cause of action.

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7 O. C 354.

S. 5 Lunatic Estates Act (XXXV of 1858)—S. 32 Evidence Act. Admissibility of certificate of a Civil Surgeon.

A report or a certificate by a Medical expert who was not called as a witness as to the mental capacity of an alleged lunatic given in the course of, and for the purpose of a case is not admissible in evidence in a contentious proceeding either under S. 32 of the Evidence Act or under S. 5 of the Lunatics Estates Act (XXXV of 1858).

7 O. C. 359.

Pre-emption—Extension of time for payment of price by Court of appeal.

A plaintiff in a pre-emption case cannot by filing an appeal obtain an extension of the time fixed for payment of the price.

A Court of appeal has power to extend the time for some special reason.

An appellant in a pre-emption case who wishes to have the time for payment of the price extended is not bound to put a separate written application to that effect but may make the request at hearing.

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7 O. C. 362.

Suit against co-sharers for possession of shamlat land and demolition of construction thereon blocking a road—Second appeal.

On the contention that the plaintiff having claimed exclusive possession was not entitled to a decree for joint possession, it was *held* (1) that even if he had done so the Court should not on that ground interfere in second appeal with the decree for joint possession if on other grounds the plaintiff was found to be entitled to such possession.

2 On the finding that the road had been blocked to some extent, it was *held* that the plaintiff was entitled to the relief prayed for as the damage could not be remedied by a partition.

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7 O. C. 365.

Certified Copy of registered document, admissibility of—Public document—Ss. 65 (e) and (f) Evidence Act and 74 (2) Registration Act.

A private registered document does not become a public document; and a certified copy of it can not be used to prove the contents of the original.

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7 O. C. 369.

Award—S. 525 C. P. C. = The second schedule of Act V of 1908, suit for division of joint property.—Art. 113 Limitation.

1. The fact that an award has not been filed in Court does not make it invalid, the provisions of S. 525 being not imperative.

2. A suit to enforce an award cannot be treated as a suit for specific performance of a contract within the meaning of art. 113.
3. That where by an arbitration a property has been awarded jointly to some members of the family, a suit can be brought by any of such members against the others for the division of that property alone without including the property which jointly belonged to the whole family.

7 O. C. 372.

Adverse title, by tenant assertion of—J under-proprietary right—Jurisdiction adverse possession not sufficient to create under-proprietary right.

1. When on the basis of an assertion of an adverse title by the tenant, an order adverse to the landlord has been passed by the Revenue Court, the landlord will be required to file a declaratory suit.
2. When it was proved that a person was holding under a decree which it was alleged created a perpetual lease in his favour, and that he could not claim under-proprietary rights because he or his ancestors had never been proprietors, a mere assertion on the part of the lessee during the currency of the lease that he was an under-proprietor could not create an under-proprietary right in his favour by adverse possession.

Notes.

(1) R.—12 O. C. 15.—Cause of action for declaratory suit by landlord against tenant setting up under-proprietary title.

R.—10 I. C. 11.—(Not discussed).

(2) Diss.—12 O. C. 164.—In the judgment in 7 O. C. 372 pp. 378, 380, the remarks suggesting, that a Civil Court has jurisdiction in such cases to determine whether or not a lease has expired and make a declaration as to the incidents of a tenancy, are dissented from.

(1) Exp.—14 O. C. 196.—It is not necessary that the Revenue Court must uphold the assertion of the under-proprietary right before the landlord can maintain a suit in a Civil Court. It is enough if the decision of the Revenue Courts is adverse to the title of the landlord.

(2) Dist.—16 O C. 163.—The principle laid down in 7 O. C. 372 can have no application where the suit is one for possession and not merely for a declaration.

8 O. C. 1.

Suit for rectification of mortgage-bond—S. 31 Specific Relief Act (I of 1877.)

That the alleged mistake (that instead of $2\frac{1}{2}$ Biswas share by mistake only $1\frac{1}{2}$ Biswas share was entered in the mortgage-bond) could not be regarded as a mutual mistake, and the suit, therefore, was not maintainable. A mistake on one side may be a ground of defence or a ground for rescinding, but not for correcting or rectifying an instrument. To rectify a contract when the mistake was unilateral and not mutual is in effect to make for one party a new contract different from what he intended.

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8 O. C. 5.

S. 21 (a) Specific Relief Act—Suit for recovery of money agreed to be paid on a mortgage—Acknowledgment of receipt of consideration—Damages—Breach of contract.

1. That the suit, for recovery of money left with the mortgagee to pay off the prior mortgage, was one to enforce a contract to lend money upon a mortgage and therefore having regard to S. 21(*a*) was not maintainable.

2. That the suit could not be treated as one to recover damages for breach of a contract, and that even if treated as such, the sum agreed to be paid could not be awarded as damages; specific damage must be proved

Notes.

(1) **R.**—10 O. C. 69.—Suit by mortgagee to recover mortgage-money not a suit for specific performance.

F.—11 O. C. 217.—Suit for recovery of money agreed to be paid on a mortgage is a suit on a contract to lend money, a suit for specific performance of such a contract was not maintainable.

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8 O. C. 11.

Procedure in a suit where one party offers to abide by the oath of the other.

In such a case the record of the Court should show what questions are to be decided in accordance with the oath. *Held*, that the record of the proceedings regarding the oath was insufficient and that the question of law should have been decided.

8 O. C. 13.

Lease—Suit for land in possession of successors of lessee—Ss. 22, 127, 108 (4) and (13)—Oudh Rent Act—S. 15 Transfer of property Act—Jurisdiction construction of lease—Compensation for improvements

On the contention of the defendant that the lease was a perpetual lease on the strength of which their father had constructed wells etc., that they could not be dispossessed from the land, and that the suit was not cognizable by the Civil Courts.

1. *Held*, that the lease was for life only.
2. That the defendants were not tenants.
3. That the suit was cognizable by the Civil Courts.
4. That the law as to compensation for improvement by tenants was not applicable.

Notes.

(2 & 3) **Dist.**—12 O. C. 164—In 8 O. C. 13.—The suit was for possession on the allegation that the defendants were trespassers. It was necessary for the Civil Court to construe those leases in order to determine whether the defendants were tenants or trespassers.

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8 O. C. 21.

Reversioner—Suit for declaration that sale by widow is not binding—Consent by some only of several reversioners to transfer—Form of relief prayed for—S. 42 Specific Relief—No legal necessity proved.

1. That the case was one in which a declaration should have been made, and that the terms of the prayers for relief presented difficulty in the way of making the declaration prayed for.
2. Consent to transfer by a widow given by some reversioners does not *per se* validate the transfer.
3. Consent of the plaintiff's father did not deprive the plaintiff of his right.

Notes.

(2) **F.**—9 O. C. 104.—The value of such consent depends upon the circumstances of the case.

(2) **F.**—14 O. C. 170—The legal efficacy of a consent given by reversioners is to be attributed to the fact that it constitutes evidence of the proprietry, if not the actual necessity, of the transaction.

8 O. C. 30.

Suit for declaration of under-proprietary right—Cause of action—Prescription.

That the plaintiff's cause of action to sue for a determination of his rights arose when the decree for enhancement of rent was passed against him and that he has required title by prescription.

Notes.

Dist.—11 O. C. 240—In 8 O. 30, the plaintiff had resisted a notice of ejectment on the ground that he was an under-proprietor, and the notice was cancelled. He continued to hold on the same terms until settlement when he was recorded as an occupancy tenant. Mr. Wells held that he had acquired a title as an under-proprietor by prescription. But in 11 O. C. 240, no under-proprietary title was claimed but land was claimed as a good deal of money had been spent on it.

R.—12 O. C. 164—If the suit to contest the notice of ejectment is dismissed on the ground that the plaintiff is a tenant he can sue for a declaration that he is under-proprietor of the land.

Dist.—8 I. C. 710—In order to enable the tenant to acquire under-proprietary right by prescription, the tenant must show that he put forward a claim to such right to the knowledge of the landlord and that an adverse order was passed by the Court in his presence.

F.—10 I. C. 11 (13)—The cause of action for the declaratory suit accrued on the date of the order passed by the Revenue Court, and as the suit had been brought immediately after the passing of an order by the Revenue Court it was well within limitation.

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8 O. C. 33.

Redemption suit—S. 86 Transfer of Property Act—Adverse possession.

That from the date when the time agreed upon under a foreclosure decree expired, the mortgagee held possession not as mortgagee but as an absolute owner and had acquired a title to to the property by prescription independently of the right to foreclosure which they had under the decree.

Notes.

Dist.—9 I. C. 431—In 9 I. C. 431, the possession of the mortgagee was not unlawful He had been put in possession by the consent of the mortgagor.

8 O. C. 37.

Resjudicata—Decision of question of law.

Held, that the previous decision that the bond in question was invalid was res-judicata, although that decision may have been erroneous.

Notes.

R.—10 O. C. 145.—That the decision in the first suit was in fact that the suit was premature and this decision being on a question of law was res-judicata between the parties.

8 O. C. 44.

Judgment—Procedure as to recording of—S. 25 Act IX of 1887.

That even when exercising Small Cause Court Jurisdiction a Court is bound to place on record something to show that it has considered the evidence adduced before it.

Note

R.—8 O. C. 290—The judgment of the Appellate Court should give all the particulars mentioned in S. 574 C. P. O.=O. XLI, r. 31 Act V of 1908.

8 O. C. 45.

Ss. 8, 11, 14, 15 and 22 cl. (6) Act I of 1869—Primogeniture Sanad - Mahomedan Law. Setting up new case in appeal.

1. That the estate was not taken out of the provision of Act I of 1869 by the fact that S's name was only entered in Lists I and II after her demise, and that the plaintiff's case was governed by the ordinary Mahomedan Law.
2. That the plaintiff could not be permitted to set up an entirely new case in appeal.

Notes.

(1) **R.**—16 O. C. 291—In 8 O. C. 45, it was *held*, that a person who succeeded to a *taluqa* before passing of the Oudh Estates Act of 1869

was not an heir or legatee, and that the estate of such heir or legatee would not be governed by Ss. 14 and 22 of Act I of 1869.

R.—22 I. C. 267—As to the history of the case.

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8 O. C. 55.

Witnesses—Procedure as to trial of Sessions cases.

It is not proper for a Sessions Judge to refuse to allow the prosecutor to call his witnesses in the order he chooses.

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8 O. C. 57.

Pre-emption—Payment of purchase money, out of Court—S. 15 Oudh Laws Act.

No payment except a payment made directly into Court should be held valid.

Notes.

F.—14 O. C. 85—The payment must be made in Court whether the decree does or does not provide for such payment into Court.

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8 O. C. 59.

S. 265 C. P. C. = S. 54 Act V of 1908. S. 69 Oudh Land Revenue Act, Jurisdiction of Civil Court—Suit for partition.

A Civil Court which passed a decree for partition of a share of an undivided estate paying revenue to Government has no power to order the Collector to effect the partition; but the decree-holder should apply to the Collector to have his share partitioned.

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8 O. C. 61.

Lease for life—Construction of lease.

At the first regular settlement, S claimed under-proprietary rights in a certain village against the Talukdar, and on his claim being dismissed, he obtained a lease of it at a certain annual rent In 1877 in a suit instituted by him to contest his liability to ejectment under a notice issued by the Talukdar a compromise was effected and embodied in a lease, dated the 8th June 1877. In this document it was agreed that S would remain in possession of the village on payment of rent, &c.,

that the relations which existed between him and the Talukdar should continue, and that the latter promised never to eject S so long as he paid what was due from him and remained obedient. *Held*, that the lease of the 8th June 1877 was for S's life only, and that the Talukdar became entitled to possession on his death.

Note.

Cite.—12 O. C. 164.—

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8 O. C. 65.

Cause of action—Abandonment of claim—Estoppel—Causes of action arising on different dates and referring to different properties—Code of Civil Procedure, Ss 13 and 43.

One M. B. died in 1865. His mother was recorded as sole owner of his estate, and after her death in 1870 M. B's two widows B (the plaintiff's sister) and I F. were recorded as owners. B died in 1888 and her half share was recorded in the name of I. F. In 1894, the plaintiff's nephews (sons of her brother M. A. and M, both of whom had died in 1890 and 1891 respectively) succeeded in obtaining possession of the estate. The plaintiff sued her nephews first in 1895 for arrears of maintenance based on an agreement with her brother, but the suit was compromised, and secondly in 1899 for her share as a sister in the property left by B, which was decreed in her favour. A few years after, she brought the present suit to recover (1) the whole share which M inherited from B, (2) the whole of the property which M inherited from his father.

Held, that the plaintiff was not bound to include the present claim either in the suit of 1895 or in that of 1899, as there were two different causes of action, nor would it be right to infer from the plaintiff's inaction in 1895 and 1899 that she intended to abandon her present claims.

Note.

R.—12 O. C. 347.—On the facts of 8 O. C. 65, the rule of res-judicata was clearly inapplicable.

8 O. C. 75.

Foreclosure decree—not made absolute—Ss. 88 and 89 T. P. Act.

It is necessary to have a decree under S. 88 made absolute before executing it.

8 O. C. 77.

Bond—Art. 80 sch. ii Limitation—Meaning of "single bond" and "bond subject to a condition" in art. 60 and 68 sch ii Limitation.

Bond executed on May 13th, 1900—The principal sum to be paid after 2 years and interest after every 3 months; in case of default the creditor entitled to realise the whole debt without waiting for the completion of the term. Only Rs. 4 paid in September 1900.

On a suit instituted on March 3rd 1900, *held*

(1) That the suit was barred by limitation

(2) The meaning of "single bond" in art. 66 and 'bond with a condition' in art. 68 explained.

Notes.

R.—14 O. C. 129.—In 8 O. C. 77, the relevant article was art. 80 of the first schedule Limitation Act (IX of 1908).

Dist.—16 O. C. 38.—In 8 O. C. 77, there was no convenant in that hypothecation bond expressly permitting the creditor to wait for the expiry of the longer term or to sue before the expiry as he thought proper where such a covenant exists, the question is not one of waiver, but of a pure contract and the creditor is entitled to adopt either of the two alternatives expressly contemplated by the bond arts. 65 or 80 applies to such cases.

8 O. C. 81.

Reversioner—Alienation by widow—Nearer-reversioner alive—S. 42 Specific Relief Act.

That as a nearer reversioner was alive when the suit was brought, the suit was not maintainable by the plaintiff in the absence of an allegation or proof of collusion. The fact that the nearest reversioner died after the suit was brought could not make the suit, which was not maintainable at the time of its institution, maintainable afterwards.

8 O. C. 84.

Jurisdiction—Determination of the effect of the terms of lease within the exclusio Jurisdiction of Rent Court.

1. That the defendant never having set up a proprietary or under-proprietary title, no cause of action had accrued to the plaintiff to seek, from the Civil Court, the declaration that the defendant had no proprietary or under-proprietary right in the land.

2. It was exclusively for the Rent Courts to determine whether the defendant was liable to ejectment under the terms of the lease.

Note.

R.—12 O. C. 84—Burden of proving under-proprietary right.

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8 O. C. 86.

Rateable distribution—S. 295 C. P. C. = S. 73 Act V of 1908.

That the object of S. 295 C. P. C., being to provide for rateable distribution of assets upon which two or more persons have equal claims, the words "*against the same judgment-debtor*" must be read as referring more to the property which a judgment-debtor represents than to the person against whom execution has been sought. The test of the application of S. 295, is not whether the decrees have been passed against the same judgment-debtor, but whether the applicants for a rateable share have applied for execution against the same judgment-debtor.

Note.

R.—10 O. C. 129.—Right of decree-holders to rateable distribution where decrees against estates of different persons but where same persons are judgment-debtors.

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8 O. C. 91.

Joint trial—Ss. 109, 110, 112 and 117 Cr. P. C.

That proceedings under Ss 109 and 112 against one person shall not be amalgamated with proceedings under Ss. 110 and 112 against another person.

Under S. 117 Cr. P. C, a Magistrate is not empowered to deal in one and the same enquiry with a person called upon to give security under S. 109, and another person called upon to give security under S. 110.

8 O. C. 94.

Custom—Proof of—Value of Wajib-ul-arz—S. 35 Evidence Act—Hearsay evidence—Admission of as regards relationship, custom—S. 32 (4) and (5) Evidence—Presumptions as to statement of a witness regarding facts occurred in his life-time and those occurred before his birth—Exclusion of daughters.

1. There is no objection to a party pleading that a custom obtains both in a family and in the tribe to which that family belongs, but he must prove that the custom is binding on the family whether he confines his evidence and plea to the family or not.

2. *Custom*—A custom to be valid must be ancient, continuous, reasonable and definite, and all this must be established by clear and unambiguous evidence.

3. Value of *Wajib-ul-arz* as record of custom—It is generally more valuable as a record of opinion of persons presumably acquainted with the custom than as an official record of custom; but if duly attested by Settlement officials and signed by Zemindars, it must be admitted in evidence under S 35 Evidence Act.

4. Hearsay evidence, upon the questions (*a*) whether A survived; (*b*) whether A at the time of his death was joint or separate; (*c*) the grounds of the opinion of a deceased person as to the existence of a custom, could not be proved under S. 32(4) and (5).

5. When a witness speaks to facts which occured in his own life-time in his own family village or neighbourhood, after he emerged from childhood, it may be presumed that he is testifying to his own knowledge, but when he speaks of instances of the application of the custom or particular facts which occurred before he was born and he does not give the source of his information, it cannot be presumed that he is repeating information acquired from his father or grandfather or some other person who would be likely to have been aware of the facts.

6. Documents relating to *gaddi-nashini* estates were admissible although they related to estates which devolved upon a single heir.

7. That among *Jangra Songarha Chauhans* daughters were excluded by brothers and male collaterals however remote.

Note.

(2) **F.**—15 O. C. 247.—A custom to be valid must be ancient, continuous, resonable and definite and all these elements must be established by clear and unambiguous evidence.

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8 O. C. 115.

Restitution against a person not party to decree passed on appeal, claim for—S. 583 C. P. C. = S. 144 (1) Act V of 1908.

Restitution cannot be obtained against a person who was not a party to the decree passed on appeal.

Note.

Dist.—16 O. C. 225—S. 144 of the present Code does not provide for the execution of the appellate decree but requires the Court of first instance, to cause such restitution to be made as may place the parties in the position which they would have occupied but for such decree as had been varied.

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8 O. C. 116.

Pleadings—Setting a new and inconsistent case not made out in the plaint.

In a case in which the plaintiff claimed Rs. 2,000 in Government Notes on the allegation that they had been transferred to her under registered deed by the defendant's father on account of her having refrained from making objections to the grant of a succession certificate to him, it was held that she could not afterwards be alloweed to abandon the case made out in the plaint and set up a new and inconsistent case that the deed was an agreement to transfer in consideration of natural love and affection.

8 O. C. 118.

Award by Collector without giving objector opportunity of stating his case before him Ss. 3 (c), 9, 11 and 18 Land Acquisition Act of 1904.

That having regard to the provisions of Ss. 3, 9 and 11 there was no legal award, and the Court should have refused to proceed on it until the provisions of the law had been complied with.

Note.

R.—9 O. C. 311—Four of the six appellants having refused to accept the award, the Collector made a reference to the District Court under S. 18 Land Acquisition Act which that Court returned in accordance with the decision in 8 O. C. 118.

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8 O. C. 121.

Pre-emption—Sale of transferable right in land—Subordinate or under-proprietary tenure—Ss. 6, 7, 9 and 10 Oudh Laws Act.

1. Pre-emption could be claimed in respect of a sale-deed which purported to create a *birt* right in favour of the purchaser subject to the payment of eight annas as Government revenue to the vendor.

2. That a right of pre-emption arises in the case of a sale whereby a person does not convey all his rights in the land but only carves out a subordinate tenure.

Notes.

Dist.—10 O. C. 348—The vendor in 8 O. C. 121 was himself the full owner of the property transferred but in 10 O. C. 348, the vendor was an under-proprietor—A perpetual lease is not a sale.

(1) **F.**—14 O. C. 41—That a *birt*-deed was the sale of a transferable right within the meaning of the Oudh Laws Act.

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8 O. C. 124.

Reversioner—Abatement of declaratory suit by reversioner on his death.

1 There being no privity of estate between one reversioner and another, each must claim in his own right from the last male holder of the estate.

2 That the right of a contingent reversioner to maintain a declaratory suit does not survive to the person who on the plaintiff's death becomes the next reversioner and that such a suit abates on the death of the original plaintiff.

8 O. C. 128.

Ss. 176 and 177 I. P. Code—Ss. 46 and 55 N.-W. P. and Oudh Land Revenue Act. (III of 1901).

To justify conviction under S. 46 (Act III of 1901) read with S. 176 Penal Code it must be proved that a particular Patwari or Kanungo asked a particular zamindar for information, and that information was either refused or when given was false. Unless a requisition to furnish information is made and the information is refused or, if furnished, is found to be false, no conviction can be sustained. It is no offence on the part of the zamindar merely to abstain from going to the patwari in order to mention to him that the rent of a tenant or tenants has been enhanced.

8 O. C. 132

Clog on equity of redemption—Deeds of further charge on property previously mortgaged—Bonds stipulating repayment of money borrowed within time fixed, for redemption of a previous usufructuary mortgage—Transfer of Property Act, 1882 Ss. 60 and 61—Foreclosure, suit for.

The predecessors in title of defendants mortgaged with possession the property in suit for Rs. 1,000 by a deed executed on 16th July 1891, and on the same day borrowed a further sum of Rs. 100 upon the same security. On the 13th June 1892, 25th March 1894 and 15th October 1895 they borrowed further sums. The deeds of those dates were registered and recited that the aforesaid property was held upon usufructuary mortgage by the plaintiff under the deed of July 16th, 1891, that the sums now borrowed should be paid with interest within the time fixed in the original mortgage-deed, and that the mortgagors should not be able to redeem the mortgage without payment of the amount due on the three subsequent deeds. The plaintiff brought a suit to foreclose his mortgage claiming the amount due under all five deeds. The defendants admitted that the money secured by the deeds of July 16th, 1891 was

due, but denied that the last three deeds created any further charge on the property.

Held, (per Wells, A J. C.) that the three last deeds which practically amounted to fresh mortgages were not a clog on the equity of redemption and having regard to Ss. 60 and 61 of the Transfer of Property Act, the plaintiff could enforce them against the defendants. The principle on which the prohibition of clogging mortgages is based is one of equity, that when a man is borrowing and pressed for money he may not have to assent to unreasonable terms, and therefore in the mortgage-deed there must not be any provision which fetters his right to redeem. But this principle does not apply to a case when a man has deliberately increased the amount of the mortgage-money by taking further loans, and equity will not deprive the mortgagee of his dues.

Held, (per Scott, J. C.) that the three last deeds did not create mortgages or practically amount to fresh mortgages, but that having regard to the provisions of S. 60 of the Transfer of Property Act they did not clog or fetter the defendant's equity of redemption and could be enforced.

Note.

(1) **Dist.**—8 O. C. 227, (232).—The Judgment in 8 O. C. 132 is only authority for holding that where there is some kind of a definite engagement that a mortgage can not be redeemed without paying off money due on some deeds of further charge, such further charge must be redeemed But in 8 O. C. 227 there was no definite engagement.

8 O. C. 140.

Sub-mortgagee—Effect of redemption of original mortgage.

That a person who accepts a sub-mortgage of property does so at the risk of his security disappearing by redemption of the original mortgage and that his interest in the property continues only so long as his mortgagor has interest in the property.

Note.

Not F.—12 O. C. 260.—That a mortgagor is bound by a sub-mortgage of which he has notice. He cannot destroy the security of sub-mortgagee by redeeming the mortgage.

8 O. C. 142.

Custom—Exclusion of females—Necessary proof—Wajib-ul-arz.

A custom can be proved otherwise than by evidence of instances in which it was acted on.

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8 O. C. 143 (P. C.)

Estoppel—Compromise—Decree of Court passed on basis of compromise.

When a party had absolutely renounced all his interest for valuable consideration and such renunciation was evidenced by a deed of compromise filed in the suit and by a decree of Court passed thereon, the party filing such compromise was estopped from subsequently challenging it.

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8 O. C. 145.

Under-proprietary right.—Burden of proof—Jurisdiction of Civil Courts.

1. The Civil Courts could not decide whether the defendant was an ordinary tenant or tenant with a right of occupancy; all that it could do was to settle whether the defendant had or had not an under-proprietary right.

2. That the fact that in the settlement records, the defendant was recorded as a tenant of the land raised the presumption that he was only a tenant and it was for him to rebut this presumption.

3. In order to establish an under-proprietary title it was necessary to prove.

   (1) that he had formerly been a proprietor,

   (2) that the land in suit had been held by him or some person from whom he inherited at some time since the 13th February 1844, and

   (3) that this had been held by such persons as *sir* or *nankar* when he was in proprietary possession.

Notes.

R.—9 O. C. 167.—Merely having been at some time a proprietor and having been allowed to hold since annexation at a favourable rate of rent will not entitle any one to a decree for an under-proprietary right or to separate plots of land as *sir*.

R.—8 I. C. 408.—The provisions of Sub-Settlement Act are not necessarily exhaustive, and an under-proprietary right can also be established by evidence of some specific grant or by an acknowledgement by the superior proprietor.

R.—8 I. C. 691.—Where a person at the time of regular settlement claimed certain land as *sir* and also certain *nankar* rights and was decreed by the Settlement Courts only heritable and non-transferable rights, subject to the payment of a fixed amount of rent: *Held*, that he could not subsequently claim under-proprietary rights with respect to the same land.

R.—14 O. C. 196.—An under-proprietary right by prescription must be proved in accordance with conditions laid down in 8 O. C. 145.

R.—15 O. C. 33.—A claimant to under-proprietary right on the basis of prescription is bound to prove his claim according to the provisions of the Oudh Sub-Settlement Act of 1866.

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8 O. C. 150.

Time requisite for obtaining copy—Application for copy to be sent by post—Limitation.

Where an application is made for a copy to be sent by post, and instead of the copy being so sent to the applicant merely a notice is posted on the board that the copy is ready, the applicant is entitled to have the time up to the delivery of copy to him deducted from the period of limitation.

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8 O. C 152.

Attachment, removal of—S. 276 C. P. C. = S. 64 Act V of 1908.

1. That the mere fact of an application for execution having been struck off the file does not necessarily imply that the attachment has been removed, nor can such removal be inferred from the mere fact that the decree holder erroneously applies for a fresh attachment. It is only where the execution case is struck off after a complete termination of the case and the execution proceedings are put an end to, that such an inference can be drawn.

2. That under the circumstances of the present case the attachment has not been withdrawn.

Notes.

R.—8 I. C. 727.—An order directing an application for execution to be struck off the file does not in itself necessarily involve the removal of the subsisting attachment.

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8 O. C. 155. (P. C.) = 27 All. 271.

Sale-deed—Voidable and not void—Failure of consideration—Champerty. Gambling in litigation—Plea of failure of consideration by third party.

1. That the appellant not being a party to the sale-deed could not challenge it merely on the ground of failure of consideration, and that it was not enough for a trespasser seeking to maintain possession against a purchaser from the rightful owner, to make out that the sale-deed in favour of the respondent was merely voidable. He must have also shown that it was absolutely void

2. That in the present case there was nothing extortionate, or unreasonable in the terms of the bargain, no gambling in litigation, and nothing contrary to public policy.

Notes.

R.—10 O. C. 173 (178)—Not discussed.

R.—14 O. C. 139—8 O. C. 155 does not touch this point because there had not been an out and out sale.

Dist.—16 O. C. 136—The ruling in 8 O. C. 155 is wholly different from 16 O. C. 136. In the former the vendor never impeached his deed as being a valid transfer of the property. On the contrary he had affirmed it. The case cannot be relied upon as a guide to the true construction of the agreement in 16 O. C. 136.

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8 O. C. 161.

S. 294 C. P. C. = O. XXI, r. 72 Act V of 1908—Step-in-aid of execution—Art. 179 (4) Sch. ii Limitation Act.

An application under S. 294 C. P. C. is a step-in-aid of execution.

8 O. C. 166.

Recovery of money upon an existing consideration which afterwards fails, suit for —Compensation for breach of an implied contract between mortgagor and and mortgagee—Arts. 97, 115, 116 and 120 Limitation—S. 68 Transfer of Property Act.

In 1869, K mortgaged a grove with possession to S and Z. In 1882, S having died sub-mortgaged the grove to B with possession. In 1883 heirs of S sued Z for half the share and got possession. In 1891, heirs of B transferred their rights to H. In 1899, K sued the representatives of S, Z, and B for redemption and obtained possession in December 1899. On 3rd March 1903 sued representatives of B to recover what was due under the mortgage of 1882.

Held, that suit was for the recovery of money upon an existing consideration which afterwards failed, and was barred under art. 97.

2. Where there is no express contract in a mortgage-deed that the mortgagor will secure the mortgagee in possession of the property, such an implied contract can only be derived from provisions of S. 68 of the Transfer of Property Act and the period of limitation for compensation for a breach of it is 3 years from the date of the breach under art. 115. *Held*, therefore, that the suit even if considered to be one for compensation for breach of contract, was barred when brought on the 3rd March 1903, the breach having occurred in December 1899.

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8 O. C. 172

S. 127 C. P. C. = O. XI R. 11 (V of 1908) and S. 136 C. P. C. = O. XI. r. 21 (V of 1908).

That no order under S. 127 C. P. C., can be passed until there has been an omission or refusal to answer interrogatories and that the order to answer interrogatories contemplated by S. 136 upon failure to comply with which the party in default is liable to have his defence struck out, is an order passed under S. 127.

8 O. C. 174.

Under-proprietor—Illegal ejectment by landlord—S. 108 (10) Oudh Rent Act Jurisdiction.

1. That a suit by an under-proprietor for the recovery of the occupancy of land from which he has been illegally ejected by the landlord is not cognizable by the Civil Court.

2. That the jurisdiction of the Rent Courts is not ousted by a denial on the part of the landlord of the status of the under-proprietor.

Notes.

(1) **Diss.**—9 O. C. 37—A suit for possession as under-proprietor by one who has been ejected as ordinary tenant is cognizable by a Civil Court.

(1) **R.**—12 O. C. 90.—When an under-proprietor does not allege possession or when his suit under S. 108 (10) is thrown out by the Revenue Courts he can sue in the Civil Courts.

8 O. C. 177.

Adverse possession—Possession of waste land, jungle land, tank land—Act 124 sch ii. Limitation Act—Presumption.

1. Where a talukdar sues for possession of waste land, jungle land, tank land &c., situate in his taluka, *prima facie* evidence of his possession within 12 years anterior to the date of suit must be given, but in determining this question evidence to physical acts of enjoyment and user indicating possession is not necessary.

2. The talukdar's title having been established, his possession if shown to have existed at some prior period should be presumed to continue until possession as taken of by another person in an exclusive manner.

A *talukdar* may be in possession of such lands without actual user of it, and a person does not necessarily disposses the owner of the land by plainting trees or by cultivation—To dispossess the owner, he must assert clearly that he claims the right to hold possession as owner, or his conduct must be such as to amount to an assertion of an intention to exclude the actual owner.

3. The meaning of the term "possession explained.

Notes.

(1) **F.**—9 O. C. 33—Presumption as to possession of waste land.

R.—8 I. C. 708—Structures of a purely temporary nature, made by a tenant for the convenience of his house, do not constitute such an assertion of right on the part of the tenant as would justify the conclusion that he meant by erecting such structures to set up a claim to the ownership of the soil, and can, therefore, be no evidence of adverse possession.

(1) **R.**—12 O. C. 58—That 8 O. C. 177 is an authority for the general proposition, that possession as a rule follows the title of the true owner it can be shown that he has been ejected from any specific plots—Possession of part is possession of the whole.

8 O. C. 184.

Mahomedan Law—Inheritance—Shia Mahomedan dying without heirs.

That the property of a Shia Mahomedan dying without heirs escheats to the Crown. The rules of Mahomedan Law that such property goes to *Mujtahids* &c., must now be considered obsolete.

8 O. C. 186.

Pre-emption—Right of pre-emptor to execute decree passed in favour of the vendor —S. 272 C. P. C.=O. XXI, r. 53 Act V of 1908.

S brought a suit, against B, a trespasser for possession of a house and land. During the pendency of the suit, S sold the village to A whose name was entered on the record as plaintiff. The decree was passed in favour of A. Before execution of the decree, M brought a suit for pre-emption against A and got a decree.

Held, that M was entitled to execute the decree passed in favour of A.

8 O. C. 189.

Application to set aside a sale—Purchaser of property after attachment S. 310A C. P. C.=O. XXI r. 89 (V of 1908).

A purchaser of property after attachment is entitled to make an application under S. 310A.

8 O. C. 191.

Minors—Compromise by guardian without leave of the Court—Act 144 sch. ii Limitation—S. 462 C. P. C.=O. XXXII, r. 7 Act V of 1908.

1. *Held*, That a suit for possession by a minor alleging that he was not bound by the compromise or decree passed thereon was governed by art. 144.

2. That the compromise and the decree thereon were under S. 462 void.

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8 O. C. 193.

Hard and unconscionable bargain. Undue influence—Money advanced under pressing necessity.

The fact that the money was advanced under pressing necessity would not make the transaction hard and unconscionable.

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8 O. C. 197.

Lease—Execution of S. 3 Registration Act—(III of 1877) Suit by lessee to recover rent from tenant—Lease includes kabuliat.

In a suit for recovery of rent, the defendant admitted in his written statement, that the plaintiff was lessor of the village but subsequently contended that no lease was executed by the lessor in favour of the plaintiff who has merely executed a *kabuliat* which was registered.

Held 1, That the defendant could not be allowed to deny that the plaintiff was lessee of the village.

2. That under the Stamp Act and S. 3 of the Registration Act 'lease' includes kabuliat and that it need not be executed by the lessor.

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8 O. C. 200.

Compensation.—Illegal enforcement of payment of Nazrana. Ss. 17, 108 (9) Oudh Rent Act—Jurisdiction.

The term 'illegally enforced' cannot apply to something which is to be done by process of law.

To realise a sum as *Nazrana* under a threat of ejectment is not "illegal enforcement of payment of rent" under S. 108 (9).

The suit for compensation for illegal enforcement of payment of rent under a threat to eject the plaintiff is not cognizable by a Rent Court.

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8 O. C. 202.

Pre-emption—Right of auction purchaser to pre-empt property sold to another person prior to confirmation of sale—S. 316 C. P. C.=S. 65, O. XXI, r. 94 (V of 1908).

That a transfer of a share in a village did not give a right of pre-emption to a person who had been declared the purchaser of another share at an auction, but had not at the time of the transfer obtained confirmation of the auction sale or a sale certificate.

Note.

R.—10 O. C. 273—Right acquired by auction purchaser before confirmation of sale.

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8 O. C. 206.

Jurisdiction—Suit for profits against the heirs of Lambardar.

A suit for profits collected by deceased Lambardar against his son who himself is appointed Lambardar should be laid in a Civil Court.

Note.

App.—8 O. C. 257—Suit by tenant against landlord and his agent for compensation for illegal ejectment was not cognizable by the Civil Courts.

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8 O. C. 210.

Disqualified proprietor—Burden of proof in case of allegations of fraud and undue influence—Pleadings.

1 A Disqualified proprietor is not incompetent to borrow money.

2 The disqualified proprietor should prove that the transaction was unconscionable.

3 It is incumbent on the party who seeks to set aside a contract on the ground of undue influence or fraud, to give in his pleadings full particulars of the circumstances on which he relies as the

basis of his plea. It is not enough to assert that fraud vitiated the transaction.

4. If a contract at its inception and completion cannot be impeached as unfair, a Court cannot impeach it subsequently because a small pecuniary liability has grown into a big one.

8 O. C. 227.

Redemption—Construction of deed of further charge—Penalty in case of default in payment at the stipulated time.

1. Construction of deed of further charge.
2. That the penalty of Rs. 1/8 per day from the date of default was an unconscionable one and should not be enforced in full.

8 O. C. 233.

Redemption—Mortgage of 1849 in which no time for redemption was fixed. S. 3 of Act XIII of 1866—arts. 134 and 144 sch. ii Limitation Act—Res-judicata.—Admission of Counsel on point of law.

1. That an erroneous admission of the plaintiff's counsel before the Court on a point of law was not binding on the plaintiffs.
2. That Act XIII of 1866 did not apply where no time for redemption was fixed in the mortgage-deed and S. 3 of the Act did not bar the suit.
3. That art. 134 Limitation Act was no bar as the word "purchase" in that section did not include a 'mortgage'
4. That the suit having been brought after more than 12 years from the date of J's purchase was barred by art. 144.
5. That the suit which was brought by D (Manager of the Joint family) for redemption of the mortgage in 1868 and which was decided against him operated as *res-judicata* in the present suit.

8 O. C. 241.

Extension of time fixed in a decree.

The Court had power to extend the time laid down in the decree.

Note.

Dist.—16 O. C. 5.—In 8 O. C. 241, the decree was passed subject to plaintiff's taking out Letters of Administration within a cer-

tain period. A Court cannot extend the time fixed in a pre-emption decree for the payment of purchase money after the time fixed has expired.

8 O. C. 245.

Ss. 124, 125 and 126 Cr. P. C.—Security for good behaviour—Order passed without notice to parties.

The order of the District Magistrate cancelling an order of Deputy Magistrate (accepting security) without giving notice to the parties was illegal.

8 O. C. 249.

Building erected without sanction—S. 147 N. W. P. and Oudh Municipalities Act I of 1900—Second prosecution.

A person was convicted under S. 147 of the Act for failure to comply with a notice issued under S 87 (5) of the Act. As he failed to remove the wall in question, the Municipal Board served him with a fresh notice under S. 87 (5) and when he failed to comply with it prosecuted him again under S. 147. The Magistrate then sentenced him to pay a fine of one rupee a day till he removed the wall.

Held, that as the Magistrate at the first trial had refused to inflict a daily fine he was not competent to inflict such a fine on the second trial.

Note.

Diss.—11 O. C. 122—That the words "first conviction" in Ss. 132 and 147 make it clear that the Legislature contemplated a conviction for an original offence or disobedience of a lawful order and subsequent convictions for a continuation of or persistence in an original offence or disobedience—In 8 O. C. 249, the reason for setting aside second conviction was erroneous.

8 O. C. 251.

Costs—Second Appeal—S. 584 C. P. C.=S. 100 Act V of 1908.

A second Appeal lies against an order about costs only, if the order of the 1st Appellate Court is contrary to some specified law in the ordinary sense, and there is thus some ground for an appeal under S. 584 C. P. C.

8 O. C. 254.

Auction purchaser—Restitution of mesne profits to Judgment-debtor Ss. 244 C. P C. (=S. 47) 312 C. P. C. (O. XXI r. 92) 583 C. P. C. (=S. 144 (1) and 588 C. P. C. (=S. 104; O. XLIII r. 1).

1. That the question whether the sale was a valid one or otherwise was a question between the parties to the suit in which the decree was passed relating to the execution of the decree and as such was covered by S. 244 (c).

2. That the order setting aside the sale could be treated as a decree and the application under S. 583 C. P. C. was maintainable.

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8 O. C. 257.

S. 108 cl. 9 (c) Oudh Rent Act—Jurisdiction—Revision S. 622 C. P. C.= S. 115 Act V of 1908.

That S. 108 cl. 9 (c) excludes from the jurisdiction of Civil Courts, a suit brought by a tenant against his landlord and the agent of the landlord.

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8 O. C. 261.

Appeal—Dismissed in default on the adjourned date—Appeal treated as an application for revision—Ss. 556 and 558 C. P. C.=O. XLI, rr. 17, 19, (V of 1908).

1. Where the appellant did not appear on the adjourned date, the appeal should not have been dismissed in default but decided on the merits.

2. Where an appeal is dismissed on the adjourned date in default, the proper remedy is to apply for revision of the said order.

3. Appeal treated as an application for revision.

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8 O. C. 263.

*Arbitration—Reference by agent having no express power to refer—Subsequent ratification. Chapter XXXVII C. P. C.=*The second schedule.

1. That the Chapter XXXVII of the Code of Civil Procedure relating to arbitration applies also to execution proceedings.

2. Where the principal subsequent to the reference ratified the conduct of his agent, such ratification cured the defect in procedure.

Note.

R.—9 I. C. 412.—That the parties to the suit could ratify the reference to arbitration although the requirements of S. 506 C. P. C. of 1882 had not been strictly followed by the Court in the first instance.

8 O. C. 266.

Plaint—Amendment—New case.

1. An application for amendment of the plaint, so as to base his claim in the alternative, namely that, if the joint family, as alleged by him, was not proved, still under the ordinary Hindu Law, he as the only surviving brother, had preferential right to succeed, was allowed.

2. If the Court sees that the plaintiff is entitled to the relief which he claims, although on grounds other than those put forward in his claim, the Court should grant the relief, if the defendants are not thereby taken by surprise.

8 O. C. 270 (P. C.) = 27 All. 383.

Construction—Deed of trust of 1839—Meaning of the term "heirs" explained. Interpretation of a later deed by the help of a former deed.

1. That upon a proper interpretation of the deed of trust, the pension was to devolve upon the heirs in general and not only upon those who were also descendants.

2. That in construing a deed, reference could not be made to an earlier deed executed by the same person when the later deed did not embody or refer to the earlier document, nor were they contemporaneous, nor did they form part of the same transaction. Nor could the decisions on the earlier document afford a precedent for the interpretation of the later document when the language of the two documents was found to be entirely dissimilar.

Note.

(2) **R.**—24 I. C. (73)—It is dangerous to construe one deed by a reference to the terms and conditions entered in another unless the two form part of one and the same transaction.

8 O. C. 275.

Pre-emption—Sale when complete—Conditional sale—Limitation—Cause of action agreement to purchase—

After the sale-deed, dated the 4th February 1897, an agreement, dated the 16th March 1897 was entered into between the vendee and the vendor to the effect that if the purchase money was paid back till the 11th May 1903, the vendors would be entitled to get back their property. The money was not paid back by the vendors till the date fixed by the agreement. On the 26th April 1904, the present suit was instituted for pre-emption.

Held 1, That the suit was barred by limitation, the cause of action having arisen on the date of sale.

2. That if the effect of the agreement of March 1897 could be supposed to make the sale a mortgage by conditional sale, the plaintiff could not bring a suit for pre-emption until there had been a decree for foreclosure.

8 O. C. 278.

Fraud—S. 11 C. P. C. = S. 9 (V of 1908)—Plaintiff pleading his own fraud.

Where the lower Appellate Court without going into the merits of the case dismissed it on the ground that in view of the statement of the appellant who pleaded his own fraud, the suit was not maintainable.

Held, that the lower Appellate Court ought to have decided it on the merits.

8 O. C. 281.

Suit by objector for recovery of the price realized by sale of attached property. S. 283 C. P. C. = O. XXI, r. 63 (V of 1908).

Appeal—

An appeal lay from the decision of the first Court.

8 O. C. 283.

Pre-emption—Consideration, suit for recovery of a portion of—Res-judicata—Fraud—Rights and liabilities of pre-emptor. Relations of vendor and vendee.

One P executed a sale-deed in favour of the respondent for Rs. 2,500, a suit for pre-emption was brought in which P and the res-

pondent were parties. The pre-emptor claimed the property on payment of Rs. 1,400. P in her defence stated, that the sum of Rs. 2,500 was the true consideration and that she had received the entire amout. The pre-emptor got the decree on payment of Rs. 1,400 only. Subsequently P brought the present suit for recovery of Rs. 1,000 the balance of the consideration stated in the deed after giving credit for Rs. 100 her share of expenses in the pre-emption case.

Held, that the question what P had received and what she was entitled to was res-judicata between her and the respondent and the present suit was not maintainable.

Note.

R.—9 O. C. 308—Admission of vendor in sale-deed and written statement as to part payment of price by vendor—Decision of question as to payment of price between vendor and vendee in a suit by pre-emption.

8 O. C. 286.

Mortgagee—Suit by, for possession of the mortgaged-property—Default in payment of instalment—Cause of action, recurring.

That this was not a case where recurriug causes of action could be considered to have arisen every year in the month of Jeth; that there arose only cause of action under the terms of the mortgage-deed, it being in the month of June 1891 when the first default was made; and that having been brought after 12 years from that date was time-barred.

Note.

R.—14 O. C. 129—In 8 O. C. 286 claim was on a mortgage but in 14 O. C. 129, the suit is brought on the basis of an instalment bond.

8 O. C. 288.

Pre-emption—Deed purporting to ractify some mistakes regarding number and plots of land sold under a previons deed, but stating no consideration for rectification—Suit for pre-emption of new plots entered in—Limitation.

Held, that the latter document was not a sale-deed, as it did not purport to transfer anything to the vendee for a price, and that the suit was barred by limitation.

8 O. C. 290.

Judgment of Appellate Court—What it should contain—S. 574 C. P. C.= O. XLI, r. 31 (V of 1908).

The Judgment should give all the particulars indicated 574 C. P. C. *viz.*—

(1) The points for determination; (2) the decision thereupon; and (3) the reason for such decision.

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8 O. C. 293 (P. C.)=27 All. 655.

Alluvion and Diluvian—S. 4 cl. (2) Regulation XI of 1825—Oudh Laws Act.

1. That the law applicable to the case was contained in Bengal Regulation XI of 1825 which was made applicable to Oudh by the Oudh Laws Act, and the first point to be ascertained under the said Regulation was, who was the original owner of the lands in dispute.

2. The rule as to gradual accretion could not apply to cases in which by a sudden change in its course a river broke through and intersected an estate, separated a considerable piece of land from one estate and joined it to another without destroying the identity and preventing the recognition of the land so removed. In such cases the land, on being clearly recognized, shall remain the property of the original owner.

Note.

R.—28 All. 647—That an accession must be by gradual, slow and imperceptible means.

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8 O. C. 297 (P. C.)=27 All. 581.

Deed of Endowment—Right of trustee to recover money lent out of the profits of dedicated property—Trustee-ship—Succession—Religious endowment—Mahant.

That the money under the mortgages having been advanced from the profits of the endowed estate, and the plaintiff having succeeded as trustee and manager of the temple property, the suit brought by him to enforce the mortgages against the defendant was maintainable.

8 O. C. 302.

Suit for mesne profits—S. 92 Transfer of Property Act—Res-judicata.

If a mortgagor after a decree of redemption fails to get an account of the profits of the property taken up to the date fixed for payment, he is not entitled to bring a separate suit for mesne profits of the period for which he has failed to take such account.

Notes.

R.—12 O. C. 152—Subsequent suit for profits from the date of deposit to possession not maintainable.

R.—10 I. C. 11 (13)—Not discussed.

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8 O. C. 303.

Declaration as to right of redemption—Sale of equity of redemption—Art. 120 Limitation Act.

That a suit for a declaration of right cannot be held to be time-barred so long as the right to the property in respect of which declaration is sought is a subsisting right.

Notes.

F.—10 I. C. 11 (13)—Cause of action for a suit for declaration.

F.—20 „ „ 147—A suit for a declaration that a lease granted by a *Lambardar* is invalid against the plaintiff is within time if brought within 12 years of the date on which the execution of the lease became known to the plaintiff.

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8 O. C. 306.

Ss. 278, 283, 317 C. P. C. = O. XXI, r. 58—O. XXI, r. 63—S. 66 Act V of 1908 Benami purchaser—Res-judicata.

1 Under S. 317 C. P., no suit can be brought by a third party against a certified purchaser on the ground that such purchaser is not the real beneficiary owner.

2. That where a decree-holder attaches a particular property which is released from attachment on the objection of a third person, and no suit is brought under S. 283 C. P. C., the order releasing the property becomes conclusive and operates as res-judidicata

The decree-holder cannot by a fresh attachment under another decree of his against the same judgment-debtor reopen the question. The order passed in the first case so far as the decree-holder is concerned operates as *res-judicata* against him in the second case as well.

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8 O. C. 313.

Sanction to prosecute—S. 195 (c) Cr. P. C.—Ss. 465 and 467 Penal Code

In criminal proceedings under Ss. 465 and 467 Indian Penal Code no previous sanction was necessary as the original mortgage-deed had not been "produced or given in evidence," the complainant having given only secondary evidence of the same by producing a certified copy.

The word 'document' in S. 195 (*c*) Cr. P. C., refers only to the original.

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8 O. C. 317 (P. C.) = 27 All. 634.

S. 22 Oudh Estates Act (I of 1869)—Grantee—Legatee—Rule of succession Primogeniture sanad—Taluqdari Property—Non-Taluqdari property.

That B having succeeded as legatee before the passing of the Oudh Estates Act, was not a legatee within the meaning of that Act and consequently succession to the taluqa could not be governed by S. 22 of that Act.

That the Oudh Estates Act being inapplicable to the case, the succession to the taluqa was governed not by the ordinary rules of Hindu law, but by the terms of the *sanad* granted to G, in substitution for the earlier *sanad* in favour of G. S, and by the terms of that *sanad*, the taluqa descended on the death of the holder to the nearest male heir according to the rule of primogeniture. The defendant was therefore entitled to the taluqdari property on the death of B, to the exclusion of his widow.

Notes.

F.—14 O. C. 327—In 8 O. C. 317, the defendant had been most anxious to produce a certain *sanad* and he had in fact entered it in his lists of documents but in the Court of first instance he had failed to discover where the original was, while an

appeal was pending he obtained a certified copy which was accepted in evidence. The action of the Court was challenged on appeal to His Magisty in Council, but their Lordships *held*, that the Court was right in admitting the document.

R.—8 I. C. 422.—The word *gaddinashini* means as a rule, succession by a single heir. The rule of primogeniture in S. 8 of Act I of 1869 means lineal primogeniture which implies the succession of the senior line in preference to the junior line and consequently in cases of estates entered in Lists No 3 and 5 of the said Act, the Line prevails over the degree.

R.—22 I. C. 577.—The existence of a family custom of the kind referred to in S. 8 may in the absence of evidence to show that the other property was governed by a different rule of devolution, be regarded as relevant evidence tending to show that a similar rule applies to other property which the Talukdar may have acquired and left undisposed of at the time of his death.

R.—24 S. C. (73)—The omission to frame a specific issue cannot prejudice the parties in the trial if the issues framed are sufficiently wide and they are not taken by surprise.

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8 O. C. 327.

S. 99 Transfer of property Act—Sale of mortgaged-property by mortgagee in execution of his money-decree—Sale not void—S. 244 C. P. C. = S. 47 (V of 1908.)—Plaint treated as an application under S. 244 C. P. C.

1. Sale of mortgaged-property in execution of money-decree is not void but voidable at the option of the mortgagor.
2. That the sale could have been impugned in execution proceedings under S. 244 C. P. C. and not by a separate suit.
3. That the plaint in the suit could be treated as if it had been an application under S. 244 C. P. C.
4. That the sale not having been impugned but having been confirmed and the order confirming the sale having become final, it could not be set aside under S. 99.

Note.

R.—8 O. C. 409—Sale of ancestral land in excess of that sanctioned by Government.

8 O. C. 339.

Suit for declaration to receive offerings at the temple and for an injunction restraining the defendants from interfering with the receipt of such offerings —Jurisdiction.

1. That the suit was maintainable in the Civil Court.
2. That the right of receive offerings being a right of property, a suit for declaration and for perpetual injunction with respect thereto would lie;
3. That the plaintiff having acquired by prescription a right to perform certain duties and to receive consequent offerings, were entitled to maintain the suit; it being immaterial whether or not they were the owners of the temple or the idol.

8 O. C. 345.

S. 55 Transfer of Property Act.—Covenant as to title. Warranty, Fraud—Misrepresentation Caveat-emptor.

That in view of S. 55 T. P. Act, the doctrine of *caveat-emptor* does not apply to sales of land in India; and there being a special covenant protecting the purchaser against any latent defect in title, the plaintiff was entitled to recover his purchase money.

8 O. C. 349.

Hindu Law.—Reversioner—Right to redeem. S. 91 cl. (b) Transfer of Property Act.—Burden of proof—Ism-i-farzi.

1. That the reversioner has an interest in the right to redeem and is entitled to redeem as such.
2. That the burden of proving a particular transaction to be *ismi-farzi* lies on the person alleging it.

8 O. C. 353.

Occupancy right—Jurisdiction of Civil Court—S. 7A Act IV of 1901—S. 25 Oudh Rent Act—S. 25 Oudh Laws Act—Pleadings.

1. The parties must abide by the position which they have deliberately adopted.

2. That the jurisdiction of a Civil Court is not excluded simply because the defendant chooses to set up a plea which would oust the jurisdiction of that Court.

3. That the transfer having been effected prior to 1st January 1902, the defendants could not claim any occupancy right under S. 7A Act IV of 1901, nor could the plaintiff's claim such right under S. 5 of the Oudh Rent Act, because occupancy rights could only be claimed under that section by persons who had become tenants by the 24th August 1866, nor under S. 25 Oudh Laws Act because that section did not apply to private alienations.

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8 O. C. 356.

Injunction—Perpetual—Interruption of light and air.

That unless there was a substantial interference with light and air such as would reasonably interfere with the convenient and comfortable habitation of the house and would amount to a nuisance, the plaintiff had no right to complain.

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8 O. C. 361.

Redemption—Second suit for.

That where a Settlement Court decree did not fix a time within which the mortgage-money was to be paid, the decree was merely a declaratory decree and incapable of execution and in such a case a subsequent suit for redemption was not barred.

Notes.

R.—14 O. C. 100—Application for execution of decree in which no time is fixed for payment would be time-barred if not presented within 3 years from the date of the decree.

R.—15 O. C. 99—The decree fixed no date for the payment of *nankar*. The mere addition of the direction that the *nankar* was to be realized on the execution side would not alter its character as a declaratory decree.

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8 O. C. 370.

S. 244 C. P. C.=S. 47 C. P. C. (V of 1908)—Objection to execution of decree by transfer of judgment-debtor—Appeal—Meanings of "representative" and "or their representative"

1. That the transferee of the judgment-debtor was not his representative under S. 244 C. P. C.

2. That the order dismissing his objection was not appealable.
3. That the word "representative" means the legal representative.

Note.

(1) R.—14 O. C. 89.—The case in 8 O. C. 370 merely explains what was the meaning of representative of a judgment-debtor according to the provisions of S. 244 C. P. C. and it was decided that, that section only applied to persons who represent the parties to the suit upon the record and was not meant to refer to strangers to the decree setting up a title to the property in suit adversely to any of the parties to that suit.

8 O. C. 379.

Mahomedan Law—Construction of deed—Validity of Waqf.

That as the effect of the deed was to give the property in substance to the settler's family in perpetuity and not to charitable purposes, there was no valid *Waqf* under Mahomedan Law.

Note.

R.—11 48.—Wakf nominally for pious purposes but substantially to provide maintenance for a particular family is void.

8 O. C. 389.

S. 13 C. P. C. = S. 11 (V of 1908)—S. 43 C. P. C. = O. II, r. 2 Act V of 1908—S. 73 C P. C. = O. V. r. 10 Act V of 1908.—Withdrawal of suit with permission to bring a fresh suit.

1. That although the cause of action stated by the plaintiff was identical in both suits, yet as the only matter which was determined in the former suit was that the Civil Court could not give the relief therein sought, it was doubtful whether S. 13 or explanation II of that section could apply but that S. 43 of the Code barred the suit.

2. The "cause of action" means every fact which it is material to be proved to entitle the plaintiff to succeed and every fact which the defendant would have a right to traverse, and does not defend upon the right claimed. One test in deciding whether the cause of action in two suits is the same is whether the same evidence would support both.

That S. 373 C. P. C. did not bar the present suit.

Notes.

(1) **R.**—10 O. C. 44—First suit for possession dismissed as non-maintainable—Subsequent suit for declaration barred.

Dist.—13 O. C. 19—In 8 O. C. 389, the suit was barred inasmuch as he had claimed a remedy which he might have claimed in the previous suit based upon precisely the same cause of action. But in 13 O. C. 19 the causes of action were distinct.

8 O. C. 395.

Confession—Made to a person not a Police officer—Admission Ss. 21, 24, 25, 26 27 Evidence Act—Evidence of Magistrate to prove confession recorded by him S. 164 Cr. P. C.—Murder.

1. That the confession of the accused made to the residents of the neighbouring villages and to the District Magistrate was admissible in evidence against him.

2. Any fact discovered in consequence of an admissible confession can also be admitted against him.

8 O. C. 405.

Appeal—Ss. 244, 278, 283, 586, C. P. C.=S. 47—O. XXI, rr. 58, r. 63—S. 108.

On an objection to the effect that the house attached in execution of a decree of the Court of Small Causes against the husband of the objector was exclusively her property.

Held, 1. That the objection was governed by S. 244 C. P. C. (not S. 278 C. P. C.) and consequently an appeal could lie to the lower Appellate Court against the order of the Court of first instance allowing the objection.

2. That the suit being of a nature of Small Cause Court no second appeal lay.

8 O. C. 409.

Sale of land in excess of that sanctioned by Government S. 20 Oudh Laws Act—Attachment—Jurisdiction—Jurisdiction—Ss. 266 and 276 C. P. C.=S. 60—S. 64, (V of 1908).

1. That the Court has no jurisdiction to sell land in contravention of the terms of S. 20, and that if it does so, the purchaser acquires no title.

2. That an order of attachment cannot subsist after a sale has been confirmed.

8 O. C. 418.

Riot—Unlawful assembly—S. 154 I. P. C.—S. 190 and 556 Cr. P. C.

That in order to convict an accused person of an offence under S. 154 Penal Code, the following facts must be established:—(1) that an unlawful assembly or riot has taken place on the land owned or occupied by the accused or in which he claims an interest; (2) that he, knowing that such an offence is being or has been committed or having reason to believe that it is likely to be committed, does not give the earliest notice thereof to the principal officer in the nearest Police Station; (3) in case of his having reason to believe that it was about to be committed he does not use all lawful means in his power to prevent it, and (4) in the event of its taking place he does not use all lawful reasons in his power to disperse or suppress the riot or unlawful assembly.

9 O. C. 1.

Pre-emption—Ss. 4 and 14 Limitation Act—Plaint returned for presentation to proper Court—Valuation—Jurisdiction.

When a Court returns a plaint as being beyond its jurisdiction it can not be said that the suit has been legally instituted, a suit can only be said to be instituted when the plaint is presented to the proper officer of the Court which has jurisdiction to try the suit.

9 O. C. 7 (P. C.) = 28 All. 1.

Ss. 13 and 244 C. P. C. = Ss. 11—47 Act V of 1908.—Res-judicata—Previous decree for redemption directing payment into Government Treasury—Loss of money so deposited during mutiny. Redemption.

1. That in order to maintain a plea of res-judicata it must appear from inspection of the record that the person whose interest it is sought to bind was in some way a party to the suit. A mere intention that a suit should be for the benefit of a minor would not bind a minor's interest, when the minor is not represented in the suit by a guardian, and the suit does not purport to have been instituted on behalf of the minor.

2. That a mortgagor of an undivided share may redeem the entirety, at any rate if the mortgagee does not object, and may be compelled to do so if required by the mortgagee.

3. That where in a suit for redemption it was ordered that the mortgagor should recover possession on depositing the mortgage-money in the Government Treasury, and the money was deposited but before it could be made over to the mortgagee the mutiny broke out and the Treasury was *looted*, the decree became incapable of execution owing to *vis major* and a fresh suit for redemption was necessary to give effect to the rights of the parties and to do justice between them, and such a suit was not barred under S. 244 C. P. C.

Notes.

R.—15 O. C. 7.—Most of the essential facts are to be found set forth in 9 O. C. 7.

(2) **R.**—10 O. C. 81 (84)—The general rule is that a person interested in part only of the mortgaged-property may insist upon redeemiug the whole of it; but several exceptions to this rule have been recognized, one is that, where the person wishing to redeem and the mortgagee had both acquired parts of the mortgaged-property, the plaintiff cannot redeem the whole against the will of the mortgagee.

9 O. C. 18.

Redemption—Improvements made by mortgagee—S. 72 (a) and (b) Transfer of P. Act—Damages for planting groves by tenants.

1. That as the mortgage-deed contained a distinct contract regarding the sums payable to the mortgagee on redemption, he was not entitled to add to the principal money any other sums spent by him for the improvement of the property under S. 72 (a) and (b).

2. That his claim to costs incurred for building houses for tenants was rightly allowed; and that the plaintiffs claim to damages for the planting of groves should not be maintained.

9 O. C. 28.

Execution of decree—S. 135 Contract Act—Discharge of surety.

The liability of the surety was not discharged by the decree-holder's giving time to the principal judgment-debtor to pay up the

decretal amount because S 135, Contract Act did not apply to claims which had been decreed.

9 O. C. 29.

Ss. 88, 147 and 152 N.-W. P. and Oudh Municipalities Act (I of 1900) Removal of building. Right of accused to challenge validity of order under S. 88 (I of 100)—Retrial.

That by S. 152, an accused person is not prohibited from challenging the validity of a notice issued under S. 88, where the Board's order is wholly *ultra vires.*

9 O. C. 32.

Appeal—Judgment—S. 551 C. P. C =O. XLI, r 11 } Act V of 1908
S. 574 C. P. C =O. XLI, r. 31 }

That the dismissal of an appeal under S. 551, by a Court whose decision may be the subject of an appeal does not relieve the Court from the necessity of writing a judgment according to S. 574.

9 O. C. 33

Res-judicata—Mortgagor's suit for possession of mortgaged-property against trespasser after dismissal of similar suit by mortgagee in default.—Presumption as to possession of waste land.

1. *Held*, that the decision in the former suit did not render the question res-judicata.
2. That the mortgagor being in rent collecting possession of the village, must be presumed, in the absence of any evidence to the contrary, to be in possession of the waste land therein.

9 O. C. 35.

Review—Application by representative of a deceased party for review of ex parte decree against the latter—Appeal—Ss. 108, 623 and 629 C. P. C. = O. IX, r. 13—S. 114; O. XL VII, r. 1, 7, 9 (V of 1908).

No appeal lay against the order admitting the application for review except on the question of limitation.

9 O. C. 37.

Under-proprietor—Suit for possession by—Ss. 60 and 108 (10) Oudh Rent Act—Jurisdiction.

A suit for possession as under-proprietor by one who has been ejected as ordinary tenant was cognizable by a Civil Court.

Notes.

R.—10 O. C. 23.—Suit for recovery of occupancy of holding by the heirs of a deceased tenant was cognizable by Civil Courts.

Over.—12 O. C. 90—If the suit of an under-proprietor under S. 108 (10) is thrown out by the Revenue Court he can then sue the landlord for possession in a Civil Court and ask for a declaration of his right.

Dist.—13 O. C. 188—The rule laid down in 12 O. C. 90 affirmed.

9 O. C. 42.

Arrest of judgment-debtor pending his application for insolvency in other execution proceedings—Arrest before discharge for debts scheduled in application for insolvency.—Order to furnish security.

1. That the mere fact that a judgment-debtor has made an application for insolvency in execution of one decree cannot debar other decree-holders from causing his arrest in execution of their decree until he has been actually discharged by the Insolvency Court.

2. That a decree-holder is not debarred from pressing his claim by causing the arrest of the judgment-debtor merely because his debt has been scheduled in an application to be declared an insolvent.

3. It is unnecessary to require the judgment-debtor to furnish security except for his appearing before the Court when called upon.

9 O. C. 49.

S. 488 Cr. P. C.—Maintenance of wife—Effect of subsequent Civil Court's decree declaring the parties not being husband and wife.

The order of maintenance cannot be enforced after a decree of the Civil Court declaring the parties not being husband and wife.

9 O. C. 53.

Petition—Hindu widow.

That a Hindu widow having a life interest in her husband's estate is entitled to claim partition.

9 O. C. 55.

Will—Construction of a document—S. 6 Transfer of Property Act—Contracts to make testamentary disposition.

R and P brought a suit for a declaration that C had no power to transfer the property specified in the deed of 27th July 1882, (will), and for the cancellation of the deed of gift in favour of his relatives, or in the alternative for a decree for actual possession of 8 annas share in the villages.

The principal pleas of the defendants were that the suit was barred by limitation and that R having dealt with the property in contravention of conditions of C's deed of the 27th July 1882, the deed became null and void.

Held 1, that the property in suit was not the joint property of C and R after the 27th July 1882, and that C having been in adverse possession of the property in suit since 1882, the suit was barred by limitation.

2. That in order to determine the effect of a document its terms must be considered.

3. That contracts to make testamentary dispositions are valid; but under S 6 T. P. Act, the person in whose favour such a contract exists cannot transfer his supposed rights under the contract to a third person and such a third person cannot on the strength of a such transfer sue for a declaration of those rights

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9 O. C. 63.

Redemption—of whole mortgage by owner of part of the equity of redemption. Patwari rate—Chaukidari rate.

1. A person interested in part only of mortgaged-property may insist upon redeeming the whole; but when a mortgagee purchases a part of the property the latter can insist upon retaining the portion so purchased, but he is not entitled to have the redemption restricted to the interest of the plaintiff who seeks to redeem.

2. Having regard to S. 9 (4) of Act IX of 1889 S. 5 of the Act did not apply—The Superior proprietor was not entitled to recover Patwari rate in the suit as brought.

3. Chaukidari rate allowed.

Note.

(2) R.—12 O. C. 205.—In a suit for arrears of rent the superior proprietor is not entitled to recover Patwari rate from the under-proprietor with whom a sub-settlement of the whole village has been made as the parties do not stand in the relationship of land-holder and tenant.

9 O. C. 65.

Practice—Legality of holding brief for another. Ss. 36, 37, 39 and 652 C. P. C. =O. III, r. 1, 2, 4—Ss. 122, 129, 130, 131—(V of 1908) appeal.

That the appeal argued by a pleader to whom the brief had been transferred by another pleader was properly heard and decided and the party so represented should not be allowed to re-argue the appeal.

9 O. C. 69.

Ss. 110 (6) 112 and 117 Cr. P. C.—Evidence of general repute—Facts to establish charge of desperate and dangerous character—Joint trial not prejudicing the accused.

Joint trial—1, That where there is no evidence of habitual association beyond the fact of the two accused being master and servant, a joint trial is illegal, but it need not be set aside unless it is shown that the accused was actually prejudiced or that the trial led to an improper order being passed.

General repute—2 That evidence of mere general repute is not sufficient to prove that a person is so desparate and dangerous a character, that he cannot be allowed to remain at large. It is not sufficient to do so on vague and general evidence that some one was robbed or beaten and the people say that the accused was responsible for it.

Note.

R.—12 I. C. 518—Statements accused's caste fellows and neighbours.

9 O. C. 76.

Jurisdiction—Partition by Revenue Courts—Ss. 111, 112, 233 and 234 N.-W. P. and Oudh Land Revenue Act (III of 1901).

Under such a partition a title is acquired by the person to whom the land has been allotted, on the basis of which the Civil Court

can give him a decree for possession, irrespective of the question whether possession has been actually or formally delivered by the Revenue Court.

Notes.

R.—20 I. C. 46—Jurisdicton of Civil Courts to grant possession of lands partitioned.

F.—20 I. C. 145—Where the plaintiff came to the Civil Court seeking a declaration that certain lands held in severalty by him had been wrongly included in the shares allotted by the Revenue Courts to the other co-sharers in the partition case. *Held*, that the suit was not maintainable by reason of the provisions of S. 33 (k) of the United Provinces Land Revenue Act.

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9 O. C. 80.

Objection as to the remand order—Ss. 562, 588 (28) and 591 C. P. C.—Second Appeal=O. XLI r. 23—S 104; O. XLIII, r. 1—S. 105 Act V of 1908.

The validity of the remand order can be questioned in second appeal preferred against the final decree passed in the case. It is not necessary that the appellant should appeal on other grounds as well; the appeal may be lodged against the final decree solely upon the ground that the remand order was illegal.

Note

App.—9 O. C. 235.

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9 O. C. 86.

Pre-emption—Share in a law suit sold—Ss. 9 and 10 Oudh Laws Act.

That where property was not in possession of the vendor at the time of the sale and he had only a doubtful right to recover it, such a right if sold could not be considered a proprietary or under-proprietary tenure or a share of such tenure within the meaning of S. 9 Oudh Laws Act, on the sale of which a right of pre-emption could be claimed.

Notes.

R.—9 O. C. 331—Property sold not in actual possession of the vendor.

F.—11 I. C. 279—That the sale of doubtful right could not be the subject of suit for pre-emption.

Dist.—10 O. C. 273—Sale of an equitable interest liable to pre-emption—The interest acquired by the Auction-purchaser prior to the confirmation of sale was not of an uncertain character.

Dist.—16 O. C. 99—That the sale, in lieu of a consideration which was paid in cash and part of which was left with the vendee for expenses of redemption, was subject to pre-emption—In 9 O. C., 86, all that was sold was doubtful right to recover the property if the litigation was successful. In 16 O. C. 99, the vendor was admittedly the owner of the disputed property. He was in constructive possession of it through his mortgagees.

9 O. C. 91.

Redemption—from co-mortgagor who has redeemed the entire property,—Adverse possession—Art 144 and 148 sch. ii, Limitation Act.

1. When one of several co-mortgagors redeems the entire property, it cannot be said that he has the same rights and stands exactly in the same position as the mortgagee The redeeming co-mortgagor has only a charge on those shares for the money paid for redemption and the proper costs incurred in so redeeming.

2. That the limitation for redeeming the property from the hands of such co-mortgagor is that of 12 years under art. 144 and the limitation runs from the date when the redeeming co-mortgagor sets up his adverse possession.

Note.

(2) **F.**—16 O. C, 163.

9 O. C. 96.

Jurisdiction—Appeal—Suit for redemption.

In a suit to redeem a mortgage the value of the subject matter of the suit, for the purpose of jurisdiction, is the principal amount secured by the mortgage-deed.

Held, where in a suit to redeem mortgages, the principal secured by which did not exceed Rs. 5,000, a decree was passed by the Subordinate Judge for redemption of the mortgages on pay-

ment of Rs. 11,000, that the value of the suit did not exceed Rs. 5,000, and, under S. 18 of Act XIII of 1879, the appeal from the decree lay to the District Judge and not to the Judicial Commissioner.

Note.

Dist.—10 O. C. 42—Where a plaintiff brings a suit for recovery of property subject to a charge for unknown amount, the value of the suit is the real value of the property and not the supposed amount of charge.

9 O. C. 97.

Mahomedan Law—Mother transferring her minor children's property.

That a mother has no power whatever to deal with the property of her minor children and therefore a sale by her of their property conveys no title to the purchaser.

Notes.

R.—10 O. C. 321.—A brother in a Mahomedan family has no power to deal with the property of a minor The Court refused to grant any equitable relief against the transfer unless the minors made restitution of any advantage by which their estate had benefited.

App.—11 O. C. 1.—Transfer by a person who is not a natural guardian or a guardian judicially appointed is absolutely void.

R.—12 O. C. 146.—Voluntary alienations by some heirs not binding upon others.

R.—16 O. C. 119.—The appointment of the guardian in 9 O. C. 97 was not correctly made.

9 O. C. 101.

Restitution—of possession of property taken in execution of decree. S. 311, 583 and 647 C. P. C. = O. XXI, r. 90—S. 144 (1)—S. 141 Act V of 1908.

That S. 583 read with S. 647 provided for restitution of possession under orders passed in appeal which did not amount to decrees.

9 O. C. 104.

Hindu Law.—Reversioner.—Alienation of Hindu Widow—Consent of reversioner —Presumption as to legal necessity.

That the consent by a reversioner is or may be evidence of the propriety of the transfer and that the value of such consent

depends upon the circumstances of the case; and that having regard to the circumstances of the present case, the consent of the reversioner was worth nothing and that the sale was not binding upon the plaintiff.

Note.

F.—14 O. C. 170.

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9 O. C. 107.

Revision—S. 622 C. P. C.=S. 115 Act V of 1908—Error of Law not connected with the Jurisdiction of the Court.

In a suit based on a document which bore a one anna stamp with two parallel lines drawn across it, the Court held, that it was a promissory note payable otherwise than on demand and that it was therefore not duly stamped and was not admissible in evidence. In revision it was contended that the Court had acted in the exercise of its Jurisdiction with material irregularity because the decision as to the admissibility of the document was wrong.

Held, that S. 622 C. P. C., does not apply when the Court has erred, if at all, in deciding a question of law which is not connected with the Jurisdiction of the Court.

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9 O. C. 109.

Resumption of grove piecemeal.

Where a plot of land had been given to a person to plant a grove thereon, the landlord was presumably not entitled to enter into possession of the portions of the grove which had become vacant or to cultivate them himself or to let them for cultivation to others. The plot must be taken to have been granted as a whole and the tenure must stand or fall as a whole, unless some contract or custom is shown to the contrary. In the absence of proof of such a custom or contract, it must be held that the grantor of the plot gives the grantee a right to occupy the whole plot so long as it retains the character of a grove.

Note.

R.—11 O. C. 379.—Limitation for removal of trees newly planted by a grove-holder.

9 O. C. 113.

Ss. 13, 16, 17, and 22 Oudh Estates Act—Gift (oral) by Taluqdar in favour of his wife—S. 123 Transfer of Property Act.

That under the Oudh Estates Act the gift by a Taluqdar in favour of his wife was ineffectual and invalid, and that if the gift was not governed by that Act it was invalid under S. 123 T. P. Act.

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9 O. C. 119.

Hindu Will—Bequest of life interest to woman—Life Estate—Construction of Wills—Meaning of "malik."

1. That, under ordinary circumstances, a Hindu wife takes by will of her husband only life interest and that if any more is claimed, it is necessary to show that the husband had given her in express terms a heritable right or power of alienation.

(2) That the word "malik" should not be interpreted as conferring anything more than the life interest upon the widow.

Notes.

(1) **R.**—11 O. C 271—The testator was entitled to give his widow power of disposal and she executed a will in accordance with his wishes.

(2) **Over.**—12 O. C. 157—The use of the word *malik* imports full proprietary right.

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9 O. C. 125.

Res-judicata—Decision as to point pleaded by one defendant and supported by another defendant to be res-judicata between them.

The plaintiff S brought a suit against the defendant C for possession of a deceased Hindu's property on the ground that he became entitled to it by survivorship. The defendant besides pleading adoption, custom, &c., also pleaded that if his adoption was invalid it was not the plaintiff but one R who was entitled to the property by right of inheritance. In consequence of this last plea, it would seem, R instituted a suit for possession of the property. The Subordinate Judge thereupon made R a defendant to the plaintiff S's suit and S a defendant to her suit. In the suit of R it was pleaded by the present defendant

C that R had a better right than the present plaintiff S. The Subordinate Judge held, that R had no title as against the plaintiff S and accordingly decreed the claim of S and dismissed that of R who did not appeal. The defendant C appealed, making the plaintiff S alone a respondent.

Held, that the question whether it was R, or the plaintiff S who had a better title was *res-judicata* between the plaintiff and R as well as between the plaintiff and the defendant C.

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9 O. C. 129.

Custom of Dhardhura—S. 3 Act 1 of 1869. Suit by Taluqdar for possession of land by reason of Dhardhura custom.

In a suit by a Taluqdar for possession of land by reason of custom of *Dhardhura*, the defence being denial of custom and that if such custom ever prevailed, it was superseded by the Taluqdari Sanad granted to the Taluqdar's predecessor and by S. 3 of Act I of 1869.

Held, that the plea of custom was admissible in the case, and that there was no reason for treating a title conferred by a Taluqdari Sanad differently from a title acquired in any other manner.

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9 O. C. 142.

Suit for profit—Mortgagee in possession to be joined as defendant

In a suit for profits by a sharer against another co-sharer, who has mortgaged his share to a third-party, and when both mortgagor and mortgagee are in possession, both may at the option of the plaintiff be impleaded as defendants.

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9 O. C. 144.

Interest when usufructuary mortgagee does not take possession of the mortgaged-property—Interest.

When usufructuary mortgagee does not take possession of the mortgaged-property and thereby loses the profits which he should have otherwise obtained he cannot subsequently claim interest in lieu of those profits.

Notes.

Dist.—10 O. C. 29—In 9 O. C. 144, the mortgage was purely usufructuary and there was no undertaking to pay interest except out of the profits of the property. In 10 O. C. 29 there was a distinct undertaking on the part of the mortgagor to pay any amount on account of interest which was not recoverable out of the profits of the property.

Dist.—11 O. C. 323.—The ruling in 10 O. C. 29 is clearly applicable and the ruling in 9 O. C. 144 does not apply.

R.—16 O. C. 56.—The principle applied in 9 O. C. 144 has a distinct bearing on the decision in 16 O. C. 56.

9 O. C. 147.

Suit by mortgagee for possession of mortgaged-property, Art. 135 Limitation Act.

Where a suit was brought for the foreclosure of a mortgage made on the 3rd May 1863, *held*, that the mortgagee having become entitled to possession under the terms of the deed on the 3rd May 1868, the suit which was instituted on the 22nd January 1903 was barred by limitation under art. 135 sch. II Limitation Act.

Notes.

F.—9 I. C. 1038 (1039)—That because the plaintiff had not claimed possession of the property within 12 years from the date of the expiration of the term fixed in the bond, the suit for foreclosure was barred by limitation.

R.—16 O. C. 157.—That the right to sue on the mortgage having become barred under Act XIV of 1859 or Act IX of 1871, nothing contained in Act XV of 1877 revived that right.

9 O. C. 153.

Redemption.—Court-fee on memorandum of appeal—S. 7 cl. IX Court Fees Act (VII of 1876).

Where the appellant challenges only the amount held by the Court below to be payable, the court-fee should be computed *ad-valorem* on the difference between the amount found to be

payable by the Court below and the amount which the appellant contends should be paid.

Notes.

R.—13 O. C. 62.—Where a plaintiff sues for possession of land and the Court requires him to pay a sum which he disputes and he appeals on the ground that he is not liable to pay that sum, he must pay court-fee on the amount in question.

R.—16 O. C. 354.—That the appellants were liable to pay court-fee on the amount claimed by them in excess of the amount awarded by the Court.

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9 O. C. 156.

S. 4 Partition Act (IV of 1893)—Meaning of "*undivided family*" *and* "*dwelling house*"

That according to S. 4 of the Partition Act the words "undivided family" must be so interpreted as to include every family whether it be a Hindu or otherwise and one which is undivided *qua* the particular dwelling house; and the words "dwelling house" must be interpreted to mean not only the house in which the members of an undivided family actually live but also which belongs to the family and in which other members of that family have a right to live if they feel so inclined to do.

Note.

R.—7 I C. 436 (440)—The words "undivided family" must be taken to mean undivided *qua*, the dwelling house in question, and to a family which owns the house but has not divided it.

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9 O. C. 159.

Ss. 96, 321 Succession Act—Wills executed by Hindus—Interpretation of.

Interpreting a will executed by a Hindu, the lower Appellate Court applied the provisions of S. 96 of the Indian Succession Act. *Held*, that under S. 331 of that Act, the provisions of the Act did not apply to will executed by Hindus in Oudh.

9 O. C. 161.

Trespasser—Possession heritable.

That a possessory right even that of a trespasser is heritable.

Notes.

R.—9 O. C. 230—Tacking of various periods of adverse possession.

F.—11 O. C. 337.

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9 O. C. 164.

S. 373 C. P. C.=O. XXIII, r. 1 (V of 1908)—Withdrawal of suit without obtaining leave.

That where a reversioner withdraws his suit for a declaration without obtaining leave to bring another suit, his subsequent suit for possession will not be barred.

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9 O. C. 167.

Under-proprietary right, claim for, on ground of being old proprietors without evidence of specific grant of the right—Sub-Settlement Act (Oudh) XXVI of 1866.

There is no law which authorises a Court to hold that a person who merely had been a proprietor and has held for a long time since at a favourable rent is necessarily an under-proprietor, but that there must be evidence of some specific grant of an under-proprietary right such as *birt* or *shankalap*, or of an acknowledgment by the talukdar.

Notes.

R.—12 O. C. 164—As to burden of proving under-proprietary right.

R.—14 O. C. 196—An under-proprietary right by prescription must be proved in accordance with conditions laid down in 9 O. C. 167.

R.—15 O. C. 33—A claimant to under-proprietary rights on the basis of prescription is bound to prove his claim according to the provisions of the Oudh Sub-Settlement Act (XXVI of 1866).

R.—8 I. C. 407—The provisions of Sub-Settlement Act are not exhaustive and an under-proprietary right can also be established by evidence of some specific grant or by an acknowledgment by the superior proprietor.

9 O. C. 169.

Pre-emption—Proposal to sell—Ss. 10 and 11 Oudh Laws Act.

A mere proposal to sell property does not entitle any one to claim pre-emption, but under the Oudh Laws Act there must be a complete contract for sale before a suit for pre-emption can be maintained.

Notes.

R.—10 O. C. 273—Assuming that no title passed on the execution of the sale-deed there was at least a completed contract to transfer the property which could validly form a subject of a suit for pre-emption.

R.—13 O. C. 219—Where a plaintiff claims pre-emption on the basis of an agreement, such an agreement must not be a conditional but an absolute one. In order to give rise to a claim for pre-emption, it must evidence a complete contract to sell.

Dist.—15 O. C. 1.—In 9 O. C. 169—At p. 172, it is pointed out that the common notion is that there must be a complete sale before a plaintiff can sue for pre-emption. But as the ruling goes on to explain this notion is erroneous.

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9 O. C. 174.

Suit for a declaration that the notes were not liable to attachment in execution of a decree against the defendant—Transfer of interest in Government Promissory Notes—Ss. 14, 46 and 48—Negotiable Instrument Act (XXVI of 1881).

In June 1903, the plaintiff endorsed some Government Promissory Notes of the value of Rs. 20,000 to the Secretary of State for India as security for one B, a Government treasurer. In August 1903 he presented an application to the Deputy Commissioner in which he stated, that he had sold the notes to S, that he would endorse the notes to S, when required to do so, that S, had purchased the notes subject to the Secretary of State's lien etc. On the following day S presented a corresponding petition to the Deputy Commissioner in which he stated, that he had purchased the notes and had a lien on them subject to the Secretary of State's claim. About the same time the plaintiff by a letter requested S to to discount certain *hundi* in the name of certain firms and S discounted some of them

to the extent of Rs. 9,000. Subsequently the plaintiff brought a suit for a declaration, that the notes were not liable to attachment in execution of the decree of the 1st defendant (The Allahabad Bank Limited, Lucknow) against the defendant S. *Held*, that the interest of the plaintiff in the notes was transferred to S, that the transfer was purely of a chose in action to which the Negotiable Instruments Act did not apply, and that the plaintiff's suit was not maintainable.

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9 O. C. 179.

Arrears of rent against maintenance-holder—Rules of the British-Indian Association as to payment of rent by maintenance-holder—Jurisdiction of Rent Court as to determination of right to maintenance allowance.

Held 1, according to the rules of the British-Indian Association, the plaintiff was entitled to half the Government revenue in the second generation and in the third generation to the amount of the Government revenue plus 10 per cent.

2. The rental for the purposes of these rules must be taken to be twice the Government revenue and not the gross rental calculated according to the *Jamabandis* of every year.

4. It was not within the province of a Rent Court to determine whether the maintenance was or was not payable or to set off the *guzara* allowance against the amount decreed to the plaintiff.

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9 O. C. 185.

Ss. 152 and 154 (2) Oudh Rent Act —Sale of under-proprietary right in execution of decree for arrears of rent against transferee to whom the right was transferred subsequent to the decree but before attachment—Declaration refused on ground of plaintiff's misconduct.

(Per Wells A. J. C.)—That the plaintiff's suit being a vexatious suit brought in order to retain money which they are justly liable to pay and the necessity for declaration having arisen from their own dishonest conduct, it should be dismissed; and also that having regard to the provisions of Ss. 152 and 154 (2), the plaintiffs were liable in the same way and to the same extent as their transferor and that the property in suit was liable to be sold in execution of the decree for arrears of rent.

(Per Scott J. C.)—That having regard to the provisions of Ss. 152 and 152, a decree-holder cannot execute a decree for rent against the under-proprietary right which has been transferred subsequent to the decree but before attachment, but that he has a right of suit against the transferee for the arrears.

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9 O. C. 188 (P. C.) = 28 All. p. 570.

Ss. 173, 174 Oudh Land Revenue Court—Disqualified proprietor—Simple loan taken by such person. Undue influence—S. 16 Contract Act—Interest.

Ss. 173, 174 of the Oudh Land Revenue Act, 1876, were not intended to interfere with the personal status or rights of an adult disqualified proprietor who is neither idiot nor lunatic, except as regards the management of his property or anything expressly prohibited. There is no prohibition of a disqualified proprietor contracting debts or borrowing money and it is contemplated in S. 174, that such a person may enter into contracts, which but for the provision of that section, might result in his property being taken in execution. But he cannot without the sanction of the Court create a charge upon his property.

Where a creditor knew the debtor for 50 years and knew that his property was under the management of the Court of Wards, and he was in a helpless condition and yet he (the creditor) lent him money on a high rate of interest, *held*, that the position of the parties must be deemed to be such that the creditor was in a position to dominate the will of the debtor within the meaning of the amended S. 16 of the Contract Act.

Under the circumstances of the case simple interest at 18 per cent. per annum on the sums advanced was allowed.

Notes.

R.—6 I. C. 203—Debt borrowed under arrest for payment of Government Revenue.

R.—6 I. C. 439.—Money lent to helpless widow to establish her right to maintenance.

R.—6 I. C. 572.—Presumption where the lender is in a position to dominate the will of the borrower.

R.—7 All. L. J. 655.—Where the interest is excessive having regard to the security, it is necessary to find also that the lender was in a position to dominate the will of the borrower when the contract was entered into before any presumption can arise that the contract was induced by undue influence.

R.—10 I. C. 14.—The mere fact that the rate of interest is high is not sufficient to justify the conclusion that the bargain was unconscionable.

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9 O. C. 196. (P. C.) = 28 All. 439.

Mahomedan Law—Gift—Delivery of possession—Sale-deed, fictitious and invalid.

By the Mahomedan Law, a holder of property may in his life-time give away the whole or part of his property if he complies with certain forms; but it is incumbent upon those who seek to set up such a transaction to show very clearly that those forms have been complied with. It may be by deed of gift simply, but unless accompanied by delivery of the thing given so far as it is capable of delivery, it is invalid. Or it may be by deed of gift coupled with consideration, in which case delivery of possession is not necessary, but actual payment of consideration must be proved, as also the *bona fide* intention of the donor to divest himself *præsenti* of the property, and to confer it upon the donee.

Held (upon the evidence) that the deed which purported to be a conveyance for value was a transaction in which no consideration passed or was intended to pass; that in executing that deed the plaintiff did not intend to give the property to the defendant except subject to a reservation of the possession and enjoyment to himself and his wife during their lives, to which the defendant pledged himself, and that the deed was not followed by delivery of possession, but was a fictitious and *benami*-deed and was invalid and void.

Notes.

5 I. C. 946.—R.—12 Bom. L. R. 169—To complete *hiba bilewaz* actual delivery and receipt of consideration however small is essential

R.—11 A. L. J. 726—Early death after execution of deed whether justifies finding of mortal complaint.

R.—20 I. C. 286—A gift of property by a person not in actual or constructive possession is invalid.

9 O. C. 204.

S. 34 Land Revenue Act (III of 1901)—Transfer of possession before the Land Revenue Act came into force.

That S. 34 does not apply to cases of transfer of possession which took place before the Act came into force.

9 O. C. 205.

Ss. 522, 525 C. P. C. = The Second schedule (V of 1901)—Appealable.

1. An order dismissing an application under S. 525 to have an award filed in Court is not a decree and is not appealable

2. In S. 522 the words "upon the judgment so given a decree should follow" refer to a judgment according to the award and not to a judgment or decision that the award is invalid and not binding on the parties.

Note.

(1) **Not F.**—11 O. C. 116—An order refusing to file agreement to refers to arbitration is appealable.

9 O. C. 211.

Pre-emption—Meaning of "sub-division"—Ss. 8 and 9 Oudh Laws Act.

In a suit for pre-emption the village in dispute consisted of four parts known as *tarafs* A, B, C and D; these tarafs were entered in the khewat in the column headed "name of thok or patti." Separate lands were assigned to each taraf; every share lay wholly in one taraf; the revenue of each share was separately entered in the *khewat* and the revenue payable by each taraf was known.

Held, that each taraf was a sub-division of the mahal.

2. The word "sub-division" in S. 8 Oudh Laws Act include a part made by a division of a town or a city and is not confined to a part made by division of part of a city into smaller parts, and the word sub-division in S. 9 of the Act means not only a part made by division of a part of a mahal but also a part made by division of a mahal.

Notes

(2) **R.**—16 O. C. 203—The distribution of the revenue is not essential in order to constitute sub-division of a tenure.

(2) **R.**—13 I. C. 490—Where separate villages are the component parts of a mahal, each village is a " sub-division " of the mahal.

9 O. C. 214.

S. 310 A, C. P. C. = O. XXI, r. 88, Act V of 1908—Ss. 5 and 6 Limitation—S. 10 General Clauses Act (X of 1897).

The application was made a few days after sale which took place on the 20th September—The Court was closed all through October. On the 1st November the applicant tendered Rs. 477-8-0. The tender was retained by the Court officials till the next day when it was returned to the applicant because he had offered too much, the amount due being only Rs. 345, and because he had given an incorrect number of the suit, and had not entered the date fixed for hearing, which was not provided for in the form of tender.

The Court refused to grant the application on the ground that the money had not been deposited within 30 days of the date of sale and that the provisions of Ss. 5 and 6 of the Limitation Act did not apply.

Held, that having regard to the provisions of S. 10 of the General Causes Act (X of 1897) the money was tendered within time.

9 O. C. 216.

Hindu Law.—Joint family—Presumption as to separation of all members on the separation of one of them.

When one co-parcener separates, it is not impossible that the others should remain united. If then it is proved that the others lived throughout in union, it would be sufficient to establish an agreement to remain united.

9 O. C. 219 (P. C.) = 28 All. 585.

Compromise—Minor—Guardian—Leave of Court—S. 462 C. P. C. = O. XXXII, r 7 Act V of 1908.

1. That in order to maintain the validity of a compromise entered into on behalf of a minor, when such compromise is subse-

quently challenged, it must be shown that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it should also be shown by an order on petition or some way not open to doubt that the leave of the Court was obtained.

2. Under the circumstances of the case, the decree need not have been set aside in its entirety but it would be quite sufficient if there is made a declaration that the compromise and the decree are not binding upon the minor and that he is remitted to his original rights.

Notes.

Exp.—34 Cal. 83.

R.—10 O. C. 321.—The duties imposed upon the Civil Courts for the protection of minors have to be positively performed; and such performance cannot be inferentially assumed in the absence of direct evidence.

R.—14 I. C. 6.—Leave for sanction in express terms not necessary.

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9 O. C. 221.

S. 20 Limitation Act—Settlement of accounts—Interest.

That where the interest was not paid in cash but on a settlement of accounts the amount of interest calculated up to date was added on to the principal and the aggregate amount thence forward treated as principal, there had been a payment of interest *as such* sufficient to satisfy the requirement of S. 20 of the Limitation Act.

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9 O. C. 224.

Separate suit for mesne profits due at the date of suit for possession—S. 43 C. P. C.=O. II r. 2 Act V of 1908.

A separate suit for those profits is barred.

Note.

R.—9 O. C. 322—Suit for possession subsequent to suit for mesne profits barred.

9 O. C. 227.

The date from which rent fixed under S. 100 Oudh Land Revenue Act should be payable—S. 3 (g) Oudh Laws Act.

The rent fixed by the Deputy Commissioner becomes payable from the date on which the revenue was assessed on the plot.

Note.

Dist.—11 O. C. 187—The rent assessed becomes payable only from the date of declaration made in the suit.

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9 O. C. 230.

Adverse possession by successive trespassers—Tacking of various periods of adverse possession—Succession by sale as to possessory interest of one trespasser by another.

That a person who was in possession of the property as a trespasser is entitled to tack on to the period of his possession, the period of the possession as trespasser of his predecessor in title through whom he claims.

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9 O. C. 232.

Jurisdiction—S. 108 Oudh Rent Act—S. 42 Specific Relief Act.

1. A suit for declaration that the plaintiff is entitled to get from the defendant his co-sharer, the amount of arrears of revenue to the extent of his share is cognizable only by the Revenue Court.
2. It is also barred under S. 42 Specific Relief Act as the plaintiff can sue for the arrears alleged to be due from the defendant.

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9 O. C. 233.

Sub-mortgagee—Sale of mortgagor's interest and of original mortgagor's interest—Objection as to want of necessary parties in appeal.

A sub-mortgagee is entitled to a decree for sale of his mortgagor's interest and may even obtain a decree for sale of the original mortgagor's interest.

2. Objection as to want of necessary parties disallowed as it was not taken in the Court of first instance.

9 O. C. 235.

S. 13 Explanation (2) C. P. C. = S. 11 Act V of 1908—Cause of Action—S. 43 C. P. C. = O. II, r. 2 Act V of 1908.

Where first suit brought on the basis of a gift was dismissed on the ground that the deed of gift being unregistered was inadmissible in evidence.

Held, that the second suit as heir was not barred.

Note.

R.—12 O. C. 347—The facts of the case in 9 O. C. 235 were somewhat complicated but it can scarcely be doubted that the plaintiffs' cause of action in the suit then before the Court was wholly different from that in the two earlier suits which were then pleaded as a bar.

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9 O. C. 239.

Hindu Law—Mitakshara—Samanodakas—Agnates removed more than 14 degrees—Cognates—Bandhus—Sisters' son.

Held, that under the Mitakshara, a person who is removed more than 14 degrees from the common ancestor cannot be considered to be a *Samanodaka* of the deceased entitled to succeed in preference to the deceased's sister's son who is Bandhu.

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9 O. C. 243.

Res-judicata—S. 13 C. P. C. = S. 11 Act V of 1908—Decision erroneous in law over-ruled by a later decision.

A decision *inter partes*, if in other respects it fulfilled the requirements of S. 13 C. P. C., could not be avoided by showing that it was erroneous in law or based on a ruling which has been over-ruled.

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9 O. C. 246.

Mahomedan Law—Legitimacy—Recognitiou of sonship—Achnowledgment.

1 That under the Mahomedan Law, a child need not necessarily be considered legitimate merely because his parents lived together for a certain period and his father called him his son.

2 That a mere recognition of sonship is not necessarily sufficient to effect the legitimation of a son.

Notes

(1) **R.**—13 O. C. 255—In 9 O. C. 246, one of the judges expressed his opinion to the effect that it would be a great calamity if Courts were bound to hold that a person was a legitimate son merely because on a solitary occasion his father referred to him as his son

(2) **F.**—14 O. C. 356—In 9 O. C. 246, it was proved that plaintiff's father lived with his mother for some time in spite of this it was held, that this evidence was wholly insufficient to prove the legitimacy more specially as his mother though alive was not called as a witness.

9 O. C. 249.

Renunciation of right of Government as to abadi land in the city of Lucknow—Land decreed in favour of Nazul—Lord Canning's Proclamation of 1858.

9 O. C. 254.

Redemption—S. 583 C. P. C.=S. 144 (1) Act V of 1908—Mesne profits—Res-judicata.

1 That under S. 583 to C. P. C., the appellants were entitled to mesne profits by way of restitution for the whole of the village from the date when the respondent obtained possession under the decree of the first Court up to the date when the full amount due under the decree of the Appellate Court was paid and to the mesne profits on the one-third share from the date of full payment until the appellants recovered possession.

2. That the question whether the respondent having obtained possession on a decree which allowed redemption on payment of a smaller sum that the Appellate Court found to be due, was liable for mesne profits for the period between the date of obtaining possession and the date on which he paid up the whole amount due was not a matter in appeal before this Court and therefore not *Res-judicata.*

9 O. C. 259.

Ss. 55 (6) (b), 82, 95 Transfer of Property Act—Mortgage-money paid by the purchaser of a portion of the mortgaged-property to pay off a prior mortgage —Contribution—Charge. Payment by one who actually supplies the money.

1 That the plaintiff who had become owner of a part of the mortgaged-property and who paid off the mortgage-debt in order to

save the property from being sold in execution of the decree obtained on the basis of the mortgage of 1886, acquired a charge on the 4 *pattis* in respect of so much of the money as the *pattis* were rateably liable for.

2. That the money having been supplied by the plaintiff for the payment of the mortgage-decree, the payment must be considered to have been made by the plaintiff.

3. That even if the money paid by the plaintiff were considered as purchase money, he had a charge on the property sold to the mortgagee to the extent of the money paid by him.

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9 O. C. 269.

Disability of some of joint judgment creditors when time began to run for applying for execution of decree S. 7 Limitation Act.

That S. 7 applied whether all or some only of the joint judgment creditors were under disability when time began to run.

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9 O. C. 271.

Pre-emption.—Proprietors suit against under-proprietor—S. 9 (5) Oudh Laws Act—The plaintiff and the vendee not residing in the village. Decision as to who is entitled by drawing lots.

That under S. 9, the plaintiff and the vendee were members of the village community and were equally entitled to pre-empt the property. The question as to who is entitled to the property was decided by drawing lots.

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9 O. C. 273.

Trespasser—Suit for possession against—

In a suit by a mortgagee (plaintiff) for possession of the mortgaged-property from which the defendant had dispossessed him, the defence was that the original mortgagor had no title to the property and therefore could not mortgage it to the plaintiff and consequently the plaintiff's suit was not maintainable.

Held, that the plaintiff was entitled to a decree unless the defendant was the true owner. Possession is good title against all persons except the rightful owner and entitles the possessor

to maintain an action in ejectment against any person other than such owner who dispossess him.

Note.

F.—11 O. C. 337.—Possession, valid title against all except rightful owner.

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9 O. C. 275.

S. 424 C. P. C. = S. 80 Act V of 1908.—Notice of suit to public officer.—Amendment—Malicious prosecution.

The plaintiff stated that a cause of action accrued to him when the defendants arrested and sent him up for trial to the Magistrate under S. 454 Indian Penal Code and when S, at the instigation of the defendant, lodged a false complaint. The question for consideration was whether under S. 424 C. P. C. notice of suit should have been given to the defendants.

Held, 1 that if the defendants induced S. to make a report or file a complaint they did not act in their official capacity, and therefore so far as the report and complaint were concerned no notice of suit was necessary; but that the other alleged acts of the defendants purported to be done by them in their official capacity within the meaning of S. 424 C. P. C., even if they were action in pursuance of an illegal conspiracy, and therefore the defendants were entitled to notice in respect of them.

2. That having regard to the frame of suit no amendment could be allowed but the suit should be dismissed in toto.

Note.

(1) R.—10 O. C. 49.—That the suit against the Deputy Commissioner was bad for want of notice.

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9 O. C. 281.

Step-in-aid of execution—Art. 179 (4) sch. ii Limitation—S. 649 C. P. C. = Ss. 36, 37 (V of 1908) Transfer of decree for execution—

1. Application by legal representatives of decree-holder to be brought on record is a step-in-aid of execution.

2. If after a Court has passed a decree the local jurisdiction in respect to the subject matter of the suit is transferred to some

other Court the application for execution may be made either to the Court which passed the decree or to the Court to which the local jurisdiction has been transferred.

Note

R.—10 O. C. 263 (265).—An application for execution made by a *benamidar* is a good application and saves limitation.

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9 O. C. 284.

Purchase money—Unpaid—Charge upon immovable property—Arts 111, 132 Sch. II Limitation—S. 55 Transfer of Property Act.

That a suit by a vendor to recover the unpaid balance of the price of immovable property by sale is governed by Act 132.

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9 O. C. 288.

S. 90 Transfer of Property Act—S. 108 C P. C. = O. IX, r. 13 (V of 1908).

An application to set aside an ex parte decree passed under S. 90 T. P. Act is not maintainable.

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9 O. C. 289.

Pre-emption—Plaintiff whose entire share was wrongly sold was a co-sharer.

It was found that the officer conducting the sale had wrongly sold up the entire share of the plaintiff inspite of the order of the Court directing only a portion to be sold.

Held, that the sale of the entire share of the plaintiff was invalid and therefore the plaintiff was still a co-sharer in the mahal and as such entitled to claim pre-emption.

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9 O. C. 292.

Suit for proprietary possession where tenant sets up under-proprietary right—Declaratory suit.

That the suit for proprietary possession was not maintainable. The proper course for a proprietor against whom a person alleged to be a tenant sets up a claim to under-proprietary right is to sue for a declaration.

Note.

App.—12 O. C. 164.

9 O. C. 296.

Suit for arrears of rent—Kabuliat is not equivalent to lease—Unregistered Kabuliat—Ss. 105, 107 Transfer of Property Act—S. 91 Evidence Act—Compensation for use and occupation of land.

1. That a *kabuliat* is not lease or the equivalent of a lease although for the purposes of the Stamp Act a lease includes a *kabuliat.*

2. That an agreement to execute a lease of immovable property for any term exceeding one year was inadmissible in evidence and that its terms could not be proved by oral evidence.

3. That the plaintiff was at liberty to prove that she gave and the defendant accepted a lease for one year at a certain rent and, that the defendant obtained possession in accordance with the agreement. If this was proved and also that the defendant held over after the expiry of the first year, he was liable to pay rent at the same rate for the period he remained in possession. Even if this was not proved, plaintiff was entitled to a decree for the amount claimed as compensation for use and occupation of the land by the defendant.

Notes.

(3) **R.**—9 O. C. 362—A suit on account of compensation for use and occupation without a formal and registered lease was maintainable.

(1) **Aff.**—12 O. C. 140—That a Kabuliat signed only by the tenant is not equivalent to a lease.

(3) **F.**—10 I. C. 2 (3)—There being no provision in the Oudh Rent Act for the fixation of rent of ordinary tenants at will, the appellants were entitled to a fair occupation rent as compensation for use and occupation.

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9 O. C. 301.

Order passed without appeal—Jurisdiction of Settlement Court.

1. *Held*, that the order of the Settlement Officer passed in 1872 without there being any formal appeal before him and merely under verbal instructions by a Judge of a superior Court was wholly irregular and without jurisdiction.

2. That the defendant having been in possession of land for about 36 years should not be ejected unless the title of the plaintiff was proved beyond reasonable doubt.

9 O. C. 308.

Pre-emption—Admission of vendor in sale-deed and written statement as to part payment of price by vendor—Decision of question as to payment of price between vendor and vendee in a suit for pre-emption.

The sale-deed recited that Rs. 2,300 had been paid and that Rs. 6,200 remained to be paid, making a total of Rs. 8,500. The plaintiff's case was that the price was not fixed in good faith and that the real market value of the property was Rs. 5,600. The Court below found, and that finding was not challenged in appeal, that the price was not fixed in good faith. The vendors and the vendees stated in their respective written statements that the sum of Rs. 2,300, had in fact been paid but the Court below found and that finding was not challenged in appeal, that this sum of Rs. 2,300 was not in fact paid. The Court found that the market value of the property was Rs. 6,226-4, and that on account of mortgages on the property, the plaintiff was entitled to retain for payment to the mortgagees the sum of Rs. 1,737-12-9, so that the plaintiff was bound to pay to the defendants the sum of Rs. 4,488-7-3, out of which the Court directed that the vendee should get Rs. 1,300 and the vendors Rs. 3,188.

On an appeal by the vendee it was contended that the sum to be paid to him should be increased by Rs. 2,300, the receipt of which the vendors acknowledged both in the sale-deed and in the written statement.

Held, that in suit for pre-emption where there is a dispute between the vendor and the vendee, as to the amount to be paid and the Court decides the amount to be paid by him and how much out of it to each of the defendants, it is as much a decision between the defendants as between the plaintiff and the defendants and is thenceforth binding on both the defendants.

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9 O. C. 311.

S. 49 Land Acquisition Act (I of 1894) Meaning of 'house'

That in S. 49 word 'house' is not confined to land covered by a building and includes not only a courtyard attached to a house but also as much of the land appurtenant to the house as is

necessary for the convenient occupation of the same ; and therefore the Govt. was not entitled to acquire the land in suit alone without the consent of the owners.

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9 O. C. 315.

Promissory notes—Execution not proved—Decree when loan admitted—Onus of payment when execution admitted by defendant.

The defendants, having admitted the execution of a promissory note on the same date and in terms identical with the promissory note set up by the plaintiff and having failed to prove the payment, the onus of which lay on them, the plaintiff was entitled to a decree.

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9 O. C. 322.

Ss. 43 and 44 C. P. C.=O. II rr. 2, 4, 5 Act V of 1908—Suit for possession subsequent to suit for mesne profits.

A person having once sued for mesne profits with respect to land for which he was then entitled to possession, cannot subsequently sue for possession of the same.

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9 O. C. 326.

Misjoinder of causes of action—Transferees under separate deeds of different dates executed by widow, cause of action against—Ss. 43 and 45 C. P. C.=O. II rr. 2, 3, 6 (V of 1908).

Held, that the suit, for a declaration that, (*a*) alienation made by P. and M two widows in favour of S, (*b*) alienation made by P only in favour of R, were without legal necessity and inoperative after their death, was bad as the cause of action with respect to both could not be joined in one suit.

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9 O. C. 331.

Pre-emption—Property sold not in actual possession of vendors—Sale of a share in a law suit.

That this being the case of a sale of property not in actual possession of the vendors, it was not such a sale of immoveable property which could be the subject of pre-emption.

Notes.

Dist.—10 O. C. 273.—In 9 O. C. 331 what was sold was a share in a law suit which cannot be the subject of a claim to pre-emption.

F.—11 I. C. 279.—Sale of doubtful right could not be subject of pre-emption suit. But in 10 O. C. 273, the vendor had an equitable interest of which he could not be deprived by any one claiming under him.

R.—13 I. C. 508.—A pre-emption suit not instituted *bona fide* with the object of excluding a stranger is not maintainable.

Dist.—16 O C. 99.—Where there was no claimd over the title of the vendor and the sale of the property in possession of the mortgage was effected in view of a consideration which was paid in cash and part of which was left with the vendee for expenses of redemption, *held*, that such a sale was subject to pre-emption.

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9 O. C. 339.

Res-judicata.—Plaintiff no party to the previous case.—Decision in the previous case obtained against the widow was not binding on the plaintiff her adopted son—Mis-joinder.

Held, 1 that the previous decision was not res-judicata.

2 That there was no mis-joinder. The plaintiff's right to sue for the whole estate in one suit was not affected by the passing of the estate into the hands of other trespassers.

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9 O. C. 350.

Hindu Law—Suit to recover debt brought against the son—Separation of son from father—Liability of son to discharge father's debt art. 120 sch. ii Limitation.

That as the liability of a Hindu son to pay the debt of his father arises from the moment, the father has failed to discharge the obligation, the suit having been brought more than 6 years after the date of the decree under S. 90 T. P. Act, and also from the date of separation, was barred by limitation.

9 O. C. 352.

Hindu Law—Succession to the property of illegitimate collateral.—

That an illegitimate person has no right to succeed to the property of another illegitimate collateral.

Note.

Diss.—14 O. C. 727.—The rule by which one illegitimate brother can succeed to another is not necessarily confined to persons of *Sudra* caste

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9 O. C 354.

Abatement of suit—S. 367 C. P. C. = O, XXII r. 5 Act V of 1908.—Appeal —Revision.

Where a Court on the death of a plaintiff refused to grant the application of his widow to be brought on the record and ordered the suit to be dismissed as having abated.

Held, that the proper remedy for the widow was to appeal against that order and not to apply for revision.

Note.

F.—10 O. C. 121.

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9 O. C. 357.

Malicious prosecution—Damages with respect to—Meaning of "Prosecution" False information to Magistrate.

It is not necessary that there should have been a prosecution of the plaintiff by the defendant for an offence described in the Indian Penal Code: if a person sets a criminal law in motion (*e. g.* gives false information as to the bad character of a certain person) he must be treated as a "prosecutor" and as such liable to a claim for damages.

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9 O. C. 362.

Landlord and tenant—Suit for compensation for use and occupation Ss. 562, 566 C. P. C. = O. XLI, r. 23, Act V of 1908.

That where a person had with the consent of the Taluqdar entered into the collecting possession of a village as a lessee and had

remained so far a certain period, though without a formal and registered lease, a suit for money against the occupant on account of compensation for use and occupation of the village was maintainable.

Notes.

R.—12 O. C. 140—That the undertaking contained in the *kabuliat* could be enforced against the person who was in possession of the village under the *kabuliat.*

F.—10 I. C. 2(3).—There being no provision in the Oudh Rent Act for fixation of rent of ordinary tenants at will, the appellants were entitled to a fair occupation rent as compensation for use and occupation of the land in suit.

9 O. C. 365.

S. 375 C. P. C. = O. XXIII, r. 3 Act V of 1908.—Appeal from decree passed on compromise.

That there being no agreement between the parties as to the interpretation of the compromise when it was originally filed, there had been no real and genuine adjustment of the case before the Court and in fact no final compromise between the parties upon which the Court could proceed to decide the case. If the Court wishes to act upon the compromise according to the amendment originally suggested by the defendant and subsequently agreed by the plaintiff, a fresh compromise amending those terms should have been put in and verified by all the parties concerned.

That there being no decree passed in the case within the meaning of S. 375 C. P. C. in asmuch as there had been no real agreement between the the parties, the decree so passed was open to appeal and could not be considered as final.

Notes.

R.—9 I. C. 426—In a suit against the defendant, who had built on the plaintiff's land, the plaintiff offered in Court to allow the defendant to retain his building subject to a rent fixed by him but the Court decided to allow the defendant to remain on the plaintiff's land on payment of a rent fixed by the Court: *Held*, that there was no agreement between the parties amounting to an adjustment of the case in whole or in part.

9 O. C. 373.

Redemption—Bona fide purchaser from mortgagee—Ostensible owner—Suit to redeem brought more than 12 years after sale—Art. 134 sch. ii Limitation.

That where a person believing that his vendor had an absolute interest in a certain property of which he was only the mortgagee purchased the same for valuable consideration, the suit brought by the heirs of original mortgagor to redeem the property from such purchaser, if brought more than 12 years after the date of sale, was barred by limitation.

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9 O. C. 377 (P. C.) = 28 All. 727.

S. 2 Limitation (XV of 1877)—Alleged adoption over 12 years ago—Possession for less than 12 years—Effect of adoption—Res-judicata.

The immunity gained by the lapse of 12 years after the date of an apparent adoption does not amount to acquisition of title within the meaning of S. 2 Limitation Act.

Semble—Where parties to a suit accept an issue however improperly raised, and the Court tries it as the main question in the case, if the party against whom decision is given allows such decision to become final, the finding on the issue becomes *res-judicata.*

Notes.

Dist.—7 I. C. 427 (430)—Where the relief sought in a suit is the recovery of possession and not merely a declaration that a certain adoption is invalid, art. 141 applies and the period of limitation is 12 years.

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9 O. C. 381.

S. 106 Cr. P. C.—Security to keep the peace—Intention to commit a breach of the peace at the time of committing the offence essential.

That before an accused can be called upon to give security under S. 106 Cr. P. C. it must be proved that there was an intention on his part to commit a breach of the peace at the time of committing the offence of which he has been convicted.

10 O. C. 1.

Mohamedan Law—Guardianship—Majority Act 1875,

That in matters of contract a Mahomedan boy or girl does not attain majority until the completion of the age of 18 years or 21 years as the case may be and the boy or girl is till the completion of such age deemed to be under the guardisnship of the person who would be entitled to his or her guardianship under the Mahomedan Law.

Note.

R.—10 O. C. 247—Age of majority where guardian has been appointed—Death of guardian before minor attains age of majority.

10 O. C. 4.

Landlord and tenant—Wajib-ul-arz—Sale in execution of decree—Purchaser, no right to occupy against consent of landlord.

That where the *Wajib-ul-arz* of the village gave the tenants residing in that village a right to sell or mortgage the materials of their house, a purchaser of the house in *auction sale* in execution of decree against the tenant could not acquire a right to occupy the house without the permission of the landlord.

Note.

R.—14 O. C. 231—Talukdar has a right to possession of the house left by the tenant.

10 O. C. 6.

Bond—Money payable by instalments—Default in payment of two instalments, art. 75 sch. ii Limitation Act.

Where it is provided in a bond that in case of default of payment of two instalments the whole amount of the bond will be recoverable, if the suit is brought more than 3 years from the date of default in payment of two instalments it is time-barred.

10 O. C. 8.

S. 622 C. P. C.=S. 115 [(V of 1908) Revision—Omission to consider part of defence owing to an erroneous view of law.—Jurisdiction.

Where a subordinate Court declines to consider a certain part of the defence owing to an erroneous view of law, such Court should

be deemed to *have failed to exercise jurisdiction* vested in it by law.

Note.

R.—13 O. C. 109.—Revision of an order refusing to add parties—Meaning of "Case."

10 O. C. 11.

Mahomedan Law.—Restitution of conjugal-rights subject to payment of dower—Dower not paid but demanded.

In such suit it is open to the wife to demand her dower, although there has been previously a consummation of marriage, and the Court is competent to pass a conditional decree subject to payment of the dower debt.

Note.

R.—15 O. C. 127.—Under the Sunni Law, a wife has the right to refuse to surrender her person to her husband, in spite of consummation of marriage, so long as the prompt dower remains unpaid.

10 O. C. 14.

Anomalous mortgage.—Usufructuary mortgage—Personal covenant to pay—Decree for sale.—S. 68 Transfer of Property Act.

That where a mortgage, of a usufructuary character contains a personal covenant to pay, the mortgagee is entitled to sue for sale of the property on the basis of such a covenant.

Notes.

R.—16 O. C. 90—In case of a simple mortgage a personal convenant is always implied and a decree for sale in such a case can be granted.

10 O. C. 17.

Pleadings—Compromise in Settlement Court not equivalent to a mortgage-deed—Adverse possession—S. 100 Transfer of Property Act—Recovery of the whole share—Redemption—Art. 144 Sch. ii Limitation.

1. No suit for redemption could lie as the compromise in the Settlement Court did not create the relationship of mortgagor and mortgagee.

2. Suit to redeem was converted into a suit to recover possession on payment of a charge.

3. The suit being really one for possession on payment of a charge it was governed by Art. 144, and as the defendant had not succeeded in showing that they had been in *adverse possession* for more than 12 years, it was not barred by limitation.

4. The plaintiff could recover not only his own share but also those of his o her co-sharers on payment of the amount due from him as well as from those other co-sharers.

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10 O. C. 21.

Arrears of rent—Assignee of—S. 132 Oudh Rent Act.

That the Limitation of 3 years applies to all suits for arrears of rent whether brought in the Civil Court or in the Rent Court.

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10 O. C. 23.

Jurisdiction of Civil and Revenue Courts—S. 108 (8), (10) Oudh Rent Act—Suit for recovery of occupancy of holding by the heirs of a deceased tenant—Relationship of landlord and tenant.

That the real question for decision in the case was whether the plaintiffs were entitled to succeed to the right of occupancy as heirs of the deceased tenant, that until such question was determined no relationship of landlord and tenant could be established to enable the plaintiff to claim relief in the Revenue Court; and the suit was rightly instituted in the Civil Court.

Notes.

R.—12 O. C. 90—Remarks on pp. 26, 27 in 10 O. C. 23 referred.

F.—16 O. C. 105—In 10 O. C. 23 (27) it was held, that a person calling himself an under-proprietor need not sue under cl. 10 of section 108 unless he has himself been in possession and has been illegally ejected by the landlord and that a person who has never been in possession but who claims to be entitled to succeed to an under-proprietary holding may sue in the Civil Court.

10 O. C. 29.

Redemption—Mortgagee not put in possession—Interest—Covenant to pay interest not recoverable out of the profits of the property.

That where in a mortgage-deed there was a distinct undertaking to pay any amount on account of interest which was not recoverable out of the profits of the property and the mortgagor failed to deliver possession, the mortgagee was entitled to refuse redemption until the whole of the interest during such period was paid.

Note.

App.—11 O. C. 328— That the mortgagee was entitled to get interest for the period he was out of possession.

10 O. C. 31.

Ejectment of tenant—Denial of landlord's title—Forfeiture—Wajib-ul-arz—S. 111 Transfer of Property Act.

That S. 111 Transfer of Property Act did not apply, and the landlord was not entitled to eject the tenant from the site on the ground that he had denied the landlord's title and thereby incurred a forfeiture of his right to occupy the site.

Note.

Dist.—21 I. C. 256—

10 O. C. 33.

Suit for partition of joint family property—Parties to such a suit—Misjoinder.

The main cause of action against all the defendant was that they were in possession of the plaintiffs' share in the joint family property and refused to give them up, and if any separate causes of action were alleged they were only subsidiary to the main cause of action.

10 O. C. 36.

Arrears of rent—Transferee from under-proprietor.—S. 79 N. W. P. and Oudh Land Revenue Act—S. 145 (2) Oudh Rent Act.

That a transferee from an under-proprietor of a portion of the holding becomes liable to pay any arrears of rent due at the date of transfer.

10 O. C. 38.

Suit for money advanced to minor—Registered-bond executed by guardian—S. 68 Contract Act.

1. The suit brought against the minor, after 3 years from the date when the loan was made, was barred, and the registration of the bond could not extend the period of limitation against the minor.

2. The suit could not be maintained under S. 68 Contract Act as it was neither pleaded nor proved that the money so advanced was necessary for the minor. It was not sufficient merely to prove that the money was spent for the purposes of the minor.

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10 O. C. 41.

Distraint—Liability of shikmi tenant for rent due from the tenant-in-chief. S. 72 Oudh Rent Act.

That a landlord is entitled to distrain the crop of a shikmi (sub-tenant) in respect of rent due by the tenant in chief.

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10 O. C. 42.

Value of the suit—S. 7 cl. IX Court Fees Act—Forum of appeal.

That where a plaintiff brings a suit for the recovery of certain property subject to a charge of unknown amount, the value of the suit is the real value of the property and not the supposed amount of charge, and the forum is to be determined accordingly.

Note.

R.—10 O. C. 291.—

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10 O. C. 44.

S. 43 C. P. C.=O. II, r. 2 Act V of 1908—Suit for possession against a lessee dismissed as non-maintainable—Subsequent suit for declaration as to his title to the lands in dispute barred under S. 43 C. P. C.

Note.

Dist.—13 O. C. 19—In 10, O. C. 44, the causes of action were the same but in 13 O. C. 19 they were distinct.

10 O. C. 49.

Pre-emption—S. 424 C. P. C. = S. 80 Act V of 1908—Notice to public officer—Costs of improvement—Cost of stamp paper for sale-deed—Purchaser cannot plead his mortgage.

1. That the suit against the Deputy Commissioner was bad for want of notice under S. 424 C. P. C.
2. That the suit was not liable to be dismissed as against the vendee inasmuch as under the circumstances the vendor was not a necessary party.
3. That the objection as to the sufficiency of notice under S. 424 C. P. C. could only be taken by the Secretary of State.
4. That the suit was not liable to dismissal simply because it was carried on with money supplied by a third-party.
5. That the pre-emptor was not liable to pay the costs of improvements or of the stamp of the sale-deed.
6. That the defendant as purchaser of the equity of redemption could not in the absence of a special contract to the contrary set up his own previous mortgage as still subsisting.

Note.

(2) **F.**—13 O. C. 241—The lower Court was justified in not causing the representative of the vendor to be brought on the record.

10 O. C. 65.

Appeal to Privy Council—S. 596 C. P. C. = S. 110 Act V of 1908.

That the last clause of S. 596 C. P. C.—relates to the subject matter of the suit and therefore there is no right of appeal when the two Courts differ only as to costs.

Note.

F.—9 I. C. 1040—Right to appeal.

10 O. C. 69.

Mortgagee—Suit to recover mortgage-money not a suit for specific performance—Separate suit for damages arising from failure to pay off a prior mortgage—Ss. 39, 54 Contract Act—Set-off—Compound interest.

That a suit for recovery of money based on a mortgage bond could not be regarded as one for specific performance under S. 24 (*b*) Specific Relief Act.

2. That there being no evidence of undue influence and the deed not having been shown to be either void or voidable, the provision to pay compound interest must be enforced.

3. That the defendants could in a separate suit sue the mortgagee for recovery of such damages as may have accrued to them owing to the mortgagee not having paid off the prior mortgage.

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10 O. C. 76.

Will—What amounts to undue influence in case of will—Confidential position.

That in order to set aside a will on the ground of undue influence, it is not sufficient to establish that a person who is largely benefited under the will had the power to overbear the will of the testator, but it must also be shown that such power was exercised and that it was by the exercise of such power that the will was obtained.

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10 O. C. 81.

Redemption—Mortgagor and mortgagee acquiring interest in the property.—Mortgagor cannot redeem whole.

That a person interested in part only of the mortgaged-property may insist upon redeeming the whole of it, but where the mortgagee has acquired part of the mortgaged-property, a purchaser of part only cannot redeem more than his own share against the will of the mortgagee.

Notes.

R.—14 O. C. 257—A second suit for redemption by the sons of the mortgagor is not maintainable.

F.—21 Indian cases 251.

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10 O. C. 86.

Pre-emption—Owner of grove-land is a co-sharer—Non-payment of Government Revenue.

That the owner of a plot of land on which there stands a grove for which no Government revenue is paid is a co-sharer for the purposes of pre-emption.

Notes.

Ap.—10 O. C. 225—Test of co-sharership, an owner of plots of land in *abadi* is a co-sharer.

R.—11 O. C. 290—Plaintiff's title at the time of institution of suit—Title acquired by purchaser subsequent to the cause of action.

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10 O. C. 88.

Pre-emption—Price actually paid how for evidence of market value.

That in the absence of any other evidence, the actual price paid is good evidence of the market value.

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10 O. C. 89.

S. 145 *Cr. P. C.*

Where the dispute is only as to who is entitled to collect the rent from the tenants the criminal Courts have no jurisdiction to take proceedings under S. 145, Cr. P. C.

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10 O. C. 92—(P. C.)

Redemption.—Construction of mortgage-deed—Compound interest.

That the two clauses of the deed should be read together and that on the proper construction of the deed, the mortgagor was liable to pay compound interest on the amount of unpaid interest

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10 O. C. 95.

Legal practitioner.—Suit for damages against—Wrong advice—Art. 90 sch. ii Limitation.

1. That in order to hold a legal practitioner responsible in law for the damages caused to his client by the wrong advice given by such practitioner, it is not enough to show that the advice given was wrong, but there must be proof of gross negligence on his part and of the want of such reasonable skill and deligence which is to be expected from a practitions of his position.

2. That the suit having been brought more than 3 years after the negligence of the defendant become known to the Bank, it was barred by limitation.

10 O. C. 108.

Suit—for contribution—Costs—Liability of co-sharer to contribute even if not sued by superior proprietor.

1. That a person liable with others jointly and severally does not lose his right of contribution against the others by failing to ask the Court to make them parties to the suit inasmuch as the liability to contribute does not depend upon the decree but on the fact that he and the co-sharers were in the position of joint promisors and where one of such promisor has to discharge the whole debt or a part greater than his share he is entitled to recover from each of the others a contribution or proportion of the excess beyond his own share.
2. That as the plaintiff could not have avoided payment of the whole rent at the time when he was sued and when he had to pay it, a cause of action for contribution accrued on the payment.
3. That there could be no right to contribution in respect of *costs*.

Note.

R.—16 O. C. 285—10 O. C. 108 is not on all fours, as regards facts with 16 O. C. 285.

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10 O. C. 112.

Ss. 164, 342, 364, 533 Cr. P. C.—S. 80 Evidence Act—Statements recorded in English.

Where confession of the accused was recorded in English and no evidence was taken to prove that the accused had actually made those statements *held*, that the Sessions Judge was wrong in admitting such confessions against the accused.

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10 O. C. 117 (P. C.)=29 All. 331.

Hindu Law—Res-judicata—Legal necessity—Possession decreed subject to payment of sum proved to have been advanced for legal necessity.

A Hindu widow sold her husband's estate and the plaintiff brought a suit for pre-emption which was dismissed on the ground that on right of pre-emption was proved. Subsequently after

the widow's death, the plaintiff as reversioner to her husband's estate sued to recover possession of the property.

Held, that the subsequent suit was not barred, and that the introduction of any question as to the effect of the conveyance upon the reversion would have been incongruous to the matter of that suit.

2. That where the consideration for the sale-deed was a decree which was subsequently set aside on appeal, such a decree could not be considered as legal necessity justifying the sale, specially where the decree-holder himself was the purchaser.

3. That, where a portion of the purchase money was not justified by legal necessity, the sale could be set aside and possession decreed to the reversioner subject to the payment of what was borrowed for legal necessity.

Notes.

Dist.—6 I. C. 207—A sale by a Hindu widow cannot be set aside upon payment of the amount which it was necessary for the widow to raise to pay off a legal debt, simply because the property sold was not sold for a sum which exactly covered the debt.

R.—7 I. C. 225—A suit which is not really for setting aside alienation but for recovery of property on the ground that the life-tenant could not confer any title that would subsist after her death and that the plaintiffs are entitled to possession since her death, is maintainable by one co-sharer for his share only.

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10 O. C. 121.

Ss. 366, 588 (18) C. P. C. = O. XXII, r. 3 (2)—S. 104; O. XLIII, r. 1 Act V of 1908—Joint Hindu Family—An order declaring a person not to be the legal representative appealable—Right of descendants of a karta to carry on a suit.

1. The order passed under the first paragraph of S 366 C. P. C. treated as an order under S. 367 C. P. C. appealable.

2. That the descendants of a *karta* could not claim to carry on the suit as Karta against the wishes of the other adult members.

3. That if the other members of the family did not or could not join with the descendants of the *karta* in carrying on the suit, they were entitled to carry it on themselves for the benefit of the whole family by making other members of the family parties to the suit.

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10 O. C. 129.

Ss. 295, 622 C. P. C. = Ss. 73 and 115 Act V of 1908.

1. *Revision.*—That the existence of an alternative remedy is not necessarily a bar to the exercise of revisional jurisdiction where the lower Court fails to exercise jurisdiction.

2 That in order to claim a rateable distribution under S. 295 C. P. C. it is not necessary that the two decrees shall have been passed precisely against the same judgment-debtors but that the test is whether the applicant for a rateable share and the person in execution of whose decree assets have been realized have both applied for execution against the same judgment debtor.

Note.

(1) R.—13 O. C. 341.

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10 O. C. 132.

Ss. 110, 117 (3) Cr. P. C.

Observations upon the nature of evidence of general repute are admissible in proceedings under S. 117 (c) Cr. P. C.

Notes.

R.—10 O. C. 108—As to the meaning of the evidence of general repute.

R.—12 I. C. 518—Statements of accused's caste-fellows and neighbours.

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10 O. C. 136.

Condition as to restraint on alienation—Void and inoperative condition—Sale in execution of decree of such interest.

That where a decree of a Settlement Court was based on a compromise which contained restrictions as to alienation, such conditions were void and inoperative.

2. That where such a decree stood in favour of the judgment-debtor his right was transferable and could be attached and sold in execution of decree against him.

Note.

Dist.—14 O. C. 189—In 14 O. C. 189—There was a sale under which life-interest in part of the property was reserved by the vendor with consent of the vendees.

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10 O. C. 139.

Application by judgment-debtor to be declared an insolvent—Application for transfer by decree-holder—S. 24 C P. C. = S. 22, 23 (3) Act V of 1908.

That proceedings under Chap XX C. P. C. (Repealed by the Provincial) Insolvency Act 1907 are necessarily proceedings in execution of a decree and the judgment-debtor throughout such proceedings is in the position of a defendant.

2. That the Court has no jurisdiction to pass an order for transfer under S. 24 C. P. C., on an application made by the judgment-creditor.

Note.

R.—10 I. C. 29 (30)—As to the fact of the case

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10 O. C. 141.

Ss. 310A, 311 C. P. C. = O. XXI rr. 88, 89 Act V of 1908—Meaning of "applies"—Presentation of an application to the Munsarim—Withdrawal of application before order passed.

That when an applicant presented an application under S. 311 C. P. C. to the Munsarim of the Court and before the Court passed an order on it he applied to withdraw the application and consequently the application was withdrawn, the applicant should have be held to have withdrawn the application before the making of it was complete, and should not be considered to have applied under S. 311 C. P. C., and should be held to be entitled to make an application under S. 310A.

10 O. C. 145.

Ss. 13, 43 C. P. C.=S. 11—O. II r. 2 Act V of 1908—Suit for sale by puisne-mortgagee—Dismissal of the suit on the ground that previous mortgage not offered to redeem—Second suit for redemption for prior mortgage and sale—Res-judicata—S. 89 Transfer of Property. Act.

That the pialntiff's cause of action for the present suit was exactly the same as his cause of action for the former suit *viz.*, mortgage to him and non-payment of the mortgage money. In the former suit he might and ought to have offered to redeem the prior mortgage. The suit should therefore be dismissed as barred by Ss. 13 and 43 C. P. C.

Note.

R.—12 O. C. 347—The decision in 10 O. C. 145 was by a majority of two Judges against one and was in favour of the application of the maxim of *res judicata* to the facts then before this Court.

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10 O. C. 159.

Hindu Law—Widow—Decree obtained against—Not binding on the reversioners Daughter's sons—Succession amongst—Per capita not per stirpes.

1 A decree for sale, obtained against the widow, in a claim put forward by her adversely to the reversioners, cannot be considered binding on the reversioners, and a sale if held in execution of such a decree should be considered to pass only the interest of the widow and not that of the reversioner.

2 That after the death of the daughters who suceeeded to a Hindu woman's estate, the daughter's sons take *per capita* and not *per stirpes.*

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10 O. C. 163.

Hindu Law—Alienation by widow—Reversioner's suit for possession—Art. 91, 141 Sch ii. Limitation.

A suit by reversioner for recovery of possession of property alienated by a Hindu widow is governed by art. 141.

10 O. C. 165.

S. 526 Cr. P. C.—Transfer of a criminal case from one Court to another—Grounds.

If the facts alleged by the accused are such that they will reasonably give rise to the belief that no fair trial would be had, a transfer ought to made.

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10 O. C. 168.

S. 110 C. P. C.—General repute—Evidence of Police officer not based on personal knowledge.

1. That evidence of the general repute of a person includes what is generally said of him in the neighbourhood in which he lives.
2. That a Police officer should not be permitted to depose to the result of enquiries made by him for the purpose of the case or to put in a list of cases in which the person to whom the enquiry relates is said to have been suspected by others.

Note.

R.—12 I. C. 518—Statements of accused's caste-fellows and neighbours.

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10 O. C. 171.

Ss. 311 and 588 C. P. C. = O. XXI, r. 90—S. 104; O. XLIII, r. 1 Act V of 1908—Appeal from an order dismissing the application for default.

That no appeal lies from an order dismissing for default an application to set aside a sale under S. 311 C. P. C.

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10 O. C. 173.

Agreement to provide funds for litigation—Suit for recovery of property based on such agreement—Extortionate and unconscionable—Art. 113 Sch. ii. Limitation—Refusal to perform one's part of agreement.

1. If by the agreements no title vested in the plaintiffs, the suit should be treated as one for specific performance and as such was barred by limitation. If title passed then the plaintiffs could not recover on the strength of the agreements as their father had refused to carry out his part of the agreement.
2. That the agreements were extortionate and unconscionable and therefore could not be enforced.

10 O. C 179.

Pre-emption—Ss. 10, 11, 12 and 13 (a) Oudh Laws Act—Requirements of a valid notice—Foreclosure—Market value—Wrong amount entered in the decree. Interest after decree up to the date of notice.

1. That cl. (*a*) of S. 13 refers only to cases in which no notice was issued at all or was issued in an irregular manner and that cl. (*d*) covers cases in which either the amount claimed by the mortgagee was not really due on the mortgage or was not claimed in good faith or exceeded the fair market value of the mortgaged-property.

2. That a mortgagee issuing a notice under S. 10 is not entitled to claim interest up to the date of notice but only up to the day on which the decree for foreclosure was made absolute.

3. That where a wrong amount is entered in the notice, the decree must provide for payment by the pre-emptor on payment of what was due on the mortgage at the date of the order absolute, or if that exceeds the market value of the property, upon payment of the market value.

Notes.

(1) **App.**—12 O. C. 314—When a decree absolute for foreclosure was obtained without giving notice a right to sue for pre-emption occured from the date of decree—Time for issuing notice.

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10 O. C. 189.

Jurisdiction—Suit for possession of trees and land—Definition of "land"—Meaning of "ungathered produce"—S. 3 (3) Oudh Rent.

The Oudh Rent Act does not limit the use or occupation of land leased to a tenant to the growing of crops.

The word "ungathered produce" besides crops includes trees, grass, *kankar*, &c.

That a suit for possession of trees as well as of land against a tenant holding under a special agreement on the ground that under the agreement his right to possession had ceased was one exclusively cognizable by the Rent Courts.

10 O. C. 193 (P. C.)

Redemption of a portion of the mortgaged property where the mortgagee refuses to allow redemption of the whole—Estoppel by defence raised in the previous case.

Under a mortgage of September 1879 and a subsequent agreement S became the mortgagee in possession for a term of 12 years of a 4 annas share of K, and an 8 annas share of B in 2 villages. In December 1888, K mortgaged his 4 annas share for 30 years to the plaintiff who redeemed the mortgage of 1879 and took possession of both shares In 1897, B mortgaged his 8 annas share to the defendant who then sued the plaintiff for redemption of that share on the payment of the amount due on it under the mortgage of 1879. The plaintiff insisted on the defendant redeeming the whole share of 12 annas and the defendant's suit was dismissed. In 1899, the defendant brought another suit for redemption of both shares, obtained a decree and took possession In 1901, plaintiff sued for redemption of the 4 annas share of K only, on payment of the amount due on it under the morgage of 1879 but offered to redeem the share of B also. The defendant did not accept the offer. *Held*, that the plaintiff was entitled to redeem K's 4 annas share.

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10 O. C. 196.

Right of Private defence—S. 102 Penal Code.

1. The right of private defence commenced as soon as the opposite party appeared with arms and began to move towards applicants which was a distinct threat to attack them and as the accused had not inflicted injuries more than were necessary under the circumstances, this conviction could not be sustained.

2. That when a person is attacked while doing a lawful act, he is entitled to stand his ground and defend himself and that the law does not intend that he must run away to have recourse to the proctection of the public authorities.

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10 O. C. 201.

S. 5 Limitation Act—Appeal—"Sufficient cause."

The respondent contended that the appellant having obtained copies of the Judgment upon the first two applications, could not

claim the days spent in obtaining the third copy as "time requisite for obtaining a copy of judgment" and the appeal was therefore barred by limitation.

Held, that although the appellant was not legally entitled to claim deduction of such time, yet he has made out a sufficient case for not presenting the appeal within the period of limitation inasmuch as the uniform practice of the Court, in determining the question whether an appeal was presented within limitation, had been to have regard solely to the endorsements made upon the copy of the Judgment upon which the appeal was lodged, and such practice must have misled the applicant.

10 O. C. 205.

Jurisdiction—Declaration—that certain land is the exclusive property of the plaintiff by private partition—S. 233 N. W. P. Oudh Land Revenue—S. 42 (2) Specific Relief Act.

1. That the Civil Courts had jurisdiction to grant such a declaration.
2. That the only declaration to which the plaintiff was entitled in the case was to the effect that he alone was entitled to the profits of the land in suit until regular partition had been made by the Revenue Court.

10 O. C. 209.

Mahomedan Law—Shia—Will—Validity in favour of heirs—Construction—Witness ignorant of the contents.

1. That the rule that a will is invalid unless the attesting witnesses are made acquainted with the contents was not a definite and inflexible rule and may safely be treated as obsolete.
2. That the will in this case could not be regarded as disinheriting an heir, but that it merely ignored some of the heirs.
3. That a bequest by a Shia Mahomedan in favour of an heir is invalid only to the extent of $\frac{1}{3}$ of his estate.

10 O. C. 214.

S. 561 C. P. C. = O.XLI, r. 22 (V of 1908)—Cross-objections maintainable only with respect to the principal appeal—Interest—Provision as to payment of interest in the shape of decrha Penalty.

1 The respondents could be allowed to object only to the decree against which the appellant was appealing; if they wanted to

appeal against the order of the District Judge passed on their appeal, they ought to have filed a separate appeal.

2. That the stipulation for the payment of *deorha* was not in the nature of a penalty and could therefore be legally enforced.

10 O. C. 218.

Suit for possession by mortgagee on default of payment of interest—Ss. 12 and 21 (a) Specific Relief Act.

1 A suit for possession by mortgagee on default of payment of interest was not a suit for specific performance of a contract.

2 That the suit could not be regarded as a suit to enforce a contract to transfer immoveable property within the meaning of S. 12.

Note

(1) **R.**—10 I. C. 190 (192)—A suit for possession on the basis of a mortgage-deed is not a suit for the specific performance of a contract, and that the defendant could not be allowed to redeem in the present suit.

10 O. C. 225.

Pre-emption—Owner of plots of land in abadi—Member of village community—Vendee joining stranger.

1 The owner of plots of land in *abadi* is a co-sharer and could be allowed to pre-empt as a member of the village community.

2 That when in purchase a co-sharer associates with himself a stranger and there is no specification of the shares acquired by each of them, the co-sharer loses his preferential right to purchase, and the whole property sold is liable to pre-emption.

Notes.

(1) **R.**—11 O. C 90—Plaintiffs' title at the time of institution of the suit. Title acquired by purchaser subsequent to the cause of action.

(1) **R.**—12 I. C. 490.

10 O. C. 235.

Occupancy tenure—Sale valid in favour of landlord.

That the sale of an occupancy tenure by a tenant to his landlord is valid.

Note.

R. 11 O. C. 292—That relinquishment of his holding by father without son's consent is perfertly valid

10 O. C. 238.

S. 176 Penal Code.—"Official Register"—Refusing to furnish information to the patwari regarding collections made by a zamindar—Ss. 32, 46, 234 U. P. and Oudh Land Renenue Act.

1. That the words "official register" in S. 176 Penal Code do not refer exclusively to the registers prescribed by S. 32 N. W. P. and Oudh Land Revenue Act (III of 1901).

2. That a *jamabandi* is a register answering this description, and consequently where a zamindar refuses to give the patwari information as to the collection of rent made by him he is liable to be convicted of an offence under S. 176 Penal Code.

10 O. C. 241.

Mahomedan Law.—Dower—Principle for determination—Wasika and amanati notes—S. 5 Oudh Laws Act.

That in determining the amount of dower-debt under S. 5 Oudh Laws Act, the income of the husband from *wasika* and *amanati* notes should be taken into consideration.

10 O. C. 243.

S. 7 A Oudh Rent Act.—Suit for cancellation of the sale and return of the purchase money—where expproprietary rights claimed.

When along with some *zamindari* certain *sir* land was sold and the vendor undertook not to claim occupancy rights therein but subsequently claimed and obtained those rights, *held*, that the purchaser was not entitled to compensation in respect of the *sir* land.

10 O. C. 245.

S. 158 C. P. C = O. XVII, r. 3, Act V of 1908.—Appealable.

An order of District Judge, dismissing the suit under S. 158 C. P. C. amounts to a decree. Power of the Appellate Court to act under S. 158 C. P. C. is confined to appeals before it.

10 O. C. 247.

Mahomedan Law.—Age of minority—Death of guardian—Ss. 2 and 3 Indian Majority Act IX of 1875—Art. 120 sch. ii Limitation Act.

1. That the age of majority must be governed by the provisions of the Indian Majority Act, and not according to the provisions of the Mahommedan Law; and that the suit having been brought within 6 years from the date when plaintiff attained the age of 21 years, was not barred.

2. That where a guardian has been appointed of a minor, he must be considered to be a minor until he attains the age of 21 years, even that guardian may have died, before the minor attains the age of 21 years.

Note.

F.—11 O. C. 159—In case of the removal of the certificated guardian, the ward will not attain his majority till he attains the age of 21 years.

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10 O. C. 252.

Purchaser's liability to pay off the encumbrances entered in the proclamation of sale.

The plaintiff claimed redemption of the mortgage of July 4th 1896, contending that the sale of the village was not binding upon him inasmuch as at the time of sale, the mortgage of August 1896 had been paid off, and the defendant having taken an advantage of this fact was a trustee of the village for him or at least of the benefit improperly obtained by him. The defendant contended that the sale was binding upon the plaintiff. It was proved that the mortgage of August 1896 had been paid off, and that the village in suit was not worth more than Rs. 20,000.

Held, 1 that the defendant having purchased the property for Rs. 14,633 with an incumbrance of Rs. 5,543, had paid almost the full value of the property, and had not therefore obtained by his purchase any benefit of which he should be considered a trustee for the plaintiff.

2. That a purchaser at an execution sale cannot avoid his purchase merely because charges not entered in the sale statement are

found to be enforceable against the property, nor is such a purchaser bound to admit the existence or validity of charges, merely because they are entered in the sale statement.

10 O. C. 257.

Pre-emption—S. 9 (2) and (3) Oudh Laws Act—Suit with respect to Revenue free land (Nazul)—Co-sharer—Village community—Estoppel.

1. That the land in suit was not in any way responsible for the revenue assessed upon the village, the plaintiff and the vendor were not co-sharers of the same *mahal* and therefore the plaintiff could not claim to pre-empt the property under S 9 (2), but the plaintiff could pre-empt the property as a member of the village community under S. 9 (3), and that it was not necessary that the vendor should be a member of the village community.

2. (On evidence). That no case for *estoppel* had been made out.

10 O. C. 263.

Benamidar—Application for execution, made by—Art. 179 Sch. ii Limitation.

That an application for execution made by a *benamidar* is a good application made in accordance with law and saves limitation.

10 O. C. 268.

Receiver—Appointment of— 503 C. P. C.= O. XL, rr. 1 to 3, Act V of 1908.

Where a decree-holder had attached certain property in execution of his decree and the Court refused to pass an order for sale of the property on the ground that it was heavily encumbered, the decree-holder could not apply for the appointment of a receiver under S. 503 C. P. C.

10 O. C. 273.

Pre-emption.—Ss. 310 A, 311 C. P. C.= O. XXI, rr. 89, 90 Act V of 1908. Before a sale had been confirmed, the auction purchaser transferred the property to the sons of the judgment-debtor who were not cosharers in the village.

Held, 1 assuming that no title passed on the execution of the sale-deed there was at least a completed contract to transfer the

property which could validity form a subject of suit for pre-emption.

2. That the interest acquired by the auction purchaser prior to the confirmation of sale was not of an uncertain character It was an equitable interest enforceable against the judgment-debtor, of which they could not be deprived either by the judgment-debtor. or any other person claiming under him except by proper proceedings taken in accordance with S. 310 A, or 311 C. P. C.

Note.

(2) **R.**—16 O. C. 49—Right of pre-emption when property sold was in possession of the mortgagee and sale effected partly in lieu of expenses to be incurred in redemption.

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10 O. C. 277.

S. 6 Transfer of Property Act.—Hindu Law.—Transfer of reversionary interest —Un-registered document where value of the property not specified in the deed exceeds Rs. 100.

1. That the transfer of a reversionary interest is invalid under S. 6, T. P. Act

2. That a document, by which property exceedings Rs. 100 in value is transferred is invalid if not registered, although the value of the property is not specified in the deed.

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10 O. C. 280.

Execution of decree—Purchaser of a portion of the property charged with payment of a decree, right of—Liability of other properties charged when a portion of property sold subject to entire charge.

The appellant having purchased a decree obtained by A (by which it was declared that the amount found due was to be a charge upon several properties, tried to execute it against some of the properties.—He had also purchased one of such properties in execution of a decree held by a third person. At the time of sale it was notified that the property to be sold was subject to the charge created by the deeree in favour of A. The appellant exempted the property purchased by him and sought

to recover the amount of his charge created by the decree in favour of A by sale of the rest of the property.

Held, 1 that the appellant being interested in a small portion only of the property subject to the charge created by the decree in favour of A, was entitled to exempt the property purchased by him.

2. That the property purchased by the appellant could not be considered to have been sold subject to the entire charge created by the decree in favour of A, and that there was no justification for holding that the other properties charged with the payment of the decree had been released from their liability.

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10 O. C. 287.

S. 106 Cr. P. C.—Jurisdiction—Invalidity of order requiring security passed by Appellate Court when first Court had no such power to pass.

That the jurisdiction of a Court of appeal is limited to the jurisdiction conferred on the Court of first instance and as in this case the Honorary Magistrate (of the 2nd class) could not pass an order requiring the applicant to furnish security, the order passed to the effect by District Magistrate in appeal was invalid.

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10 O. C. 289.

Hindu Law—Joint family—mortgage of an undivided interest of a co-parcener.

That where a mortgagee takes a mortgage from a co-parcener of his undivided interest in a joint family, the mortgage is invalid and is liable to be set aside in a suit brought for the purpose by another co-parcener.

No declaration should be given to the mortgagee that the co-parceners shall in future hold the property in defined shares and that the share of the mortgagor is subject to a lien in favour of the mortgagee for repayment of the amount intended to be secured by the mortgage. The proper course for the mortgagee in such a case is to obtain a decree against his mortgagor personally and attach his interest in the property.

Note.

(1) **R.**—10 O. C. 367—In 10 O. C. 289 it was decided that the mere circumstance of a mortgage executed by a member of a joint

family with respect to his share in the property does not necessarily imply partition.

10 O. C. 291.

Appeal presented beyond time—"Sufficient cause"—S. 5 Limitation Act—Advise of Counsel—Trust—History of settlement with taluqdars.

That as the appellant had acted *bona fide* on advise of his counsel, who had advised him to lodge the appeal before the District Judge, and as the question of qorum of the appeal was not free from difficulty and counsel for the appellant had acted with due care and attention, the applicant had made out sufficient cause for not presenting this appeal within time.

2. The village in suit was settled with the defendant who claimed a lien on it for revenue paid in respect of it.

Held, on the evidence that no case of trust has been made out.

3 The history of the settlement with taluqdars of Oudh as mortgagees reviewed.

10 O. C. 305.

Insolvency orders passed by Chartered High Courts, effect of.

Right of decree holder where debt wrongly entered in the schedule. Order of discharge passed by Chartered High Courts operates throughout the whole of British India.

10 O. C. 308.

Ss. 596, 598 C. P. C. = S. 110, O. XLV, r. 2 Act V of 1908—"Substantial question of law" meaning of application for leave to appeal to His Majesty in Council

That the words "substantial question of law" in S. 596 C. P. C. mean question of general importance, they do not include a question of the construction of a document in which the parties alone are interested. If no such question is shown to exist leave to appeal to His Majesty in Council cannot be granted.

10 O. C. 314 (P. C.)=29 All. 339, 4A L. J. 344.

Lis pendens—S. 52 T. P. Act—Contentions suit before service of summons.

The plaintiff was purchaser in execution of a decree based on a first mortgage of the property in suit. The defendant was in

possession as a prior purchaser in execution of a decree on a second mortgage of the same property, passed in a suit to which the first mortgagee was not made a party. The second mortgage was executed after the institution of the suit on the first mortgage but before the summons had been served. *Held*, that the doctrine of *lis pendens* applied and that the plaintiff had the better title.

Where a suit is contentions in its origin and nature it is not necessary that the summons should have been served in the suit in order to make it a "contentions" one within the meaning of S. 52 Transfer Property Act.

Irrespective of the doctrine of *lis pendens* it appeared from the circumstances of the case that the defendant was cognizant of the first mortgage, of the decree made on the basis of it, and of the sale proceedings which took place in execution of the decree.

Notes

R.—13 O. C 50—A right to immoveable property is directly and specifically in question both in a suit for sale and in a suit for redemption and S 52 Transfer Property Act applies to both class of cases.

R.—13 O. C. 98—S. 52 applies to a case in which a decree is passed upon a compromise if the other conditions of the section are satisfied.

Not F.—10 I. C. 842—Whereon a pre-emptor filing a suit for pre-emption, the vendee sells the property to a person who possesses equal right of pre-emption, the doctrine of *lis pendens* does not apply, if the right of the subsequent vendee subsists at the date of sale to him, and is not time-barred, for no new right is created by the sale.

R.—11. I. C. 464(465)—The doctrine of *lis pendens* is applicable to *ex parte* mortgage suits and purchases in execution.

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1 O. C. 388 (P. C.) = 29 All. 708.

Under-proprietary rights—Birt rights in Oudh.

Held, that persons holding *bai birt* tenures under a grant by the taluqdar or the proprietor for money received, which tenures were often spoken of in the district of Gonda also as *birt zamindari*, acquired, under the Record of Rights Circular, 1861,

upon the annexation of Oudh by the British Government, under-proprietary rights as against the taluqdar. The policy of the Government was to confer heritable and transferable tenures upon such persons.

Note.

R.—14 O. C. 41—That a *birt*-deed should be treated as a sale-deed and not as a lease and that *birt* generally implies an under-proprietary right.

10 O. C. 321.

Minor—Suit brought to set aside a decree passed against him.—Affidavit that the guardian has no interest adverse to the minor.

1. That a mortgage executed by a certificated guardian without the sanction of the Court is not void *ab initio* but that the absence of such sanction relegates the guardian to the position which he would have occupied if he had not been granted a certificate at all.

2 That where a minor challenges a decree, he must establish either that he was not properly represented or that the guardian *ad litem* was guilty of gross negligence in the conduct of the suit.

3. That where a person is appointed by a Court as the guardian, it is the duty of the Court to see that the provisions of the Code, are fully complied with. There must in such cases be an affidavit verifying the fact that the proposed guardian has no interest adverse to the minor and is a fit person to be appointed.

That where there has been no enquiry as to the fitness of the guardian his appointment is not good in law and the minor cannot be said to be properly represented, and the decree passed against the minor in such a suit is not binding on him.

10 O. C. 337.

S. 118 Evidence Act—Ss. 5, 6, 13 Oaths Act 1873—Witness competent to testify but unable to understand oath—Evidence recorded without administering oath

Where a witness is competent to testify but is unable, owing to his tender age, to comprehend the nature of an oath or affirmation, S. 13 of the Oaths Act relieves the Court of the necessity of administering an oath or affirmation to him; and

the evidence of such a person recorded without oath or affirmation may be admitted.

10 O. C. 343 (P. C.) = 29 All. 519.

Res-judicata—Evidence and proof of adoption—Presumption as to probability from conduct of parties—S. 13 C P. C = S. 11 Act V 1908. Estoppel.

In a suit by the appellant against the respondent for a share in certain family property, the question was whether the respondent had been in 1853 validly adopted into another family.

Held 1, that the Committee of Taluqdars appointed under S. 33 Oudh Estates Act (1 of 1869) is not such a Court as is described by S. 13 C. P. C., and their award refusing the respondent maintenance in his own family on the ground that he had been adopted into another was not *res-judicata* in the present suit.

2. The fact that the respondent in 1879, on the death of his alleged adoptive mother claimed to succeed her as the adopted son of her deceased husband, and so secured the succession to which the predecessor in title of the appellant, was then entitled, though he did not oppose the respondents' claim, did not estop the respondent from denying the alleged adoption in this suit

3. A party who asks the Court to presume that an adoption did take place must establish an initial probability that the adoption was likely to have been validly made, and that the conduct of the parties cognizant of the facts has been at least consistent with such a hypothesis.

10 O. C 348.

Pre-emption.—Perpetual lease—S. 9 Oudh Laws Act.

That no right of pre-emption can be claimed in respect of a perpetual lease as such a lease is not a sale.

Note.

F.—14 I. C. 717.—

10 O. C. 350.

S. 562 C. P. C. = O. XLI, r. 23 (V of 1908).—Remand—Appellant not allowed to challenge the validity of the decision on which remand made.

That in an appeal from a decree passed after a remand under S. 562 C. P. C., an appellant cannot be allowed to reopen the decision on which the remand is made.

10 O. C. 353.

Ss. 103, 311, 588, 647 C. P. C.=O. IX, r. 9--O. XXI, r. 91—S. 104; O. XLIII, r. 1—S. 141 Act V of 1908—Appeal from an order refusing to set aside the order dismissing an application for setting aside the sale in default.

That no appeal lies against an order rejecting an application under S. 103 C. P. C. for reviving an application under S. 311 C. P. C. dismissed in default.

10 O. C. 354.

Foreclosure decree—S. 87 Transfer of Property Act—Money paid to discharge a portion of decree cannot be returned.

That where the mortgagor pays only a certain sum under a foreclosure decree but fails to pay up the whole and an application is made by the mortgagee for an order absolute to foreclose the mortgaged-property to him in lieu of the unpaid portion, the mortgagor cannot ask the Court that the sums paid by him under the decree should be returned to him before the decree is made absolute.

10 O. C. 356.

Prior mortgagees' right to redeem a puisne mortgagee.

Where a property has been foreclosed by the first mortgagee in a suit to which the second mortgagee was not a party, the first mortgagee is entitled to redeem the second mortgage; the holder of the second mortgage cannot, however, redeem the first mortgage.

Notes.

R.—13 O. C. 50—As to the form of the decree.

Dist —10 I. C. 174 (176)—Foreclosure decree discharged by the payment made by one defendant against all—Effect of redemption by a puisne mortgagee.

10 O. C. 360.

Hindu Law—Son's right to challenge a ready money-debt contracted by the father—Meaning of "antecedent debt."

Where family property is mortgaged by a Hindu father to secure repayment of an advance made at the time of the mortgage

his son cannot challenge the mortgage on the ground that there was not an antecedent debt. In order to challenge such a transaction he must show that either the debt was not contracted at all or is no longer in existence or is tainted with immorality.

Notes.

F.—12 O. C. 248.

R.—9 Indian Cases 406 (411)—Where a mortgage of family property has been effected by the father, not for legal necessity but also not for immoral purposes, the mortgagee is entitled to a mortgage-decree against the interest of both father and son.

Over—14 O. C. 299.

10 O. C. 363.

Jurisdiction—S. 233 Land Revenue Act (N.-W. P. and Oudh 1901.)

That S. 233 which provides in effect that the Civil Courts shall not interfere with the partition and union of mahals does not apply to suits with regard to a partition in which the plaintiff had no opportunity of having his objections considered by the Revenue Court.

Note.

Exp.—20 Indian Cases 145.

10 O. C. 365.

Ss. 112 and 118 Cr. P. C.—Failure to record an order under S. 118—Irregularity of procedure.

That the provisions of S. 112 Cr. P. C. are merely directory and a failure to record an order under S. 118 should be treated as a mere irregularity.

10 O. C. 367.

Hindu Law—Joint family—Suit for possession brought by a minor to recover proprety alienated without necessity—Limitation—Mother not guardian—Arts. 44, 144 Sch. ii Limitation Act.

1. That in a joint Hindu family, the mother of a minor cannot be considered to be the legal guardian of the minor.

2. Where a member of a Joint Hindu family brings a suit for recovery of possession of the property alienated during his minority by mother professing to act as his guardian, within 12 years from the date of transfer, but more than 3 years from the date of attaining majority, the suit is not barred under art. 44 sch. *ii* Limitation but is governed by art. 144.

10 O. C. 374.

Pre-emption—Limitation in suits based on foreclosure—Art. 120 Limitation Act.

1. That the pre-emption could be claimed in the case of a decree for foreclosure passed on a compromise made in a suit brought for sale of the mortgaged-property on the basis of a simple mortgage.

2. That the limitation in such a suit is to be reckoned from the date when the decree is made absolute.

Note

(2) **R.**—12 O. C. 314—The notice be issued either at the time when he files his suit for foreclosure or with such reasonable promtitude thereafter that the 3 months' grace allowed by S. 12 may expire before the decree absolute is passed.

10 O. C. 378.

S. 4 Succession Certificate Act—Joint decree-holders—Right of the heir of a decree-holder.

That as far as the sums awarded jointly were concerned the surviving decree-holder could execute the decree, but she could not be allowed to execute it with respect to the sums awarded severally without the production of a succession certificate.

11 O. C. 1.

Mahomedan Law—Minor—Transfer of property by one who is not guardian—Custom—Art. 44 and 144 sch. ii. Limitation—Redemption suit by minor 12 years after sale—Ss. 64, 65, 135 Contract Act—Ratification of a void contract—Estoppel—S. 3 Oudh Laws Act.

1. Where a custom is proved to exist, it supersedes the general law which, however, still regulates all outside the custom.

2. That the mortgage of property, belonging to a Mahomedan minor by a person who is not his natural guardian or a guardian judicially appointed, is absolutely void, even though it may have been executed to pay off debts legally payable by the minor; the minor should not be allowed to recover the property until he has paid those debts and thus made restitution to the extent that he has derived advantage.

3. That a suit for redemption brought by a minor is not barred, if brought more than 12 years after it has been sold by one not legally competent to sell, the minor being still entitled to base his cause of action on the original mortgage.

4. That where a transfer is void *ab initio*, it cannot be validated by a subsequent ratification.

11 O. C. 15.

Hindu Law—Joint Hindu family—Right of a member to represent other members of the family—Suit for the recovery of the whole of the family property by one member.

That a member of a Joint Hindu family could not insist upon representing the other members in a suit brought for recovery of the property belonging to the whole family.

Note.

R.—11 I. C. 291—That the decision of the previous suit by B, could not be res-judicata inasmuch as B, had not instituted the former Suit as head of the family and that C as member of the joint family could depend the suit with regard to the entire property, it being joint family property.

11 O. C. 19.

Application to leave to appeal as pauper—Verification—Ss. 403, 592 C. P. C. = O. XXXIII, r. 2; O. XLI r. 1 (V of 1908).

The application if it contains no schedule of the property and is not verified ought to be rejected.

11 O. C. 20.

Will—of illiterate person—Proof.

Those who propound the will of an illiterate person must prove affirmatively that the testator knew and approved of the contents

of the will. Knowledge of the contents cannot be inferred from the fact that he marked the document.

11 O. C. 22.

Execution of decree—Application—Limitation in case of amended decree.

That an application for execution made after 3 years from the date of the original decree, but within 3 months of the date of an amended decree by which it became for the first time capable of execution was within time.

11 O. C. 26.

Pre-emption—Decree for foreclosure on a mortgage by ostensible owner—S. 41 T. P. Act.

Where a mortgagee foreclosed a share mortgaged to him by one who was merely an ostensible owner, a suit for pre-emption brought by a co-sharer against such a mortgagee could not be defeated on the ground, the mortgagor was not the real owner of the share mortgaged.

11 O. C. 29.

Ss. 28, 29, 47 Guardian and Wards Act (1890)—Appeal against order granting possession to transfer.

That no appeal lies against an order of a District Judge sanctioning a mortgage in favour of a particular person in preference to another person. Such an order cannot be treated as an order refusing sanction to morgage.

11 O. C. 30.

Suit by Government to impugn correctness of demarcation of village boundaries accepted by Settlement authorities and agreed to by defendants.

Held, that having regard to circumstances of the case and the conduct of the parties through a long period of more than 30 years, the plaintiff was bound to abide by the demarcation proceedings of 1872 and could not be allowed to impugn their correctness.

11 O. C. 41.

Execution of decree—Sale in execution of decree of inferior Court by order of Court of higher grade—Second Appeal—Ss. 244, 285 C. P. C. = Ss. 47, 63 Act V of 1908

1. The order of the Subordinate Judge, sending for the file of the execution proceedings from the Munsif's Court and causing the property to be put up for sale in the execution of the Munsif's decree, was illegal; he ought to have sold the property in execution of the decree passed by himself.

2. That the proceedings before the Subordinate Judge were under S. 244, C. P. C. and a second appeal was admissible.

11 O. C. 45.

Jurisdiction.—Valuation of suit for purposes of jurisdiction—S. 17 Civil Courts Act (Oudh).

In a suit for demolition of a building and restoration of the land and in the alternative for possession on payment of compensation, the building was found to be worth more than Rs. 1,000; and the Munsif, in whose Court the suit was filed returned the plaint for presentation to the proper Court.

Held, that the subject matter of the suit was the value of the property which the plaintiff said he was entitled to take possession of, and that the case should be restored to the Munsif's file and disposed of according to law.

11 O. C. 48.

Mahomedan Law.—Wakf nominally for pious purposes but substantially to provide maintenance for a particular family—Construction of deed.

Held, that in the deed the appropriation was nominally for a pious purpose and substantially to provide maintenance for the defendants and their descendants, and therefore under the Mahomedan Law the wakf was void and of no effect.

11 O. C. 57.

Execution of decree—Application for—On the last day of 12 years. S. 230 C. P. C. = S. 48 Act V of 1908.

That no order granting the prayer contained in the application could be passed because more than 12 years had elapsed from the date of the decree.

Notes.

R.—11 O. C. 220.—Application of S. 19 Limitation Act to execution proceedings as provided for by S. 230 C. P. C.

R.—8 I. C. 127.—Fresh application or one ancillary to the previous application.

11 O. C. 61.

Ss. 526, 145 Cr. P. C.—Transfer of case under S. 145 Cr. P. C.

That proceedings under S. 145 are "Criminal Cases" and therefore S. 526 Cr. P. C. applies to proceedings under S. 145 Cr. P. C.

11 O. C. 64.

Haq-i-Chaharum—liability of vendee to the landlord—Wajib-ul-arz.

That unless the right of the landlord is limited by the Wajib-ul.arz to a right to claim *haq-i-chaharum* from the vendor, the right can be enforced against the vendee also.

11 O. C. 67.

Pauper—Application for leave to sue—Ss. 407, 409, C. P. C. = O. XXXIII r. r. 5 and 7 Act. V 1908.

That a person, who applies for leave to sue as a pauper, must make out that he has a good subsisting *prima facie* cause of action, capable of enforcement in Court and calling for an answer.

11 O. C. 69.

S. 13 C. P. C. Explanations II and III = S. 11 Act V of 1908—Suit for a share in inheritance—Subsequent suit for dower cause of action.

That the cause of action for a claim for dower is distinct from that for a share in the inheritance.

2. That there is no legal obligation to include a claim for dower in a suit for inheritance.

11 O. C. 73.

Mortgage—Effect of accepting deed of further charge from some of the mortgagors.

That the integrity of the original mortgage was not destroyed by accepting mortgagors deed of further charge executed by some only of the original secured on their own share of the mortgaged-property.

11 O. C. 75.

S 126 Oudh Rent Act—Tenant of lands in a joint mahal taking a mortgage with possession of a share therein, liability of, to pay rent as tenant to the lambardar—Suit for recovery of landlord's share of rent.

1. That the fact of a tenant taking a mortgage of a share in a village does not extinguish his tenancy.
2. Upon the defence that by an arrangement between the plaintiff and R., the latter had received the rent of the plots in question and therefore the plaintiff was not entitled to sue for it, *held*, that there being nothing to show that this was intended to be a permanent arrangement or that the arrangement was intended to continue even if R parted with his share, it did not evidence a "special contract" with in the meaning of S. 126 of the Oudh Rent Act.

11 O. C. 78 (P. C.) = 30 All. 1.

Hindu saw—Mitakshara—Alienation by widow—Legal necessity—Consent of reversioner—Consent subsequent to alienation—Exclusion of daughters from succession among Bhale Sultan Chatris of Oudh.

1. A custom excluding daughters from succession among the Bhale Sultan Chatris of Oudh was held to be proved.
2. Apart from legal necessity, a Hindu widow can validly alienate property with the consent of the next reversioners so as to bind persons who are the actual reversioners upon the death of the widow.
3. Ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible.
4. It is immaterial that the consent of the reversioners is given subsequent to the alienation.

Notes.

Cite.—15 O. C. 122—That a reversioner cannot transfer his chance of succeeding to an estate.

Dist.—32 All. 176—A gift by a Hindu widow (succeeding to the separate estate of her deceased husband) is not valid and does not create a title which cannot be impeached by the remote reversioner because it has been made with the consent of the nearer reversioners.

11 O. C. 89.

Mortgage—Cancellation of—Permanent lease of mortgaged lands in favour of mortgagee—Mortgagee's failure to perform his part of the contract—Jurisdiction.

A mortgage and a lease were executed by the plaintiff upon the understanding that the defendants were to pay off the prior mortgages. The defendant did not pay off the perior mortgages and brought a suit to recover the money advanced to the plaintiff. The plaintiff in this case sought for cancellation of the mortgage and the perpetual lease with the *kabuliat*.

Held, that the case, being one of contract based upon reciprocal promises in which the defendants refused to perform their part of the contract, and that, the contract of lease and that of mortgage being parts of one and the same bargain, the plaintiff was entitled to be relieved of both the deeds.

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11 O. C 93.

Objections by respondent against a party not appellant in the appeal and having distinct interest—Rectification of sale-deed—S. 31 Specific Relief Act.

1. The respondent has no right to file objections against a party who is not an appellant in the case and whose interest is entirely distinct from those of the appellant.

2. That, the deed upon which the plaintiff's claim rested, not having been rectified in accordance with the provisions of S. 31, Specific Relief Act, the plaintiff's suit was not maintainable.

Note.

Dist.—16 O. C. 213.—Where the plots were still in the possession of the heirs of the mortgagor and there were no third persons whose rights were to be injuriously affected, the decision in 11 O. C. 93, did not apply.

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11 O. C. 95.

S. 92 Evidence Act.—Oral evidence to prove that the deed purporting to be a mortgage was intended to be a sale.

That oral evidence is not admissible between the parties to a deed which purports to be a mortgage, or their representatives in interest, to prove that it was intended to be a sale.

11 O. C. 98.

Appeal—Submission to the order returning plaint.—

Where a plaint was returned for presentation to the proper Court and the plaintiff submitted to the order and presented the plaint to the proper Court.

Held, that it was not open to him to appeal from the order returning the plaint.

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11 O. C. 101.

Letters of administration.—S. 4 Probate and Administration Act—Joint family property—Right of daughter in preference to first cousin.

1. That letters of administration cannot be granted in respect of joint family property.

That daughters have a better right to letters of administration in respect of the separate property of the deceased than a first cousin.

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11 O. C. 102.

Will by taluqdar—Construction of document—Threats and undue influence—Revocation of will—Ss. 2, 19 Oudh Estates Act—S. 57 Succession Act.

1. That a portion of a document may operate as a will although another portion may have nothing to do with the will.
2. That the provisions of the Indian Succession Act which have been made applicable to the wills of taluqdars and grantees apply to all the wills and codicils executed by them and not to any particular class of such wills and codicils.

Note.

F.—F. C. A. No. 101 of 1910—Chaudhri Bharath Singh *v.* Chaudhri Balbhadhar Singh. A Hindu has the power to make a valid bequest independently of Act I of 1869. Replies sent by taluqdars or grantees to inquiries made by the Government as to their wishes in regard to the devolution of their estates amount to testamentary disposition enforceable under the Hindu Law.

11 O. C. 112.

Execution of decree—Power of Court to which the decree has been transferred to grant permission to continue execution proceedings begun upon the application of a decree-holder, since deceased—S. 232 C. P. C. = O. XXI, R. 16 Act V of 1908.

That the Court to which a decree has been transferred cannot give permission under S. 232 C. P. C. Such permission can be granted only by the Court which passed the decree.

11 O. C. 114.

S. 111 cl. (b) Land Revenue Act (III of 1901)—Suit after expiry of period fixed by Revenue Court to establish such right.

A suit, to establish right to a share claimed in a partition case in a Revenue Court after the expiry of period fixed by the Revenue Court, could not be entertained.

11 O. C. 116.

S. 523 C. P. C.—The second schedule Act V of 1908—Appeal—Order refusing to file agreement to refer to arbitration.

That an appeal lies against an order refusing to file an agreement to refer to arbitration.

11 O. C. 118.

Ss. 129, 132 Oudh Rent Act—S. 7 Limitation Act—Suit for arrears of rent—Minority of plaintiff.

In a suit for arrears of profits when the cause of action arose during the minority of the appellant, it was *held* that, the appellant was entitled to the benefit of S. 7 Limitation Act.

11 O. C. 121.

Daily fine—Conviction on failure to comply with an order to vacate land—S. 168 Municipalities Act (I of 1900).

That S. 168 does not authorize the imposition of a daily fine.

11 O. C. 122.

Ss. 132, 147 Municipalities Act (I of 1900)—Sentence of daily fine on second conviction for failure to remove the structure.

1. That the imposition of a prospective fine is illegal.

2. That the words "first conviction" in Ss. 132 and 147 make it clear that the Legislature contemplated a conviction for an original offence or disobedience of a lawful order and subsequent convictions for a continuation of or persistence in an original offence or disobedience.

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11 O. C. 126—(P. C.)

Redemption—Construction of deed—Compound interest—maintenance paid by the mortgagee—Enhanced Government revenue—Arrears of rent barred by limitation—Res-judicata—accounts filed in previous suit for possession—Points not raised in the courts below.

1. *Held*, (on construction of the deed)—that the mortgagor was not liable for compound interest since the mortgagee took possession of the mortgaged-property.

2. That under the terms of the mortgaged-deed, the mortgagee was entitled to (*a*), the amount paid by him on account of maintenance, (*b*) enhanced Government revenue over and above the usufruct of the mortgaged-property and (*c*) the arrears of rent even if such arrears were barred.

3. That nothing had occured in the previous suit for possession to raise an estoppel against the mortgagor, and therefore he might in the suit for redemption show that under the terms of the deed compound interest was not payable.

4. That the points not taken in the Courts below could not be raised at the hearing of the appeal before their Lordships.

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11 O. C. 144.

Pre-emption.

1. *Period fixed for payment expiring on a Gazetted holiday*—That the payment could be made when the Court opened.

2. *Delay due to official oversight.*—That the rights of a decree-holder are not affected by such delay.

3. *Appeal.*—That the question of payment or non-payment of a pre-emptive price in terms of S. 214 C. P. C. = O. XX, r. 14 Act V. of 1908 is not a question of execution open to appeal under S. 244 C. P. C. = (S. 47 Act V of 1908).

4. *Power of High Court to extend period.*—That a High Court in revision has the power vested in a Court of Appeal, to fix a fresh date for the deposit of the purchase-money.

5. *Appeal treated as revision.*—The Court in this case, treated the appeal before it as an application for revision.

Notes.

(4) Dist.—16 O. C. 5.—A Court cannot extend the time granted by a pre-emption decree for the payment of the purchase-money after the time fixed by the decree has expired.

(3) Dist.—17 O. C. 14.—Where a pre-emption decree directed that the suit should stand dismissed with costs, if the purchase-money be not paid within two months and the Court subsequently passed an order dismissing the suit on the ground that the payment was not made within time, *held*, that the order was appealable as a decree.

11 O. C. 148.

S. 198 Cr. P. C.—S. 495 Penal Code.

Person "aggrieved."—That a brother of the husband of the woman who committed bigamy is not, as such, a "person aggrieved" upon whose complaint the Court could take cognizance of an offence of bigamy.

11 O. C. 151.

Injunction Notice.—S 494 C P C.= O. XXXIX, r. 3 Act V of 1908.

That an order granting an injunction without notice to the opposite party and without giving any reason for adopting such a course is illegal.

11 O. C. 152.

Instrument—not sufficiently stamped—S. 36 Stamp Act—admissibility of acknowledgment evidencing a fresh contract.

1. That an instrument once accepted, rightly or wrongly, in evidence cannot by reason of the special provisions of S. 36 be challenged on account of deficiency of stamp duty.

2. Where an acknowledgment contained the words "and shall be paid," *held*, that these words evidence a fresh contract furnishing an independant cause of action.

11 O. C. 154.

Suit for foreclosure—Jurisdiction—Values of subject matter.

1. That a suit foreclosure of a mortgage of land is a suit for land.
2. That the value of the subject matter of such a suit cannot exceed value of the mortgagor's interest which will pass to the plaintiff mortgagee on foreclosure.

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11 O. C. 159.

Minor—Ss. 440, 578 C. P. C. = O. XXXII, rr. 1 and 4 (2) ; and S. 99 Act V of 1908—Suit instituted without next friend.

Such a suit should not be dismissed but the proper course is to give an opportunity for steps being taken to have a next friend brought on the record.

2 *Effect on attainment of majority by removal of certificated guardian*—The ward will not attain his majority till he attains the age of 21 years.

Note.

(2) **Dist.**—15 O. C. 153—Where the appointment of a guardian is cancelled the age of majority must be deemed to be 18 years.

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11 O. C. 164.

Reza milkiat—Meaning of—it means a proprietary or under-proprietary title in a small plot of land.

Note.

R.—16 O. C. 173—As to under-proprietary right in *Reza milkiat.*

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11 O. C. 169.

Application for leave to appeal.

1 *S. 562 C. P. C. = O. XLI, r. 12 Act of 1908*—applies to a case decided on a point of law on such materials as are available before the parties prove disputed documents or adduce oral evidence.

2 That the words "*evidence of essential facts*" in 17 All. 112 meant evidence of facts essential to the disposal of the case and not merely essential to the question which has been decided.

3. *S. 595 C. P. C. = S. 109 Act V of 1908 "final order"*—That an order of remand which will not necessarily have any effect on the ultimate decision of the case was not a final order.

11 O. C. 173.

Alternative reliefs.

S. 17 Court Fees Act—Applies not only to a case in which cumulative reliefs are sought but also to a case in which the plaintiff claims alternative relief in respect of different causes of action.

11 O. C. 176.

Pre-emption—Plea that a sale was in reality a gift—Estoppel.

Where it was contended that the parties to a sale-deed were estoppel from proving as against the pre-emptor, that the transaction was in reality different from what it appeared to be, *held*, that before the plea of estoppel could be maintained it must be proved that the plaintiff believed the representation and brought his suit in consequence of that belief.

2. A gift does not give rise to a right of pre-emption.

Note.

(1) **Dist.**—8 I. C. 501 (502)—That under Ss. 92 and 99 of the Evidence Act, evidence could be given by the pre-emptor to show the real nature of the transaction, he being no party to the instrument.

11 O. C. 180.

Ss. 278, 283 C. P. C. = O. XXI rr. 58 and 63, Act V of 1908.

That an order disallowing a claim under S. 278 C. P. C. for want of prosecution is conclusive unless a suit is brought under S. 283 within one year from the date of the order.

Notes.

F.—12 I. C. 345.

5.—I. C. 890—**R.**—28 P. R. 1910—That the order allowing the objections was an adjudication on the merits after an investigation under S. 280 C. P. C. (of 1882), and a suit for declaration that the property was liable to attachment must be brought within one year from the date of the order.

11 O. C. 183.

Under-proprietor—Acquiring superior proprietary rights—Merger.

Where an under-proprietor acquired the superior proprietary rights by inheritance, *held*, that the under-proprietary tenure ceased to exist from that date.

Notes.

Dist.—12 O. C. 97—In dealing with the question of merger, the Court has to consider the circumstances of the transaction and where no intention is expressed, the Court should consider what is most advantageous to the parties.

Dist. and Doubt—13 O. C. 35—Mortgage of proprietary rights by its owner before merger does not affect under-proprietary rights after merger.

11 O. C. 187.

Under-proprietary rights—S. 107 H. Oudh Rent Act.

1. *Effect of declaration of such right*—That a person becomes under-proprietor from the time when the declaration is made and not before.

2. *Effect of assessment of rent*—That such rent becomes, payable only from the date of declaration made in the suit.

Note.

Dist.—12 O. C. 35—In 11 O. C. 187, a rent free tenure was resumed but in 12 O. C. 35, the appellants became ex-proprietary tenants from the date on which the partition was confirmed. In 12 O. C. 35, it was held that the rent determined under S. 36 (2) though subsequent to the institution of the suit took effect from the date on which the ex-proprietary tenancy arose.

11 O. C. 191.

S. 17 C. P. C.=S. 20 Act V of 1908.

1. *Place of payment*—Where no place of payment is specified, the debtor must follow his creditor and pay where his creditor is.

2. *Principal and Agent*—That the same rule applies to the case of an agent who has to pay money to his principal.

11 O. C. 195.

Khasra.

Admissibility of entries in remark's column.—That such entries made by the Patwari are admissible in evidence.

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11 O. C. 197.

S. 53 Transfer of Property Act.

1. *Good faith.*—That even where there is some consideration, the transaction will be avoided under S. 53, if the element of good faith is not present.

2. *Single creditor's right.*—That a single creditor is entitled to maintain proceedings to avoid fraudulent transfers.

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11 O. C. 206.

Purchaser—Decree-holder putting property to sale without disclosing his lien Ss. 237, 287 C. P. C. = O. XXI, rr. 13, 66, 70 Act V of 1908.

That a person who has caused the property of his judgment-debtor to be sold in execution cannot afterwards set up any claim of his own against that property unless he shows that the purchaser purchased with notice of it.

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11 O. C 208.

1. *Limitation for application under S. 206 C. P. C. = O. XX, r. 6; S. 152 Act V of 1908.*

That no question of limitation arises with regard to action under S. 206.

2. *Revision S. 622 C. P. C. = S. 115 Act V of 1908.*—Where the lower Court declined to correct a clerical error it could be interfered with in revision by the High Court.

Note.

R.—VI I. C. 537 (540)—

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11 O. C. 212.

1. *Contract with respect to Mahabrahmani offering.*—That such contract is not enforcible against the heirs of or representatives of the parties to the agreement.

2. *Transfer of non-existent property.*—That, if the transaction were regarded as a transfer rather than a contract, it could not take effect with respect to non-existent property.

11 O. C. 217.

Suit for recovery of money agreed to be paid on a mortgage—S. 21 (a) Specific Relief Act.

The plaintiff mortgaged certain property to B for 12,000. He received Rs. 4,000 in cash. Rs. 7,000 were left with the defendants to pay off prior mortgage and the balance Rs. 1,000 was paid to the plaintiff after a month and a half. This was a suit to recover this sum of Rs. 1,000. The defence was that the defendants had to pay Rs. 84,000 to the prior mortgagee so that he owed the plaintiffs Rs. 400.

1. *Held*, that, it being a contract to lend money, a suit for specific performance of such a contract was not maintainable.

2. That such a contract does not create a debt.

11 O. C. 220.

Execution of decree—Effect of order in execution proceedings as res-judicata.

The order is binding on the parties in all subsequent proceedings in the suit on principles analogous to those of *res-judicata*, and that the effect of the previous order must be confined to the point actually decided.

2. *Application of S. 19 Limitation Act and S. 230 C. P. C. = S. 48 Act V of 1908.*

That the provisions of S. 19 Limitation Act cannot affect the absolute prohibition, against the granting of an application after 12 years as provided by S. 230 C. P. C.

11 O. C. 225.

1 *Appropriation of debt due to two persons towards a debt due against one of them alone.*

That in execution of a decree obtained against one person, alone a decree-holder is not entitled to have a debt due to that person and another jointly realised and applied towards the discharge of his decree.

2 *Amendment of plaint*—Where a plaintiff sued on a promissory note in favour of himself and others, who were added as defendants, on the plea that he alone was not entitled to the amount claimed, the plaintiff was allowed to amend his plaint so as to claim jointly for himself and the added defendant.

11 O. C. 231.

Right of assignee of a money-decree obtained by the mortgagee, to sell in contravention of S. 99 Transfer of Property Act—S. 232 C. P. C.=O. XXI. r. 16 (V of 1908).

Estoppel—That S. 99 Transfer of Property Act applies as much to the transferee of a money-decree obtained by the mortgagee as to the mortgagee himself.

11 O. C. 235.

1 *Power of Court to give effect to orders of His Majesty in Council.*

That Courts in this country have inherent power to give effect to such orders

2. *Mesne profits—Decree silent as to.*

In such case the Court whether by S. 583 C. P. C.=S. 144 (1) Act (V of 1908) or by reason of its inherent powers, can order execution for *mesne profits.*

11 O. C. 238.

Revison—S. 622 C. P. C.=S. 115 Act V of 1908.

That, where there is no irregularity or want of jurisdiction, the order of the Lower Court, even if erronenous, cannot be disturbed in revision.

Note.

R.—12 O. C. 405—No application for revision will be against an interlocutory order which does not determine the case.

R.—9 I. C. 83 (85)—

11 O. C. 240.

Under-proprietary right—Marwat grant—S. 3 Oudh Rent Act—That a *marwat grant* is not an under-proprietary holding.

11 O. C. 246.

Power to demand security from manager—S. 258 C. P. C. = O. XXI, r. 2 Act V of 1908.

That as he was acting as managing member of a Joint Hindu family no security could be demanded from him.

11 O. C. 248.

1. *Mortgage with possession—Second mortgage under an unregistered deed—Delivery of property—S. 59 Transfer of Property Act*—That there being nothing in the transaction which could be regarded as delivery of the property, the deed should have been registered.

2. *S. 49 Registration Act—Purchaser not bound by stipulation postponing redemption till payment of the additional advance.*—That a purchaser of the property subject to the mortgage was not bound by the stipulation; and that the stipulation could not be enforced because the subsequent deed being inadmissible in evidence under S. 49 Registration Act could not be used to fetter the equity of redemption.

11 O. C. 252.

S 111 Land Revenue Act.—Jurisdiction—Objection by talukdar in a partition proceeding between under-proprietors.

That such objection, alleging that certain land claimed by the under-proprietors was not a part of their under-proprietary holding, could be maintained under S. 111 by Revenue Courts.

11 O. C. 256.

Rule of succession applicable to non-talukdari property.

(1) That the devolution of the acquired property was not governed by the *sanad*.

(2) That a zamindar cannot make his property descendible in a manner not recognised by the ordinary law to which he is subject.

Note.

Dist.—16 O. C. 291—The decision in 11 O. C. 253 which was based on a *sanad* does not apply where the question of custom was raised.

11 O. C.261.

Ss. 203, 437 Cr. P. C—Grounds for dismissal of complaint —Order for further inquiry—Notice if essential.

1. Where a complaint has been dismissed under S. 203, *held*, that the Session's Judge was not bound to issue notice to the accused before ordering further inquiry under S. 437.

2. That a person bringing a complaint is entitled to produce evidence in support of it subject only to two conditions, *viz.*, (*a*) that facts alleged constitute an offence and (*b*) that there are no circumstances apparent on the examination of the complainant, such as to justify the Court in coming to the conclusion that the complaint is false.

11 O. C. 264.

Second Appeal—Finding of fact based upon an incorrect view of the law—S. 584 C. P. C.= S. 100 Act V of 1908—Joint Hindu Family—Separate transaction—Entries of separate possession.

1. That where the parties have not had the benefit of a proper discussion of facts based upon a correct view of the law, the proper course is to set aside the decree and remand the suit.

2. That neither the mere occurrence of separate transactions on the part of individual members of a joint Hindu family nor the fact that property was entered as their separate possession in the village papers, is in any way conclusive on the question of separation.

11 O. C. 267.

Ss 112, 118 Cr. P. C.

1. *Order absolute at variance with the conditional order*—That a Magistrate cannot vary the conditional order made under S. 112 by enforcing further conditions in the order absolute.

2. *Enquiry about sureties*—That a Magistrate ought not to reject sureties merely on the report of the Police without making any enquiry himself.

Note.

(2) **App.**—15 O. C. 263.—Magistrates have no authority to reject sureties merely upon an unfavourable report of the Police.

11 O. C. 271.

Hindu Law—Will—Power of appointment, validity of—Person appointed, qualifications necessary.

1. That a Hindu testator has a right to grant a power of appointment to a person named in the will by which the final devolution of his estate should be regulated at the termination of a life estate created under the will.

2. That the person capable of taking under the will must be such a person as should take a gift *inter vivos* and therefore must either in fact or in contemplation of law be in existence at the death of the testator.

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11 O. C. 279.

Purchaser's liability for arrears of Government Revenue—Liability as between purchaser and original co-sharers—contribution between persons equally liable S. 142 Land Revenue Act (III of 1901)—S. 69 Contract Act.

1. That the object of the second part of the first clause of S. 142 is not to transfer the liability for the revenue from one person to another but to make the person succeeding to the property liable in addition to those already liable.

2. That as between a vendee and the vendor, in the absence of a contract to the contrary, the responsibility for payment of the arrears of revenue rests on the latter who enjoyed the property during the time for which the arrears are payable.

3. That S. 69 Contract Act applies to cases in which both plaintiff and defendant were liable for a payment which has been made by the plaintiff alone.

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11 O. C. 285.

Redemption—Burden of proof—Admission—S. 63 Evidence Act—S. 6 of Act 1 of 1869.

1. In case of an old mortgage the burden is on the plaintiff to give at least *prima facie* proof that the mortgage is redeemable.

2. That secondary evidence of the terms of the mortgage-deed, if admissible, must be of the kind specified in S. 63 Evidence Act.

3. That no admission by the mortgagee can operate to make a mortgage redeemable which by law was irredeemable at the time when the admission was made.

Note.

(1) **R.**—18 I. C. 230.

11 O. C. 290.

Pre-emption.

(1) *Plaintiff's title at the time of institution of the suit*—That the plaintiff must show a valid and subsisting title at the time when he brings his suit into Court.

2. *Title acquired by purchaser subsequent to the cause of action*—That a purchaser may use a title acquired by him subsequently to the origin of the cause of action as a defence against a pre-emption suit instituted after his acquisition of the said title.

Notes.

(1) **R.**—12 O. C. 229—Plaintiff must show a valid title on the date of decree—Imperfect partition.

(2) **R.**—14 O. C. 156—Pre-emption suit dismissed if property resold to vendor prior to suit.

11 O. C. 292.

Hindu Law.

1. *Son's interest in a tenant's holding of the father*—That the sons living jointly with their father are not the co-tenants of his holding.

2. *Relinquishment by father without son's consent*—That such relinquishment of his holding is perfectly valid.

11 O. C. 295.

Undue influence.

S. 16 Contract Act—In order to make out a case for undue influence there must be certain relations between the parties anterior to the transaction in question which placed one party in a position to dominate the will of the other.

11 O. C. 301.

1. *Transfer of the chance of an heir apparent—S. 6 (a) Transfer of Property Act.*—That such transfer is invalid and cannot operate to transfer any interest in the property.

2. *Mutation of names or transfer of possession.*—That neither mutation of names nor transfer of possession can pass any title where the law requires a registered-deed.

3. *Estoppel—Recital in a deed, effect of, in an action collateral to it.*—Where a distinct statement of a particular fact is made in a recital of a bond and a contract is made with reference to that recital, *held*, that the party making the statement would not be estopped from disputing the fact so admitted in an action not founded on the deed but wholly collateral to it.

4. *Promise—Estoppel*—That a promise not being a representation as to an existing fact, cannot by itself be the foundation of an estoppel.

Notes.

(1) Dis.—14 O. C. 139.—In 11 O. C. 301—The agreement sought to be enforced had been made during the life-time of the widow in possession of the property. In 14 O. C. 139, the agreement in question could have been made the basis of a suit for specific performance after the vendor had obtained possession of the whole of the property.

(1) R.—15 O. C. 122.—The ruling in 11 O. C. 301 is clear authority for the proposition, that a reversioner can not transfer his chance of succeeding to an estate. An agreement amounting to a transfer of an expectancy of succession by a reversioner is void.

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11 O. C. 307.

Penalty—Interest at enhanced rate on default.—S. 74 Contract Act.

1. That an agreement for enhanced interest, simple or compound, payable prospectively from date of default may or may not be a penalty according to the circumstances of each case.

2. That a covenant for interest at an enhanced rate to take effect retrospectively from date of the bond is necessarily a penalty.

3. That, where no unfair advantage has been taken, a debtor is not entitled to relief merely because in case of default the terms accepted by him are markedly less favourable.

Note.

F.—13 I. C. 624.—

11 O. C. 310.

Hindu Law.—Widow—acquisitions out of the income of widow's estate—Purchase for value—Burden of proof—Legal necessity.—

1. That if property acquired by a widow out of the income of her husbands' estate be treated by her as an accretion to the said estate, she cannot alienate it except for *legal necessity;* but if she clearly shows her intention to keep the property separate, it may be regarded as an investment of accumulated savings over which the widow has full disposing power.

That in the absence of evidence as to the intention of the widow it is not equitable to throw the burden of proof on a *bona fide* purchaser for value.

3. That no presumption can be drawn from the mere fact that the property acquired consisted of shares of other members in the family property.

Note.

R.—16 O. C. 359—That properties acquired by a widow out of the income of the husband's estate must be presumed to be the widow's property.

11 O. C. 319.

Minor—Decree against a properly represented minor.

1. That where there is no fraud, collusion or gross negligence on the part of the next friend or guardian, the minor is as much bound, whether it was for his benefit or not, as if he were of full age.
2. *Minor not properly represented*—The minor cannot be held to have been not properly represented merely because the Court appointed as his guardian a person whose act was called in question in the suit.
3. *Fitness of guardian S. 443 C. P. C. = O. XXXII, rr. 3 (1), 4 (2) Act V of 1908*—A person whose act is called in question should not be appointed as guardian *ad litem* even though it is a case to which S. 443 C P. C. applies.

11 O. C. 323.

Redemption—Interest—Possession on default of payment of—Construction of mortgage-deed.

Where under the terms of the mortgage-deed the mortgagee, on default of payment of interest was entitled to take possession but he did not take possession until several years after the first default.

Held, that the mortgagee was entitled to get interest for the period he was out of possession.

11 O. C. 326.

Suit for recovery of Patwari rate—Jurisdiction—S. 108 (2) Oudh Rent Act.

That a suit for recovery by a superior proprietor of the Patwari rate due from an under-proprietor lies in the Rent Courts under S. 108(2).

11 O. C. 328.

Confession—Admissibility against a co-accused—S. 30 Evidence Act.

That a confession of a prisoner affecting himself and co-accused is, when duly proved, admissible as evidence against both; but a confession unsupported by other testimony is evidence of the weakest kind against a co-accused. The Court must in each case decide what weight should be attached to it.

R.—12 C. C. 418—That the retracted confessions have very little weight as evidence against the other accused persons and do not constitute the independent evidence of corroboration of the statement of the approver.

11 O. C. 334.

Hindu Law—Joint family—Decree against father—Suit against son on death of father.

That the death of a father does not give his creditor a fresh cause of action against his son for the recovery of a judgment-debt binding upon the sons.

11 O. C. 337.

1. *Possession, valid title against all—Except the rightfull owner.*
2. *Possessory title is heritable and transferable.* That such title would descend by inheritance to the heirs and is also transferable.

11 O. C. 342.

S. 253 C. P. C = S. 145 Act V of 1908—Surety for performance after the decree.

That S. 253 C. P. C. does not apply to a person who gave security for the performance of the decree after it had been passed.

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11 O. C. 345.

Occupancy tenant—Validity of mortgage—That a temporary transfer, whether in the form of a mortgage or otherwise by an occupancy tenant in favour of his *land-holder* is valid.

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11 O. C. 346.

Suit for possession of property mortgaged and sold during minority of plaintiff —Limitation—Arts 12, 91, 144 *Limitation.*

1. That the suit having been instituted within 12 years of the date of mortgage is within time.

2. That such a suit is not barred by arts 12 or 91.

Notes.

Not F.—17 O. C. 52—The claim of the plaintiff became extinguished three years after his attaining majority.

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11 O. C. 353.

Suit to enforce registration—Ss. 32, 73, 74, 76, 77 Registration Act.

1 In order to maintain a suit under S. 77, refusal to register by a Sub-Registrar, an application to the Registrar within time, and a refusal by him must be established.

2. That the fact that the Registrar has not held a full inquiry, or has taken a wrong view of the law does not bar the suit.

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11 O. C. 355.

Suit for removal of building constructed by a co-sharer without the consent of others.

That the other co-sharers are entitled to such relief if they have objected to it at the first possible opportunity and no great injury will thereby be caused to the co-sharer who has erected the building.

11 O. C. 358.

S 195 Cr. P. C.

S. 80 Registration Act—That a Registrar is not a Court within the meaning of S. 195 Cr. P. C, though he is entitled to institute a prosecution for any offence falling under S. 82 Registration Act.

11 O. C. 360.

Appeal under S. 421 Cr. P. C.

Right of Counsel to refer to certified copies of evidence at the hearing of appeal—That the Counsel was entitled to refer to certified copies of the evidence.

11 O. C. 362 (P. C.) = 30 All. 510.

Pedigree, admissibility in evidence of—Statements of members of the family touching tradition on the subject of its descent—Statements made post litem motam—Notice of controversy.

1. That pedigrees which are merely documents drawn up on a particular occasion for a specific purpose by members of the family are, unless made *post litem motam*, admissible in evidence no declaration made by the member who drew it up or adopted it touching the family reputation or tradition on the subject of its descent.

2. That in order to make any such statement inadmissible on the ground of its having been made *post litem motam*, the matter in controversy must be the same before and after the statement is made.

Note.

(2) **R.**—15 O. C. 364—The distinction between cl. (6) and cl. (5) of S. 32 Evidence Act is clearly laid down in **11** O. C. 362.

11 O. C. 371 (P. C.) = 30 All. 525.

Malicious prosecution—Suit for damages—charge false to the knowledge of complainant—Information to the Police—S. 495 Cr. P. C.—Malice.—

1. Where a complainant does not go beyond giving what he believes to be correct information to the Police, and the Police without further interference on his part (except giving such honest

assistance as they may require), think fit to prosecute, he cannot be held responsible in damages for the failure of prosecution. But if the charge is false to the knowledge of the complainant and he misleads the Police by bringing suborned witnesses or influences them to assist him in sending an innocent man to trial, he would be liable, although the prosecution has not, technically, been conducted by him. The mere setting the law in motion is not the criterion, the conduct of the complainant before or after making the charge must also be taken into consideration.

2. That malice may be shown at any time in the course of an inquiry.

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11 O. C. 377.

Ss. 90, 96, 97 Transfer of Property Act.

1. *Costs recoverable.*—

   (*a*) That costs decreed are recoverable under S. 90, Transfer of Property Act.

   (*b*) That S. 97 applies directly only to proceedings under S. 96.

2. *Mortgagee holding a single decree on two mortgages.*—Cannot be precluded from appropriating sums recovered by him in execution towards the satisfaction of whichever mortgage he finds most convenient.

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11 O. C. 379.

Art. 32 sch. ii Limitation Act.—

A suit for removal of trees newly planted by a grove-holder is governed by art. 32 Limitation Act.

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11 O. C. 381.

Hindu Law.—Joint family—Presumption in favour of jointness—Entries in revenue papers of specified shares.

1. Where a family is once proved or admitted to be joint, there is a strong presumption in favour of the continuance of such jointness which can be rebutted only by most cogent evidence.

2. That the mere fact that names of two brothers are entered in the revenue papers as owners of specified shares does not constitute separation.

3. That cesser of commensality is cogent but not conclusive evidence of separation; the intention to separate must be proved.

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12 O. C. 1.

Pre-emption—Meaning of "Village community"—Ss. 7, 8, Oudh Laws Act—Inhabited sites not necessary for existence of village community.

1. That a "village community" consists of the whole body of persons possessing rights as proprietors, under-proprietors or haritable lessees in village lands and that the existence of an inhabited site in the village is not necessary to the establishment thereof.

2. That the exclusion laid down in S. 8 applies to the situation of lands and not to the residence of the village community.

Notes.

(1) **F.**—13 O. C. 202—A grove-holder is not member of the village community.

12 O. C. 13[1]

S. 108 (15) Oudh Rent Act.

Suit for profits—The plaintiff need not be a *recorded co-sharer* during the period to which the suit relates. It is sufficient that the name was recorded at the time when the suit was brought.

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12 O. C. 15.

Under-proprietary title—Declaratory suit by landlord against tenant setting up under-proprietary title—Art. 120 Sch. ii Limitation.

Where a person contesting a notice of ejectment alleged himself to be an under-proprietor and the suit contesting the notice was decreed merely on the technical plea that one notice was not sufficient, *held*, that the decision did not set time running against the landlord for a declaratory suit against the tenant.

Note.

Dist.—16 O. C. 163—The principle laid down in 12 O. C. 15 can have no application in a case where the suit is one for possession and not merely for a declaration of title.

12 O. C. 17.

S. 17 C. P. C. = S. 20 Act V of 1908.

1. *Catalogue, whether offer or not*—That a *catalogue of goods* for sale is not a series of offers but only an invitation for offers.

2. *Place of suing—Contract.*

Where A in *Rae Bareli* on receipt of a letter from a firm in Bombay giving particulars of an electrical machine for sale, sent an order which was complied with, *held*, that it was A who offered to buy the goods and it was the firm who accepted the offer and the contract was therefore made at Bombay.

12 O. C. 21.

Mortgage—Suit for possession by mortgagee entitled to foreclosure also—Ss. 42, 43 C. P. C = O. II, R. 1; O. II, R. 2 (V of 1908)—Plea raised for the first time in second appeal.

Held, 1, that he could maintain his suit for possession without suing for foreclosure.

(2) That Ss. 42, 43 do not mean that when two remedies are open to a plaintiff, he is bound to sue for both.

(3) That the plea that Ss. 42, 43 barred the suit raised for the first time in second appeal was not entertainable.

12 O. C. 23.

Ss. 518, 522 C. P. C. = The second schedule, Act V of 1908.

1. *Meaning of "award"*—That the word "award" in S. 522 means the award as given by the arbitrators and not as amended under S. 518 C. P. C.

2. *Power of arbitrator to direct payment by instalments*—Where all matters in dispute were referred to arbitration, the arbitrator had power to determine not only the amount to be paid but also the mode of payment and could therefore direct payment by instalments.

12 O. C. 25.

Ss. 108 (O. IX, r. 13)—540 C. P. C. = S. 96 Act V of 1908.

In an *appeal* against an *ex parte decree*, the appellant is not entitled to ask the Appellate Court to accept the appeal on grounds which could be urged in an application under S. 108 C. P. C., and to remand the suit for rehearing.

12 O. C. 31.

Pre-emption.

1. *Valuation of suit where property is alleged to be of greater value than sale consideration* —In such a case the value of the suit should be measured by the consideration stated in the deed.

2. *Sufficient cause—Appeal filed in the Court of the District Judge by mistake.*

Note.

1. **Not F.**—9 I. C. 414—The jurisdiction of the Court is to be decided by the valuation set forth by the plaintiff in the plaint and not by the price set out in the sale-deed.

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12 O. C. 33.

S. 56 Specific Relief Act—Suit for an injunction to close the door and to remove the thatch and to prevent the flowing of water from the defendant's roof on his land.

Held, that the facts did not constitute such a dispossession as to bar the suit under S. 56, and to necessitate a resort to an action for ejectment.

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12 O. C. 35.

Ss. 36 (2), 126 Land Revenue Act (U. P)—Ex-proprietary tenant—Restropective effect of determination of rent.

That the rent determined under S. 36(2) though subsequent to the institution of the suit took effect from the date in which the exproprietary tenancy arose.

F.—15 O. C. 45.—Such tenant is liable to pay rent from the date on which the exproprietary tenancy arises.

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12 O. C. 37.

S. 91 Transfer of Property Act—Redemption—Right of daughter-in-law of a Hindu to redeem—Interest—Maintenance.

That a daughter-in-law of a Hindu entitled to maintenance has not such an interest in the family property as would entitle her to redeem.

12 O. C. 40.

Award—S. 526 C. P. C.=The second schedule Act V of 1908—Misconduct—Grounds of appeal against order enforcing private award.

1 That an order under S. 526 C. P. C. directing an award to be filed and ordering its enforcement is a *decree.*

2 *Appeal*—That in such a case no appeal will lie except in as far as the decree is in excess or not in accordance with the award.

3. The question of the misconduct of arbitrators cannot be considered in such an appeal.

12 O. C. 45.

Mortgage.—

1 *Purchaser at a sale in execution of a mortgage decree.*—That such purchaser does not claim through or under the mortgagee but that such a purchaser acquires the interest of the mortgagor as at the date of the mortgage.

2 *Adverse possession*—If the mortgagee entitled to possession was kept out of possession by a trespasser for more than 12 years, the interest of the trespasser will not be affected by a subsequent purchase at a sale in execution of a decree on the mortgage.

3 That in the case of a simple mortgage when the mortgagee is not entitled to possession, 12 years adverse possession against the mortgagor would extinguish the security as regards the property held adversely to the mortgagor.

12 O. C. 58.

Trespasser.—

1 *Possession of part—Presumption*—That possession of part is in law possession of the whole, if the whole is otherwise vacant. But constructive possession of this kind can only be presumed when there is a claim based upon title.

2 *Trespasser's possession*—That trespasser's possession is confined to the land actually occupied by him.

12 O. C. 63.

Custom.—

1 *Exclusion of daughter's son from inheritance*—That the exclusion of the daughters necessarily implies the exclusion of daughter's sons as well.

2. Construction of *wajib-ul-arz* excluding daughters.

3. *Custom of exclusion of daughters' sons from inheritance* was proved amongst the *Bais Choudhri Thakurs of the* village *Alampur* in *Pergana* Rokha, District Rae Bareli.

Note.

F.—XXII, Indian Cases 138.—Although there is no express exclusion from inheritance in the language of a wajib-ul-arz, there may be exclusion by necessary implication.

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12 O. C. 74.

Ss. 283, 278, 279 C. P. C. = O. XXI, r. 58, 59, 63 (V of 1908) Burden of proof—

If a person intervenes unsuccessfully on the strength of a document of title and is obliged to bring a suit under S. 283, he must give *prima facie* evidence that the document represents a *bona fide* transaction. But the rule does not apply where the objection under S. 278 was not maintainable and there could not have been an inquiry under Ss. 279 to 282 of the Code.

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12 O. C. 78.

S. 622 C. P. C. = S. 115 Act V of 1908—S. 31 (2) Guardian and Wards Act.

1. That the High Court is not precluded by the absence of an application by a party from exercising its jurisdiction under S. 622.

2. That the *order granting permission for sale* (not reciting the necessity) could not be regarded as embodying the particulars required by S. 31 (2) Guardian and Wards Act merely because it was endorsed on the back of an application which specified an alleged necessity.

3. That S. 31 (2) Guardian and Wards Act, though it relates to procedure is not merely directory.

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12 O. C. 83.

Guardian—Transfer—Notice to relations.—

When a widow is appointed guardian of the person and property of her minor children, a note should be made on the file to the

effect that applications for transfer by the guardian will not be sanctioned until after notice has gone to the male relations of her late husband.

12 O. C. 84.

Redemption—Property purchased from mortgagee—Art. 134 Limitation Act. —Question of bona fide purchase.

This was a suit for redemption of an usufructuary mortgage in which the transferee from the mortgagee was also made a party. It was found that the mortgagee had purported to transfer the absolute ownership of the property.

1. *Held*, that the suit against the vendee is barred by art. 134.
2. That it is not necessary to inquire into the question of *bona fides* under this article.

11 O. C. 90.

Jurisdiction—(Civil and Revenue Courts)—Suit for possession by under-proprietor—Merger.

1. *Plaint to determine jurisdiction*—That the question whether a suit has been instituted in the right Court or not must in the first instance be decided on the plaint.
2. "*Illegally ejected*" *in S. 108 (10) Oudh Rent Act*—The words include an ejectment by process of law if the ejectment is illegal.
3. *Application of S. 108 (10)*—It is not confined to such under-proprietors as have had their under-proprietary rights determined by competent authority.
4. *Jurisdiction*—If a person alleges that he is an under-proprietor, that he was in possession and that he was ejected by the landlord, he must in the first instance sue under S. 108 (10). If he does not allege possession he must sue in the Civil Court. If the suit of an under-proprietor under S. 108 (10) is thrown out by the Revenue Court he can then sue the landlord for possession in a Civil Court and ask for a declaration of his right.

Notes.

Dist.—13 O C. 35—The decision in 12 O. C. 90 turned upon the fact that the mortgage under which J claimed was executed after

13 had succeeded to the rights of R and that the deed in J's favour purported to mortgage all the *zamindari* rights of B. The learned Judge who decided that case treated this fact as evidence that B himself had merged, at least for the purposes of this mortgage, his proprietary rights. In 13 O. C. 35 this would be at most only a piece of evidence capable of being outweighed by other consideration

(2 and 3) **Affir.**—13 O. C. 88.

(1) **R.**—16 O. C. 105—Though as laid down in 12 O. C. 90, the question whether a suit has been instituted in the right Court or not must in the first instance be decided on the plaint, there cannot be any doubt that S. 108 (10) would not apply, if the claimant was not, in actual possession of the said land but was merely seeking to obtain actual possession on the strength of his alleged under-proprietary title as against the landlord and the person in actual possession.

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12 O. C. 97.

1. *Jurisdiction—S. 33 Oudh Land Revenue Act*—Where during a partition relating to the superior proprietors, the Revenue Court decided a question of under-proprietary title, *held*, that the decision is not binding and does not bar the jurisdiction of the Civil Court.

2. *Merger*—That in dealing with the question of *merger* the Court to consider the circumstances of the transaction and where no intention is expressed, the Court should consider what is most advantageous to the party

3. *Meaning of "with dakhili and khariji rights"*—Construction—Where a person possessing an under-proprietary holding became entitled by inheritance to the superior proprietary estate and executed a sale-deed of the share in the property which he claimed by inheritance to provide means for carrying on litigation and the words used in the sale-deed were "*with dakhil and kharij rights*," &c. *held*, that those words were not intended to include the under-proprietary tenure which was already in possession of the vendor.

Note.

(2) **R.**—13 O. C. 35—Proprietary or under-proprietary rights—Mortgage of either rights by its owner before merger does not affect the other rights after merger.

12 O. C. 106.

Easement—S. 15 Easement Act—Superior proprietor—That a superior proprietor is not barred from acquiring an easement by prescription over land held by an under-proprietor.

12 O. C. 109.

Revision—S. 622 C. P. C. = S. 115 Act V of 1908.

That the High Court will not exercise its revisional jurisdiction as long as there is any other remedy open to the applicant.

Note.

Diss.—13 O. C. 341.—The existence of an alternative remedy is not necessarily a bar to the exercise of revisional jurisdiction.

12 O. C. 111.

Custom—Meaning of "*ghair kuf*" *and* "*ghair biradri*"—*Construction of wajib-ul-arz.*

1. That the words "*ghair kuf*" *and* "*ghair biradri*" had practically the same meaning.
2. That recognition was the chief test of *biradri* for the purpose of a custom excluding a *ghair biradri* wife from succession.
3. That a wife who is not *ghair kuf* to her husband must be treated as a *biradri* wife within the meaning of the *wajib-ul-arz.*

12 O. C. 124.

Dyhak—Daswant—Nankar—Under-proprietary right—S. 140 Oudh Rent Act set off.

1. That a right to a cash *Nankar* or to *Dyhak* or *Daswant* does not necessarily connote a right to possession of land as under-proprietor or in any other capacity though rights to Dyhak or Daswant are in a sense of under-proprietary rights.
2. That the claim to deduct the *Dyhak* from the rent payable by them was a claim to a set off and as such barred by S. 140.

Notes.

(1) F.—14 O. C. 335.—

(2) Dicus.—17 O. C. 6.—Where it appeared that the claim was based on decrees of the Settlement Court which intended to lay down that the *dyhak* dues were recoverable by deduction from the rent, *held*, that the claim was not for a set off. Vide XXII Indian Cases p. 125 and XXIII Indian Cases 231.

12 O. C. 129.

Suit for possession more than six months after dispossession.

Possession good title against trespasser.—That a person who has been dispossessed can, as against a trespasser, succeed on proof of prior possession alone without showing title even though he does not bring his suit within 6 months of the date of dispossession.

12 O. C. 130.

Appeal.—Court-fee payable—S 7 (9) Court Fees Act.

Suit for redemption—Decree for redemption on payment of deeds of further charges.—Where the plaintiff appealed on the ground that he was not liable to redeem the two deeds of further charge.

Held, that the court-fee paid being the same as that paid on the plaint and there being no dispute as to the amount due on the subsequent deed, the court-fee paid was sufficient.

Notes.

Diss.—13 O. C. 62—

Not F.—15 Indian Cases 746—

„ —16 O. C. 354—The decision in 12 O. C. 130 was subsequently held in 13 O. C. 62 to be not good law. The appellants were liable to pay the court-fee on the amount claimed by them in excess of the amonnt awarded by the Court.

12 O. C. 133.

Mortgrge.—Purchaser at sale in execution of decree for sale to which puisne mortgagee was not made party—Purchaser at sale in execution of decree of puisne mortgagee's sale to which prior mortgagee was not made party. The latter forcibly dispossessing the former.

Held, that the purchaser at sale in execution of the decree of prior mortgagee was entitled to a decree for possession subject to

the defendant's (purchaser at a sale in execution of the decree of puisne mortgagee) right to redeem.

2 *Amount payable.*—That the amount payable for redemption of the property is not the price paid by the plaintiff but the amount which was proportionately due on the mortgage on account of the property in dispute.

Notes.

(1) **Dist.**—13 O. C. 50—The facts in 12 O. C. 133 were rather peculiar and the question whether the prior mortgagee who has purchased the property was entitled to redeem the puisne mortgagee does not seem to have been considered.

(2) **Not F.**—13 O. C. 62—12 O. C. 133 is contrary to the current of authority both in this Court and in the Allahabad High Court and is likely to cause confusion.

12 O. C. 140.

1. *Kabuliat.*—That a Kabuliat signed only by the tenant is not and cannot be held to be tantamount to a lease.

2. *Kabuliat without lease enforcible.*—Where the defendant was in possession of a village under a *kabuliat* executed by him undertaken to pay rent at a certain rate but no lease had been executed, *held*, that the undertaking contained in the *kabuliat* could be enforced against him.

3. *Interest.—S. 53 C. P. C = O. VI r. 17; O. VII r. 11 (V of 1908).*

S. 73 Contract Act.—That the defendant was liable to pay interest in addition to the rent agreed to be paid, either by way of damages or under the interest Act XXXII of 1839.

12 O. C. 146.

Mahomedan Law—Voluntary alienation by heirs in possession for payment of debts of deceased.

That such alienation is not binding upon the heirs who have not joined in making the alienation.

12 O. C. 151.

Appeal—S. 629 C. P. C = O. XLVII, rr. 7 and 9 Act V of 1908.—Appeal against an order admitting review.

That no appeal lies from an order granting an application for review of judgment except on the grounds stated in cl. (*a*) (*b*) and (*c*) of S. 629 C. P. C.

12 O. C. 152.

Suit for redemption after refusal to accept the deposit—Subsequent suit for profits from date of deposit to possession—S. 83 Transfer of Property Act.

The present suit was brought to recover profits from the mortgagees for the period during which he had been in possession from the date of deposit to possession.

Held, that the plaintiffs could not now sue for profits which ought to have been and could have been taken into account in the former suit but for which they failed to sue therein.

12 O. C. 154.

Trespassers—Profits of land in possession of trespasser.

That trespassers in actual occupation of land are *prima facie* bound to account for the profits of the land and not merely to pay a sum equivalent to that for which the land might have been let to others.

12 O. C. 157.

Hindu Law—Will—Meaning of "malik" in relation to Hindu female.

Where the property is given or devised to a Hindu female, the use of the word "*malik*" imports full proprietary rights unless there is something in the context to qualify it.

12 O. C. 164.

Interpretation of a decree or instrument—Proprietary or under-proprietary title.

1. That if the question whether or not a proprietary or underproprietary title exists involves the interpretation of a decree or instrument, the interpretation is not a matter reserved exclusively for the *Revenue Court*.
2. *Jurisdiction of Civil Courts*—That a Civil Court cannot determine whether or not a lease has expired and make a declaration accordingly.

Note.

F.—18 I. C. 281—Suit for declaration that defendant has no exproprietary right and for invalidity of lease is cognizable by a Civil Court.

12 O. C. 171.

1. *Appeal—Court-fee on costs*—Where the appellant seeks distinct relief on the ground that the costs of the parties have not been

properly assessed or apportioned, the value of such distinct relief should be reckoned as part of the subject matter in dispute.

2 *Appellant's costs not allowed*—Where the plea taken in the memorandum of appeal was that the appellants were not liable to pay the excess amount or the defendant's costs but no mention was made about their own costs in the Court of first instance which had not been allowed, *held*, that in such a case, the appellants were not liable to pay court-fee on the amount of their costs in the original Court, and the Court of appeal had full authority to award such costs to the appellants.

12 O. C. 175.

Execution of decree.—

1 *S. 244 C. P. C. = S. 47 Act V of 1908*—The question whether a fraud has been committed by auction purchaser *alone* is not triable under S. 244 but the question whether a fraud has been committed in an execution sale, either by the decree-holder alone or by the decree-holder and auction purchaser together, is one which arises between the parties to the suit and is as such triable under S. 244 C. P. C.

2 *Auction purchaser not representative of decree-holder*—That an auction purchaser cannot be taken to be representative of the decree-holder.

12 O. C. 183.

Suit for ejectment as tenant—Plaintiff's failure to establish tenancy.

Where the plaintiff sued to eject the defendant from shop alleging him to be a tenant thereof and it was found that the defendant was in possession without title, *held*,, that although the plaintiff had failed to make out his case as to letting he nevertheless should get a decree on his title unless the defendant could show a better one.

12 O. C. 185.

Pre-emption—Documents called "hiba-bil-iwaz" but on the face of it a sale-deed Art. 10 sch. II. Limitation Act.

Held, that the document was an instrument of sale for the purpose of art. 10.

Note.

R.—XXI Indian cases 60.—Transfer by husband to wife in lieu of dower.

12 O. C. 191.

Jurisdiction of Civil Courts to interfere with actions of Municipal Board Ss. 86 and 88—Municipalities Act (I of 1900).

1. That a Civil Court is not competent to discuss the advisability of actions of a Municipal Board and has no power to interfere with them unless the Board's action is *ultra vires.*
2. That the word "such" in S. 88 (2) is not restricted only to such projection or structure, &c, as has been unlawfully made without the written permission of the Board.
3. That, a Municipal Board is competent under S. 88 to issue notice ordering removal of any structure made with the previous sanction of the Board, but such structure being lawfully in existence, is bound to make reasonable compensation for the damage caused.

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12 O. C. 197.

Redemption—Zamindar's right to—Mortgage by grove-holder.

Where according to custom of the village a person holding a grove as a tenant loses his right in the trees by abandoning the village the fact that the tenant may have mortgaged the trees and placed the mortgagee in possession cannot prevent the equity of redemption from resting in the Zamindar and giving him a title to redeem the mortgage.

Notes.

R.—12 O. C. 201.—But where the grove-holder has not absconded the Zamindar has no right to redeem.

R.—16 O. C. 341.—Maintainability of suit for recovery of possession when property in suit remained long as *bona vacantia.*

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12 O. C. 201.

Redemption—Mortgage by grove-holder—Zamindar's right to redeem—S. 91 Transfer of Property Act.

Where the grove-holder who has mortgaged the grove with possession is alive and residing in the village, the Zamindar as such has not such an interest within S. 91 Transfer of Property Act as would entitle him to redeem the mortgage.

12 O. C. 205.

S. 108 (2) Oudh Rent Act—Arrears of rent—Patwari rate—Ss. 9 (4), 15 Act IX of 1889 (Kanungos and Patwaris Act.)

That in a suit for arrears of rent under S. 108 (2) Oudh Rent Act superior proprietor is not entitled to recover Patwari rate from the under-proprietor as the parties do not stand in the relationship of land-holder and tenant.

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12 O. C. 209.

Hindu Law—Lunatic—Act XXXV of 1858—(Lunatic Estates Act)—Joint family.

Where a lunatic was a member of a Joint Hindu family and was possessed of no property beyond his rights in the joint property of the family, *held*, that the provisions of Act XXXV of 1858 could be applied to such cases, but the interference of the Civil Court should be strictly limited to cases of neglect or ill-usage and to waste or mismanagement of the joint property.

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12 O. C. 220.

Pre-emption—Effect of Oudh Laws Act on previous settlement decrees giving to some persons a heridatory right of pre-emption in respect of certain property.

That since the enactment of the Oudh Laws Act previous decrees of the settlement or other Courts cease to be of value as against members of the village community not parties thereto. The statutory right of the pre-emptor is in no way affected by the older settlement decree to which he was no party.

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12 O. C. 225.

Jurisdiction—S. 107 E. and H Oudh Rent Act—Decree for resumption by Revenue Court—Suit in Civil Court for declaration of under-proprietary right.

That the Civil Courts have no jurisdiction to re-open the question and grant a declaration of under-proprietary rights with respect to the land.

Note.

R.—17 O. C. 86—Civil Court's power to decide the question of proprietorship after decision of the Revenue Court.

12 O. C. 229.

Pre-emption.

1. *Pre-emption must show a valid title and the date of decree.*

2. *S. 9 and 11 Oudh Laws Act—Imperfect partition—Ss. 131 Act III of 1901*—Where an imperfect partion had taken place between the co-sharers and had been confirmed prior to the institution of the pre-emption suit, *held*, that the relationship between the shareholders of the village *inter se* was not under S. 131 Act III of 1901, altered until it took effect.

The plaintiff was a share-holder in Mauza *Chholabari*. H (defendants) acquired a share belonging to S under a foreclosure decree, dated the 22nd June 1901. This suit was instituted on 7th June 1907, claiming pre-emption of that share, The defence was (1) that H had, previous to the date of foreclosure decree acquired a one biswa share in the same *patti* (2) that an imperfect partition of the village had been effected whereby the share acquired by H had been placed in one *thok* while the share of the plaintiff had been placed in another *thok*.

The finding of the Court of first instance on the first contention was not contested.

Held, that it was incumbent on the plaintiff to show that he had a subsisting right to pre-empt. As a matter of fact within a few days his suit having been instituted, the *partition*, which had already been confirmed, came into force, and the plaintiff became a co-sharer in another *thok*, whereas the share obtained by defendant was placed together in another *thok*, and the plaintiff is no longer a co-sharer of the sub-division of the tenure in which the property was comprised. Moreover the share of H, which has been obtained by the defendants presumably after the foreclosure decree, has admittedly not been pre-empted No attempt has been made by the plaintiff to enforce his right of pre-emption therein and he has lost his right by lapse of time.

Note.

(1) R.—14 O. C. 146—Pre-emption suit to be dismissed when property resold to vendor prior to suit.

12 O. C. 236.

1. *Trustee.*—That the Mahant of an *asthan* and temple dedicated to worship is in the position of a mere trustee and has at the utmost the powers of a manager or guardian of an infant.

2. *Power to create a trust—S. 47 Trust Act.*—That a person has no power to appoint a trustee of property of which he himself is the trustee and therefore a deed creating a trust executed by such a person is void *ab initio*

3. *Estoppel.*—That there can be no estoppel against plaintiff where the defendant acted with full knowledge of the facts and where there was no misrepresentation on the plaintiffs' part.

12 O. C. 248.

Hindu Law.

Son's power to set aside voluntary sales by father—Antecedent debt.—Where a Hindu father sold the ancestral family property without *necessity* for an inadequate consideration consisting *partly* of *antecedent debts* and partly of payments in cash received at the time of sale, *held*, that the sons were entitled to have the sale set aside as regards their shares in the property on payment of their proportionate shares of the sums paid by the purchaser.

Note.

F.—14 O. C. 299.—Meaning of "antecedent debt."

12 O. C. 257.

S. 59 Transfer of Property Act.—*Signing of name of illiterate executant by another* in his presence and at his request does not invalidate the execution of the deed.

12 O. C. 260.

1. *Sub-mortgage.*—That a mortgagor is bound by a sub-mortgage of which he has notice. He cannot destroy the security of the sub-mortgagee by redeeming the mortgage.

2. *Decisions between co-defendants when necessary.*—

Note.

(1) R.—18 I. C. 389.—Right of sub-mortgagee to bring mortgaged-property to sale.

12 O. C. 267.

Under-proprietary right—Settlement decree against talukdar for a perpetual hereditary farming lease, construction of—Talukdar's power to have a non-transferable tenure sold.

That the decree not being one for under-proprietary rights, the Talukdar could not for purposes of his own convert a non-transferable tenure into a transferable one against the wishes of the holders and in this way effect their ejectment in a manner not contemplated by law.

Note.

R—13 O. C. 303—As to reasons given in 12 O. C. 267.

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12 O. C. 271.

Redemption.

1. *S. 91 (a) Transfer of Property Act*—That the decree having created a permanent heritable interest, it was an interest of the kind referred to in S. 91 (*a*) Transfer of Property Act which entitled the plaintiff to redeem the mortgage.

2. *Effect of confiscation on mortgages.*—That the mortgagee as such having remained in possession of the mortgaged land the confiscation of the soil of Oudh which followed the Mutiny of 1857, did not affect the rights of the mortgagor or the mortgagee.

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12 O. C. 275.

1. *Mortgage by way of conditional sale*—On a construction of the deed *held*, that the mortgage created by it was a mortgage by way of conditional sale, and that it contained no personal contract to pay the mortgage-money.

2. *Test of personal liability.*—The test in each case is the remedy provided in the deed for satisfaction of the mortgage-debt.

Note.

Dist.—16 O. C. 90—In 12 O. C. 275, the mortgage was by conditional sale. In the case of a simple mortgage a personal covenant is always implied and a decree for sale can be granted.

12 O. C. 279.

1. *Tenancy created by holding over.*—That a tenancy created by holding over is a tenancy on the same terms as those on which the original tenancy was created subject to the modification that it would be a tenancy from month to month or from year to year according to the purpose for which the land was let. In case of a house let on a *sarkhat* it was to be a monthly tenancy.

2. *Notice—S 106 Transfer of Property Act.*—That the provisions of S. 106 Transfer of Property Act as to notice were inapplicable to the case as there was an express contract as to the mode in which the tenancy could be terminated.

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12 O. C. 285.

Mortgage.—Prior extinguished on execution of a second mortgage—S. 74 Transfer of Property Act.

That 74 does not apply when it is clear on the facts that the first mortgage has been satisfied and extinguished on the execution of the second mortgage which alone is outstanding, although the first one was satisfied out of money raised by the second.

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12 O. C. 288. (P. C.) = 31 All 73.

1. *Suit to dispute title and recover possession of share—Suit in Civil Court on title after partition—S. 74 Oudh Land Revenue Act XVII of 1876.*

That there was no proof of any compromise. The mutation of names by itself created no proprietary title. The document of 1896 contained no words that could be construed as amounting to an abandonment by the plaintiff of his legal rights.

2 *Estoppel*—That as no enquiry under S. 74 Act XVII of 1876 was made and the question of title was left to be decided by the Civil Court, the grounds of estoppel failed.

Note.

Dist.—23 I. C. 860—When an objection being raised in a partition proceeding, the Revenue Courts referred the objector to the Civil Court for his relief.

Held, that it could not be argued there from that the partition was made subject to the decision of the Civil Court upon the point objected to.

12 O. C. 293 (P. C.)=31 All. 394.

Decree, construction of—Oudh Sub-settlement Act XXVI of 1866—Rules 2, 3, 13—S. 52 (2) Oudh Rent Act.

1 That the Financial Commissioner under Rule 13 in the schedule to Act XXVI of 1866 had jurisdiction to make the decree of 1869 and that it was a valid and binding decree. Claims which have been theretofore disposed of "otherwise than in accordance with those Rules" within the meaning of Rule 13 refer to claims which have not been supported by the proof prescribed by Rules 2 and 3, amongst others, for the establishment of future claims.

2. That the lease decreed was only a lease for a term of 30 years from the date of the decree.

3. That the present holders are now in the position of tenants whose tenancy has expired and the proper course for their ejectment is by notice under S. 52(2) Oudh Rent Act.

12 O. C. 300 (P. C.) = 31 All. 386.

Undue influence—Disqualified proprietor—Burden of proof—S. 16 Contract Act.

That in the case of a disqualified proprietor whose estate was under the control of the Court of Wards a lender who knew the facts was *prima facie* in a position to dominate the will of the borrower and in such a case the *onus* of proving undue influence did not lie on the borrower.

Notes.

R.—5 I. C. 486.

R.—6 I C. 439.

F.—10 I. C. 37(38)—Helpless condition of the borrower—High rate.

12 O. C. 304 (P. C.) = 31 All. 447.

Custom.

1. *Excluding or postponing daughters.*—That there is nothing in the mere fact of partibility to make evidence of a family custom excluding or postponing daughters to collaterals in impartible estates necessarily inapplicable to partible estates.

2. *Evidence of rules of succession* —That declarations made by Kanungos, entries made in the village records and answers given to official enquiries made under Government direction as to the rules of succession prevailing in particular families are *prima facie* admissible in evidence.

Notes.

R.—13 O. C. 163 (P. C.)—The weight to be attached to the entries in the *Wajib-ul-arz* expressing the views of the individuals as to the practice that they would wish to see prevailing.

R.—10 I. C. 448 (450)—There is no class of evidence that is more likely to vary in value according to circumstances than that of *Wajib-ul-arz.*

R.—10 I. C. 558(559)— " " "
R.—11 I. C. 316(327)— " " "

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12 O. C. 308.

S. 182 Indian Penal Code.

That a person who was accused of an offence could not with impunity make a false charge against the presiding officer, such charge being ordinarily punishable under S. 182 and could not escape punishment because his object was to get the case transferred to another Court.

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12 O. C 314.

1. *Ore-emption—Ss. 10 and 12 Oudh Laws Act—Decree for foreclosure —Right to sue*—Where a decree absolute for foreclosure has once been passed without the persons possessing the right of pre-emption having been allowed the option given them by S. 12, there has been a completed transfer in violation of the said right of pre-emption and a right to sue has accrued in favour of persons possessing such rights with effect from the date of the decree.

2. *Time for issuing notice*—Either at the time when he files his suit for foreclosure or with such reasonable promtitude thereafter that the 3 months' grace allowed by S. 12 may expire before the decree absolute is passed.

12 O. C. 320.

Suit for declaration of proprietary-right—Effect of entry as tenant in Settlement records—Cause of action—Limitation.

1. That although the settlement entry gave plaintiffs a cause of action but the decree for rent gave them a fresh cause of action and the present suit brought within 6 years of the decree was within time.

2. That when a plaintiff has got a right every invasion of that right gives him a fresh cause of action.

12 O. C. 323.

S. 60 (G) Act V of 1908.

1. A *Wasika allowance is a political pension.*

2. *S. 16 (2a) of Act III of 1907 Provincial Insolvency Act*—That such Wasika allowance does not vest in the Receiver.

3. That *after—acquired property* of the insolvent which vests in the Receiver is subject to the same exceptions and is of the same class as property covered by sub-section (2) of S. 16 Act III of 1907.

4. That an order directing the insolvent every month to deliver to the Receiver a portion of the money received by him on account of the pension is bad in law and cannot be sustained.

5. That the pensioner cannot be called upon to account for the money received by him as pension though the Receiver can claim to take possession of any money or other property actually in the hands or possession of the insolvent.

6. To carry out effectually the object of a statute it must be so construed as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined.

12 O. C. 347.

Res judicata—Ss. 13, 43 C. P. C. = S. 11; O. II, R. 2 Act V of 1908.

1. *Meaning of "matter which ought to have been ground of defence or attack"—"Litigating under the same title"*—That the present claim for redemption as co-owner together with another was inconsistent with the former claim to full ownership as an adopted son and their combination would

have led to confusion and embarrassment, and therefore the present claim as co-owner was not one which "ought" to have been joined in the former suit.

2. That the plaintiff ought not to be compelled to add a ground which he could not urge without the addition of some other party as a co-plaintiff or as an additional defendant.

Note.

R.—10 I. C. 29 (31)—It was necessary for the plaintiff to have raised all the pleas available to him in that suit in order to defeat the defendant and if any plea was not taken and the defendant got his decree, it was no more open to him to bring the suit for possession on the ground that his mother have only a life estate and as such the mortgage and the sale held in execution of the decree were not binding on him.

12 O. C. 381.

S. 115 Act V of 1908.

1. That *an application for permission to sue as a pauper* is in itself a case within the meaning of that term as used in S. 115.
2. That *orders under chapter XLVI of Act XIV of 1908* are open to revision under S. 622 C. P. C. = S. 115 Act V of 1908.
3. That *interlocutory orders* are not liable to revision under S. 115 Act V of 1908.
4. That the provisions of S. 405 C. P. C. = O. XXXIII, R. 5 Act V of 1908 are imperative in requiring the prosecution of an application for permission to sue as a pauper by the party in person except in cases mentioned is Ss. 640 or 641 = Ss. 132, 133 Act V of 1908.

12 O. C. 388.

Jurisdiction.

That *an assignee of the rent in arrears* for a particular year was not entitled to maintain a suit for recovery thereof in the Revenue Courts.

12 O. C. 390.

1. *An administrator appointed under S. 217 Indian Succession Act* possesses all the powers conferred by the Act upon an ordinary administrator.

2. *Creditors advancing money* or dealing with such administrator are in the same position as advancing money to an ordinary administrator.

3. That the *words "for the use and benefit of the lunatic" in S. 217* create a special liability as between the administrator and the lunatic, but they do not affect the position of creditors dealing with such administrators.

Note.

R.—12 O. C. 414—The same questions as in 12 O. C. 390 were raised—but the case was decided on the point that the administrator by merely executing a pro-note could not create a charge on the estate of which he is administrator.

12 O. C. 400.

S. 145 Cr. P. Code.

1. *An omission to publish the order under S. 145 (3)* does not deprive the Magistrate of jurisdiction to deal with the case.

2. *Jurisdiction*—Where the Magistrate was satisfied that a breach of the peace was imminent, *held*, that although his initiatory order was not as explicit and clear as it might have been, yet his proceedings could not be held to be without jurisdiction.

3. That where there is any doubt as to the exact local area within which the land in dispute is situate, inquiry can be made by a Magistrate having jurisdiction in either of the areas in which the land might be situate.

4. *Revision*—That when a Magistrate has jurisdiction under S. 145 and comes to a decision as to possession that decision as to possession, whether right or wrong, cannot be questioned in revision.

12 O. C. 405.

1. *Revision.*—That no application for revision will be against an interlocutary order which does not determine the case but which is made with the object of collecting materials upon which the case is to be determind thereafter.

2. *Meaning of the word "case" in S. 115 Act V of 1908.*—It must ordinarily mean the whole case. But where there are independent proceedings arising out of a case, such as proceedings to

restore a case dismissed in default, or to set aside a decree *ex parte*, for which the Legislature has provided an independent remedy or a different procedure, such proceeding may be a "case" within the meaning of the section. Any orders on matters arising incidentally in the course of the hearing of such proceeding, the object of which is to bring on the record or to exclude from it materials upon which its decision is to be based are not by themselves decisions in a case which can be raised until the case is finally concluded.

Notes.

1 & 2. **R.**—13 O. C. 109—Revision of an order refusing to add parties—Meaning of "case".

1 & 2. **R.**—15 O. C. 304—That proceedings under which a person is ordered to be added as defendant amount to a "case" and therefore the order is liable to revision.

12 O. C. 414.

S. 269 *Succession Act* (*X of 1865*)—*Liability of deceaseds' estate for secured debts incurred by administrator.*

The estate of the deceased cannot be held liable for an unsecured debt incurred under a *promissory* note by the administrator.

12 O. C. 418.

1. *Approver's evidence—S. 133 Evidence Act.*—That before a conviction can be based on the evidence of an approver it must be corroborated as to the identity of the person accused.

2. *Retracted confession how far evidence against co-accused—S. 164 Cr. P. C.—S. 114 Evidence Act.*—That the retracted confession of an accused has very little weight as evidence against the other co-accused persons and does not constitute the independent evidence of corroboration of the statement of an approver which is necessary to base a conviction thereon.

Note.

(1) **R.**—12 I. C. 513.—The sort of corroboration required is not corroboration of the narrative of the offence committed, but corroboration of the approver's statement that the accused took part in the offence.

13 O. C. 1.

1. *Burden of proof*—In the case of *circumstantial evidence* ; it is incumbent on the prosecution to show that it is impossible to explain the circumstances otherwise than upon the hypothesis of the accused being the guilty person. A conviction based upon circumstantial evidence alone cannot be sustained unless it can be shown beyond reasonable doubt that the guilt of the accused is the only hypothesis possible.

2. *Opinion of expert.*—To base a conviction upon the opinion of an expert in handwriting is, as a general rule, very unsafe.

3. *Evidence of expert.*—Although expert evidence derived from comparison of handwriting is very valuable as evidence corroborating the direct evidence, if any, on the point, it is only in rare cases that it can take its place.

4. *Similarities in handwriting*—Where, according to the opinion of the expert, a few similarities are discovered between the genuine handwriting of the accused and the forged signatures but there is no marked peculiarity in the handwriting of the accused or the complainant, nor is the style rare, it is unsafe to conclude that the accused was the author of the forged signature.

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13 O. C. 7.

1 *S. 162 Cr. P. C.—S, 157 Evidence Act*—The general provisions of S. 157 Evidence Act must be taken to be controlled by the special provisions of S. 162 Cr. P. C.

2 *Statement made by witness to police officer*—The written record of statements previously made by a witness to a police officer in the course of an investigation cannot be used as evidence for the purpose of corroborating the statement of the witness. It can only be used to impeach the credit of a witness for the prosecution under certain conditions.

3 *Refreshing memory by police officer by reference to statement recorded by him.*—A police officer cannot be allowed to depose to the statements made to him by refreshing his memory by reference to the record made by him of such statement.

Obiter dicta.

(Per Piggot Aditional Judicial Commissioner).

It is very dangerous procedure to allow a Police Officer to say from his own memory what certain person had said to him, without refering to the statements recorded by him.

(Per Sunder Lal Aditional Judicial Commissioner).

A Police Officer cannot be allowed to prove the statements made to him by persons who have not been called as witnesses in the Court.

The accused has no right to inspect the paper from which a Police Officer is refreshing his memory.

Quacre—Can the Police Officer, to whom a statement is made and who reduced it to writing, be permitted in his evidence to reproduce the contents of the statement from his recollection.

13 O. C. 19.

S. 43 C. P. C. = O. II r. 2 (V of 1908)—Test about the application—Identity of cause of action—Different causes of action.

First suit dismissed on the ground that the plaintiff ought to have sued for possession as he was not entitled to claim merely declaratory decree. On a second suit for possession on different causes of action it was contended for defendant that as the cause of action for the second suit was in existence when the first suit was instituted it should have been put forward then.

Held, that the second suit was not barred by S. 43 C. P. C. inas much as the test for the applicability of the section is whether the causes of action alleged in the plaint in the two cases are one and the same or are distinct.

13 O. C. 23.

Suit for contribution—Right to sue when accrues—S. 69 Contract Act—Arts 61, 99 Sch. II Limitation Act.

1 S. 69 of the Contract Act applies to the case of *co-sureties* as well as the case of joint promissors and in both cases a rlght of contribution arises as soon as one co-surety or joint promissor pays more than the proportion which is due from him.

2 Each time that an amount is paid by a joint debtor in excess of his share, he has a right of suit for contribution in respect of such payment, therefore a suit in respect of such payment is governed by art 61.

3. Arts 61 and 99 are in *pari materia*. Art 99 applies to a special kind of suit comprised in the general class to which art 61 applies.

4 The words "when the money is paid" in art 61 do not mean "when the whole debt is discharged."

13 O. C. 28.

S. 148 Act V of 1908 C. P. C.—Extension of time—

The general provisions of S. 148 relate only to proceedings anticedent to the passing of a final decree. They were never intended to give a Court power to make any alterations in the terms of a decree already passed, except under certain express provisions of the Code.

Notes.

F.—14 O. C. 147—A Court cannot accept a compromise which would have the effect of extending the time fixed for payment under a priliminary decree for sale.

R.—16 O. C. 5—A Court cannot extend the time granted by a pre-emption decree for the payment of the purchase money after the time fixed by the decree has expired.

R.—16 O. C. 206—Meaning of [illegible]—Payment allowed at any time within limitation.

13 O. C. 32.

Suit for Redemption and for account and for award of any surplus that may be found due—S. 7 (IX) Court Fees Act—Jurisdiction value.

In such suits the amount of the mortgage money determines the value of the suit both for the purposes of jurisdiction and Court fee

Obiter dicta—In a redemption suit it is the duty of the Court to settle all the accounts between the parties and the plaintiff need not claim any thing beyond a decree for redemption.

If a plaintiff joins with a claim for redemption a claim for recovery of a specified sum of money, the question of jurisdiction depend upon the aggregate value of the two claims.

13 O. C. 35.

Merger—Proprietary or under-proprietary rights—Mortgage of either right by its owner before merger does not affect the other right after merger.

A merger of proprietary and under-proprietary rights cannot be said to have taken place when such merger would be plainly pre-

judicial to the person in whom both rights are vested. Therefore, if an inferior preprietor succeeds as an heir to the superior proprietor, his under-proprietary rights remain vested in him as before and are not affected by or are responsible for any mortgages of proprietary rights which may have been effected by the superior proprietor.

Jurisdiction S. 108 (10) Oudh Rent Act—That the suit was in reality one not so much for the recovery of occupancy land from which an under-proprietor has been dispossessed as for establishment of the rights of the appellant as under-proprietor and therefore the suit was not barred by S. 108 (10).

13 O. C. 43.

Sale duly confirmed—Attachment by a Court without jurisdiction—Irregularity in attachment.

A sale ordered by a Court having jurisdiction and duly confirmed by it is not invalidated by proof that the original attachment was made by a Court not having jurisdiction.

13 O. C. 48.

Execution of decree—Application against one of several judgment debtors, effect of, against others—Art 182 sch. I of Act (IX of 1908) Limitation

Where a decree has been passed jointly against more persons than one, an application for execution made against some of them will keep the decree alive against them all.

13 O. C. 50.

S. 52 Transfer of Property Act—Lis pendens.

1. *Suit for sale and redemption.*—S 52 applies to both classes of cases.
2. *Transferee pendente lite—Estoppel*—An alienee of property which is the subject of a suit to which S. 52 applies cannot question the decree passed therein by showing that it was by any reason wrong.

13 O. C. 54.

S. 136 Oudh Rent Act—Order V of Rule 17 C. P. C. (V of 1908).

A process server is not entitled to post a summons at the house of the person to be served when he knows or has reason to believe that that person has gone to a particular place and will return to his house.

13 O. C. 55.

1. *S. 147 U. P. Land Revenue (III of 1901)—S. 174 Penal Code.*—A citation issued under S. 147 (III of 1901) is an order to the defaulter to appear at the time and place named therein within the meaning of S. 174 Penal Code and intentional disobedience of it is an offence.

2. *Construction of the sections of an act—Admisibility of the proceedings of Legislative Council for the purpose of construction.*—Debates in a Legislative Council or reports of committees which precede the passing of an Act cannot be referred to as legitimate aids to the construction of a particular section of the Act.

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13 O. C. 59.

Application for leave to appeal to His Majesty in Council under Order 45 r. 2 (Act V of 1908)—Order 41 R. 10 and Ss. 109 and 110 C. P. C.—An order rejecting an appeal for failure to furnish security for costs—is not an order affirming the decision of the court below nor is such an order "a final order passed on appeal and therefore the applicant is not entitled to a certificate order S. 110 C. P. C. (V of 1908).

Notes.

F.—14 O. C. 40—The ruling in 13 O. C. 59 may be cited as the nature of an order, passed under O. XLI, r. 10 (2) is there discussed. It is conceded that an order, passed under O. XLI r. 10 is not appealable.

R.—16 O. C. 264—The words "final order passed on appeal" in S. 109 have always been held to imply orders disposing of an appeal at the hearing.

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13 O. C. 62.

Court-fee—Suit for possession—Decree for possession conditional on payment of a sum disputed in appeal—Where a plaintiff sues for possession claiming an unconditional decree or admitting his liability to pay a certain sum and the Court requires him to pay a sum which he disputes and he appeals on the ground that he is not liable to pay that sum, he must pay Court fee on the amount in question.

13 O. C. 66.

Ss. 145, 146, 147 C. P. C.—Costs of proceedings—Only the Magistrate who passes an order under Ss. 145, 146, 147 Cr. P. C, can decide by whom the costs of the proceeding are to be paid but the amount of the costs may be assessed by his successor.

2 *Time for making order for costs*—An order for costs should as a rule be made at the time of passing the order, when the facts are fresh in the minds of the Magistrate.

13 O. C. 70.

Ss. 7A, 126, Oudh Rent Act—S. 36 U. P. Land Revenue Act (III of 1901)—Person entitled to receive rent payable by ex-proprietary tenant—Suit for arrears of rent.

A sold his share in a village to *B* and became an exproprietary tenant of land which has been his *sir* and the rent payable therefor was determined under S. 36 (III of 1901)—*Held* that *A* was the tenant of *B* alone and not of all the co-sharers in the village and that therefore, *B* alone was entitled to maintain a suit for arrears of rent against *A*.

13 O. C. 74 (P. C.) = 7 All. L. J. 41—32 All. 92.

Oudh Talukdars—Provision for maintenance of relatives—Rules of practice framed by British Indian Association—Construction.

That it is not within the province of a Rent Court to determine whether the maintenance was or was not payable.

13 O. C. 79.

1. *Powers of manager*—The powers of a manager of the property of a *charitable* or *religious institution* are the same as those of a manager for an infant heir.

2. *Burden of proof.*—Where property belonging to such an institution has been alienated by the manager the burden of proving *necessity* for the alienation lies upon alienee.

3. *Conclusive proof of necessity*—Where money had been borrowed by the manager in order to satisfy a decree against him which had been followed by an attachment and an order for sale of property belonging to the institution:—*Held* that the Court was not bound to accept the decree and the order for sale as conclusive proof of necessity.

Note.

R.—11 I. C. 166 (174)—A similar grant by Alamgir to a Hindu religious institution is mentioned in 13 O. C. 79.

13 O. C. 90.

Execution of decree—Plea of limitation regarding a previous application for execution—Res judicata—Ss. 13, 234 and 248 C. P. C. = S. 11, 50, O. XXI, r. 22 (V of 1908).

The seventh and last application was resisted on the ground that the fifth application on which the present one depended for its validity was barred by limitation.

On the fifth application notices were issued under S. 234, to show cause why the heirs of the judgment debtor should not be brought on the record. No one appeared and the names were entered. The application was ultimately thrown out because the decree-holder failed to furnish the process fees. The sixth application was made by purchaser of the decree and on his failing to prove the purchase it was thrown out.

Held, that in these circumstances the court could not be considered to have determind that the application was made within time.

13 O. C. 94.

Insolvency petition.

1. *S. 6 (3) Provincial Insolvency Act* (III of *1907.*)—Where an insolvency petition has been put before a court by a debtor the court is entitled to dismiss the application only when it is satisfied that the debtor had no right to present the petition under S. 6 (3).

2. The provision about proof of the service of notice on the debtor, or of the alleged act of insolvency, or of the debtor's ability to pay debts or of any other sufficient cause, contained in S. 15 (1) of Act III of 1907, refer to cases where the insolvency petition is put in by the creditor.

3. Where a debtor has a right to present the petition, the court is bound under S. 16 (1) Act III of 1907, to make an order of adjudication. Questions relating to alleged *bad faith* or *fraud*, etc., on the part of the debtor arise for decision only when the debtor applies for an order of discharge.

13 O. C. 98.

S. 52 Transfer of Property Act—Lispendens—Decree passed upon a compromise—S. 52 Transfer of Property Act applies to a case in which a decree is passed upon a compromise if the other conditions of the section are satisfied.

13 O. C. 103.

S. 145 Oudh Rent Act—Extension of period of limitation where it expires on a Sunday—Application of S. 5 Limitation Act to proceedings under the Oudh Rent Act—That S. 5 Limitation Act did not apply to the case and the application was barred by time.

13 O. C. 109.

Revision of an order to add parties—S. 115 O. I, r. 10 C. P. C. (V of 1908.)—"Case"

Where the lower court rejected the applicant's application to be made a party on the grouud that the plaintiff was not willing to implead them as defendants: *Held*, that the Court *failed to exercise the jurisdiction* vested in it.

"*Case*"—That the petition of the applicant, the proceedings held thereon, and the order of the court rejecting the petition amounted to a "*case.*"

Note.

F.—15 O. C. 304.

13 O. C. 114.

S. 152 C. P. C. (V of 1908)—Amendment of judgments, decrees or orders.

The test whether a court can make an alternation under S. 152, is whether the order as it stands represents the intention of the judge at the time he made it. If it does then a mistake in it cannot be treated as an accidental slip or omission which may be corrected under the section.

13 O. C. 119.

Execution of decree—Transfer of a decree passed by a Civil Court for execution to a Rent Court—Ss 38, 39; O. XXI C. P. C. (V of 1908)—Rateable distribution.

A decree passed by the Civil Court can be transferred for execution to a Rent Court and *vice versa.*

Note.

R.—13 O. C. 291—It is not necessary for a decree holder seeking rateable distribution to apply for execution of his decree to the court where the realization takes place.

13 O. C. 123. (P. C.) = 32 All. 287.

S. 456 C. P. C. = O. XXXII, rr. 3, (2), (3) and (4) C. P. C. (V of 1908)—Proper representation of minor—Appointment of guardian ad litem—No affidavit forthcoming.

That it must be presumed that everything was regularly and properly done and that the minor was properly represented at the hearing of the suit.

13 O. C. 125.

Interest after due date—General covenant for payment of interest.—

Where there is a separate covenant for payment of interest independent of the covenant for payment of the principal sum at a certain date, interest under the former covenant, is payable after the date fixed for payment of the principal.

13 O. C. 128.

Mortgage—Covenant for mortgage money being paid up from the surplus profits—Mortgagor's right to redeem—Clog on equity of redemption—Redemption.

A mortgage deed provided as follows :—

" When the entire mortgage money is paid up from the surplus profits, the property can be redeemed in the month of *Jeth*. So long as the entire mortgage money is not paid up, the mortgaged property cannot be transferred to any one else nor will the executant repay the mortgage money by borrowing elsewhere."

Held, (1) that this covenant did not debar the mortgagors from redeeming the mortgage by payment of any sum remaining due whenever convenient to them.

(2) (Per Evans A. J. C.) that even if the covenant did clog the equity of redemption, so as to bar redemption by any payment in cash, such condition being in restraint of the right of redemption should be disregarded by a Court of Equity.

13 O. C. 137.

Application under Ss. 87 and 89 Transfer of Property Act—S. 258 C. P. C.= O. XXI, r. 2 (V of 1908).

An application under S. 87 or 89 is an application for execution and S. 258 C. P. C. applies to proceedings held under the application.

Note.

F.—15 O. C. 234.—Un-certified payment cannot be recognized even for the purposes of limitation.

13 O. C. 140.

Guardian of a minor, qualifications for appointment as,—S. 17 Guardian and Wards Act (VIII of 1890)—

Other things being equal and the minor not expressing or being old enough to express an intelligent preference, the Court should decide in

favour of the person who is entitled to the custody of the minor under the law to which the minor is subject.

A Court is not bound to appoint the person who is entitled to the custody of the minor under the law to which the minor is subject. The Court should weigh all the circumstances of each particular case and decide what would be for the welfare of the minor, which ought to be the paramount consideration in every case.

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13 O. C. 143.

S. 10 Sale of Goods Act—Stipulation as to the time of delivery.

Unless a different intention appears from the terms of the contract, stipulations as to the time of delivery are not deemed to be of the essence of a contract of sale of goods.

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13 O. C. 146.

S. 19 Oudh Rent Act—Whether lessee entitled to suspension of rent on account of scarcity.

A lessee is not entitled to a suspension of the rent fixed by his lease in proportion to the rental demand suspended under the orders of the Local Government on account of scarcity. The principle of S. 19 applies to such a case.

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13 O. C. 148.

Mortgage—Failure to get actual physical possession on account of mortgagor's fraud—Suit by mortgagee—Simple money decree—Arts 95, 97, 116 and 120 Sch. II Limitation Act.

Where the plot mortgaged turned out to be the *Sir* land of the defendant and plaintiff obtained merely proprietary possession with the right to collect rent at a reduced rent from the mortgagors and the lower appellate Court found as a fact that the contract was obtained from the plaintiff by defendant by means of a concealment of material facts amounting to fraud:—*Held* (1) that, upon the finding of the lower appellate Court, the plaintiff would be entitled to a simple money decree for the sum advanced with such interest as the Court might find due.

(2) That the claim must fall either under art. 95 or 97 and arts 116 or 120 could not apply to the case.

13 O. C. 125.

Interest after due date—General covenant for payment of interest.—

Where there is a separate covenant for payment of interest independent of the covenant for payment of the principal sum at a certain date, interest under the former covenant, is payable after the date fixed for payment of the principal.

13 O. C. 128.

Mortgage—Covenant for mortgage money being paid up from the surplus profits—Mortgagor's right to redeem—Clog on equity of redemption—Redemption.

A mortgage deed provided as follows :—

"When the entire mortgage money is paid up from the surplus profits, the property can be redeemed in the month of *Jeth*. So long as the entire mortgage money is not paid up, the mortgaged property cannot be transferred to any one else nor will the executant repay the mortgage money by borrowing elsewhere."

Held, (1) that this covenant did not debar the mortgagors from redeeming the mortgage by payment of any sum remaining due whenever convenient to them.

(2) (Per Evans A. J. C.) that even if the covenant did clog the equity of redemption, so as to bar redemption by any payment in cash, such condition being in restraint of the right of redemption should be disregarded by a Court of Equity.

13 O. C. 137.

Application under Ss. 87 and 89 Transfer of Property Act—S. 258 C. P. C.= O. XXI, r. 2 (V of 1908).

An application under S. 87 or 89 is an application for execution and S. 258 C. P. C. applies to proceedings held under the application.

Note.

F.—15 O. C. 234.—Un-certified payment cannot be recognized even for the purposes of limitation.

13 O. C. 140.

Guardian of a minor, qualifications for appointment as,—S. 17 Guardian and Wards Act (VIII of 1890)—

Other things being equal and the minor not expressing or being old enough to express an intelligent preference, the Court should decide in

favour of the person who is entitled to the custody of the minor under the law to which the minor is subject.

A Court is not bound to appoint the person who is entitled to the custody of the minor under the law to which the minor is subject. The Court should weigh all the circumstances of each particular case and decide what would be for the welfare of the minor, which ought to be the paramount consideration in every case.

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(2) That the claim must fall either under art. 95 or 97 and arts 116 or 120 could not apply to the case.

13 O. C. 152.

Interpretation of statute—Change in law of procedure—Amendment of plaint.

The question of amendment arising subsequent to the passing of the new Civil Procedure Code (V of 1908) will be governed by it although the case was instituted under the old Code.

13 O. C. 155.

Arts. 97 and 116 Sch. II, Limitation Act—A suit for the recovery of money secured by a mortgage-deed found to be invalid.

Such suit was governed not by article 116 but by art. 97.

13 O. C. 158.

Minor—Proper representation—Guardian ad litem, propriety of the appointment of the person who executed the mortgage-deed which was the subject of suit—Decree made against minor.

1. The general rule is that if a minor is properly represented by a next friend or *guardin ad litem* and there is no fraud or collusion on the part of the next friend or guardian or of the opposite party and the next friend or guardian is not guilty of gross negligence, a minor is as much bound by the decree or order made in the suit, whether it was made for his benefit or not, as if he were of full age.

2. Where the person appointed guardian *ad litem* of the present plaintiff in a previous litigation was not only his certificated guardian but also his father and natural guardian, who had the power to mortgage the plaintiff's property for his benefit, *held*, that, the plaintiff was properly represented, notwithstanding the fact that the aforesaid guardian *ad litem* was the person who had on behalf of the minor executed the mortgage-deed which was the subject of suit.

Note.

(1) **R.**—22 I. C. 923—A compromise decree cannot be set aside until fraud or collusion on the part of the next friend or gross negligence of the guardian *ad litem* is established.

13 O. C. 161.

Ss. 423 and 439 Cr. P. C.—Ss. 114 and 323 Penal Code—Revision.

That under Ss. 439 and 423 Cr. P. C. the Court had power to pass any order that may be just and proper and the offence having been *compounded* the conviction should be set aside.

13 O. C. 163 (P. C.) = 7 All.L. J. 704 = 32 All. 363.

Hindu Law—Right of step-brother—Succession with whole brother—Special custom—Wajib-ul-arz—Evidence of custom.

A step-brother in a *Mitakshara* Hindu family has no right to share equally with a whole brother, in the absence of a special custom.

Wajib-ul-arz—There is no class of evidence that is more likely to vary in value according to circumstance than that of the *Wajib-ul-arz.*

Where from internal evidence it seems probable that the entries recorded connote the views of individual as to the practice that they would wish to see prevailing rather than the ascertained fact of a well established custom, it is proper to attach weight to the fact that no evidence at all is forth-coming of any instance in which the alleged custom has been observed.

Note.

R.—20 I. C. 894—Whether or not a custom exists is a question of fact.

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13 O. C. 165 (P. C.) = 7 All. L. J. 709.

Pre-emption—S. 9 Oudh Laws Act—Meaning of Mahal —

G had obtained a *sanad* of *taluka Sarauna*, but in 1834, on the occasion of the regular settlement, a compromise was made between *G* and his brother *B* and uncle *C* by which $\frac{1}{2}$ of the taluka was assigned to *G* as superior proprietor and the other $\frac{1}{2}$ to *B*, and *C*, in equal shares in under-proprietary right, they paying the Government Revenue plus *malikana* to the *talukdar*, and being jointly liable to him in respect of the same as rent. *B* died childless and his share devolved on *C*. *C* died and his property devolved upon A, and *D*. In 1893 a partition was made between *A* and *D* under which the property in suit was assigned to *A*, *but no separate engagement was made* for the Government Revenue in respect of the 3 villages or the two pattis assigned to *A*. *A* sold this property to *H* (son of *G*) the talukdar *D* filed suit for pre-emption.

Held, 1 that the villages assigned to *C* did not form a separate *mahal*. The *qabuliyat* of the *taluka* in which they are included shows that each village in the *taluka* was separately assessed to revenue, and that the *talukdar* entered into one engagement for the payment of the revenue on all the villages. The whole *taluka* is a *talukdari mahal*. The plaintiff is certainly not a co-sharer in the *talukdari mahal*, for the *talukdar* had no co-sharer,

Nor is the plaintiff a co-sharer in any of the inferior *mahals* of which the *taluka* is made up.

2. The word *mahal* means any parcel or parcels of land which have been separately assessed to or are held under a separate engagement for the revenue and for which a separate record of rights has been prepared.

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13 O. C. 170 (P. C.) = 7 All. L. J. 579 = 32 All. 345.

Legitimacy—Long co-habitation—Presumption of marriage—Mother originally a prostitute.—

Prolonged co-habitation may give rise to a presumption of marriage, but that presumption is not necessarily a strong one and does not apply where the mother, before she was brought to the father's house, was a prostitute.

Note.

F.—14 O. C. 356.

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13 O. C. 172 (P. C.) = 7 All. L. J. 274.

Ss. 13, 16, 17 Oudh Estates Act (I of 1869)—Oral gift not valid—Construction of document—Will—Gift.

1. Immoveable property in Oudh is not transferable by gift *inter vivos* otherwise than by a registered deed.

2. The provisions of Ss. 16 and 17 Act I of 1869, equally apply to a gift made in favour of the *adopted son* There is no contradiction between the provisions of S. 16 and 13. A gift in contravention of S. 16 cannot be valid even when the object of the gift is exempt from the operation of S. 13.

3. As to the interpretation of the instrument, their Lordships *held* that it was testamentary and could not be construed as a deed of gift *inter vivos*.

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13 O. C. 177.

Jurisdiction—S. 92 C. P. C. (V of 1908).

A suit against the Mohant alleging various breaches of trust and asking for removal of the Mahant from his trusteeship and for a declaration that the property in suit was trust property.—Came in within S. 92 C. P. C. and therefore, under Sub-section (1) of the section the suit could not be entertained unless instituted in conformity with the provisions of the sub-section.

13 O. C. 179.

S. 20 Limitation Act—Suit for recovery of debt or legacy—Suit for possession of property.

The first part of S. 20 applies only to suits for the recovery of a debt or legacy and does not apply to a suit for possession of property. Nor does the second part of the section apply to a suit for possession.

13 O. C. 180 (P. C.) = 31 All. 551.

Sale in execution for decree—Possession given to purchaser who was the decree-holder setting aside sale for irregularity—Satisfaction of decree and restoration of property to mortgagor—Remedy for recovery of mesne profits and interests—Separate suit Ss. 244 C. P. C. = S. 47 (V of 1908) and S. 583 C. P. C. = S. 144 (1) Act V of 1908.

The main question for decision on this appeal was whether the respondents (mortgagors) were entitled to recover from the appellant (Purchaser decree-holder) the profits of certain property received by him during the time he held possession of it under a sale in execution of a decree which was set aside; and if so whether interest should be allowed on the said profits.

1. *Separate suit.*—Held that the respondents were entitled by S. 583, and S. 244 to recover mesne profits and interest thereon in the execution proceedings.

2. That the appellant were not entitled to interest on his purchase money which had not been actually paid, but was set off against what was due on the decree.

13 O. C. 183=31 All. 557.

Mohamedan Law—Inheritance—Distribution of the estate.

1. *Custom excluding females*—That the existence of the custom was a question of fact, and that the usual practice of accepting concurrent findings of fact should be followed.

Articles 123, 144 sch. II Limitation Act.—A Mohamedan died in 1865 possessed of immoveable property which passed first to his mother and, on her death shortly afterwards, to his two widows each taking an 8 anna share. On the death of the senior widow on 24th January 1888 the junior widow had possession of the whole estate until her death on 19th December 1894 when mutation of names was made in favour of the defendants who were nephews of the senior widow, and who as the result of litigation were even-

tually left possessed of only the 8 anna share which had belonged to her. In a suit instituted on 11th February 1903 by her sister to recover from the estate of a brother who had died on 7th February 1891 a share of property which had devolved upon him on the death of his sister, the senior widow, and other property which he had inherited from his father, the plaintiff claimed the latter as sole heir on the ground that the widow and daughters were excluded by custom from inheriting, and that the defendant's fathers had predeceased the brother whose estate she was claiming.

Held in respect of the former property that the cause of action arose at the earliest from the death of junior widow, and the suit having been brought within 12 years from that date was not barred by limitation.

The Court of the Judicial Commissioner *held* that the daughters but not the widow were excluded by custom, and calculated the share of the plaintiff on the principle that as the custom by which daughters were excluded was founded on the notion that property should not be allowed to pass into another family, the exclusion should operate for the benefit of the persons who became heirs in default of daughters who should therefore be treated as non-existent so as to let in the defendants, the nephews, and their Lordships of the Judicial Committee affirmed that view.

2. *Effect of compromise as estoppel—Renunciation of claim—Omission to make claim—in a former suit—S 43 C. P. C.= O. II, r. 2 (V of 1908).*

That under the circumstances no renunciation could be implied from the plaintiff's compromise of her suit, nor from her omission to make the present claim previously and there was no estoppel. The onus was on the defendants who alleged such relinquishment and estoppel to establish their case, and on the evidence they had failed to do so.

13 O. C. 188.

Jurisdiction—Ejectment of under-proprietor—S. 108 (8) and (10) Oudh Rent Act.

1. The application of S. 108 (10) Oudh Rent Act is not confined to under-proprietors whose rights as such have been declared by a competent Court.

2. The ejectment of an under-proprietor may be an illegal ejectment within the meaning of S. 108 (10), although it was carried out under the provisions of the Rent Act.

3. Where a person claiming to be an under-proprietor has brought a suit to contest a notice of ejectment under S. 108 (8), and the suit is

dismissed, he cannot come straight to the Civil Court, but must first sue in the Revenue Court under S. 108 (10).

13 O. C. 198.

S. 476 Cr. P. C.—Judicial proceedings—Proceedings by a Revenue officer as distinguished from a Revenue Court—Ss. 4 (9) and 46 U. P. Land Revenue Act (III of 1909)—S. 177 Penal Code.

Where, under orders of the Deputy Commissioner, a Deputy Collector made inquiries, which resulted in the finding that the applicant was in the habit of giving no receipts for rents received and did not record the correct realization in the Patwari's papers, and the Deputy Collector thereupon passed an order under S. 476 Cr. P. C., directing that proceedings under S. 177 Penal Code, should be instituted against the applicant.

Held, that the inquiry was one under S. 46 (III of 1901), and the Deputy Collector in making the inquiry was acting merely as a Revenue officer, and not as a Revenue Court, nor were his proceedings *judicial proceedings* within the meaning of S. 476 Cr. P. C. The order passed by the Deputy Collector was, therefore, without jurisdiction and must be set aside.

Note.

R.—17 O. C. 25—Power of High Court acting as a Criminal Court in revision.

13 O. C. 202.

Pre-emption—Grove-holder whether as such a member of the village community S. 9 Oudh Laws Act.

A grove holder *i. e.* a person owning trees, but having no interest in the land in which they are planted, is not, as such, a member of the village community, and cannot claim a right of pre-emption in respect of the sale of a portion of the proprietary right.

13 O. C. 206.

Bill of exchange—Holder and acceptor—Accommodation acceptor—Contract to treat the acceptor as surety—Principal and surety—Ss. 32, 37 Negotiable Instruments Act (XXVI—1881).

The general rule is that the acceptor of a bill of exchange is the principal debtor and the drawer the surety. A contract to the contrary may be entered into between these two parties inverting their positions and such

a contract may be proved in proceedings as between them. No such contract can be set up as between the acceptor and the holder.

It is open to the acceptor to prove that by virtue of a contract between himself and the holder of a bill of exchange, his liability is that of a surety and not of a principal debtor.

Mere notice of the defendant's position as an accommodation acceptor is not sufficient to preclude the holder from treating him as a principal debtor. He cannot be so precluded in the absence of evidence proving that there is a contract under which he is bound to treat the acceptor as a surety.

13 O. C. 219.

Pre-emption.

1. *Right of pre-emption*—A right of pre-emption is a right to the benefit of a contract or a right of substitution entitling the pre-emptor by reason of a legal incident, to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title It is in effect as if in a sale deed the vendee's name were rubbed out and the pre-emptor's name inserted in its place.

2. *Right relative not absolute*—The right of pre-emption is not an absolute right to acquire immoveable property but only a relative right to acquire it in preference to all other persons and in this respect it *differs essentially from the right* which has its origin in proposal and acceptance. In all cases, a violation of the right is an essential condition to the bringing of a suit for enforcement of the right of pre-emption.

3. *Notice—Tender made and refused*—A person holding a right of pre-emption is not entitled to claim a decree merely on the ground that the owner of the property had issued a notice under S. 10 Oudh Laws Act and that a tender made subsequent to the receipt of notice was refused.

4. *Agreement to sell*—Where a plaintiff claims pre-emption on the basis of an agreement, such an agreement, must not be a conditional but an absolute one. In order to give rise to a claim for pre-emption it must evidence a complete contract to sell.

13 O. C. 235.

Ss. 216 A, 395 and 400 Penal Code—Meaning of "belonging to gang of Dacoits"—Evidence of approver—Evidence necessary for corroboration of an approver.

1. A person cannot be said to *belong to a gang of dacoits* in respect of whom the Court is satisfied that his connection with the gang was limited

to a series of acts, none of which amounted either to dacoity or to abetment of dacoity, though they might be punishable under S. 216A.

2. It is not necessary for a conviction under S. 400, that the person convicted must have taken part in any one dacoity.

3. Evidence, showing the actual participation by an accused in any given dacoity is evidence both of his association with the gang and of his object in such association.

4. Evidence, though not believed for the purpose of a conviction under S. 395, may yet be relied upon for the purpose of a conviction under S. 400.

5. A conviction under S. 400, cannot be considered bad in law merely because the evidence on the record would also have justified conviction for a specific offence under S. 395.

6. No conviction can be based on the evidence of the approver without clear and independent corroboration.

7. Evidence in corroboration of the statement of an approver must be evidence to prove that the particular person to whom it relates was guilty of the offence charged; it is not sufficient that it should merely corroborate the general accuracy of the story told by the approver.

8. Evidence dealing with facts outside the knowledge of the approver would amount to a corroboration of the approver's statement, if it tended to prove the guilt of the particular accused with reference to the offence charged.

Note.

R. 13 O. C. 243.—It has been urged before us that in accordance with the view of the law expressed in 13 O C. 235, a single instance of association with a gang, if established, is a sufficient proof of such a connection as is implied by the word "belong" in S. 400 Penal Code; but we are of opinion that the passage in question cannot be treated as an authority for a proposition of such general import.

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13 O. C. 241.

Pre-emption.—Agreement registration of which is compulsory, embodied in a petition of compromise--Agreement conferring right of pre-emption—Compromise filed before a Revenue Court.

1. It is not possible to interperet the words of the document (compromise in the Revenue Court) as confering right of pre-emption in respect

of leases generally or in respect of the particular lease which forms the basis of the suit. An agreement conferring a right of pre-emption the registration of which is compulsory, is not exempted from the operation of the Registration Law, on account of its being embodied in a petition of compromise filed in a mutation proceeding before a Revenue Court.

2. That the vendor not being necessary party the lower court was justified in not causing his representatives to be brought on the record.

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13 O. C. 243.

1. *Approver's evidence.*—The evidence of an approver cannot by itself be accepted as sufficient proof of the guilt of an accused. It must be corroborated by evidence independent of accomplices.

2. *Confession of co-accused S 30 Evidence Act—Value of confession*—A confession duly made at any time by one of several accused persons who are under trial jointly for the same offence can be taken inso consideration under S 30 Evidence Act, but the value of such a confession as evidence is very small and does not constitute legally sufficient corroboration of the testimony of an approver either as to the *corpus delicti* or the identity of the person affected.

3. *"Belonging to gang of dacoits"—S. 400 Penal Code.*—The term implies something more than the idea of casual association; it involves the nation of continuity and indicates a more or less intimate connection with a body of persons intending over a period of time sufficiently long to warrant the inference that the person affected has identified himself with a band, the common purpose of which is the habitual commission of dacoity.

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13 O. C. 248.

Appeal against order granting review—O. XLIII, r. 1 (w) and O. XLVII, r. 7 C. P. C. (V of 1908)—Appeal on merits.

An appeal against an order granting a review can be made on the specific grounds mentioned in O. XLVII r. 7, and no others. The right of appeal granted under O. XLIII, r. 1 (w) is a right of appeal subject to the restrictions set forth in O. XLVII, r. 7.

There is no right of appeal upon the merits against the final order passed on review.

13 O. C. 251.

S. 108 (15) Oudh Rent Act—Meaning of "estate"—Jurisdiction.

1 "*Estate*" the term is vide enough to include an under-proprietary tenure.

2. *Suits for profits between under-proprietors* lie in the Rent Court under the provisions of S. 108 (15) Oudh Rent Act.

13 O. C. 255.

Mahomedan Law—Legitimacy acknowledgement of paternity, when sufficient to confer status of legitimacy.—

An acknowledgement of paternity made by a Mahomedan is not in all cases sufficient to establish the fact that the person so acknowledged is of legitimate descent. In every case the question is whether or not the acknowledgor at the time of making the acknowledgment intended to confer upon the person whom he acknowledges as his son the status of legitimacy.

Note.

F.—14 O. C. 356.

13 O. C. 260.

Pre-emption —

1. *S. 9 Oudh Laws Act—Sale in favour of one of several persons equally entitled to pre-empt.*

The last clause of S. 9 Oudh Laws Act is applicable not only where there are persons equally entitled to buy a property and the property has been sold to a stranger or to a person whose right to acquire it is inferior to that of the persons who are equally entitled to pre-empt but is applicable also to cases where two or more persons are equally entitled to buy the property and one or more of them has or have acquired it.

2. *Pre-emption of part of the property sold.*—Where several properties were conveyed under the same sale deed and the plaintiff brought a suit for pre-emption in respect of some of the properties in which he had a preferential right of purchase but did not claim pre-emption of the properties in which he had an equal right of purchase with the vendee. *Held*, that the suit must be dismissed.

13 O. C. 265.

1. *S. 28 Registration Act—Registration at a place where the property found not to belong to the executant situate.*—Under the Registration Act, it is not the duty of a registering officer to inquire into the title of the person registering

the document. The fact that the deed relates to a property situate within the jurisdiction of the registering officer is enough to give him jurisdiction, and the validity of the document on the ground of registration cannot be questioned on the basis that the executant had no title to the property situate within the jurisdiction of the registering officer.

2. *S. 53 Transfer of Property Act—Fraudulent transfer—Consideration not a necessary test of bona fide—Deed executed in order to defraud creditors—Intention to defraud makes whole deed inoperative.*—Where a transaction is found to have been effected with the object of preventing the property from being made available for the claims of the outside creditors, the transaction even if with consideration, cannot be upheld. The deed being merely a colourable transaction cannot be treated as a genuine document, even if a portion of the consideration had been found to have been paid. The deed must, therefore, be set aside in its entirety.

3. *Motive of transferee*—In order to ascertain whether a transaction is fraudulent or not, we must look to the principal motive of the transferee.

13 O. C. 282.

S. 73 C. P. C. (V of 1908—Rateable distribution—Notice to rival decree-holders.

An application for rateable distribution should be dealt with after notice to the rival decree-holder whose interests may be seriously affected thereby.

13 O. C. 286.

Article 120 *Sch. II Limitation*

Suit to recover money deposited with a lessee as security to ensure payment of rent payable under a contract of lease is governed by Art. 120.

13 O. C. 289.

Ss. 203 439 Cr. P. C.—Revision of an order passed under—Notice to opposite-party.

Revision of an order passed under S. 203, can be made without notice to the person complained against.

13 O. C. 291.

S. 73 C. P. C. (V of 1908)—The object of this section is two fold, *firstly*, to prevent unnecessary multiplicity of execution proceedings and to obviate the necessity of each and every decree-holder separately attaching and separately selling the property, and, *secondly*, to secure an equitable administration of the property by putting all the decree-holders upon the same footing and making the property rateably divisible among them.

Ss. 73 and 63 C. P. C. (V of 1908)—S. 73 did not require the transfer of a decree to the Court where the process of realization takes place as a condition precedent to an application under S. 63 and, therefore, *fortiori* it is not necessary for the decree-holder seeking rateable distribution to apply for execution of his decree to the Court where the realization takes place.

Note.

F.—14 O. C. 38.

13 O. C. 295.

1. *Jury—Verdict with respect to an offence of which the accused was not charged*—That it was competent to the jury to return a verdict of guilty with respect to an offence of which the accused was not formally charged.

2. *High Court's power to interfere with the verdict of jury*—That the High Court will not interfere with the verdict of a jury unless it is shown to be clearly and manifestly wrong.

13 O. C. 297.

1. *Art. 12 Sch. 1 Limitation (IX of 1908)—Suit for setting aside an execution sale.*—Where a sale in execution is null and void for want of jurisdiction in the Court ordering it or for other causes or where it does not affect a stranger's interest, *held*, that Art 12, does not apply to a suit to have such sale set aside or to a suit which has indirectly the effect of setting it aside.

2. *Representatives of judgment debtor bound by execution proceedings*—only to the extent of the assets received as heir of the deceased and not with respect to property acquired by himself by purchase.

13 O. C. 302.

Pauper appeal—O. XLIV, r. 1 C. P. C. (V of 1908)—Matters to be considered in determination.

All that a Judge is bound to consider is what is contained in the application, copy of the judgment and the copy of the decree. He is not to refer to any other matter is determining whether the application for leave to appeal as a pauper may or may not be granted.

13 O. C. 303.

1. *S. 48 C. P. C. (V of 1908—Art 182)—Sch. III Paragraph 11 (3) Limitation Act—Sch. I art. 182 Act V of 1908 S. 48*—The protection extended to a decree-holder by the provisions of paragraph 11 (3) of the 3rd sch. of Act

V of 1908 applies, both, to the limitation of 12 years referred to in S. 48 C. P. C. and to the limitation of 3 years provided by Art 182 Limitation Act (IX of 1908).

2. *Notice under Order XXI, r. 22 C. P. C. (V of 1908).*—The issue of the notice gives a new start for limitation even though the preceding application upon which the notice was issued was defective or irregular.

13 O. C. 309.

1. *S. 421 Cr. P. C.*—Although it is not required by law that a Session's Judge should write a regular judgment when exercising the power of summary dismissal given to him by S. 421 Cr. P. C., still the matter being one for discretion on the part of the subordinate appellate courts, it is very important that such discretion should be exercised upon sound and reasonable lines.

2 *Revisional power of the High Court.*—Where a conviction is based upon *circumstantial evidence*, the question always remains whether the evidence which has been believed by the Court, which heard it, is of such a nature that it ought to have been accepted as establishing the guilt of the accused person beyond reasonable possibility of doubt and this is a question which may be dealt with by a High Court upon an application *for revision.*

2. *S. 27 Evidence Act.*—Is a proviso to the preceding sections which deal with what may or may not be proved as *against the person making a confession.* It has nothing whatever to do with what may or may not be proved as *against other persons* when the persons who made the alleged confession is not himself on his trial but is appearing as a witness in the case.

4. *Statements made by accomplice elsewhere than before the Court.*—Hearsay evidence of any statement whatsoever made at any time and under any circumstances by an accomplice cannot be produced as against the accused before the Court Statements made by an accomplice elsewhere than before the Court and not in the presence of the accused can be proved only to corroborate, to contradict or to impeach the credit of the accomplice. In no case can they be put forward as substantive evidence of the truth of the facts therein stated.

13 O. C. 316 (P. C.)=7 All. L. J. 1122=32 All. 599.

S. 8, Lists 1, 3 and 5—S. 22 (11) Oudh Estates Act (I of 1869)—Conditions in Sanad—Succession—Primogeniture—Intestate succession.

Under S 8 the name of a *talukdar* was entered in Lists 1 and 5, and it was declared that the succession to the estates comprised in the *sanad*

granted to *talukdars* should be regulated by the rule of primogeniture, and in the *sanad* it was provided that in the event of the *talukdar* or any of his successors dying intestate, the estate should descend to the nearest male heir according to the rule of primogeniture.

Held, that the language of the *sanad* was simple language conveying the ordinary meaning of the word "primogeniture" in the Law of England.

The estates of *talukdars* must, for the purposes of intestate succession, be treated as *impartible*.

Where after the death of a *talukdar*, his two collateral heirs being uncle and nephew claimed the estate. *Held* that the nephew was the heir being entitled to succeed according to the rule of lenial primogeniture.

13 O. C. 332 (P. C.)

Grant of property to one of 3 brothers—Brothers living jointly—Conduct of brothers.

The Government made a grant to *G* one of 3 brothers who were living jointly. *G* when examined with a view to the preparation of the *khewat* of the property granted, stated that he and his two brothers were joint in equal shares. The *khewat* was signed by *G* in which the names of all the 3 brothers in equal shares were recorded as zamindars.

Held, that it must be inferred that under a family arrangement, which cannot now be questiond the 3 brothers became jointly entitled as members of an undividual Hindu family to the property, although the Government grant was to one *G* alone.

13 O. C. 335.

European British subject—Appeal against conviction by Court of Session—Ss. 4 (j) and 40 Cr. P. C.

That the appeal in this case under S. 410 Cr. P. C. lay to the High Court of Judicature for the North-Western Provinces and not to the Court of the Judicial Commissioner of Oudh.

13 O. C. 337.

1. *Assessor—Person not summoned to act as Assessor acting as such—537 Cr. P. C.*—That the Court was not properly constituted, and a defect of this kind was not a mere irregularity which could be cured by S. 537 Cr. P. C.

2. *Want of objection by accused*—That want of objection was immaterial.

13 O. C. 341.

1 *Revision—Alternative remedy being available not necessarily a bar to revision—S 115 C. P. C. (V of 1908).*—Although the practice of the court has been to discourage applications for revision where other remedies are available, yet the existence of an alternative remedy is not necessarily a bar to the exercise of revisional jurisdiction.

2. *Power of Munsarim to fix dates.*—That the Munsarim had no power to fix a date for the next hearing of the suit.

3. *Hearing of a case fixed for a date subsequently declared a holiday.*—That as the case could not be taken up on the 24th on account of the holiday and there was nothing to show who fixed the following day for the hearing of the case, there was no justification for calling the case on the 25th the day on which it was dismissed.

Arbitration superseded—Sch. II cl. (8) C. P. C. Act V of 1908.—That the words " and in such case shall proceed with the suit" in cl. (8) of the second schedule do not necessarily mean that the court shall proceed at once on the same day to examine witnesses.

Note.

(1) **F.**—15 O. C. 304—The order was passed in an entirely independent proceeding by which the plaintiffs sought to bring new defendant upon the record and once an order is passed on such application the proceedings amount to a case which has been disposed of.

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13 O. C. 347.

Mahomedan Law.

1. *Gift by a person not in possession.*—No valid gift can be made by a person who claims to be the owner of a property which is not in his possession, but is in the possession of trespassers.

2. *Constructive possession.*—The rule laid down in reported cases, recognizing the validity of gifts where no actual possession can be delivered, can be applied only to those cases where constructive possession can be traced to the owner. Where the owner of a property is ousted by a trespasser, he has no possession at all and can not make a valid gift.

Notes.

(1) **R.**—20 I. C. 286—A gift by a person not in actual or constructive possession is invalid.

(1) **R.**—17 O. C. 60.—That if a gift is made of two distinct properties and is perfected with regard to one of them by delivery, and not with regard to the other, the gift is not void in its entirety, but takes effect as to the property which has been duly delivered.

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13 O. C. 352.

Finding returned by lower appellate Court—High Courts power to consider questions of fact.—

Where there has been a remand from the High Court to the lower appellate Court, the High Court in considering the finding returned by the lower appellate Court has no power to go into questions of fact.

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13 O. C. 354.

1. *Security for good behaviour—Appeal to District Magistrate—Submission of proceedings to Sessions Judge—Ss. 123 406 Cr. P. Code.*

A person ordered to give security by a Magistrate is entitled to appeal to the District Magistrate notwithstanding that the proceeding may have been laid before the Sessions Judge under S. 123 Cr P. C. But the right of appeal is lost as soon as the Sessions Judge has passed orders on the case under sub-section (3) of S. 123 Cr. P. C.

2. *Procedure to be adopted by Sessions Judge —*

The Sessions Judge on receiving the record under S. 123 (2) Cr. P. C. should at once give notice to the person ordered to give security of the date on which the case will be taken up If before the last mentioned date, the person ordered to give security does not object to the case being taken up by the Sessions Judge on the ground that he has appealed, or the Sessions Judge does not become aware that appeal has been filed in the Court of the District Magistrate, the Sessions Judge should proceed to dispose of the case. If, on the other hand, the Sessions Judge is informed or becomes aware that an appeal has been filed, he should stay his hand until the appeal has been disposed of.

Appeal filed to the Sessions Judge.—Where the person ordered to give security presented an appeal to the Sessions Judge: *held*, that the Sessions Judge should have returned the memorandum of appeal to him for presentation to the District Magistrate instead of forwarding the appeal to the District Magistrate directly.

13 O C. 357.

Compensation for improper injunction—Malice—Ss. 94, 95 C. P. C. (V of 1908).

In a suit for compensation for loss resulting from an injunction wrongfully obtained, the plaintiff need not prove malice. If the injunction is applied for and obtained without reasonable or probable cause, the person who has been wronged by the issue of such injunction is entitled in law to claim damages.

Where the goods of a shop have been seized by an officer of the Court, it is his business to see that the rent of the shop is paid and a proper watch is kept, or to remove the stock in trade to another place.

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13 O. C. 366.

Sale in execution of decree—Wajib-ul-arz forbidding sale of trees by tenant.—

Where a Wajib-ul-arz provided that tenants who had planted groves had a right to cut standing trees for their household use but could not sell any tree except with the permission of the owner of the land: Held that the terms of the *Wajib-ul-arz* forbidding sale applied as much to sales in execution of decrees as to a private sale.

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13 O. C. 369.

Mahomedan Law—Waqf Shia School—Possession.

Where a *mutawalli* (other than the dedicator himself) is appointed there must be actual delivery of possession to him, when the dedicator appoints himself *mutawalli*, there must be constructive delivery, that is to say, the dedicator being himself in possession must declare that he intends to hold thereafter as trustee and not as owner.

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13 O. C. 375.

Hindu Law.—Marriages between persons of different castes—Rights and previleges of their children—Recognition of such marriages by members of the family.

An offspring of a *Kshatriya* by a *Sudra* woman is not a *Sudra* but an *ugrah.*

Though intermarriages between different castes are prohibited and considered invalid under Hindu Law, the prohibition does not apply to marriages between persons of hybrid castes or between a person of a hybrid caste and a Brahmin or Kshatriya, or a Vaishya, or a Shudra and when

such marriages are recognized by the family as valid marriages the off spring born out of such marriages must be considered legitimate and as such entitled to right and previliges under the Hindu Law.

13 O. C. 388.

Setting aside of a decree on ground of fraud—Decree against two defendants—Suit by one defendant.

When the plaintiff succeeds in proving that the decree obtained against him and another person was obtained by fraud and that other person was a party to the fraud the entire decree must be set aside.

14 O. C. 1.

Pre-emption.

1. *Ss. 10 and 11 Oudh Laws Act—Sale deed executed before expiry of the period fixed for tender.*—Where a vendor issued notice under S. 10, but executed the sale deed before the period of 3 months allowed for a tender under S. 11, had expired· *Held*, that the failure on the plaintiffs part to make the tender did not bar his right to sue for pre-emption.

2. The evidence on the point of the price in the sale deed having been stated in good faith and the burden of proof discussed.

14 O. C. 6.

Construction of decree—Execution of decree after release of the estate from management of the Court of Wards—S. 49 Court of Wards Act (III of 1899).

1. (On construction of decree) *Held*, that the court intended to give the plaintiff a decree which he could enforce against the ward's property in the event of its being released from management.

2. That the substantial defendant was the ward, although he was sued in the name of the Deputy Commissioner under S. 49.

14 O. C. 10.

Redemption.

Facts—A decree for redemption, in which the period fixed for payment of the mortgage money was 6 months, was finally affirmed by the Judicial Commissioner on 9th July 1909, the decree holder deposited in court the amount payable under the decree and prayed that notice might be issued to

the mortgagees defendants requiring them to withdraw the money. On 13th July 1909, he presented an application praying that he might be placed in possession of the mortgaged property.

1. *Held*, that up to the passing of Act V of 1908, the decree holder had a right to redeem the mortgage at any time before the passing of an order absolute for sale without obtaining an extension of the time limited by the decree, and his right to do so after passing of that Act was saved by S. 6 of the General Clauses Act, 1897.

2. That the application of July 13th, 1909 was governed by Art 182 Sch. I Limitation Act.

3. That as the application to the court to send notice to the mortgagees requiring them to withdraw the money was an application to the Court to take a step in aid of execution and, therefore, the application of 13th July, 1909 was within time.

Note.

R.—14 O. C. 100.—Decree in which no time is fixed for payment would be barred by time if not executed within 3 years from the date of the decree.

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14 O. C. 14.

Will.—

1. *Grant of the Letters of administration for the whole property—S. 41 Act V of 1881 S. 19 (1) Court Fees Act (VII of 1870) Court fee not paid—Application can be heard.*—S. 19 1 (1) of the Court Fees Act is no bar to the hearing of an application for the grant of probate or Letters of Administration if proper Court fee has not been paid. If the petitioner undertakes to pay such Court fee as may be found due if his application is accepted, the Court will hear the application.

Under S. 41 *Act V of* 1881 it is within the discretion of the Court to grant letters of administration in respect of the whole or any portion of the property.

2. *Construction of will* S. 21 Probate and Administration Act (*a*) That the provisions of the Will were not vague and indefinite and that the bequest was in favour of a specified or definite person, and (*b*) that the bequest was not made in favour of Government but in favour of the "Collector of Lucknow," meaning the person who for the time being, *held* the office of the Deputy Commissioner of the Lucknow District and (*c*) that although

the interest of the Deputy Commissioner under the Will was not a beneficial interest but merely that of a trustee, the administration of the whole or of any portion of the property could, notwithstanding S. 21 of the Probate and Administration Act, under S. 41 of the same Act, be granted to the Deputy Commissioner in view of the safety of the estate.

3. *Revocation.*—That a testator's declarations, alleged to have been made by him at various times prior to his death are not legally admissible in evidence to prove the actual destruction of the Will.

4. *Pre-sumption—Lost Will*—That although the general presumption of law is, that if a Will is traced to the testator's possession and is not forth coming at the time of his death, it has been destroyed by him, this presumption does not arise unless there is evidence to satisfy the Court that it was not in existence at his death.

14 O. C. 33.

O. XXI, r. 89 C. P. C. Act V of 1908.

The sale cannot be set aside at the instance of a judgment-debtor who has sold the property after the date of the Court sale.

14 O. C. 36.

Execution of decree—Application to arrest judgment-debtor—Illness, ground for refusing application—O. XXI, r. 37 C. P. C. Act V of 1908.

If the Court has reason to believe that the judgment-debtor is not in a fit state of health to undergo confinement, it would act wisely in issuing a notice to him to show cause in the first instance.

14 O. C. 38.

Revision—S. 115 C. P. C. (Act V of 1908)—High Court's power of revision against order of Revenue Court.

A High Court has power in revision to interfere with the orders of Court of Revenue exercising jurisdiction under the Rent Act in those cases only in which an appeal lies to the Court of the District Judge and to the High Court.

Rateable distribution—S. 73 C. P. C. (V of 1908)—It was not necessary for a decree-holder seeking rateable distribution to apply for execution of his decree to the Court holding the assets.

14 O. C. 40.

O. XLI R. 10 (2) C. P. C. (V of 1908.)

An order rejecting an appeal for failure to furnish security for costs is not appealable.

14 O. C. 41.

1. *Birt-deed for less than Rs. 100. Registration*—That such a deed, reserving a fixed annual rent, really implied a grant for money paid for under-proprietary rights by a superior proprietor in favour of the *birt* holder, and should, therefore, be treated as a sale-deed and not as a lease and did not, therefore, require registration.

2. Meaning of *Birt*—It generally implies an under-proprietary right. It is a cession under which a superior proprietor parts with a certain portion of his proprietary rights either for money paid or for religious purposes.

14 O. C. 45.

Effect of payment to one of joint mortgagees—Consent of all mortgagees' necessary to effect a valid discharge—S. 45 Contract Act.

One of several mortgagees cannot give a valid discharge without the consent of the others.

14 O. C. 49.

Mahammedan Law.

1. *Will in favour of an heir—Consent given during last illness*—A bequest in favour of an heir is void unless the other heirs give their consent to it after the death of the testator. Consent given during the life-time of the testator even though during his last illness is of no avail.

2. *Revival of original will on failure of a subsequent one.*—The mere revocation of a will followed by a disposition subsequently found to be in effectual will not set up the original will unless the two acts are as connected that it can be said that the substitution of an effectual disposition was a condition of the revocation of the original will.

14 O. C. 53.

S. 7 Succession Certificates Act (VII of 1889)—Prima facie title to be determined in case of intricacy.

1. When a Court, considering that the pleadings of the parties are contentious and are such as will necessitate a prolonged enquiry into intricate

questions of law or fact, decides summarily as to who is prima facie entitled to the certificate, the Court need not frame issues on such questions or record evidence thereon.

2. Meaning of " Summary inquiry."

14 O. C. 58.

Suit for arrears of rent—Assessment of rent—Date from which it takes effect—S. 107 G Oudh Rent Act.

In a suit for resumption the rent was fixed by the Deputy Commissioner. On appeal to the Board of Revenue the amount of rent was changed by agreement of the parties and decree was passed in terms of the agreement

Held, that the defendant became a tenant upon the passing of the Deputy Commissioner's order and the rent ultimately fixed by the Board was payable from the date of the order passed by the Deputy Commissioner

14 O. C. 60.

S. 108 Oudh Rent Act—S 9 Specific Relief Act—Jurisdiction.

A *suit by a tenant against landlord* for *recovery of possession of land* from which he has been *unlawfully dispossessed* is not cognizable by a Civil Court.

14 O. C. 62.

O. XXXIV r. 6 Act (V of 1908).

Mortgage of land by an occupancy tenant—Decree for sale—Dismissal of application for sale on the ground that property was not saleable—Application for personal decree.—That the mortgaged property having been found to be unsaleable, the decree-holder was entitled to maintain the application for a personal decree.

14 O. C. 65.

S. 92 C. P. C Act V of 1908—Suit for against trespasser for possession of trust property.

A suit for possession cannot be maintained *under S. 92 C. P. C.* against a trespasser in possession of trust property.

14 O. C. 68.

Chaukidar's Register of Births and Deaths—S. 35 Evidence Act.—That the register was not admissible in evidence.

Note.

R.—15 O. C. 351.

resisted by the Nawab on the ground that they were included in the *Sanad* granted by Government to him. W's application was then dismissed. The present suit was brought to recover possession of a share of the villlages.

Held, 1 that the correlative obligation that lay on the Nawab to release the property on payment of the money, created no trust, nor did it constitute him a trustee for W.

2. That when she applied for the regular settlement of the villages, an adverse title was set up on behalf of the Nawab

3. That from the date of the dismissal of W's application, the Nawab's possession was adverse to her, and that the suit was barred.

14 O. C. 100.

Execution of decree.

Decree capable of execution even though no time fixed for payment—S. 47 (2) C. P. C. Act V of 1908.—On a compromise a decree was passed for possession of property subject to the payment by the plaintiff of a certain sum. The compromise did not mention the time during which the money was to be paid. The plaintiff contended that the decree was not capable of execution until the money was paid into court and the application for execution having been made within 3 years of that payment was within time.

1. *Held*, that the decree was intended to be executed and not to merely declare the rights of the parties to be enforced in a subsequent suit.

2. That if no time for payment of the money was fixed by the decree, the decree holder had 3 years within which to execute the decree and as in the present case the money had not been deposited within 3 years from the date of the decree, the application was time barred.

14 O. C. 103.

Mahomedan Law—Custody of a minor girl—Disqualification for guardianship by marriage with a man not related to the minor within prohibited degrees. —S. 17 Guardian and Wards Act (VIII of 1890)

A woman otherwise entitled to the custody of a minor girl a disqualified if she is married to a married to a man not related to the minor within the prohibited degrees.

The discretion allowed to a court entertaining an application for the appointment of a guardian under S. 17, is very wide and as a matter of principle the High Court should not interfere with orders passed by District Judges which are fairly within the bounds of their discretion.

14 O. C. 106.

Mortgage—Post diem interest—Interest awarded as damages, when to be charged on land.

Where land is liable to be sold for recovery of interest due up to the date at which the principal sum is payable, interest awarded as damages for non-payment of the principal should be held to be charged on the land and included in the decree for sale.

Where interest is stipulated for in a mortgage-deed at the rate of 25 per cent. per annum, the Court would be justified in allowing *post diem* interest at the rate of 6 per cent. per annum.

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14 O. C. 108.

Appeal against decree passed on review—O. XLVII, rr, 1 (2) and 7.

A decree passed on an application for review of judgment is appealable on the ground that the Court which admitted the application for review had no Jurisdiction to do so.

2. *Jurisdiction of Conrt.*—A Court has no Jurisdiction to entertain an application for review of its judgment when an appeal has been filed against that judgment and the petitioner for review has received notice of the appeal and can present to the appellate Court the case on which he bases his application for review.

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14 O. C. 111.

O. IX r, 13 C. P. C. (V of 1908)—Grounds for setting aside of exparte decree.

The defendant must satisfy the Court that in fact the summons was not duly served upon him or that he was prevented by sufficient cause from appearing when the suit was called on for hearing.

In the absence of any of these two grounds the Court has no jurisdiction to restore the suit merely because the suit was one for possession of land.

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14 O. C. 115.

Execution of decree—Auction sale of property both ancestral and self-acquired. Sanction of Government for sale of ancested property.

1. That the sale of the self acquired share was never sanctioned by the the Commissioner and sanction of Government for sale of ancestral property was not sufficient.

2. That sanction given after the sale of ancestral property was not sufficient.

3. That the sale of no part could be upheld as it was impossible to say which part of the share was sold first.

14 O. C. 117.

Res-judicate—Matter which might have been made a ground of defence or attack —Identity not necessary in causes of action in the two suits—S. 11 Exp. IV Act V of 1908 C. P. C.

On June 3rd 1904, A executed a usufructuary mortgage deed and also a deed of further charge in favour of the plaintiffs. On September 4th 1905, he executed another mortgage deed the consideration for which consisted of the amounts due on the previous deed and a further advance. In 1906, A sued through his next friend for cancellation of the deed, dated 4th September 1905 and for possession of the property. The claim was decreed and in execution of the decree the plaintiffs were dispossess of the mortgaged property. The plaintiffs brought the present suit for recovery of the property on the basis of the usufructuary mortgage deed, dated 3rd June 1904.

1. Held, that the present suit was barred by S. 11, Exp. IV.

2. A matter in the sense of a ground of defence or attack may be *res-judicata* even though it has not been actually decided in the previous suit.

3. The fact that the cause of action in the two suits are different is no ground for holding that a matter is not *res-judicata*.

14 O. C. 124.

Execution of decree—Step in aid of execution- -Art 182 Limitation Act.

1. *Deposit of process fee*—Mere payment of process fee does not amount to an application to a court to take a step in aid of execution.

2. The *request of the agent of the decree-holder* for the issue of a warrant is not an application to the court to take a step in aid of execution.

14 O. C. 127.

Hindu Law—Manager of joint family—Suit to recover debt belonging to joint family—Necessary parties.

That as the head of the family, the plaintiff was competent to maintain the suit and that it was not necessary for the other members of the family to be joined as plaintiffs, although the Court had discretion to add them as defendants.

14 O. C. 129.

Instalment bond—Default in payment of an instalment—Art 75 sch. I Limitation Act.

Where the suit was brought within 3 years of the date fixed for the payment of his last instalment but more than 3 years after the first instalment had become due.

Held, that in the absence of *waiver*, time began to run from the date of the first default.

The question whether the creditor is bound to sue or is only entitled to sue on the occurrence of default in payment of an instalment is immaterial.

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14 O. C. 133. (P. C.)

Will—Family arrangement—Immediate operation—First and irrevocable—Whether document is will—Inconsistency in pleadings—Costs.

An instrument which was a family arrangement arrived at by the mediation of certain gentlemen who were old friends of the family, and which was intended to be operative immediately and to be final and irrevocable, was held to be a non-testamentary instrument and, therefore, void as regards immoveable property, because it was not registered.

Notwithstanding conflicting views presented by the appellants, their Lordships gave effect to the real character of the instrument, but did not allow costs to the successful appellants.

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14 O. C. 139.

Agreement to supply funds for litigation—Right to recover property based on such agreement—Sale—Conveyance.

One A. was entitled to succeed to certain property on the death of a widow as being the nearest reversioner of the widow's deceased husband. The property was in possession of remoter reversioners. In order to prosecute his claim he entered into an agreement with the plaintiff by which he agreed to give him half the property in dispute in lieu of the funds supplied to him by the plaintiff for the expenses of the suit. The plaintiff and A. jointly sued for possession of the property. Before the decision of the case A died and the question arose whether on the basis of the said agreement plaintiff could recover half of his share in the property. The Courts below allowed the plaintiff's claim.

2. That sanction given after the sale of ancestral property was not sufficient.

3. That the sale of no part could be upheld as it was impossible to say which part of the share was sold first.

14 O. C. 117.

Res-judicate—Matter which might have been made a ground of defence or attack —Identity not necessary in causes of action in the two suits—S. 11 Exp. IV Act V of 1908 C. P. C.

On June 3rd 1904, A executed a usufructuary mortgage deed and also a deed of further charge in favour of the plaintiffs. On September 4th 1905, he executed another mortgage deed the consideration for which consisted of the amounts due on the previous deed and a further advance. In 1906, A sued through his next friend for cancellation of the deed, dated 4th September 1905 and for possession of the property. The claim was decreed and in execution of the decree the plaintiffs were dispossess of the mortgaged property. The plaintiffs brought the present suit for recovery of the property on the basis of the usufructuary mortgage deed, dated 3rd June 1904.

1. Held, that the present suit was barred by S. 11, Exp. IV.

2. A matter in the sense of a ground of defence or attack may be *res-judicata* even though it has not been actually decided in the previous suit.

3. The fact that the cause of action in the two suits are different is no ground for holding that a matter is not *res-judicata*.

14 O. C. 124.

Execution of decree—Step in aid of execution- -Art 182 Limitation Act.

1. *Deposit of process fee*—Mere payment of process fee does not amount to an application to a court to take a step in aid of execution.

2. The *request of the agent of the decree-holder* for the issue of a warrant is not an application to the court to take a step in aid of execution.

14 O. C. 127.

Hindu Law—Manager of joint family—Suit to recover debt belonging to joint family—Necessary parties.

That as the head of the family, the plaintiff was competent to maintain the suit and that it was not necessary for the other members of the family to be joined as plaintiffs, although the Court had discretion to add them as defendants.

Held, that the agreement in question did not amount to a "sale" as defined in the Transfer of Property Act or to a "Conveyance" as defined in the Indian Stamp Act and that it did not transfer any property to the plaintiff nor did it confer any title to him.

14 O. C. 144.

Mortgage of occupancy holding—Transfer in breach of terms of decree of Settlement Court—S. 6 Transfer of Property Act—S. 23 Contract Act.—

1. That the mortgage in breach of the conditions of the settlement decree, granting "*kabzadari*" without the right of transfer, was not a transfer for an "illegal purpose" within the meaning of S. 6, Transfer of Property Act or "for an unlawful object or consideration" within the meaning of S. 23 Contract Act.

2. That the condition forbidding transfer contained in the settlement decree was only for the benefit of the superior proprietor, and that the plaintiff was not entitled to the assistance of the Court in un-doing his own Act.

Note.

(2) Rel.—15 O. C. 67.—There is an essential distinction between restrictions on transfers imposed by the Legislature and restrictions imposed by contract or decree—It is not competent to a transferor of a non-transferable interest, conferred by a decree, to raise the plea that the transfer is void.

14 O. C. 147.

1 *O. XXXIV rr 4 and 5 C. P. C. (V of 1908)—Extension of time fixed for payment under preliminary decree for sale.*—The Court cannot extend the time fixed for payment under a preliminary decree for sale.

2. *Compromise extending time.*—A Court cannot accept a compromise and pass an order in accordance with its terms which would have the effect of extending the time fixed for payment under the preliminary decree.

14 O. C. 153.

Jurisdiction—Partition proceeding.

A Civil Court has no jurisdiction to go behind the ultimate allotments of lands at a partition made by the Revenue Courts, nor can it question the final allotment made at the partition because some intermediate orders made in the course of partition have not been properly carried out.

Notes.

F.—20 I. C. 145.—Where the plaintiff comes into Court seeking a declaration that certain lands *held* in severalty by him had been wrongly included in the shares allotted by the Revenue Courts to the other co-sharers in the partition case; *held*, that the suit was not maintainable.

R.—23 I. C. 866—A suit for possession by a declaration that the plaintiff is entitled to a partition of the land wrongly allotted to the defendants in partition by the Revenue Court, does not lie in the Civil Court.

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14 O. C. 156.

Pre-emption.

Property re-sold to vendor prior to suit—Where a suit for pre-emption was brought within time but the vendees had resold the property to the original vendor before institution of the pre-emption suit.

Held, that the retransfer was sufficient to defeat the claim for pre-emption.

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14 O. C. 161.

S. 54 Transfer of Property Act.

Tangible immoveable property—Registration—An undivided property is a "tangible immoveable property" within the meaning of S. 54, and, therefore, a sale of such property, if under Rs. 100 in value, is not compulsorily registrable.

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14 O. C. 164.

A suit by *Lambardar against co-sharer* for his share of *revenue paid* is a suit for contribution and the *decree* in such a suit should specify the *liability of each* co-sharer separately.

A Lambardar is entitled to recover *interest* from the defaulting co-sharers.

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14 O. C. 170.

1. *Declaratory suit—Establishment of title.*—In a declaratory suit the plaintiff must establish his title even though the defendant may not pretend to be able to establish any title in himself

In such a suit the Appellate Court cannot take into consideration the bearing on the title of the contending parties of facts which came into exis tence subsequent to the institution of the suit.

2. *Hindu mother succeeding to her son—Limited estate.*—Such mother does not posses an absolute estate but only a qualified one alienable under certain conditions.

3. *Consent of reversioners*—Such content constitutes evidence of the pro priety, if not the actual necessity, of the transaction.

4. *Voluntary transfers.*—The principle by which a Hindu widow is allowed to alienate absolutely with the consent of the reversioners cannot be extended to voluntary transfer made by way of gift without consideration and for a purely worldly purpose.

Note.

(1) **Dist.**—XXII Indian Cases 129—When the right of a plaintiff to sue alone was not questioned by the defendants, who had an interest in the subject matter of the suit, but by those subsequently found having no interest in it: *held*, that such an objection, as coming from persons not in a position to plead it, must be disregarded.

14 O. C. 189.

Construction of document.

1. That the intention of the parties was that the vendor should remain in possession for his life and, therefore, the vendor could not transfer any interest therein.

2. That *S. 10 Transfer of Property Act* was inapplicable to the case, as there was no Transfer of Property with a *condition restraining alienation.*

3 *Document containing two clauses one repugnent to the other*—The rule of construction, that if there be two clauses of the deed the one repugnant to the other, the first shall be received and the latter rejected, is subject to the general rule that every document must be construed as a whole.

4. *Real meaning*—In construing a document, the form of expression, the literal sense is not so much to be regarded as the real meaning of the parties which the transaction discloses.

14 O. C. 193.

Pre-emption.

Relationship—S. 9 Oudh Laws Act—The relationship mentioned in S. 9 is not confined to relationship through males It means consanguinity from a common stock as opposed to affinity or relationship by marriage.

The test laid down by the section is nearness in point of relationship and not the position of the parties in the line of inheritance.

14 O. C. 196.

1. *Under-proprietary title claimed by tenant served with notice of ejectment—Cancellation of notice on the ground that the person was more than a tenant—Cause of action for a declaration from the Civil Court—Jurisdiction*—The decision of the Revenue Court affords a cause of action to the landlord to go to the Civil Court for a declaration that the plaintiff did not possess any under-proprietary right.

2. *Under-proprietary right under S. 11 Oudh Sub-Settlement Act (XXVI of 1866)*—To establish such rights it must be shown that the *nankar* was granted in consideration of having founded a *purwa*, and even then such rights can be granted only in respect of such *nankar*.

3. *Long—Perpetual lease*—A long lease, even a perpetual lease, does not constitute the lessee an under-proprietor.

4. *Possession*—Where the possession and exercise of *zamindari* rights are traceable to and are derived from the lease granted, such possession and exercise are insufficient to confer an under-proprietary title by prescription.

Note.

(3) **F.**—22 I. C. 125—A long lease does not constitute the lessee an under-proprietor—A former proprietor can claim an under-proprietary right in respect of *Sir* or *Nankar*.

14 O. C. 204.

Lease—Determination of Agricultural leases granted by mortgagee—Redemption—Ss. 111 and 117 Transfer of Property Act—S 36 Oudh Rent Act.

Agricultural leases granted to tenants by a mortgagee in possession do not determine as soon as the mortgagees, interest comes to an end by reason of redemption.

Every tenant, not being a tenant with a right of occupancy or a sub-tenant, is entitled to retain possession for a period of 7 years from the date he was admitted to occupation.

14 O. C. 207.

Ss. 34, 87 Registration Act (III of 1877)—Registration after the expiry of 4 months.

A document was presented for registration within 4 months of the date of execution. The executant appeared and admitted execution after the

period of 4 months had elapsed. The Sub-Registrar without getting the orders of the Registrar, registered the document.

Held, that the registration was not invalid and the defect was cured by S. 87.

14 O. C. 214.

Registration—Immovable property over Rs. 100 in value given in lieu of dower by a Mahommedan—Sale—S. 54 Transfer of Property Act.

A transfer by a Muhammedan of immovable property of the value of over Rs. 100 in favour of his wife in lieu of dower is a sale and cannot be recognised unless made by a registered instrument.

14 O. C. 217.

6 XXXIV, r. 6 C P C. (Act V of 1908) = S 90 T P Act

Abandonment of claim by mortgagee against property encumbered beyond its value—Right to obtain personal decree against mortgagor

That under the circumstances the mortgagee decree-holder was entitled to apply for and obtain a personal decree against the mortgagor on abandonment of all claim against the property

Obiter.—It is not incumbent on a puisne mortgagee to redeem the prior mortgage. He can do so if he likes But if he does not elect to redeem the prior mortgagee's right to sell the property is paramount charge as against him.

14 O. C. 225.

Jurisdiction—S 108 (4) Oudh Rent Act—Occupancy right created by decree—Decree forbidding alienation by tenant—Alienation against the terms of decree

1. Where a person obtained in the Settlement Court a decree for *haq qabzadari* and the decree expressly prohibits the transfer.

Held, that a transfer of such land by the tenant was invalid as it was forbidden by the decree.

2. That where such land was transferred by the tenant, a suit by the *lambardar* to recover possession of the land being maintainable under S. 108 (4) of the Oudh Rent Act was not cognizable by the Civil Court.

14 O. C. 227.

Hindu Law—Illegitimate child of Kshatryas—Status of Sudras—Succession of one illegitimate brother to another.

The offspring of an illicit connection between a man and a woman of a *kshatrya* caste cannot be deemed to be *Sudras*.

The rule by which one illegitimate brother can succeed to another is not necessarily confined to persons of the *Sudra* caste. The principle underlying the rule applies with equal force to other castes also.

14 O. C. 231.

Talukdars' right to possession of house left by tenant—Construction of Wajib-ul-arz—Meaning of "Viran."

The term "*Viran*" as used in a *Wajib-ul-arz*, means deserted or desolate, not dilapidated; and where a tenant dies leaving no heir his house must be deemed to be *khali shuda* and *viran* within the meaning of the *Wajib-ul-arz* and, therefore, the talukdar would be entitled to take possession thereof.

14 O. C. 234.

Hindu Law—Stridhan—Property acquired by unchaste widow.

Property acquired by an unchaste widow from the brother of a man with whom she had lived for years as his concubine is not her *stridhan*.

The property so acquired by the widow goes to her illegitimate child and not to the members of her husband's family upon whom the widow had no claims whatever after she began to live with her paramour.

14 O. C. 238.

S. 48 C. P. C. (V of 1908)—Execution of decree—Judgment debtor's fraud.

If a decree-holder exercises due diligence in proceeding with the execution of his decree, he cannot be deprived of the benefit of S 48, nor is it necessary to show that the fraud or stratagem of the judgment-debtor extended continuously for the whole of the period of 12 years following the date of the decree. It is sufficient to show that the judgment-debtor on various occasions dishonestly prevented execution of the decree by frivolous devices—such devices clearly constituting *fraud*.

14 O. C. 244.

Hindu Law.

1. *No presumption as to joint property—Burden of proof as to nucleus.*—There is no presumption that because a Hindu family is joint, it is possessed of joint property also. It lies upon the person who alleges that certain property is joint family property to show that there was a nucleus around which the property accumulated.

2. *Bequest of self acquired property—Presumption of each son's interest in such property passing to his heirs at death* —Where self acquired property is bequeathed to sons, in the absence of language clearly indicating the testators' intention, it should be held by the sons subject to the incidents of survivorship, and it should be presumed that each son takes an interest which passes to his heirs at his death.

3. *Self acquired property not disposed of passes to sons as ancestral property.*—The self acquired property of a member of a joint Hindu family, who has abstained from exercising his power of disposal over it, descends to his sons as ancestral property. The fact that he has not availed himself of his power of disposal is an indication that he treated it as joint family property.

Note.

(1) Dist.—18 I. C. 228.—That it having been proved that the money was advanced by *A's.* husband when he constituted a joint family with his father, the presumption was that the money was advanced from the family funds.

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14 O. C. 257.

Mortgage with possession—Decree for redemption—Decree not providing period for payment nor consequences for non-payment—Second suit for redemption by the sons of the mortgagor Res-Judicata—Ss 11, 47 C. P. C. (V of 1908) —Ss 92, 93 Transfer of Property Act.

1 That the former suit and the adjudication there upon exhausted the original cause of action though the right to redeem still subsisted, and that the suit was barred under Ss. 11 and 47 C. P. C

2. That the suit being for recovery of property and for payment of a debt, the sons were in no better position than the father who could not have re-opened proceedings in consequence of which property passed out of the family.

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14 O. C. 287.

S. 108 (2) Oudh Rent Act—Suit for arrears of rent—Joinder of claims in respect of several holdings.

1. Under the Oudh Rent Act a single suit by a landlord for arrears of rent due from a tenant in respect of several holdings in one and the same village is not illegal.

Where the holdings are not all held under the same tenure the Court may, if necessary, specify in its judgment the arrears due with respect to each holding.

14 O. C. 289 (P. C.)

S. 510 C. P. C. = The second schedule of Act V of 1908.

1. *Jurisdiction of Court on the refusal of one arbitrator to nominate another* —When the arbitrator refuses to accept office as such, the Court can appoint another arbitrator.

2. *Superseding arbitration without nominating arbitrator.*—That the decree of the Court, superseding arbitration and effecting division of properties, was not sustainable as parties who agree to set up a tribunal of arbitration, are not bound to submit the case referred to another tribunal, such as a District or other Judge.

14 O. C. 295.

Hindu Law—Joint family—Mortgage by a co-parcener of his undivided interest—Mortgagee's equitable rights—Bona fide transferee without notice S. 43 Transfer of Property Act.

A An undivided co-parcener made a mortgage of his undivided interest in favour of B. subsequently there was a partition and the separated share of A passed by mortgage and sale to C. who was found to have taken the transfers without notice of the prior mortgage in favour of B

Held, 1 that B. is not entitled to have it declared that the separate share of A, in the hands of C, is subject to a charge in his favour.

2. That no equitable right can be enforced against persons who have taken *bona fide* for value and without notice.

14 O. C. 299.

Hindu Law—Joint family property—Alienation—Mortgage by father—Suit to recover share in the ancestral property mortgaged—Liability of sons to discharge debts—Meaning of "antecedent debt."

Where joint family property has been obtained by the father in a joint Hindu family and only a portion of the consideration is for *necessity*, a son is entitled to recover his share in the ancestral property on payment of the proportionate amount of the consideration money required for necessity or for the discharge of the antecedent debt.

A creditor, suing to enforce against sons in a joint family on a mortgage made by their father of joint family property, is bound to prove that the loan secured by the mortgage was taken to satisfy an antecedent debt, or was justified by some family necessity or at least, that before advancing the loan, he made enquiries which reasonably led to the belief that the loan was required for family necessity or to pay off an antecedent debt.

A debt incurred at the time of a mortgage or money advanced cash down as consideration for a mortgage on joint family property is not on "*antecedent debt*" within the meaning of the rule of Hindu Law.

Note.

Vide Privy Council Judgment 16 O C. 136

14 O. C. 308.

1. *Power and duties of arbitrators.*—An arbitrator may conduct his proceedings in any manner he thinks fit, so long as he acts in accordance with the principles of justice, equity and good conscience He is not fettered by rules of practice which courts of law adopt for general convenience, or bound by the adjective law laid down in the *Code of Civil Procedure*, and the rules made under it or the rules relating to evidence to be found in the *Indian Evidence Act* He may also in forming his judgment act upon merely moral consideration of which a court of law could not take cognizance.

2 *Grounds for setting aside of award* —Where an award is good on the face of it, the parties cannot object to the arbitrator's decision either *upon law or fact* and the courts will not ordinarily review his discretion provided he acts within his authority and behaves fairly to each party. Nor will they interfere with his judgment on any mere ground of mistake.

3. *Question to arbitrator* —An arbitrator called as a witness in an action on an award might be examined as to every matter of fact with reference to the making of the award and whether in his estimate of the compensation he took into consideration any matters not included in the reference and therefore not within his jurisdiction but he cannot be questioned as to the elements which he took into consideration in determining the *quantum* of compensation or so as to scrutinise the exercise of his discretionary power to award compensation.

4. *Principles of English law* —The principles accepted in English law for regulating the conduct of arbitrators are not inapplicable to arbitration proceedings held in this country. Nor are the powers of the courts in India to review the proceedings of arbitrators any more extensive than they are in England.

Art. 158 Sch I Limitation Act.—This article cannot apply to a written statement which a defendant is required to file in answer to an application for the purpose of having the award made a rule of court

Note.

R.—15 O. C. 55—Application for leave to appeal to Privy Council in 14 O. C. 308 allowed.

14 O. C. 321.

1. *S. 92 (2) and (4) Evidence Act—Oral agreement converting mortgage by conditional sale into an usufructuary mortgage could not be proved.*

2. *O XLI, r. 23 C. P. C Act V of* 1908—Where a case is remanded, the Judge of the Court to whom the case is returned has authority to form his own conclusions irrespective of any finding arrived at by his predecessor at the original trial in respect of matters which were not touched by the Appellate Court.

14 O. C. 327.

Appeal—Power of Appellate Court to admit fresh evidence—O. XLI, r. 27 C. P. C (V of 1908)

1. An Appellate Court can admit fresh evidence in appeal if it is satisfied that the party wishing to produce the evidence was unable, through no fault of his, to produce it at the trial of the case. In such a case, the Appellate Court would be justified in taking action under O. XLI, r. 27, at the request of a party.

2. The rule for admitting fresh evidence is not confined merely to cases where the court desires to call for fresh evidence *suo motu*.

14 O. C. 332.

Suit for arrears of rent—Declaration of title—In a suit for recovery of rent, it is not necessary for the plaintiff to ask for a specific declaration of his title. A plaintiff may be entitled to claim rent even if his prayer for a declaration of title were barred by limitation.

Res judicata—In ex-parte decrees—The doctrine of *res judicata* applies to decree passed *exparte*, provided it is possible to ascertain precisely what matter were involved in the exparte decree passed by the Court.

A decree for rent involves the decision of the question that the plaintiff is entitled to recover rent, since it always decides the rent is payable to the plaintiff by the defendant.

Limitation—Where a decree for rent has been passed within 12 years before the institution of a subsequent suit for arrears of rent, the subsequent suit for arrears of rent, the subsequent claim for rent is not barred by time although the previous decree was not executed.

14 O. C. 335.

1. *Right to receive Dahyak*—That, whether or not the right to receive *Dahyak* is heritable or transferable, a right of possession such as is conferred by the Settlement decree is neither heritable nor transferable.

2. *Under-proprietary right*—S. 3 (8) and (9) Oudh Rent Act—S. 4 (15) Act III of 1901—That having regard to the language of the decree as a whole the right of the defendants did not amount to an under-proprietary right as defined in the Oudh Rent Act and the United Provinces Land Revenue Act (III of 1901)

3. *Jurisdiction*—That a Civil Court has no jurisdiction to make a declaration that a person is a " mere thekadar " as such declaration amounts to a determination of the class of tenancy which is exclusively within the cognizance of the Revenue Court.

Note.

(1) **R.**—23 I. C. 231—A cash *dahyak* right does not necessarily carry a right to possession.

14 O. C. 343.

Caveat emptor, applicapability of —This rule has no application in India in the case of ordinary sales of goods by private contract

Responsibility of attaching creditor—In India an attachment is made at the risk of the attaching creditor and he is responsible for any results which can be traced to an unlawful attachment carried out upon applications made by him.

Warranty in case of execution sales—In such sales there is no warranty given by the Court, but there is a warranty by the decree-holder that the property does belong to the judgment-debtor.

Stranger need not set aside sale —A stranger whose property is sold behind his back without any authority does not need to have the sale set aside.

Suit to recover purchase money from the decree-holder.—Where the decree-holder pointed to a carriage as the property of the judgment debtor which

was there upon attached and at the sale was purchased by the plaintiffs' predecessor in title but subsequently on a suit brought by a third person claiming the carriage it was decreed to him and the purchaser lost it.

Held, that the plaintiff was entitled to recover the purchase money from the decree-holder.

Revisional power—S. 25 Provincial Small Cause Courts Act—It is no doubt advisable that the High Court should in exceptional cases assert a general power of revision in suits tried by *Small Cause Courts* where the decision arrived at appears to be capricious or perverse or arrived at in the defiance of well known principles of law. But it is not at all an adequate ground for interference under S. 25, Provincial Small Cause Courts Act, that the presiding judge of the Small Cause Court, had before him for determination a doubtful issue of law and his decision is one which this Court might not have been prepared to affirm if the matter had come before it in a second appeal.

14 O. C. 356.

Deed of trust, conduct of trustee after execution of—The conduct of trustees, as manifested after the execution of the deed of trust and misconduct on their part or neglect to perform their duties, cannot be put forward as a valid reason for holding that the author of the trust had no intention of acting seriously, or for determining his intention at the time when he executed the deed of trust.

Mahomedan Law.—S 3 (6) Oudh Laws Act—The Mahomedan Law does not apply to trusts—The term "gift" as used in the section cannot be interpreted so as include the trust.

S. 4 Trusts Act—Dower debt—The discharge of a dower debt, due from the settlor to his wife, and the prevention of future disputes and litigation between the members of the settlor's family, are not in any sense unlawful

S. 6 Trusts Act.—The physical delivery of property, in addition to the execution of a registered instrument of transfer, is not necessary to effect a valid trust under S. 6 Trusts Act.

Construction—In construing family settlements Courts are to ascertain the real meaning of the parties to the transaction; and when that meaning has been ascertained, if it appears that the whole plan cannot be carried out but that a part of it can, effect is to be given to that part.

The Rules in English Courts not applicable—The rule established in English Courts for construing English documents are not, as such, applicable to transactions between natives of this country.

Minimum dower.—In the case of *shias*, there appears to be no fixed legal minimum for dower though in the case of *sunnis* there is some authority for saying that the minimum amount is 10 *dirms*

15 O. C. 1.

Pre-emption

Sale of mortgage.—A document, which on the face of it, is a document of mortgage, cannot be construed as a deed of sale or deed of contract for sale merely because its terms are such as to render it improbable that the redemption will ever take place Pre-emption cannot be decreed in such case. Where, however, it is proved that transaction was in fact a sale, although attempt had been made to cloak the real nature of the transaction by executing a deed of mortgage subsequent to the contract of sale, pre-emption will be allowed.

Notes.

R.—16 O. C. 9—The fact that it is highly improbable that a mortgage would be redeemed would not make it any the less a mortgage, for it is capable of redemption, however, remote the chance.

R.—2 I. C. 69—Extrinsic evidence to show real nature of transaction.—A barred debt is a good consideration for sale

15 O. C. 7.

1. *Mahomedan Law—Hanafi—Gift invalid if right in abeyance.*—In the case of a Mohamedan, subject to the *Hanafi* law, present ownership on the part of a donor is an essential condition precedent to a valid gift by him. Such a person cannot make a valid gift of a right which at the time is in abeyance.

2. *Limitation.*—Once it be found that the plaintiff has acquired by inheritance a right to a share in the equity of redemption in respect of the mortgaged property, his case falls within 60 years rule of limitation.

15 O. C. 22.

Res-judicata.

Appeal against only one out of two decrees.—Where two decrees have been passed and both of them require to be set aside in order to give the dissatisfied party the relief which he seeks, but an appeal is filed against only one decree while the other is allowed to become final, the latter operates as *res judicata* in appeal against the former.

Note.

Dist.—21 I. C. 264—Where a second appeal was preferred only against one of the two decrees made in cross appeals disposed of by a single Judgment and the matter at issue in the second appeal was not directly and substantially at issue in the appeal left intact: *Held*, that there had been no final decision of the question raised in the second appeal so as to operate as *res judicata* against the hearing of that appeal.

15 O. C. 25.

1. *Construction of document—Sale of share excluding sir bila lagan.* Where a person made a sale of his share "*ba istisnae sir 30 bigha kham nambarhai zail bila lagan*" and it was admitted that the purchaser paid the revenue for the whole share: *Held*, that the reservation of rent excluded the notion that the vendor remained proprietor of the *sir* plots and the stipulation was merely a contract between the parties that the vendor was to remain in possession of the land free of rent.

2. *Covenant by vendor to pay rent if subsequently assessed—Contract to idemnify Art. 83 Sch. I—Limitation Act*—Where the vendor in a sale-deed in respect of certain lands *held* free of rent makes a covenant agreeing to pay rent in case any rent is subsequently assessed on it and decreed against the the vendee, a claim by the vendee to recover the rent assessed on the land and decreed against him is a claim upon a contract to idemnify and is governed by Art. 83.

15 O. C. 33.

S. 105 (2); O. XLI, r. 33; O. XLIII, r. 1 (u) C. P. C. Act V of 1908.

1. *Appeal against order of remand—Decision of first Court on remand no bar to appeal*—Where a Court of first appeal, remands the case for decision on the merits, and there is an appeal against the order of remands, the fact of the case being decided by the Court of first instance in accordance with the remand order before the appeal comes on for hearing, is no bar to its being heard and disposed of.

2. *Power of the Court of appeal against order of remand*—Such Court has power not only to decide whether the order of remand is in accordance with law or not but also whether the decision is correct or not and to dispose of the suit accordingly.

3. *Position of grove-holder of long standing*—Settlement Circular No. 63 of 1863 has not the force of law and the position of a grove-holder who has been in possession of the trees of a grove for a long period, whether he be a mere tenant or one of the old proprietary body, is not, in respect of under-proprietary rights, in any way different from that of any other person who claims those rights.

4. *Claim for under-proprietary right*—A claimant to under-proprietary rights on the basis of prescription is bound to prove his claim according to the provisions of the Oudh Sub-Settlement Act (XXVI of 1866).

Note.

(4) **R.**—22 I. C. 125—Under rule 10 of the Oudh Sub-Settlement Act, (XXVI of 1866), a former proprietor, who is not entitled to a sub-Settlement, can claim an under-proprietary right in respect of the land held by him as *Sir* or *nankar* when he was in proprietary possession of the same within the period of limitation, either by himself or by some other person or persons from whom his title is derived

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15 O. C. 39.

Adverse possession—Mortgagee denying right of redemption.

That in the absence of acquiescence, amounting to a release of interest in the equity of redemption, the mortgagee's possession could not become adverse by the mere assertion or declaration on the part of the mortgagee that he held the land as a purchaser from the rightful heir.

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15 O. C. 43.

Appeal against an order of remand—Order of remand carried out no bar to appeal — S. 105 (2), O. XLI, r. 23; O. XLIII, r. 1 (w) C. P. C. (V of 1908).

The fact that before the appeal against the order of remand *is filed*, the order of remand has already been carried out, is no bar to the hearing of the appeal.

Note

Vide.—15 O. C. 33

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15 O. C. 45.

Res judicata—Suit for rent.—Where a former suit for arrears of rent brought by the plaintiff against the defendant was dismissed on the ground

that the plaintiff had failed to prove the defendant to be a tenant at will: *Held*, that it did not operate as *res-judicata* to bar a subsequent suit for *recovery of rent for the* same period against the defendant as an *ex-proprietary tenant.*

2. *Ex-proprietary tenant's liability to pay rent fixed.*—Such tenant is liable to pay rent from the date on which the ex-proprietary tenancy arises.

15 O. C. 49 (P. C.)

Mahomedan Law.

1. *Guardians of minor.*—The care of the minor's property would devolve first on the father and his executor, next on the paternal grand-father and his executor, and failing these, the right of nominating a guardian would vest in the ruling power and its administration

2. *Brothers*—The brothers of a minor have no right whatever to act except under the authority of an appointment by the Court

3. *Unauthorized guardian*—The situation of an unauthorised guardian is not bettered by describing him as a "*de facto*" guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it.

4. *Art 44, 144 sch. II Limitation Act.*—Art 44 prescribes a period of 3 years within which a ward who has attained majority may set aside a sale made by his guardian, the time running from the date of the ward's majority. But this provision has no application to a case where the sale is effected, not by a guardian, but by a wholly unauthorized person In such a case a suit for possession of the property by the ward would be governed by art 144.

Notes.

(2) **R.**—16 O. C. 119—A brother had no authority to deal with the property of a minor.

(3) **R.**—17 O. C. 52—Suit by a minor 3 years after his attaining majority for possession of land sold by his guardian his minority barred by time.

15 O. C. 55.

Application for leave to appeal to Privy Council—Ss. 109, 110, 111, sch. II para 21 (2) C. P. C. Act V of 1908.

In a case the value of the subject matter of which is Rs. 10,000, and the High Court has reversed the decision of the lower Court, an applicant is entitled to a certificate for leave to appeal to the Privy Council.

The certificate cannot be refused on the ground that in accordance with the provision of the Code of Civil Procedure, no appeal lies against a judgment pronounced in accordance with an award and a decree following it. Such provisions only affect the appeals in India and do not affect the appeals to His Majisty in Council.

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15 O. C. 58.

S. 12 Stamp Act—Cancellation of adhesive stamp—Lines drawn on.—Where an adhesive stamp on a pro-note or a receipt was cancelled by drawing lines across it in different directions, each line extending more or less beyond the edges of the stamp on to the paper on which the document was written: *Held*, that cancellation had been effected in a sufficiently effectual manner.

Burden of proof—Want of consideration.—When a document is admitted in evidence, and its execution is either admitted by the defendant or proved against him and the receipt of consideration is acknowledged therein, the burden would be upon the defendant to prove the want of consideration.

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15 O. C. 67.

1. *S. 6 (h) and (i) Transfer of Property Act.—Restriction imposed by Legislature and that by decree or contract*—The interests which are declared inalienable by S. 6 (I) are particular interests which have been created by statutes enacted to regulate the relations between landlord and tenant. An interest conferred by a decree is not covered by S 6 (I).

The transfer of a non-transferable right in land conferred by a decree does not fall within the scope of S. 6 (h) of the Act.

2. *Transferor cannot plead invalidity.*—Where there is a decree settling the rights of two parties, which contains a provision that one of them shall not alienate the property which he has got from the other, the presumption is that the condition against alienation is inserted for the benefit of the other party. The latter may waive the benefit of the condition, and if he elects to do so by giving his consent to a transfer, the transaction is valid.

It is not competent to a transfer of a non-transferable interest, conferred by a decree, to raise the plea that the transfer is void.

3. *Attestation of deed—Notice*—Although the mere attestation of a deed does not import notice of its contents, yet where a superior proprietor attests a deed of gift, being aware of its provisions, and recognizes the donee as the

transferee of the property, it will be inferred that he give his consent to the transfer. Such a consent given by the superior landlord is binding on his son.

4. *Abandonment of heritable interest.*—To constitute abandonment of a heritable, though non-transferable interest in land, there must be the clearest evidence of an intention to abandon Abandonment cannot be inferred from the mere fact that there has been no active assertion of the right during the short period which has intervened since the right came into existence.

Note.

(2) R.—18 I. C 383.—The prohibition against transfer is for the benefit of the superior proprietor only, and the transfer would be valid if made with his consent.

15 O. C. 78.

1. *S. 2 (9), O. VIII, r. 10 C. P. C. Act V of 1908—Court's power to pronounce judgment when written statement not filed.*—Where no written statement was filed and the Court decreed the claim without going into the merits of the case or stating the grounds of his order decreeing the claim *held*, that the order was not a *judgment*.

2. *Revision—Material irregularity.*—That the order of the Court decreeing the claim without going into the merits of the case was material irregularity and illegal.

15 O. C. 81.

1. *O. II, r. 2 C. P. C. (V of 1908)—Subsequent suit for a share in the property not included in the general suit for partition*—That O. II r. 2 was no bar to subsequent suit.

2. Property held by members of a family jointly with a stranger cannot be included in a general suit for partition.

15 O. C. 91.

Position of grove-holder—Position of licensor and licensee—Wajib-ul-arz.

1. That the position of a grove-holder in a case like the present was that of a licensee entitled to use, for certain purposes, land belonging to the proprietor who was licensor.

2. *Lease—Forfeiture of*—According to the general principles of law applicable to lease, the forfeiture of a lease is not involved in the case of the

breach of any condition for which forfeiture is not prescribed as the proper penalty under the terms of the lease or agreement under which the lessee holds. There is no season why a similar principle should apply to the case of a licensor and licensee generally.

3. There is an essential distinction between a *transfer by way of lease or mortgage* and a transfer by *way of sale* in which case different consideration would apply.

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15 O. C. 99.

Construction of a decree—Declaratory decree—S 47 C. P. C. Act V of 1908—Mortgage of Nankar rights—Mortgagee's right to enforce payment against Talukdar.

The plaintiffs brought the present suit against the defendant Talukdar for recovery of the amount of *nankar* for 6 years on the basis of the mortgages. The representative of mortgagor was not impleaded as defendant in the case

The relevant part of the judgment of the Settlement Court was as follows:—"Ordered that the claim of the plaintiff for receipt of Rs 240 per annum against the defendant be decreed.....The plaintiff will recover Rs. 240 per annum in execution of the decree."

2. *Held*, 1 that on a proper construction it must be *held* that the decree was merely declaratory and that the suit was not barred by S. 47 C. P. C. The mere addition of the direction that the *nankar* was to be realized on the execution side would not alter its character as a declaratory decree.

2. That the fact of the defendant Talukdar being no party to the deed of mortgage was no bar to the plaintiffs enforcing payment against the defendant.

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15 O. C. 111.

Minor—Arts 127, 144 Limitation Act—Joint family property passing to a stranger by sale.

A suit by *B* to recover possession of property conveyed by his guardians on the allegation that the sale was made for a fictitious price without any legal necessity during his minority was held to be governed by art 144.

2. *The word "share" in art 127 is used as a verb.*—The suit contemplated by art. 127 is a suit by a member of a joint family against members of the

joint family to be restored to joint enjoyment on the allegation of having been unlawfully excluded from it The article does not apply to a suit where the alleged family property has passed by sale to a stranger.

Note.

(2) **R.**—15 O. C. 397—Where the members of the family become divided in status, no member has a right on behalf of others to recover any debt due to the family, and if it is so recovered it is not joint family property, so as to entitle another member to recover his share by partition within the period provided by art. 127. The article applicable in such a case is art 62.

15 O. C. 117.

Ss 25, 26, 27 Excise Act—Shops for sale of drugs closed by order of Collector —Suit by licensee—Jurisdiction of Civil Court.—The appellant obtained a farm including 90 shops for the sale of drugs One of these shops having been closed by order of the Collector under instructions from the Excise Commissioner, the appellant sued the Secretary of State for loss arising from breach of contract.

Held, that the Civil Courts had no jurisdiction to entertain the suit and that the appellant's sole remedy was to rely on the Chief Revenue authority for such compensation as that authority thought fit to award.

15 O. C. 122.

Reversioner—Validity of transfer of expectancy—S 6(a) Transfer of property Act

A reversioner sued for a declaration that the mortgage would not affect his rights in respect of the property after the widow's death. The suit was withdrawn in consequence of a compromise whereby it was agreed that during her life time the widow would get from the mortgagee a certain sum as her maintenance, while the rest of the profits of the property would be divided between the reversioner and the mortgagee and that after the death of the widow the reversioner and the mortgagee would divide the property in equal shares :—

Held, that the agreement amounted to a transfer of an expectancy by the reversioner and was, therefore, invalid.

15 O. C. 127.

Mahomedan Law.—Wife's right under Sunni Law to refuse to surrender her person in spite of consummation.—Under the Sunni Law, a wife has the

right to refuse to surrender her person to her husband, in spite of consummation of marriage, so long as the prompt dower remains unpaid.

Decree for prompt dower passed by a competent Court out of Oudh—S. 5 Oudh Laws Act.—Where a decree fixing the amount of prompt dower was passed by a competent Court out of Oudh. *Held*, that the question could not be re-opened by the Oudh Courts and S 5 Oudh Laws Act had no application to the case as the matter had passed out of the stage of contract and dower had become a debt of record.

15 O. C. 153.

S. 3 Majority Act (IX of 1875) —Appointment of Guardian cancelled in appeal age of Majority.—

Where an order appointing a guardian is made but is subsequently cancelled by the appellate Court, in law there is virtually no appointment of any guardian at all. The case must be treated as if no order had ever been made and in such a case the age of majority must be deemed to be 18 years and not 21.

15 O. C. 159.

Mahomedan Law—Shia—Restitution of Conjugal rights —

1. *Jurisdiction of Civil Courts.*—The Civil Courts of India have succeeded to the duties which under the Mahomedan Law were discharged by the *Kazi* or at his instance by the umpires, and hence the Court have the same jurisdiction.

2. *Cruelty as defence.*—Cruelty on the part of a husband is a good and valid defence to a suit by him for restitution of conjugal rights, even when the parties are Mahomedan *Shias*

3. *Legal Cruelty.*—There must be actual violence of such a character as to endanger personal health or safety, or there must be a reasonable apprehension of it.

4. *Apprehension of danger.*—Where the wife obtained a decree for possession of her property transferred by her husband during her minority to his own brothers and in execution of her decree for cost got a warrant of arrest issued against her husband and the brother of her husband living with his husband raided her house and beat her, and the husband in a letter charged his wife with the murder of her child and for prostitution.

Held (*a*) that there was ground for apprehension of danger to the health and safety of the wife;

(*b*) That the object of the husband was not to resume happy connubial relations but to get his wife in his power with no friendly motive to her ;

(*c*) That the facts established *legal cruetly* on the part of the husband and consequently, his suit for restitution conjugal rights must be dismissed.

15 O. C. 170.

Improvement—Landlord and tenant.—

1. *Suit for mandatory injunction*—Such suit, to restrain a tenant from the construction of a well upon his holding, merely upon the ground that such construction was being effected without his consent or against his will, is not maintainable. The landlord must allege and prove some sort of damage to himself and further that the damage is of such a nature that the equities of the case would not be met by pecuniary compensation.

2. It is contrary to *the policy of the Oudh Rent Act* that the interference of the Civil Courts should be invoked upon an allegation that the tenant is using the land in a manner not approved of by his landlord

3. *Presumption*—It cannot be presumed that the construction of a well upon a holding is likely to be destructive or permanently injurious to the same or is on the face of it an act amounting to the use of the land for a purpose other than that for which it was leased.

4. *Provisions of Oudh Rent Act not applying to a case—S. 108 Transfer of Property Act.*—Where it appears doubtful that the provisions of the Oudh Rent Act do not completely cover a case, the Court may resort to the general principles laid down in S. 108 Transfer of Property Act.

5. *S. 23 Oudh Rent*—The section contemplates the possibility of a tenant's making an improvement upon his holding without the consent of his landlord. The only result of not following the procedure prescribed by the act is that the tenant is not entitled to claim compensation for improvements effected without the written consent of the landlord

15 O. C. 177.

Sanction to prosecute—S. 195 Cr. P. C.

1. *Jurisdiction of High Court.*—A High Court has jurisdiction to extend the period of 6 months for which a sanction granted by a subordinate Court, may remain in force, even though such extension is granted after the period of 6 months has expired.

2. *Extension of period*—Where sanction is granted to a private person, and the District Magistrate, within whose jurisdiction the offence has been committed, desires to take cognizance of the offence, the latter can move the court to extend the prescribed period of 6 months.

3 *Proof.*—Upon a complaint being filed on the strength of the sanction as it stands, it will be for the presecution to satisfy the court that the sanction is not being taken advantage of by the District Magistrate against the wish or without the authority of the person in whose favour it was originally granted.

15 O. C. 183.

1. *Wild animal when it can be property of pursuer.*—In order to render an animal *ferae naturae* the property of any person, there must be a complete capture, the result of which is to reduce the animal completely into possession. Mere pursuit, short of capture, will not do, and so long as it is possible for the animal to escape, it cannot be said that there is such a reduction into possession as makes the animal the property of the pursuer. The mere fact of the accused's dog overtaking an animal and pulling it down, does not preclude the possibility of escape so as to make the animal his property.

2. *Unlawful assembly—Member of, lying unconscious from the outset, not charged with offence committed by others during his unconscious state—Ss. 148, 149, 304 Penal Code—Held,* that the accused who was lying unconscious, could not be considered a member of the unlawful assembly at the time the offence of culpable homicide was committed and was, therefore, not liable to conviction on this charge.

15 O. C. 192.

1. *S. 15 Contract Act—Coercion.*—Under S. 15 a threat amounting to coercion need not necessarily proceed from a party to the contract

2. *Duress applicability of English and Indian Law.*—The law which is to be applied in India is to be sought in S. 15 Contract Act and not in English text books.

3. *Proof of coercion.*—A person who sets up a plea of coercion based upon threat has to establish three things, *viz*:—

(*a*) that the threat was uttered;

(*b*) that it was a threat to commit an act forbidden by the Indian Penal Code; and

(*c*) that the threat was uttered with the intention of causing the plaintiff to enter into the agreement complained of.

4. *Mere threat to bring criminal charge, not coercion.*—A mere threat to bring a criminal charge does not amount to coercion, as it is not *per se* an act forbidden by the Penal Code. Such an act could only be forbidden if it amounted to a threat to bring a false charge

15 O. C. 202.

1. *S. 92, O. XXXIII C P. C (V of 1908)—Trust property—Pauper*—Plaintiffs suing under S 92 cannot be allowed to file their suit as paupers. O. XXXIII C. P. C. cannot be combined with S 92 C. P. C.

2. *Validity of sanction granted by Legal Remembrancer*—The permission granted cannot be a good permission until at the time of granting it, the fact that the plaintiffs were paupers had been brought to the notice of the Legal Remembrancer

3. "*Persons interested*"—*Pujari of a temple*—A person having an interest in the trust must be a person having an interest in its due and proper administration—A *pujari* of a temple can fairly be presumed to have an interest in the trust

15 O. C. 211.

1. *Estoppel—An auction purchase, subject to a mortgage*—A person, who purchases property at an auction sale subject to a prior mortgage, is estopped from challenging the mortgage on the ground of the failure of consideration or undue influence.

2. *Purchaser of a mere equity of redemption as distinguished from a purchaser of the property*—A distinction must be drawn between the case of a purchaser who buys property *not subject to a mortgage* but with *notice of a mortgage* and subject to such risks as the notice may involve, and the case of a person who purchases property which is declared to be *subject* to prior mortgages In the former case the Court does not decide whether the mortgage subsist or not. If there is in reality a subsisting mortgage, the purchaser has to redeem it.

If on the other hand, the mortgage specified in the proclamation of sale, is a fictitious mortgage or did not subsist at the date of the sale by reason of its having been previously discharged by payment, the purchaser acquires the property free from liability for the mortgage.

When the sale is *held subject* to a mortgage, the purchaser does not get any greater right than the right of redeeming the mortgage.

Plea of priority—Where property is sold in accordance with a decree for sale on mortgage, the purchaser of the property cannot raise a plea of priority, in respect of the morgage, not set up by the mortgagee in his suit for sale.

Plea of want of consideration—Burden of proof.—If purchaser raises a plea as to want of consideration, the burden of establishing it would be upon him.

Plea of undue influence.—Where the mortgagor himself has raised the plea as to undue influence or as to the bargain being un-conscionable, the purchaser, who has purchased the property subject to such a mortgage, cannot take those pleas and ask the Court to reduce the interest on the ground of its being a hard bargain

15 O. C. 223.

Hindu Law.--

Partition between co-widows alone—Reversioner's interest to be safe-guarded when reversioner a party.—Where the reversioner is a party to the suit, he is entitled to ask the Court to safe guard his interest against possible acts of waste by the widows, provided always that he can show reasonable ground for apprehending the same.

Debts due to husband form part of unalienable corpus.—The principal of the debts due to the husband and inherited by the widow forms part of the *corpus* of the estate over which the widow's power of disposal is not unlimited.

15 O. C. 234.

1. *S. 115 O. XXI, r. 2 C P. C (V of 1908)—Effect of uncertified payment for purposes of limitation.*—A payment or adjustment, not certified or recorded in the manner prescribed by O XXI, r 2, cannot be recognized by the court executing the decree for the purposes of limitation.

2. *Wrong decision on a point of law—Revision.*—Whereby deciding a point of law erroneously, the Judge does what the law forbids him to do, his action amounts to an illegality which is liable to be corrected in revision.

15 O. C. 239.

Mortgagee's right to possession on default of payment not affected by subsequent lease—That a mortgagor cannot by executing a lease subsequeut to the date of mortgage affect the rights of the mortgagee under the contract and such lessee cannot defeat the mortgagee's right to take possession.

15 O. C. 244.

Hindu Law

1. *Right of member of an undivided family to sue for his share of profits.* Although a member of a joint family has a right to ask for a statement of account from the manager, yet he is not entitled to sue the manager for any money relief on account of his share His remedy is only by a suit for partition.

15 O. C. 253.

O. XLI, rr. 27, 29 C. P. C. (V of 1908)—Additional evidence in appeal.

Before an Appellate Court admits additional evidence, it should record separately its reasons for the admission of such evidence except for very special reasons, further evidence should not be admitted in a court of appeal. The fact that such evidence proves a very important point would not be a sufficient reason.

Where further evidence is admitted in appeal the opposite party is entitled to ask the Judge to receive any evidence which he can produce to rebut it.

15 O. C. 257.

Mahomedan Law—Widow's possession in lieu of dower—Right of husband's heir to oust her.

Where the widow is proved to have obtained possession of her husband's property after his death peacefully, quietly and without fraud in lieu of her unsatisfied dower debt, his legal heirs are not entitled to oust her until that debt has been satisfied.

15 O. C. 263.

Ss. 110, 122 Cr. P. C.

1. *Joint trial*—Where a number of persons are tried jointly under S. 110 Cr P. C. it is incumbent upon the Magistrate to exercise great care and caution in dealing with the evidence and to insist that definite evidence be given against each person who is charged.

2. *Proof*—Where the evidence amounted to nothing more than that some persons said to be of bad character had been seen at the *kothar* where the accused did his work: *Held*, that it did not justify the Magistrate in holding that the accused was a dangerous dacoit and extortioner and habitual protector and harbourer of thieves.

3. *Sureties*—That the Magistrates have no authority to reject sureties merely upon an unfavourable report of the Police.

15 O. C. 270 (P. C.)

Hindu Law—Will—Construction—Hindu lady—Absolute or life interest—Power to appoint an heir.

Where a testator under his will directed that his daughter is to remain in possession and occupation of the property and invested her with the power of appointing an heir either in her lifetime or by will *held*, that the word "heir" means heir to the testator Held further, that under the above will their is no estate at all, either absolute or for life, given to the lady, in terms.

15 O. C. 271 (P. C.)

1. *Deed executed by pardah nashin lady—Burden of proof*—In deeds executed by a *pardah nashin* lady, there is no presumption that she intelligently understood what she was doing and the onus of proving that she knew what she was doing is on one who asserts the valid execution of such deed.

The strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from a *pardah nashin* lady that the transaction is a real and *bona fide* one and fully understood by the lady whose property was dealt with.

2. *Privy Council Appeal—S. 596 C P C.=S. 110 C P. C. (V of 1908)*—The Privy Council will not disturb concurrent findings of fact on the ground that in the course of the judgment of the first Court, certain materials of a most elementary character for arriving at a conclusion had not been set out in the narrative contained in the judgment.

15 O. C. 278 P. C.

S. 114 (g) Evidence Act—Presumption—Production of document with endorsement of payment.

Suspicion, though a ground for scrutiny, cannot be made the foundation of a decision.

The production of a bond with an endorsement of payment, casts upon the plaintiff the burden of proving that the debt is still outstanding, *i. e.*, that the bond came into defendant's hands by dishonest means, and that the signatures to the endorsement are either forgeries or un-authorized.

15 O. C. 285 (P. C.)

Mortgage—Equity of redemption—Subsequent arrangement qualifying right to redeem—Clog on the equity of redemption suit for redemption.

Certain land was mortgaged and some years after another agreement was entered into whereby the equity of redemption was subjected to the condition that the land in suit would not be redeemed so long as a small annuity was paid.

Held, that there was nothing which rendered such an agreement as bad in law, even though it operated to clog the equity of redemption.

There is nothing in law to prevent the parties to a mortgage from coming to any arrangement afterwards qualifying the right to redeem.

That as it was not alleged that there was any breach of the covenants contained in the deed of compromise, the suit for redemption was rightly dismissed.

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15 O. C. 289.

Ex-parte decree, setting aside of—Meaning of "executing process for enforcing judgment" Attachment of debt due to judgment-debtor Notice—Art. 164 sch II Limitation Act—S 268 C. P. C.=O XXI, r. 46 C. P. C. (V of 1908).

Where a decree holder, who had obtained a decree *ex-parte*, applied for execution of the decree by attachment of certain money held *in deposit by the decree holder* on behalf of the judgment debtor and the money in question was attached, though no notice had been issued to the judgment debtor according to the provisions of S. 268

Held (1) that the attachment was an execution of process for enforcing the judgment which set time running under art 164.

(2) That the money attached being moveable property, not in possession of the judgment-debtor, it was only necessary to give notice to the person in possession of the same, and as the decree holder was in possession of the money, no notice was necessary.

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15 O. C. 291.

Mortgagor and Mortgagee—Lease by mortgagee in favour of mortgagor for the mortgaged property—Suit for rent of mortgaged property.

If a mortgagee chooses to put the mortgagor in possession of the mortgaged premises on payment of rent, the mortgagee is at perfect liberty to

recover the arrears of such rent as arrears of rent, and it is not necessary for the mortgagee to include these sums in a suit upon the deed of mortgage.

15 O. C. 294.

Rule 10 sch. II C. P. C. (V of 1908)—Notice of filing award to parties.

The provisions of the rule are moandatory and the Court must give notice to the parties.

15 O. C. 295.

1. *Suit by lessee against tenant for arrears of rent.*—That the lessee was entitled to obtain decrees, in as much as the relation of landlord and tenant had not ceased between the lessee and the tenants in as much *as the lessee had not been*, in due course of law, *ejected and* the lease only provided for re-entry in case the lessee agreed to give up the possession and not for re-entry by force.

2. *S. 138 Oudh Rent Act—Lessor when to be impleaded in lessee's suit against tenant.*—This section had no application to the facts of the case, and the talukdar had no right to be joined as a defendant in the plaintiff's suit. The inquiry contemplated by S 138 is an inquiry relating to a period prior to that for which rent is claimed

3. *Question of fact.*—The question whether a legal right had determined is a question of law and not of fact and a decision on such point is open to *second appeal.*

4. *Lease—Result of breach of covenent*—If a lease reserves to the lessor the right of entry in case of a breach of a covenant, the result of a breach is at best to confer upon the lessor the right of re-entry and not to entitle the lessor to make a forcible entry. If the lessee resists the exercise of the right to re-enter, the lessor's only remedy is to enforce his right to re-enter by a suit in ejectment.

5. *Applicability of rule of license to lease*—A license by a tenant to a landlord to eject him without process of law *is void* and can be no answer to a charge of forcible entry

15 O. C. 301.

Jurisdiction—Effect of partition proceedings—Recorded co-sharer alone can join in partition proceedings—S. 233 (k) U. P. Land Revenue Act (III of 1901).

That a suit by a cosharer for possession of his share on a plot of land which one of the recorded cosharers had transferred in favour of a third person, who was admittedly not a recorded cosharer, is cognizable by *the Civil Court*

15 O. C. 304.

Revision addition of party—Meaning of "case"—S. 115, O. I rr. 3, 10; O. VII, r. 1 C. P. C. (V of 1908).—

Where a Court has acted illegally and improperly in impleading a person as a defendant on allegations which show no cause of action against him, the High Court can interfere in revision against such an order.

Proceedings under O. I, r. 10 must, for the purposes of S. 115 be deemed to be separate proceedings and once an order is passed on an application made under that rule and is disposed of, the proceedings amount to a "*case*" which has been decided.

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15 O. C. 311.

S. 127 Oudh Rent Act—Tenant, holding on after formal ejectment—That the provisions of S 127 could not apply to such a case

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15 O. C. 314.

S. 2 (d) Contract Act—Consideration—Forbearance to prosecute appeal

A forbearance to continue an appeal against a person on that person's brother agreeing to pay the amount claimed in appeal is a good consideration.

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15 O. C. 317.

S. 9 Specific Relief Act—Suit in ejectment by licensee against trespasser.

A licensee of land, if dispossessed by a trespasser, is entitled to maintain not merely a suit under S 9, but also a regular suit on the basis of his title as lessee

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15 O. C. 319.

S. 25 Provincial Small Cause Courts Act (IX of 1877)—Revision whether a question of limitation a good ground for revision

An error by a Small Cause Court on a question of limitation does not justify interference by the High Court under the section.

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15 O. C. 321.

1. *Person subject to delusion*—That the accused had failed to establish that he had acted under a *bona fide* delusion, existing at the time of the commission of the offence or that his mental unsoundness was such that he did not know at the time that he was doing what was contrary to law;

2. *Verdict of aquittal*—That the fact that the accused was of unsound mind on the date of occurrence was not sufficient to entitle him to a verdict of acquittal under *S. 84, Penal Code.*

3. *Burden of proof*—The burden lies on the accused to satisfy the Court that unsoundness of mind was of such a nature and degree that by reason thereof he was incapable of knowing the nature of the Act, or of knowing that he was doing what was either wrong or contrary to law.

4. "*Knowing the nature of the Act*"—*S. 84 Penal Code*—These words have nothing to do with the appreciation of its moral quality or the forming of a correct estimate as to its legal consequence.

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15 O. C. 345.

Gift of more proprietary right or usfuruct for maintenance—Restraint on alienation by donee—Sale—Voluntary transfer.

The deed authorized the grantees to cultivate the land and to appropriate the usufruct thereof, but enjoined that if they wanted to transfer their rights they must do so to the grantor or his descendants. It also provided that if the donor at any time died childless the land was to revert to the donor or to his heirs.

Held, 1 that the deed was not a gift of full proprietary rights but only of usufruct of the land for the purposes of maintenance.

2. That the condition in restraint of alienation was valid.

3. That the sale in execution of a decree based on the mortgage of the land could not be considered as a sale "*in invitum*" which could over ride the provisions of the deed of grant but must be treated as a *voluntary transfer*, the decree and sale being necessary consequence of such transfer and as proceeding directly out of the same.

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15 O. C. 351.

1. *Kidnapping—Elements constituting offence—Ss. 361, 362, 363 Penal Code*,—Where the minor is a girl, the prosection has to establish the following fact:—

(*a*) A taking or enticing away of the girl;

(*b*) That the girl's age was less than 16;

(*c*) That she was in the keeping of a lawful guardian; and

(*d*) That the lawful guardian did not consent to her removal.

2. *Kidnapping from lawful guardianship not a continuing offence*—an offence under this section is not a continuing offence. It is complete as soon as the minor is enticed or taken out of the keeping of his or her guardian.

3. "*Taking*" *and* "*retaining*" *distinguished from* '*taking*" *and detaining*" *and* "*concealing.*"—The Penal Code makes a distinction between these words.

4. *Abetment*—Where there was no reliable evidence to show that any of the co-accused acted in concert with the principal accused at any time *before* the girl was taken away by the latter from or left her father's house, there can be no conviction of the co-accused for abetment, even if any offence against the principal accused was proved

15 O. C. 364.

Hindu Law.

1. *Reversioner, proof requisite in a claim by*—It is incumbent on reversioners to prove not merely their descent from the same common ancestor as the person whose estate they are claiming but also that there is not intermediate heir in existence with a better claim than themselves.

2. *Admissibility in evidence of a pedigree filed in the Settlement Court—S. 32 cls. (5) and (6) and S. 90 Evidence Act.*—The mere fact that the document is 30 years old and is produced from proper custody will not make it admissible under S. 32. In order to make it so, it must be shown that it is a statement made by a particular person having special means of knowledge and made before the question is dispute was raised.

Note.

(1) **F.**—21 I C. 274.

15 O. C. 373.

Ss. 4, 31 (1) Limitation Act (IX of 1908)—Meaning of "prescribed" in S. 4—S. 10 General Clauses Act.—

1. Where a suit, to which the two years period of grace provided for by S. 31 (1) was applicable, was instituted on the 8th August, the 7th August 1910 being a Sunday, the suit was not barred by limitation and that S. 10 of the General Clauses Act applied to cases governed by S. 31 (1) Limitation Act.

2. Although in such a case the limitation would not be saved under S. 4 of the Limitation Act, yet it would be so under the provisions of S. 10 of the General Clauses Act.

15 O. C. 380.

O. XLVI, r. 1 C. P. C (V of 1908).—The order does not authorize a reference where the Court below does not entertain any reasonable doubt as to the decision of the matter before it The fact that there are conflicting rulings on any particular matter of law is no reason why the Subordinate Courts should invite expression of opinion on the point of law from the High Court.

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15 O. C. 381.

S. 61 Oudh Rent Act—Application for ejectment, whether an application for execution.—An application under S. 61 Oudh Rent Act made by a landlord holding an unsatisfied decree for arrears of rent is an application for execution of the said decree.

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15 O. C. 386.

S. 413 Cr. P. C.—Joint trial by first class Magistrate—Appealable sentence against one of accused. Right of appeal of other accused.

If at a joint trial of two or more persons by a first class Magistrate, an appealable sentence is passed against any one of them, all the persons convicted have the same right of appeal even though their sentences may be of the kind against which an appeal would be barred by S 413 Cr. P. C., if the trial had not been joint.

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15 O. C. 389.

Pre-emption.

1. *Wajib-ul-arz custom*—The *Wajib-al-arz* of a village provided. "No sharer in the village can dispose of his share or any portion of it to any one who is not a co-sharer either by way of sale or mortgage, so long as any co-sharer is willing to accept a transfer of it in the same way."

Held, 1 that the *Wajib-ul-arz* did not afford evidence of the existence of a custom in conflict with the statutory right of pre-emption between co-sharers;

2. *Rights of co-sharers inter se—Ss. 9 and 10 Oudh Laws Act*—That in the absence of a well-established custom to regulate the rights of pre-emption of co-sharers *inter se*, the statutory provisions of the Oudh Laws Act stepped in, that S. 9 of the Act laid down a rule of preference to regulate the co-sharers *inter se*, and that the language of S. 10 also indicated that

the right of pre-emption could arise, not only on sales to persons out side the village community but also on sales to the members of the same community;

3. *Extent of the right*—That S 9 must be read along with S. 6 of the Act in order to arrive at a true notion of the extent of the right of pre-emption.

4. *The process and history of development of the custom and Statutory Law of Pre-emption in Oudh traced.*

15 O. C. 397.

Arts 62, 127 Sch I Limitation Act.

If, after the separation of a family, one of its members recovers a debt belonging to the family, a suit by other members for the recovery of their shares in the money realized would be governed by Art. 62 and not by Art. 127.

16 O. C. 1.

Vendor and purchaser—Whole sale price not paid—Sale pre-empted—Vendor paid by pre-emptor—Discharge of lien by payment made by third person—Ss. 41, 69, 70 Contract Act.

The plaintiff sold a certain village to the defendant a portion of the sale price was paid by the defendant while the rest remained unpaid. The sale was the subject of two rival suits for pre-emption of which one suit was dismissed and the other decreed. The pre-emptor whose suit was decreed paid the unpaid purchase money to the plaintiff but that suit was ultimately dismissed on the ground that the purchase money was not deposited in Court according to law. The plaintiff then brought a suit for the recovery of that very amount from the defendant who remained in possession of the property sold, the pre-emption suit having been dismissed.

Held, that the plaintiff's cause of action, for the recovery of his unpaid portion of the purchase money, was satisfied by payment of the said money by the pre-emptor who had stepped into the shoes of the vendor.

16 O. C. 5.

Pre-emption—Extension of time fixed in the decree— S. 152 C. P. C. = O. XX, r. 314 C. P. C. (V of 1908).

A Court cannot extend the time granted by a pre-emption decree for the payment of the purchase money after the time fixed for the decree has expired.

A right, extinguished by virtue of decree of a competent Court binding on the parties, cannot be revived by any subsequent act of the Court or the party at fault.

Interpretation of statutes—Conflicting.—Laws have to be interpreted in such a way as to avoid a conflict.

16 O. C. 9.

Pre-emption.—

1. *Sale or mortgage—Onerous character of mortgage*—The onerous character of a mortgage cannot alter the real nature of the transaction and convert it into a sale.

2. *Improbability of redemption.*—The fact that it is highly improbable that a mortgage would be redeemed would not make it any the less a mortgage, for it is capable of redemption, however remote the chance.

(3) *Transfer, short of sale, to circumvent the law of pre-emption not fraudulent.*—A person is not forbidden to circumvent the law of pre-emption by taking a transfer which falls short of a sale, but which may eventually have the same effect as a sale. There is nothing fraudulent in such a transaction.

Exclusion of oral evidence.—S. 92 Evidence Act.—A pre-emptor, not being privy to the contract, is at liberty to produce oral evidence to prove that what purports to be a mortgage is in reality a sale.

16 O. C. 19.

Assault causing death—Joint and several responsibility—Common intention not inferred from fatal blow by one of several assailants—Persons causing bodily injury—Common intention—Difference between premeditated and unpremeditated acts—Ss. 34, 299, 300, 302 Penal Code.

There are usually three classes of cases of fatal assault where the question of the joint responsibility of several assailants arises *viz*, (1) Where several persons join in the assault and inflict numerous injuries and the cumulative effect of all or some of the injuries is to cause death; (2) Where several persons commit an assault and inflict minor injuries but one of them deals a fatal blow and there is evidence of the latter's guilt; and (3) where several persons beat a man and inflict minor injuries on him but one of the assailants deals a fatal blow and the evidence leaves its in doubt as to who struck the fatal blow.

In the first case, all the assailants are responsible for the fatal assaults; in the second case, the person who is shown by the evidence to have dealt the fatal blow is alone responsible; and in the third case none of the assailants is responsible for the fatal blow.

Common intention.—The dealing of one fatal stroke by one of several assailants cannot form the basis of a valid inference that the common intention of all the assailants was to murder the person attacked.

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16 O. C. 36.

Meaning of "Competent Court"—Rule 42 in Rules framed by Government for regulating Municipal elections under S. 187 of the United Provinces Municipalities Act (1 of 1900.)—The words "a competent court" mean a Civil Court.

Appeal.—No appeal lies under the said rules against the order of the Civil Court under rule 42

In the absence of a rule made by the Local Government under the provisions of S. 187 (*h*) of the act, a Civil Court could not have authority to set aside a Municipal election made under the provisions of the act.

S. 42 Specific Relief Act "entitled to a legal character."—The words "entitled to a legal character" cannot be applied to the case of a candidate defeated at an election.

Ss. 2, 96, 141 C. P. C. (V of 1908).—The hearing of a petition under rule 42, of the rules framed by Local Government, is not a suit under the Civil Procedure Code but only a miscellaneous proceeding.

No right of appeal exists unless expressed by the Civil Procedure Code or any other legal enactment.

Difficulties arising from interpretation of rule 42 pointed out.

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16 O. C. 45.

Simple money bond—Right to sue in default of any of the conditions in the bond —Arts. 65, 80, sch. I Limitation Act.

That as the bond in suit gave the plaintiff an option in express terms to wait till the expiry of the term originally fixed for repayment, whether the interest for the first 6 months was paid, or not, the plaintiff's suit could not be regarded as barred by time because he chose to stick to the longer term. Arts. 65 or 80 Limitation Act applies to such cases.

16 O. C. 48.

S. 72 Transfer of Property Act—Property ordered to be sold in execution of a simple money decree subject to mortgagee's lien sale likely to imperil mortgagor's security—Usufructuary mortgagee not entitled to mortgage money nor to a personal decree.—

Held, (1) that S. 72 Transfer of Property Act is intended to apply to cases where the forfeiture or sale is likely to imperil the mortgagor's security;

(2) That if the plaintiff exercised his right of payment of decretal amount by virtue of his having been a usufructuary mortgagee, that money became a part and parcel of the mortgage money and he was not entitled to a personal decree for that amount.

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16 O. C. 51.

Execution of decree—Effect of want of proper attachment—Effect absence of sanction—Validity of sale

The law requires that after every attachment of a share in a *mauza* there should be a fresh sanction from Government to the sale of the property attached.

Where a certain share in a *mauza* is attached but a larger share is put up for sale and sold, the sale is invalid and must be set aside. It cannot be upheld to the extent of the share actually attached.

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16 O. C. 56.

Meaning of "usufructuary mortgage"—Mortgage in which possession is postponed to be delivered on a date of subsequent to the mortgage, interpretation of—S. 58 Transfer of Property Act.

The word "*deliver*" in S 58 does not necessarily mean "deliver immediately," and where the mortgagor is not in a position to give immediate delivery of possession it is sufficient if he gives the right to possession though he cannot give delivery of possession.

Therefore, where under the terms of a mortgage-deed, the possession is to be delivered to the mortgagee subsequent to the date of the mortgage, the transaction is an *usufructuary mortgage.*

If there is a condition in the mortgage-deed by which the mortgaged property cannot be redeemed until a certain period elapses after the date of execution of the deed, the deed is nevertheless a usufructuary mortgage.

16 O. C. 68.

Insolvency petition—Minor, position of—A minor cannot be declared a bankrupt or made party to a petition for insolvency.

16 O. C. 70.

1. *Validity of application made by decree-holder*—"*Application in accordance with law*"—An application by a decree-holder, after assigning his decree, for the transfer of the decree, in an "application in accordance with law" is sufficient to save a subsequent application made by the assignee for execution after 3 years of the date of the decree.

2. *Effect of assignment of decree on power of original decree-holder to apply for execution—O XXI, r. 16 C. P C. (V of 1908)*—Upon an application for execution made by the original decree-holder, the judgment-debtor cannot be allowed to plead that there had in fact been a transfer of the decree.

O. XXI, r 16, does not say that the decree can no longer be executed by the original decree-holder, but only empowers to transferee to take out execution, if he sees fit

Second Appeal—S 119 (B) Oudh Rent Act—A second appeal lies from an appellate order of the district Judge allowing or dismissing an appeal made to him under S. 119 Oudh Rent Act

16 O. C. 76.

Waqf, proof of—Question of law or fact—Appropriation of income, whether sufficient proof—Case to be made out by plaintiff—Evidence to prove public grave-yard.

1. The mere appropriation of the rents and profits of a particular property to the up keep of a religious foundation is not sufficient proof that such property is *endowed property.*

2. The question whether a specified property is or is not *waqf* property, is a question of law, or at any rate, a mixed question of law and fact.

3. A plaintiff who sues in ejectment for recovery of property alleged to have been appropriated by way of endowment for the up keep of an endowed property, must make out just as strong a case as a plaintiff who seeks to set aside an alienation of endowed property

4. That evidence showing that the only persons buried in a cemetry were the members of the family of the alleged founder of the waqf, his

friends and servants and any other person for whose interment permission was given by the Mutawalli cannot be treated as proof of the fact that the grave-yard is a public one.

16 O. C. 81.

S. 193 Penal Code—Contradictory statement in the same deposition—Right of witness to correct before finishing his statement—Perjury

It is desirable to give witnesses an opportunity to correct themselves, and if they do correct themselves immediately or on a second thought in the same deposition, a prosecution for perjury would hardly be desirable. No statement made by a witness in a deposition can, moreover be regarded as a completed statement until the deposition is finished and corrected, if necessary, for till then, every statement is liable to be retracted corrected, varied or qualified. The whole deposition must be read as one and if a later statement in it is contradictory to or at variance with a previous statement in the same deposition the statement first made will be deemed to be modified by the subsequent statement.

Intention to give false evidence is a necessary element to constitute an offence under S. 193. The intention can only be gathered from the surrounding circumstances; and the subsequent correction or retraction by a witness of his statement in the same deposition might negative the existence of such an intention.

16 O. C. 83.

O. V, r. 17 C. P. C. (V of 1908)—Ex-parte hearing—Affixing of Summons to outer door of house—Temporarily absence of defendant—Want of agent or male member.

1. Where a defendant or a respondent is temporarily absent from his home and is not represented at his house by any agent or male member of the family, affixing of summons to the outer door of the house is not due service.

2. That the Code of Civil Procedure does not take into account the female members of a family and does not rely upon the presumption that they will take steps to inform the defendant of what took place in his absence.

16 O. C. 86.

O. XXI, rr. 72, 90 (Act V of 1908).

Joining a stranger.—The fact that a *decree-holder* has associated with himself a stranger would not make a rule valid when the bid is a joint one and the interest of the decree-holder cannot be separated.

Permission to bid granted subject to certain conditions, validity of—An order imposing on the decree-holder a condition that his lowest bid should be the amount of the decree, is not illegal, but valid and enforceable.

Fraud.—The conduct of a decree-holder, who evades a condition imposed and colludes with strangers to bid with him in purchasing the property for much less than the decretal sum, amounts clearly to fraud.

Substantial loss—The mere fact that a decree-holder agrees to bid for the property for the amount of the decree and purchases it for a sum much less than that amount is sufficient to show that his fraud has led to substantial loss.

Such a sale is bad and should be set aside.

16 O. C. 90.

Mortgage—Simple and usufructuary—S. 98 Transfer of Property Act.

Where a mortgage deed provided that the mortgage money with interest would be paid in 2 instalments and in default of the first instalment the mortgagee would be entitled to be put in possession taking profits in lieu of interest and in case of failure the mortgagee would be at liberty to take possession with the help of the Court.

Held, (1) that the mortgage was not an anomalous mortgage but the combination of a simple and usufructuary mortgage to which S 98 did not apply.

(2) If the mortgagors did not deliver possession, the mortgage continued to retain its character of a simple mortgage and a decree for sale is, therefore, permissible.

(3) That in the case of a simple mortgage a *personal covenant* is always implied and a decree for sale in such a case can be granted.

16 O. C. 94.

Arbitration.

1. *Paragraph 8 sch. II C. P. C. Act V of 1908—Award made within time fixed but reaching Court late*—Where an order superseding the award was

passed on the date fixed but the award reached the Court the same day after the passing of the order.

Held, that the Court would be justified in setting aside *suo motu* its order as erroneous.

2. *Award invalid if not made by all the arbitrators*—On a reference to several arbitrators together, where there is no clause providing for an award made by less than all being valid, each of them must act personally in performance of the duties of his office, as if he were the sole arbitrator, for as the office is joint, if one refuses or omits to act, the others can make no valid award.

3. "*Surpanch*" The word might indicate either an umpire or referee in case of difference of opinion among the arbitrators, or might imply a chief or head arbitrator like the senior judge of any other tribunal.

4. Where a matter was referred to the arbitration of three persons, two of whom were described as *panches* and the third as *surpanch*.

Held, that this did not mean that the two *panches* alone were to decide the matter and that the third person was to be approached only in case of difference of opinion.

Judicial notice by Court of illegal award—Where an award is illegal and void *ab initio* (*art. 58 sch. II Limitation Act*) and the illegality is apparent on the very face of it, the Court should take judicial notice of it; it is not necessary that parties should file objections to the award within the time prescribed under art 158 sch. II Limitation.

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16 O. C. 99.

Pre-emption—S 9 Oudh Laws Act—Sale partly in lieu of money and partly in lieu of something valued in money.—

Where the vendor was admittedly the owner of the disputed property which was in possession of his mortgagees and there was no cloud over his title which could have prevented the vendor or the vendee from recovering the property from the mortgagees and the sale was effected in lieu of a consideration which was paid in cash and part of which was left with the vendee for expenses of redemption.

Held, 1 that such a sale was subject to pre-emption.

(2) That where a sale is effected partly in lieu of money and partly in lieu of something computable in money or valued in money, a right of pre-emption would accrue.

(3) That the vendor and the vendee having themselves valued the expenses to be incurred in prosecuting the suit for redemption and the services to be rendered in looking after it at a certain amount, the plaintiff was liable to pay the amount in order to pre-empt the property.

16 O. C. 105.

S. 108 (10) Oudh Rent Act—Under proprietary rights—Elements necessary to be proved by under proprietor suing for recovery of holding.—

S. 108 (10) pre supposes the existence of underproprietary rights, the occupation of the land by the person claiming to be underproprietor, and his ejectment from it otherwise than in due course of law. Therefore, the application of the said clause is to be limited to cases in which the previous physical occupancy of the underproprietor was either alleged or acknowledged

Meaning of "occupancy"- -Meaning of "possession."

The word "occupancy" is distinguishable from the word "possession" which includes actual as well as constructive possession.

Jurisdiction.

That a person who has never been in possession but who claims to be entitled to succeed to an under-proprietary holding may sue in the Civil Court.

16 O. C. 109.

Suit for possession of waqf property—Effect of transfer by one sajjada nashin—Limitation within which to recover property wrongfully alienated.

Held, (1) that the suit was not barred by time, as it was filed within 12 years from the date of the confirmation of the sale and also within 12 years from the date of the delivery of possession to the auction purchaser.

(2) That the decree in execution of which the property had been sold being one not binding on the *waqf* property, the plaintiff was entitled to recover possession thereof.

(3) The *waqf* property cannot be charged with any debts either by the *mutawalli* or any one else without the sanction of the *Kazi* previously obtained. The *waqf* property cannot be sold at the will of the trustee for the time being, much less can it be sold in the execution of a decree for which the *waqf* is not liable.

16 O. C. 119.

Mortgage—Charge—Ejectment of mortgagee—Mortgage by guardian of minor—Validity of mortgage not contested within time—Suit for possession.

The plaintiff as a transferee from two brothers sued the defendants for ejectment from the transferred property, which was in possession of the latter by virtue of their predecessor in interest having paid off the debt due on a previous mortgage executed by the said two brothers' elder brother on their behalf during their minority which he had no authority to do. The suit was brought more than 12 years after the date of the mortgage and more than 3 years after the two brothers had attained majority. The plaintiff contended that he was entitled to recover possession without payment of the mortgage charge paid off by the defendants predecessor in interest.

Held, that as no suit was brought to contest the validity of the mortgage within limitation, the plaintiff was bound by it and was liable to pay the mortgage charge.

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16 O. C. 122.

Hindu Law—Succession, order of, amongst gotraja sapindas—Mitakshara Law, Benares school, rule of succession according to—Meaning of Aputrasya—Meaning of Santan, sons, interpretation of.—

Where the persons claiming succession were the great-great-grandsons of the grand-father of the propositus on the one hand and the great-grand-sons of his great-grand-father on the other.

Held, that the latter were his nearer reversioners and as such preferentially entitled to succeed, for the most reasonable and acceptable rule was that the line of each paternal ancestor in turn should be exhausted as far as the third decendent in direct male line *i e.* his sons, grand-sons and great grand sons, before going a step higher in search of other heirs.

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16 O. C. 129 (P. C.)

Hindu Law—Joint family—Partition—Separation—Test—Exclusion—Mesne-profits —

Separation from commensality does not, as a necessary consequence, effect a division of the joint undivided property. A separation in mess and worship may be due to various causes, and yet the family may continue joint in estate.

What may amount to a separation or what conduct on the part of some of the members may lead to a disruption of the joint undivided family and convert a joint tenancy into a tenancy in common must depend on the facts of each case.

A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed.

Where the manager of a joint Hindu family has all along been offering to a member of the family a suitable allowance, which the latter has refused, there is no exclusion from joint estate entitling the member to *mesne profits*

16 O. C. 136. (P. C.)

1. Privy Council bound to decide a point appearing on the face of the written proofs of the parties, and plainly raised in the pleadings, notwithstanding the fact that it was not all discussed in the lower appellate Court.

2. A plaintiff in an action of ejectment must recover on the *strength of his own title*, not by the weakness of his adversary's.

3. *Agreement forming foundation of plaintiff's title*—Where an agreement forming the basis of the plaintiff's title provides that he should merely be a partner or co-owner with the other party to the agreement in a certain undivided fraction of the property in dispute, and that in case of success in the contemplated litigation in respect of the said property he should become entitled to the proprietary possession of the said fraction, a present right to the possession of a share in the property is not conferred and hence a suit for ejectment would be incompetent before the successful issue of the contemplated litigation.

16 O. C. 145.

Practice—Witness—Evidence—Right party to examine his opponent as his witness.

If a party chooses to examine his opponent as his witness, there is nothing to prevent him from doing so

16 O. C. 146.

Hindu Law—Execution of decree—Managing member of a joint Hindu family, power to discharge claims by—Managing member's power to recover money lent after the decree is passed

1. Ordinarily one out of several joint decree-holders cannot give a valid discharge for the amount of a joint decree, but where a business like money

lending has to be carried on in the interest of a joint Hindu-family as a whole, the managing member may properly be entrusted with the power of making contracts, giving receipts and compromising or discharging claims ordinarily incidental to the business.

2. That the managing member can do so even after a decree passed for the recovery of the money lent in his favour and in favour of the other members of the family if there exist circumstances indicating that the head of the family accepted payment on behalf of the family.

16 O. C. 148.

1 *Lis pendens S. 52 Transfer of Property Act.*

Application of doctrine to execution sales—Purchaser pendente lite bound by the decision in the pending litigation. The rule of *lis pendens* applies to purchasers at execution sales in the same way as to other transferees and it is not open to such auction purchasers to question decrees passed in a litigation, which was pending in regard to they property on the date of their purchase though they were no parties to the decree.

2 · *Position of auction purchaser—Estoppel.*

(*a*) Where the effect of the previous litigation was that the plaintiff's rights as reversioner were recognised, *held*, that the defendant who purchased subject to the result of that litigation is estopped from denying those reversionarry rights;

(*b*) that an auction purchaser purchases the right of the mortgagor as they existed on the date of the mortgage and the rights of the decree-holder *qua* the property sold as they existed on the date of sale.

Subrogation, legal, equitable and conventional—Ss. 74 and 95 Transfer of Property Act —Subrogation is a substitution by the operation of law to the rights and interest of the mortgagee in the mortgaged property by virtue of redemption It may be as of right such as is referred to in Ss 74 and 95 or equitable or conventional such as where payment is made by a surety of a debtor or is made by another under an agreement, express or implied, with the debtor or creditor or in order to protect a subsisting interest which could not otherwise be protected.

Auction purchaser redeeming prior mortgage entitled to suborgation —Where the defendant auction purchaser had paid the money due to a prior mortgagee-decree-holder in order to protect his interest, *held*, that the defendant was entitled to use it as a shield for the protection of his rights.

16 O. C. 157.

Mortgage—Act XIV of 1859—Act IX of 1871—Act XV of 1877—S. 31 of Act IX of 1908—Limitation Act—Right to sue for foreclosure

1. *Held*, that the right to sue on the mortgage executed on the 14th February 1859 having become barred under Act XIV of 1859 or Act IX of 1871 nothing contained in Act XV of 1877 revived that right.

2. That S. 31 of Act IX of 1908 did not confer upon the plaintiff a right to sue for foreclosure under the provisions of the Transfer of Property Act where no such suit would have been maintainable on the date on which that act came into force.

16 O. C. 161.

Mortgage—Mortgagee's right to enforce his mortgage of an undivided share—Share or cash allotment in lieu of share, to be followed.

The mortgage of an undivided share in property which under a partition has been allotted to another co-sharer cannot, in the absence of fraud be enforced by the mortgagee except, against the share which has been allotted to the mortgagor in lieu of the share mortgaged. The same rule applies where the mortgagor has been allotted a cash payment in lieu of of his share in the property.

16 O. C. 163.

Redemption—Adverse possession—Redemption by one of co-mortgagors—Art. 144 Limitation Act—Adverse possession how far affected by rejection of application by Revenue Court for correction of khewat.

One of the several co-mortgagors redeemed the entire mortgage and obtained possession of the property. Subsequently in 1892 he applied to the Revenue Court for correction of the *khewat* by removal of the name of his co-sharers. In these proceedings he asserted his exclusive right to the property and denied the rights of others who claimed to be his co-sharers. This petition was rejected by the Revenue Court. The present suit for possession on behalf of the co-sharers was instituted more than 12 years after 1892.

(1) *Held*, that the claim was barred by art. 144 by more than 12 years adverse possession.

(2) If a person who has title to immovable property allows another to retain possession under an openly avowed claim that he is holding in his own right and fails for a period of 12 years to vindicate his title by recovering possession his right to the property becomes extinguished.

(3) That the opinion of the Revenue Courts and their refusal to alter the *hewat* did not affect the question of adverse possession.

(4) Where a mortgagee in possession has had his debt satisfied out of the usufruct, the mortgage is extinguished and one of several mortgagors can only claim from the mortgagee his own individual share but has no right to take possession of the share of his co-mortgagors. If he does get possession of their shares, the possession becomes adverse at once.

16 O. C. 173.

Grove—Reza milkiyat—Right of proprietor-ship over trees and right of under proprietor-ship over land—Construction of decree.

Held, that on the construction of the decree in the light of the plaint and other statements, G and his cosharers held the grove as *Reza milkiyat* or under-proprietary right and they had a right as much to the use and proprietor-ship of the soil on which they stood.

16 O. C. 178.

Res judicata—Finding on preliminary issue—Findings on other issues.

1. That once a finding had been come to upon a preliminary issue which enabled the Court to dispose of the case, any other findings on other issues could not be treated as final decisions of the matter covered by them so as to operate as *res judicata*

2. Where in a previous suit between the parties the Court had arrived at a finding which was sufficient to dispose of the case, *viz*, that the plaintiff had no cause of action for the suit, but it appeared that the conclusion could not be arrived at without a determination as to the validity of a sale, *held*, that the question as to the validity of the sale was substantially in issue in the previous suit and was now *res judicata* between the parties.

16 O. C. 185.

Hindu Law.—

Son's liability to pay barred debts promised to pay by father.

Oral evidence, admissibility of.—That although oral evidence cannot be admitted to prove the contents of documents unless non production of the original is accounted for. Yet, there is nothing to prevent the consideration of evidence as to the existence of the documents.

Binding effect of Manager's Act —The power of a Manager to bind his coparceners other than his sons stands, however on a different footing for there is no religious or moral obligation in their case to pay debts due by the manager unless they are incurred for the family benefit.

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16 O. C. 192.

1. *Review—S. 369 Cr. P. C.*—That S. 369, Cr P. C. does not permit a review and the Magistrate had no jurisdiction to set aside his previous order.

2. *Ss. 14, 146 and 147 Cr. P. C.*—That S. 147 is intended to apply only to cases where there might be disputes concerning the right of use of any land or water as distinct from disputes as to the title to or possession of the land itself for which provision is made by Ss 145 and 146 of the Code.

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16 O. C. 194 (P. C.)

1. *Rules and orders dealing with non-appearance of a suitor*—That such rules have no application to the situation which arises when the suitor is dead.

2 *Art. 176 Limitation Act—Application for substitution of name by represeutative of a deceased party*—Where a Court, being unaware of the fact of the plaintiff's death which had taken place about a fortnight before the date of hearing, dismissed the suit for default and subsequently within the period of 6 months prescribed by Art. 176, an application was made by the deceased plaintiff's son to have his name substituted in place of his deceased father, *held*, that it was the duty of the Court to grant the application and to proceed with the suit.

S. 151 C. P. C. (V of 1908)—That apart from S. 151 C. P. C. a Court has inherent power to rectify mistakes inadvertently made.

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16 O. C. 197.

Appeal—Power given to subordinate Courts to entertain application for succession certificates.

Where an inferior Court such as that of a Subordinate Judge had been invested with powers to entertain applications under the Succession Certificate Act every appeal from the orders of such Court lies to the District Court and not to the High Court.

16 O. C. 199.

S. 82 Transfer of Property Act—Construction, availability of—Merger—Mortgagee's right to recover from any of the mortgaged properties—S. 60 Transfer of Property Act—Mortgagee's obligation to deliver possession to mortgagor.

1. That a mortgagee is entitled to recover his mortgage money from any one of the mortgaged properties he likes and the claim of a mortgagee cannot be split up at the instance of each individual purchaser of the mortgaged properties.

2. That the right to claim contribution under S. 82 is available only as between the representatives of a mortgagor or between the co-mortgagors themselves except in cases of *merger*.

3. That the obligation imposed on a mortgagee by S. 60 Transfer of Property Act to deliver possession on redemption to the mortgagor ceases if he has himself been evicted by a title paramount to his own.

16 O. C. 203.

Pre-emption.

1. *Khata a sub-division of a tenure.*—Where a village is divided into *thoks* and *thoks* into *patties* and *patties* into *khatas*, *held*, that each *khata* is a sub-division of a tenure.

2. *Distribution of revenue* —That distribution of revenue is not essential in order to constitute sub-divisions of a tenure.

3. *Pre-emption—Co-owner's right to pre-empt a definite portion of a village.*—Where there are co-owners of a definite portion of a village any of them is entitled to exclude out-siders by having a right to acquire any portion of the division in which he is an owner to the exclusion of other persons who are not co-owners in that particular division.

16 O. C. 206.

1. *S. 6 Limitation Act. Effect of existence of guardian ad litem or next friend on minor's actions after his attaining majority.*—That the existence of either cannot deprive a minor of the benefit of S. 6 Limitation Act, and the minor can make an application for execution of decree after his attaining majority within the time allowed by S. 6.

2. *Meaning of* "ਜੇਠ ਦੇ ਪਹਿਲੇ ਐਤਵਾਰ" —*Held* that the above terms did not limit the time of payment strictly to the month of *Jeth* and that it was open to the plaintiff to pay the money at any time within limitation.

16 O. C. 211.

Articles 2 and 36 Limitation Act.—

That the intention of art. 2 is to meet those cases where a public official or a public authority or private person does an act injurious or possibly injurious to another under powers conferred or honestly believed to be conferred by some act of the Legislature.

That Art. 2 does not apply to a case where the damages arise not from the doing of the act or from the failure to do it but from doing it an improper manner out of malice or carelessness Such a case would be governed by Art. 36.

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16 O C. 213.

1. *Rectification of an instrument—S. 31 Specific Relief Act*—In the absence of proof of a mutual mistake S. 31 cannot be applied in the case of an instrument of an unilateral character like a mortgage deed, to render the previous rectification of the instrument obligatory.

2. *Ss 95 and 96 Evidence Act—Oral evidence to prove how the description in a mortgage-deed was related to existing facts*—Where the plaintiff sued for a declation that he was a mortgagee in possession of certain plots and alleged that the numbers entered in the mortgage-deed were incorrect, *held*, that oral evidence was admissible to prove how the description was related to existing facts.

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16 O. C. 216 (P. C.)

Summarry Settlement, date of the making of—Kabuliat, execution of—Meaning of "Estate"—Ss. 3, 8, 10 Oudh Estates Act—Acquisitions made by Talukdar, incorporation in original estate of—Custom of impartibility.

On 5th October, 1859 an order was passed sanctioning the Summary Settlement with one A of 9 villages. The *kabuliat* however was not signed by A until the 13th of that month In the course of the first regular Settlement A recovered decrees for possession of 6 more villages Subsequently the name of A was entered in Lists I and II prepared under S 8 of Act I of 1869.

Held, 1 that the Summary Settlement must be deemed to have been made with A between the first day of April 1858 and the 10th day of October, 1859, within the meaning of S. 3 of the Act. The delay in the signing of the *kabuliat* would not effect the right acquired by the settlement as the

execution of the *kabuliat* would relate back to the time when the settlement was in fact made.

2 That the properties settled with A in 1859, togther with those of which he obtained possession under decrees passed in his favour in the course of the regular settlement, constitute "*estate*" and are consequently impartible.

3. That the question whether properties acquired by an owner become part of the "ancestral estate for the purpose of his succession" depends on his intention to incorporate the acquisitions with the original estate.

4. Where the courts in India had concurrently found that the evidence was insufficient to establish the alleged family custom of impartibility or the fact that the lands subsequently acquired were as a matter of fact in corporated with the *Taluqa* their Lordships saw no reason to differ from their conclusions.

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16 O. C. 225.

1. *Lis pendens—Collusive and fraudulent proceedings—Auction purchaser*—The doctrine does not apply to such proceeding and cannot prejudice an auction purchaser who asks to be made a party to an objection-proceeding but is not impleaded.

2. *Extension to third persons* —That a collusive proceeding is not a real proceeding and a decision arrived at in such a proceeding is binding only on the parties and their privies and not on others.

The doctrine does not extend so as to prejudice the rights of third persons who purchased at a sale held by a Court under its own decree.

3 *Subsequent variation in decree*—That a purchaser at a court sale is not bound to enquire into the correctness of the order for execution of the decree any more than into correctness of the judgment upon which the execution issues and if a purchase be made *bona fide* by a third party the sale could be upheld whether the decree be afterwards varied or found to have been satisfied, provided the court executing the decree had jurisdiction to sell the property on the date of the sale.

4. *Jurisdiction—144 C. P. C. (V of 1908)*—This sections refers to the parties to the erroneous decree but not to third persons who were parties neither to the objection proceedings nor to the proceedings on appeal. The question of restitution as against such third persons does not therefore fall within the purview of S. 144.

16 O. C. 233.

Jurisdiction of arbitrator—Award—Fixing a debt to file.—The mere fact that a Court in passing an order of reference fixes a date for the filing of the award instead of a date for the making of it does not take away the jurisdiction of the arbitrator to decide the matters referred to him for decision within the time fixed for the filing of the award.

Defect in the order of reference fatal.—That no defect in the order of reference other than that which strikes at the jurisdiction or the authority of an arbitrator, to make the award would be fatal to its validity.

Question raised in Appeal—That though no appeal lies from an order setting aside an award, yet questions regarding the validity of the award can be raised in appeal from the final decree in the suit.

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16 C. O. 238.

Receiver, ground for appointment—S 51 cl. (d), O XLI, r. 1 C. P C. (V of 1908), Discretion of Court—Convenience of decree-holder.

Where a mortgagee decree-holder applied for the realization of his decree from the rents and profits of one of the mortgaged villages by the appointment of a receiver, on the allegation that the Local Government had refused to sanction the sale of the said village on the ground that the property was inalienable but it appeared that there were other mortgaged properties which the decree holder could bring to sale, *held*, that no receiver could be appointed in such a case.

O XLI, r. 1 limits the power of a Court to appoint a receiver to cases where it appears to be both just and convenient. The convenience of the decree holder is not a sufficient consideration to justify such an appointment for what may be convenient to the decree holder may not be just to the judgment-debtor.

The appointment of a receiver *pendente lite* is a matter entirely within the discretion of the Court, and it must in the exercise of that discretion be guided by the circumstances of each particular case.

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16 O. C. 247 (P. C.)

Minors.

1. Where *no order appointing guardian* for a minor defendant *was applied for or made, held*, that the minor was not in law represented in the suit and the decree passed therein did not bind him.

2. *Compromise on behalf of minor.*—Where the decree had been passed on the basis of a compromise and the leave of the Court had not been obtained the decree could not be binding on the minors.

3 *Setting aside of compromise made to the detriment of minor's interest* — Ss. 441, 443, 456 and 462 C. P. C = O. XXXII, rr. 5 (1); 3 (1), 4 (2); r. 14; r. 7—Act V of 1908 —Where in a rival suit instituted on behalf of the same minors as plaintiffs, their next friend applied to the Court for sanction to withdraw the claim in pursuance of the compromise entered into in the other suit and thereupon the Subordinate Judge dismissed the suit, *held*, that as it did not appear that the Subordinate Judge was informed that the minors were in law unrepresented in the other suit and that the agreement of compromise had been entered into without leave of the Court the minors were, therefore, entitled to have the decree dismissing the suit set aside.

4. *Guardian or next friend—Interest adverse.*—Where it was found that the person acting as next friend and guardian was a mere dummy and was introduced only to advance the interests of the *de facto* guardian whose interests were adverse to those of the minors and that the compromise had been entered into contrary to the interests and to the detriment of the minors, *held*, that on these grounds also the minors were entitled to relief

5. *S. 42 Specific Relief Act*—That S. 42 had no application to the case and the Court could not refuse relief to the minors on that ground

6. *S 98 C P. C (V of 1908)*—That 2nd Additional Judicial Commissioner had jurisdiction to deal only with the point of law on which the Judicial Commissioner and the Additional Judicial Commissioner had differed.

16 O. C. 257.

S. 11 Suits Valuation Act—The provisions of S. 11 apply to the case where the jurisdiction of the Court is supposed to have been ousted by the subsequent discovery of some error (intentional or otherwise) in the plaintiff's valuation, and they will apply even when the Court is of opinion that the plaintiff has designedly exaggerated or understated the value of his claim for the purpose of choosing his own forum.

16 O. C. 261.

1. *Guardian ad litem, appointment of, in proceedings under S. 83 Transfer of Property Act.—S. 103 Transfer of Property Act.*

Under S. 103 Transfer of Property Act it is proper, whenever a mortgagee is a minor, to get the Court to appoint a guardian *ad litem* for him as a preliminary to proceedings under S. 83 Transfer of Property Act.

2. *S. 443 C. P. C = O. XXXII, rr 3 (1), 4 (2)*—That under S. 443 it was for the Court itself by a special order to appoint a guardian *ad litem* and that a plaintiff cannot assume to himself this function of the Court.

3. *Minor to be allowed benefit of doubt*—That every precaution must be taken to safeguard the interests of a minor and on this principle the minor should always have the benefit of any doubt that may exist where it is a question of whether the procedure in a case has been of a nature to bind him or not.

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16 O. C. 264.

Appeal—S. 109 (a) C. P. C. (V of 1908)—An order rejecting an application for review.

That an order rejecting an application for review cannot be regarded as an order appealable under (*a*) of S. 109 C. P. C.

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16 O. C. 267.

Mortgage—Undertaking by mortgagor to pay money advanced on a later security along with money due on an earlier security—Redemption—That such undertaking does not amount to a consolidation of the debts so as to preclude the redemption, of one without redemption of the other.

Collateral transaction entered into simultaneously with the mortgage—Clog on redemption—Discretion of Court to reduce interest—That such collateral transaction must be scrutinized with very great care, where it was found that the rate of interest entered in a deed of further charge was hard and unconscionable and that the creditor imposed his own terms and put pressure on the executants in order to impose a clog on redemption; *held*, that in such a case the Court had discretion to allow a lower rate of interest on the deed of further charge

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16 O. C. 272.

Hindu Law—Hindu widows power to extend limitation by making written acknowledgment and to pay a barred debt—It is not open to a Hindu widow to extend the limitation applying to a debt owed by her husband by making a written acknowledgment thereof, at all events if she does so her action is not binding on the reversioners. But it is quite another thing for her to fulfil a pious duty and actually pay off a just debt even if it is time barred.

16 O. C. 277.

S. 14 Oudh Estates Act—Definition of "Estate."

That although S. 14 of the Act provides that in the case of certain transfers specified in the section the same legal incidents to which it was subject in the hands of the transferor would annex to the property transferred in the hands of the transferee yet the property in the hands of the transferee cannot be deemed to be an "estate" or part of an "estate."

16 O. C. 281.

S. 106 (3) Cr. P. Code—Appellate Courts power to make order for security for keeping the peace—Effect of jurisdiction of original Court on powers of Appellate Court.

There is nothing in sub-section (3) of S. 106 which either suggests or implies that the powers of the original Court should in any way control those of the appellate or revisional authority and that an appellate Court has therefore power to make an order for security for keeping peace even in a case which has come within its cognizance on appeal from a Court which was not competent to pass such an order as an original Court.

16 O. C. 283.

Mortgage by Hindu widow—Reversioners bound by mortgage even though only a portion of the mortgage money was for legal necessity—Where a Hindu widow executed a possessory mortgage for a period of 50 years and on the death of the widow the reversioners brought a suit for possession and it was found that out of the debts secured by the mortgage a sum of Rs. 678 was borrowed for legal necessity, *held*, that the mortgage was binding upon the plaintiffs to the extent of Rs 678, and that they could only obtain possession by a suit for redemption which in view of the condition of the mortgage did not lie at present.

16 O. C. 285.

1. *Doctrine of contribution.*—That the doctrine can only apply while the position under the joint contract still remains unaltered.

Where some out of several mortgagors had independent dealings with the mortgagee the legal result of which was to give the mortgagee a fresh right and to impose upon those mortgagors a new liability, *held*, that as the liability did not embrace the other mortgagor who did nothing to bring it into existence they could not be called upon to share it.

Plea that at the time of contribution the right of original creditor had become time barred.—That as the general rule a defendant in a suit for contribution cannot escape liability on this plea.

16 O. C. 290.

S. 10 Act I of 1869—Presumption under S. 10, applicability of, to non-taluqdari property—S. 8 Oudh Estates Act—Family custom appertaining to a Talukdar, relevancy of, with reference to non-taluqdari property—Difference between local custom and family usage.

1. That the conclusiveness of the presumption raised by S. 10 of Act 1 of 1869 cannot be extended to property which was not held by the *Talukdar* on or before the 13th February, 1856, or which was not an "*estate*" as defined by S. 2 of the Act.

2. That the existence of a family custom of the kind referred to in S. 8 of the Oudh Estates Act appertaining to a *Talukdar* may, in the absence of evidence to show that the other property was governed by a different rule of devolution, be regarded as evidence tending to show that a similar rule applies to other property which the *Talukdar* may have acquired and left undisposed of at the time of his death.

3. That a local custom and a family usage do not stand on the same footing. A local custom carries with it an idea of great antiquity and derives its origin from its observance by successive generations of men belonging to different families, castes and tribes resident within a specified local area. No such antiquity is necessary to prove a family usage of impartibility or primogeniture.

16 O. C. 325.

Mahomedan Law—Shia School—Consummation not necessary for claim for dower.—Under the Shia Law the wife is entitled to dower on the death of her husband, whether consummation has taken place or not.

Proof of consummation.—Where the question of consummation arises, it is necessary to give proof of coition, that is to say of actual penetration.

Amount of dower.—Where a man dies without having repudiated the marriage it would be inequitable to deprive the wife of her full dower, even though consummation may not have taken place

Marriage contracted by sickman.—Where a marriage is contracted by a sickman who dies before consummation the marriage is void and the wife

has no claim to dower provided always that the cause of the husband's death is that particular illness which affected him at the time of marriage so as to make him a sickman and that the illness in question continued without interruption from the time of marriage till the time of death.

Effect of liabilities of deceased on claim for dower.—That in determining a claim of dower the question of the other liabilities affecting the property of the deceased is wholly irrelevant.

16 O. C. 341.

Occupancy tenants right to plant trees—Permission of landlord—Oudh Rent Act.—There is nothing in the law to prevent an occupancy tenant from planting trees on his holding without the permission of the *Zamindar.*

16 O. C. 346.

Trees, immoveable property for the purposes of Oudh Rent Act.—That for the purposes of the Oudh Rent Act, trees must be treated as being immovable property.

Application of the General Clauses Act (X of 1897) to the Oudh Rent Act.—That the Oudh Rent Act is to be interpreted with reference to the provisions of the General Clauses Act and *not those* of the United Provinces Act (1 of 1904).

16 O. C. 350.

S. 2; O. XXII, r. 5 C. P. C. V of 1908—Appeal

1. That an order by which persons are brought on the record as legal representatives of a deceased plaintiff or defendant is not a decree and is therefore not appealable.

2. That the word " parties" as used in the definition of " decree" includes the persons, who are joined on either side as plaintiffs and defendants and "the matters in controversy" in the said definition refer to matters in controversy between the parties ranged on one side as plaintiffs and on the other side as defendants.

16 O. C. 354.

Suit for redemption—Decree for redemption on payment of principal money —Appeal denying plaintiff's right of redemption and claiming amount due on a deed of further charge—Court fee payable on—Held, that the defendants appellants were liable to pay Court fee on the amount claimed by them in

excess of the amount awarded by the Court of first instance, though they claimed that amount as a last resort in case their plea in denial of the plaintiff's right of a redemption was not accepted.

16 O. C. 357.

S. 263 Cr P. Code—Summary trial—Magistrate bound to record reasons for conviction.—That a Magistrate trying a case summarily is bound to record his reasons for the conviction and to state them in such a manner that a superior Court acting in revision may be in a position to judge whether there were sufficient materials before the Magistrate to support the conviction.

16 O. C. 359.

Hindu Law—Acquisition by Hindu widow out of the income of her husband's estate Presumption—Suit by reversioner to recover such property, onus of proof.

1. That the properties acquired by a widow must be presumed to be the widow's property, and that the reversioners who are seeking to recover such property on the ground that it formed part of the husband's estate must establish that fact.

2. That the consideration relied upon by their Lordships of the Privy Council in I. L R 10 Cal. 324 cannot be applied as tests in every case to determine the question whether or not a particular property is part of the husband's estate. Each case has to be considered on its own merits.

16 O. C. 370.

S. 35 Cr. P. C.—Validity of concurrent sentences.—That the power of passing concurrent sentences is confined to cases where a person is convicted at one trial of two or more distinct offences.

16 O. C. 371.

S. 188 Penal Code—S. 550 Cr. P. C. Order issued by Police Sub-Inspector to a Station Master to detain certain logs lying on trucks suspected to be stolen property, legality of.

Where the Sub-Inspector instead of seizing such logs under S. 550 Cr. P. C., issued an order to the Station Master directing him to detain the same, *held*, that the order was irregular and objectionable

Where the Station Master after detaining the goods for some time forwarded the consignment under express order from the Traffic Superintendent, *held* that under these circumstances a conviction under S. 188 Penal Code could not be sustained

16 O. C. 374.

Ss 9, 12, and 18 Land Acquisition Act (1 of 1894)—Award made by Collector without being communicated to applicant—Limitation for filing objection—High Court's power of revision.

1. That an award written or signed by the collector without being made in the presence of or communicated to the applicant is *qua* the applicant no award at all and the period of limitation for filing an objection to the award can only be computed from the date when the award is made within the applicant's knowledge.

2. That the Collector, is rejecting an application made under S 18 cl. (1) of the Act, acts judicially and his order is subject to revision by the High Court

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16 O. C. 378 (P. C.)

Parda nashin lady.

1. *Deed of gift in favour of the son of a paramour and Mukhtar. Burden of proof.*—The burden of proof shall in such a case, rest, not with those who attack but with those who found upon the deed and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the grantor, in such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor.

2. *Necessity of independent advice—Proof of execution—Undue influence —*

There is no rule of law of the absolute kind requiring that a deed of gift executed by the *pardanashin* lady cannot stand unless it is proved that the lady had independent advice. Its presence or absence is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out, the transaction. If she did the issue is solved and the transaction is upheld; but if upon a review of the facts, which include the nature of the thing done and the training and habit of mind of the grantor, as well as the proximate circumstances affecting the execution—if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result, then the deed ought to stand.

16 O. C. 386.

Will, proof of—Presumption in favour of a natural will execution of which is proved.—That the presumptions of law are in favour of its being maintained

Attesting witnesses.—Where the persons who attested a will were just those witnesses that the testator had about him and it was contended that they might have been of a better class, *held*, that a comment of this character has no force except upon a proof which would satisfy the Court that these persons had committed both forgery and perjury

Natural reasonable and proper.—That in the case of a will reasonable, natural and proper in its terms it is not in accordance with sound rules of construction to apply to it those cannons which demand a rigorous scrutiny of documents of which the opposite can be said, namely, that they are unnatural unreasonable, or tinged with impropriety

Admissibility of evidence.—Where a will has been executed on a sheet of official paper in general use and evidence was given that some other people had been in the habit of having forms or sheets which they signed in blank, *held*, that such evidence was irrelevant and should not have been admitted.

S. 568 *C. P. C.*=*O. XLI, r* 27 *C. P. C.* (*V of* 1908).—Where additional evidence was admitted in appeal to discredit the evidence of a witness in the case without such witness having been afforded the opportunity of clearing up the mistake or explaining the matter, *held*, that the procedure was improper

17 O. C. 1=20 I. C. 894.

Whether or not custom exists is a question of fact.

In order that any course of conduct may be invested with the binding authority, which the law concedes to custom, it must be ancient, continuous, reasonable and definite, and these attributes must be established by clear and unambiguous evidence. The question, whether, in any given instance, the evidence led to prove the existence of those attributes is adequate proof of what the law requires, is a question of law which can be discussed in second appeal.

It is not competent to a Court of second appeal to consider the credibility of any particular evidence.

But where the lower court has acted upon inadmissible evidence, has rejected admissible evidence, or has acted upon evidence which does not come up to the standard of adequacy, its finding would be open to correction in second appeal.

Where certain "*Wajibuarz*" relating to villages other than the one in suit, were produced to prove an alleged "family custom" in matters of inheritance, on the ground that the owners of these villages belonged to the same clan as the owner of the village in dispute.

Held, that the "Wajibularz" were inadmissible in proof of the custom set up, the word "family" as used in the expression "family custom" not being wide enough to include a clan.

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17 O. C. 6=21 I. C. 201.

Section 140 of the Oudh Rent Act prevents the defendant in a suit for arrear of rent from raising a plea of counter-claim or equitable set-off except in the particular set off circumstances for which the section provides, but not from raising a plea of part payment. Hence in a suit for arrears of rent, the defendants are entitled to set up their claim to *dahyak* allowance not by way of set-off, but by way of part payment, for anything which the parties agreed might be deducted from the rent would be *protanto* a payment of the rent.

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17 O. C. 14=21 I. C. 193.

A decree, in so far as it declares that in default of payment of the amount specified therein within a specified period the suit shall stand dismissed with

costs becomes a decree for dismissal on the happening of such default and is appealable as such.

The question whether a pre-emptor has paid the amount fixed by a pre-emption decree within time or not is a matter affecting the operation of the decree and strictly does not relate to its execution within the meaning of section 47 of the Civil Procedure Code.

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17 O. C. 18=23 I. C. 182.

Where a complaint of an offence under section 211 Indian Penal Code, was ordered to be "struck off" for the complainant's absence but the Magistrate took cognizance of the case on a fresh complaint by the same complainant.

Held, (1) that the Magistrate had not authority to pass an order striking off the case;

(2) that the order stricking off the case was not tantamount to an order of discharge under section 259, Criminal Procedure Code, in as much as this section relates only to compoundable cases while an offence under section 211 Indian Penal Code, cannot be lawfully compounded.

(3) that once a sanction to prosecute is availed of and a complaint instituted on its strength, a fresh complaint on the basis of the same sanction is incompetent, inasmuch as one sanction covers only one complaint;

(4) that the Magistrate had no jurisdiction in the case after he had "struck off" the case.

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17 O. C. 21=23 I. C. 184.

Persons, merely-acting in maintenance of an existing peaceful possession, no matter whether the possession was with or without title, cannot be said to enforce any right or supposed right and, therefore, cannot be held to form an unlawful assembly within the meaning of section 141, clause (4), Indian Penal Code.

A person who is out of possession must enforce his right, if any, in the way prescribed by law and he cannot be permitted to vindicate it by the use of criminal force.

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17 O. C. 25=22 I. C. 1001.

An order passed by a Civil Court, directing the prosecution of certain persons, under section 476, Criminal Procedure Code, can not be revised by a High Court under section 439 of the Criminal Procedure Code.

The summoning of the record must be a necessary preliminary to any action which a High Court may take under section 437 or section 439, Criminal Procedure Code.

Section 439 of the Criminal Procedure Code is not independent of section 435 of the same Code.

The provisions of sections 434 and 439 must be read with the provisions of sections 435.

A High Court acting as a Criminal Court has no power to call for a record except under the provisions of section 435, Criminal Procedure Code, and under that section it can call for the record only of an inferior Criminal Court.

A High Court as a Criminal Court can not send for the record of a Civil Court or of a Revenue Court.

A proceeding under section 476, Criminal Procedure Code, may possibly be considered to be one of a quasi criminal nature.

But a Civil or Revenue Court making an inquiry under that section, preliminary to a prosecution does not become a Criminal Court by virtue of such inquiry.

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17 O. C. 33=22 I. C. 315.

Three brothers A. B. and C. appointed D. to act as an arbitrator by whose award they bound themselves in respect of partition of joint family property.

The award was duly made. It stated that "all the cash had been divided and that now no co-sharer had any right to demand accounts from another." Some years after, the sons of one of the brother sued for an account from his uncle with regard to certain property and monies which they alleged were to remain joint until realised.

Held, (1) that the plaintiffs were bound by the award which was final;

(2) that they could not claim an account as the award expressly stated that no co-sharer could, subsequently, demand an account.

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17 O. C. 38=23 I. C. 448.

(1) Where a puisne mortgagee, who had paid the amount due on a decree for sale obtained by a prior mortgagee, brought a suit for a sale on

the basis of his mortgage and claimed priority as against intermediate mortgagees in respect of the amount spent by him in redeeming the prior mortgage:

Held, that the suit, in so far as it sought to enforce the priority, must be governed by the same rule of limitation as would have applied to a suit by the prior mortgagee.

(2) The period of limitation in respect of a suit for sale on a mortgage can not be extended by subsequent transaction between the mortgagee and a third person who pays off the mortgage-debt.

(3) If a person purchases property subject to a mortgage and the mortgagee allows his right to recover the money to be lost by lapse of time, the purchaser is not debarred from taking advantage of the negligence of the mortgagee and raising a plea of limitation.

In the absence of any foundation for a suggestion of bad faith, the filing of suits to recover arrears of rent by a mortgagee in possession, is an act of management and any expenses incurred in connection therewith are recoverable by the mortgagee under section 72 of the Transfer of Property Act.

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17 O. C. 52=23 I C. 406.

Where the mother of certain Hindu minors, acting as their guardian, sold certain grove lands belonging to the minors during their minority and the minors brought a suit for possession of the grove lands more than three years after attaining majority but within 12 years of the sale.

Held, that under the provisions of section 28 and Article 44, Schedule 1, of Act IX of 1908, the claim of the plaintiffs became extinguished three years after, their attaining majority.

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17 O. C. 55=23 I C. 460

The words "portion of the produce of land" in the definition of "rent", as given in section 2, clause 5, Oudh Rent Act, mean a portion of what the land has actually produced and not portion of what it might have produced. They cannot be held to be a portion of the produce which ought to have been grown upon the fields.

Where a tenant deliberately omits to cultivate a holding the rent of which is payable in kind no arrears of rent can be held to exist and the landlord's remedy is to sue in the proper Court for damages for breach of the contract

which such a tenant is implied to have made to cultivate the holding as well as his capacities and resources permit.

Sections 124C and 124D of the Oudh Rent Act apply only when the suit has been instituted in a wrong Court and not when the plaintiff has sued the right Court upon a cause of action upon which he cannot succeed.

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17 O. C. 60=23 I C. 453.

A gift is not valid without seizin. But where the property given does not admit of physical possession and the donor gives such possession, actual or constructive, as he is capable of giving, provided he himself is not out of possession, the gift would be valid. A gift is not, however, complete until possession is taken of the thing given.

If a gift is made by a Muhammadan of two distinct properties and is perfected with regard to one of them by delivery, and not with regard to the other, the gift is not valid in its entirety, but takes effect as to the property which has been duly delivered.

Under the Muhammadan Law, which has been made applicable under section 3 of the Oudh Laws Act to questions relating to gifts between Muhammadans, a gift of a house conveys no title unless it is accompanied by delivery of possession or followed by the taking of possession with the permission, express or implied, of the donor.

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17 O. C. 68=22 I. C 293.

A, a Hindu *Junwar Chhatri* by caste, had a son B. by a Muhammadan woman, L., whom he got married to two *Chhattri* woman, by whom B. had a son C., and a daughter D. By a Muhammadan woman, B. had several sons. E. was the eldest of B's. Sons. A made a will to the effect that the income from certain properties should go to support B. and B's *aulad* "for generations after generations as long as the family of B. and his descendants remain in existence," and that the income of certain other properties should go to the support of the Muhammadan woman, L., over which she was given the power of disposition by will. After the death of B, a dispute arose between B's children by the Hindu woman and those by the Muhammadan woman as to the succession under A's will.

Held (1) that as A had got B married to two Hindu woman and desired him to live like a Hindu, A must have intended by the word *aulad* in his will to mean the issue by the Hindu women, that is, C and D;

(2) that as A settled certain other properties on his own Muhammadan mistress, L., giving her power of disposition over them by will, she was supposed to have exercised these properties to enable her to provide for her grand-children, E. etc, by her Muhammadan daughter-in-law who lived with their grand-mother, L.

The word *Khandan* ordinarily refers to the group of descendants who constitute the family of the progenitor. Illegitimate off spring, who from the necessities of the case can not share in the family life or its worship or ceremonials, cannot be included in the term *khandan*.

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17 O. C. 86=24 I. C. 223.

Where a suit was instituted in a Revenue Court on the allegation that the defendants were holding certain land as a *muafi* grant which was liable to resumpsion under Chapter VII A of the Oudh Rent Act and the defendants set up the defence that they were proprietors of the land and not mere *Muafidars* and the Revenue Court decided against the defendants and declared them to be under-proprietors under-section 107 A and the defendants there-upon instituted a suit in a Civil Court for a declaration that they were proprietors of the land in question.

Held, that the decision of the Revenue Court did not debar the Civil Court from trying the question as to whether or not the aforesaid defendants were proprietors of the land in suit.

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17 O. C. 90=24 I. C. 236.

In a suit for sale based on a mortgage the plaintiff was given a decree for his mortgage money to be realized by a sale of some of the properties, but his claim to make certain other properties liable was dismissed. The plaintiff on appeal raised no question about the amount of the mortgagemoney but sought only to make the properties exempt by the Lower Court liable for the amount of his decree and paid a Court fee of Rs. 10 only on the ground that the relief sought in the appeal was merely of a declaratory nature:

Held, that in such a case an *ad valorem* fee was payable on the value of the property, because the question in dispute was the liability of the land to be proceeded against for the debt.

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17 O. C. 92=24 I. C. 975.

A High Court in revision may grant permission to compound an offence and allow a case to be compromised.

Where in a case under-section 325, Indian Penal Code, the complainant and the accused were willing to compromise, it was no sufficient reason to refuse composition on the ground that a third party, the master of the complainant, who had received no injury from the accused, had refused or was not willing to agree to the composition.

17 O. C 94=24 I. C. 137.

Where in execution of a decree for sale in respect of certain plots of land which had been mortgaged, a number of plots were sold by auction which were not the plots specified in the mortgage-deed and the sale was confirmed and possession delivered to the purchaser, and subsequently an application was made by the judgment-debtor asking the Court to set aside the sale and to restore him to possession of the plots not covered by the mortgage-deed and the decree for sale.

Held, that the application made by the judgment-debtor was one of the nature described in Article 165, Schedule 1, of the Limitation Act; and that Article 165 must be taken to cover any application which the judgment-debtor may be entitled to make.

17 O. C. 99=23 I. C. 935.

The salary of Honorary Commissioned Officers employed in the Indian Subordinate Medical Department is attachable under the provision of section 60, sub-section (1), clause *(i)*, Civil Procedure Code, since they are "public officers" as defined in section 2, clause 17, Civil Procedure Code, and are also "officers" as defined in section 190 of the Army Act, so that they are not protected by section 144 of the latter.

Section 6, sub-section (2), clause *(b)*, Civil Procedure Code, does not amount to a declaration that the provisions of section 6, sub-section *(1)*, Civil Procedure Code, do not constitute a law passed by the Governor General of India in Council authorising deductions to be made from the pay of an officer of His Majesty's Regular Force.

17 O. C. 105=23 I. C. 943=1. O. L. J. 152.

The presumption as to a right of pre-emption is, in Oudh, a statutory presumption created by section 7 of the Oudh. Laws Act which lays down that such a right is, in the absence of any custom or contract to the contrary, presumed to exist.

Where the entry in a *wajib-ul-arz* stated that every co-sharar in the village was entitled to sell his share to whomsoever he liked,

Held, that the above entry was sufficient proof of a custom excluding the right of pre-emption in the village. Where in a previous suit relating to a village a claim for pre-emption had been put forward and allowed, and it was contended in a subsequent suit for pre-emption relating to the same village that the previous decision proved the existence of the custom of pre-emption in the village, but it was found that in the previous suit no defence like that in the subsequent suit was put forward to the effect that the custom did not obtain in the village.

Held, that the above previous decision could not establish the custom of pre-emption in the village.

Notes.

Dist.—20 O. C., 226=12 I. C. 21.

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17. O. C. 108=24 I C. 542.

When a Hindu dies leaving two widows they succeed jointly to the husband's property. While they may during their life time enjoy their shares separately, they cannot so deal with property as to destroy the incident of survivor ship which attached to the estate. Under the Hindu Law where a widow makes a surrender of her estate in favour of the nearest reversioner the surrender must be of her entire interest in her husband's property.

An oral award can be as good and effective as a written award. But until an award, whether oral or written, has been made a rule of Courts so as to give it the force of a Civil Court decree, it cannot operate to transfer property.

Where the several members of a family make settlement of their dispute, each one relinquishing all claim in respect of all property in dispute other than that falling to his share and recognising the right of the others as they had previously asserted it to the portion allotted to them respectively, the transaction is what is called a family arrangement and should be upheld as such. The test of such an arranegment is that it constitutes the recognition of a pre-existing title and not that the parties derive any title from each other.

Notes.

R.—18 O. C., 282=32 I. C. 465—18 O. C. 51 (27 I. C. 938)

17. O. C. 120=23 I. C. 625.

When a separable portion of an award is bad, the remainder of the award, if good, will be maintained.

If irregularities in the procedure of an arbitrator can be proved which would amount to no proper hearing of the matters in dispute, there would be misconduct sufficient to vitiate his award without any imputation on his honesty or impartiality; for example, if the parties are not properly summoned to appear before the arbitrator and one of the parties is not given an opportunity of meeting the case set up by the other party, it would be held that there has been no proper inquiry.

It is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of the proceeding before him; but in the absence of such notes there is no warrant for holding that an award should be set aside at the instance of one of the parties, who must be held to have known the general course of procedure and who did not make any protest until after the making of the award with the terms of which he was not satisfied.

An arbitrator, selected by the parties, comes within the general obligation of being bound to give evidence and where a charge of partiality or dishonesty is made, any relevant evidence, which he can give is properly admissible. It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality is not used for a different purpose, namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction on which his decision is final, for example, a Court should not utilize evidence relevant on a charge of corruption to criticise methods adopted by an arbitrator in determining the *quantum* of his valuations. The charge of corruption ought to be put to him fairly and squarely so as to enable him to give a direct answer or explanation. A critical cross-examination into the details of figures used by him in making his award, should not be permitted.

An arbitrator who is called as a witness in a legal proceeding to enforce his award may be asked questions as to what passed before him and as to what matters were presented to him for consideration, but no questions can be put to him as to what passed in his own mind when exercising his discretionary power on the matter submitted to him.

However, where charges of dishonesty are made the Court would reject no evidence of any arbitrator which could be of assistance in informing itself whether such charges were established. To infer the grave charge of dishonesty and partiality against an arbitrator there should be strong evidence in support of each particular instance of dishonesty.

Although in each instance the evidence of dishonesty might amount to more than a case of suspicion, yet the aggregate effect would not be sufficient to support the charge of corruption. Suspicion, in short, will not become facts and facts guilts.

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17 O. C. 134=25 I. C. 138.

Where the plaintiff accepted the burden of proof put upon him by the Court below and produced certain witnesses an order to prove execution of the deed:

Held, that he was not entitled in second appeal, because the evidence of the witness he put forward had been disbelieved, to turn round and say that it was not his duty to call evidence at all and to ask the Court to disregard the evidence which he had given.

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17 O. C. 138=25 I. C. 363.

Under section 43 of the Provincial Insolvancy Act, a Judge can take cognizance of the bad faith of a debtor at any time, whether before or after the making of the order of adjudication, although it may be that the Court has no power to refuse to make an order of adjudication merely because an act of bad faith is proved.

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17 O. C. 142=24 I. C. 604.

It is not necessary that each of the Magistrates of a Bench of Honorary Magistrates deciding the case must invariably be present at every hearing when evidence is heard and recorded. The words "the constitution of the Bench for conducting trials" in section 16 of Act V of 1898 do not exclude the authority of the Local Government or the District Magistrate to lay down rules for the guidance of the conduct of business by Bench of Honorary Magistrates. The criterion of the validity of a judgment of a Bench of Magistrates is simply whether sustantial justice has or has not been done. If for example, 2 out of the 3 members of the Bench delivering the judgment

were present on 11 out of 12 days when the evidence was recorded, and the third on 7 of those days, the irregularity is trifling and curable under section 537, Criminal Procedure Code, as occasioning no miscarriage of justice.

17 O. C. 148=24 I. C. 119

To interpret rule 42 of the Oudh Civil Dgest as meaning that no plaint or application can be received in Court unless the Court-fee which is on the plaint or application has been purchased on the date on which the presentation is made, is entirely erroneous. In such cases, simply a proper note of the actual date of presentation should be made on the Court-fee labels and the plaint or application ought then to be admitted.

17 O. C. 150=24 I. C. 32.

Thus the vendee cannot defeat the pre-emptor's right by transferring the property, after the institution of the pre-emption suit, to persons having a right to pre-emption superior to that of the pre-emptor himself.

Persons failing to exercise their right of pre-emption within the period prescribed by law cannot defeat even an inferior right of pre-emption by taking a conveyance of the property after the time for a suit for pre-emption has expired.

Persons taking conveyance of a certain property cannot subsequently plead with any good grace that the property was not transferable.

Restrictions as to alienation put by a Settlement Court's decrees as regards certain lands do not render those lands absolutely incapable of transfer. They are imposed simply for the benefit of the superior proprietor who alone can challenge the alienation of such lands.

Note.—R. 20 O. C. 13=38 I. C. 589.

17 O. C. 153=25 I. C. 121.

It is not necessary to obtain a fresh decree under Order XXXIV, rule 6, Civil Procedure Code, if the decree originally passed is both a decree for the sale of the property mortgaged and personal decree against the property of the judgment-debtor.

A decree might be construed in the light of the judgment.

17 O. C. 157=24 I. C. 45.

Article 123, Schedule 1, of the Limitation Act, applies only to a suit for a share of an estate which the defendants is legally bound to distribute and does

not govern a suit recovery of possession by one of the heirs against an other heir, *e. g.*, a Mohammadan widow. Article 144 only is applicable to the latter case.

The possession of a lien-holder cannot be adverse to those against whom the lien is claimed, nor is the lien-holder entitled to sell away the property to third persons.

The lien recognised by law in favour of a Muhammadan widow arises only in cases where the widow gets actual and lawful possession. Lawful possession means possession which has been obtained neither by force nor by fraud.

Where the heirs of a deceased Mohammadan alleged that the widow had obtained possession over the deceased's property by fraud, in as much as when she went to the Revenue Courts to ask for mutation of the property in her favour she made statements which showed that she was the absolute owner of the property.

Held, that having regard to the fact that the entries in the Revenue Registers are made only on the basis of an already existing possession, the allegation of fraud could not be sustained.

Where a deceased Muhammadan's property, and not his widow's right as a lien-holder, is transferred by her, the transferee cannot plead as against the heirs of the deceased that by virtue of the transfer he acquires any right to call upon the heirs to pay him a proportionate share of the dower-debt before they are entitled to a decree for the property in his possession.

Where the heirs of a Muhammadan sue the widow and her transferees for recovery of possession of the deceased's property, and the suit is decreed and the widow submits to the decree the transferees are no more entitled to plead that they are not liable to be ejected until the widow has been paid.

The fact that certain persons attested the execution of a document is no sufficient evidence of the fact that they had notice of its contents. It cannot be said, therefore, that the parties attesting a deed of trasfer, were consenting parties to the transfer.

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17 O. C. 169=25 I. C. 160.

An application which is in substance an application made with the object of moving the court in the matter of a formar application which

has been postponed, suspended or otherwise stayed by reason of some order is an application to continue the suspended proceeding from the point where it was stayed and may be made at any time within three years from the date when the right to apply accrued, that is, when the order for postponement, suspention or stay was withdrawn or became in operative even though the execution proceeding may have been struck off by that order.

17 O. C. 173=25 I. C. 164.

The mere fact that preference has been given to one creditor over the other does not in itself render the transaction in favour of the preferred creditor voidable under section 53 of the Transfer of property Act, provided that the transferee should be innocent of the fraud intended by his debtor.

The motive with which a *benami* purchase is entered into, the position of the parties to transaction and their relation to one another, the possession of the property concerned and of the title-deeds there of, the source and adequacy of the purchase of the money and the previous and subsequent conduct of the parties to the transaction afford valuable *data* for determining the intention of the parties and the nature of the interest, if any, sought to be created.

17 O. C. 184=25 I. C. 633.

Where the applicants were convicted under section 147 of being members of an unlawful assembly and under sections 324/194 by reason of hurt caused by one of them and were sentenced to separate terms of imprisonment in respect of both the offences, *held*, that the sentences were legal and no exception could be taken to them.

17 O. C 186=25 I. C. 45.

Held, that an adoption of a *Brahman* boy by a man of a lower caste is not authorised by Hindu Law.

For the purposes of inheritance each primary caste (Varna) must adopt from within its own limits.

17 O. C. 193=25 I. C. 146.

(1) Where the parties had agreed to start a business in partnership and to contribute capital therefor and to divide the profits and losses in fixed shares and a lease for the farm and sale of drugs was acquired in the name of the plaintiff after that agreement had been made, *held*, that the agreement was not illegal.

(2) *Held further*, that the rules on the subject which have the force of law lay down no more than that the Government refuses to recognize any person for the purposes of management or the realization of the Government demand other than the person or persons managed as lessees. There is nothing in the rules to prevent a lessee agreeing to transfer a portion of the profits or losses resulting from the lease, to a third party. (3) Held also that under O. XX, R. 15, Civil Procedure Code, it is within the discretion of a Court either to pass or not to pass a priliminary decree and a Court would make an improper use of this discretion if it passed a preliminary decree for the determination of points on which the parties had already agreed.

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17 O. C. 207=25 I. C. 384.

Held, that till the sequestration of the estate by attachment or otherwise, a creditor is not entitled to seize the rents and profits of the property of the deceased accruing after the property has devolved on his heirs-at-law or to make them personally liable to the extent of those profits prior to the sequestration. Such profits cannot be treated as the estate of the deceased and the heirs of the deceased are entitled to appropriate them.

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17 O. C. 210=25 I. C. 403.

The plaintiff instituted a suit for pre-emption in respect of a sale-deed executed for an alleged consideration of Rs. 2,000, the plaintiff valued his claim at 400 but subsequently admitted that the market value of the disputed property was 1,000. The Sub-Judge relying on the plaintiff's statement returned the plaint for presentation to the proper Court and it was presented on the same day in the Court of the Munsif.

Held, that as there was nothing to show a deliberate or reckless under valuation of the property in order to secure some improper advantage or a *mala fide* desire to institute the suit in a wrong Court, s. 14 Limitation Act applied to the case and the plaintiff was entitled to the exclusion of time during which he had been prosecuting the proceedings in the Court of the Sub-Judge.

Note—Dist. 19 O. C. 367.

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17 O. C. 213=25 I. C. 409.

An agreement to stifle a prosecution in respect of an offence of a public nature is against public policy and illegal. Agreements of that

class being founded upon the suppression of criminal offences, have a tendency to subvert public justice and it is well recognised rule that a person who has a public duty to perform should not be allowed to cause public injury in order to make a profit for himself. But there is no obligation on a person to forego his private rights and in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, not with standing they are of a public nature to compromise or settle his private damage in any way he may think fit.

Where the consideration for a promise is to obtain from or with-draw a criminal prosecution for a non-compoundable offence the promise can not be enforced. But in cases like those of criminal breach of trust or embezzlement where there is always a civil liability a bond can be taken in-acknowledgment. of that civil liability, provided the stifling of the prosecution forms no part of the consideration.

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17 O C. 218=25 I. C. 302.

In cases where there is no stipulation restraining redemption before a certain period, but only a period is fixed for payment or within which the mortgage money is likly to be satisfied from the usufruct, the term fixed for payment can only be regarded as a protection for the debtor till the contrary intention is shown. In the absence of such an intention the mortgagor may redeem at any time before or at the end of the term.

In each case the important thing is to point out whether it was the intention of the parties as expressed in the deed to postpone redemption till the mortgagee had enjoyed the usufruct for the full period named. Such term may not form an essence of the contract, where the mortgagee is only to take interest at a specified rate from the profits of the mortgaged property and to credit the rest towards the principal money.

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17 O. C. 224=25 I. C. 316.

When a statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with.

Held, that Civil Courts are invested with jurisdiction of a two-fold character in respect of objections relating to title which have been put forward in the Revenue Court within the time specified in the proclamation. In the cases specified in clauses (*a*) and (*b*) of sub-section (1) of section III of the Land Revenue Act. the jurisdiction conferred is original.

In cases under clause (*a*) there is no rule of limitation other than that which would apply under the ordinary law relating to civil suits.

In cases under clause (*b*) the jurisdiction must be invoked within the period of 3 months from the date upon which the objector is referred to the Civil Court. In cases under clause (c) the Civil Court has an appellate jurisdiction only.

Held, further that the jurisdiction being conferred on the Civil Court by statute and not by the Revenue Court order, the Civil Courts when their jurisdiction is invoked must satisfy themselve that all the conditions and qualifictions annexed to the grant of jurisdiction have been strictly complied with.

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17 O. C. 235=25 I. C. 689.

Where a disruption of the unity of a joint family as proved or admitted to have taken place, *held*, that no presumption can be raised as to the date of that disruption.

Held, further, that where one co-parcener separates himself from the others there is no presumption that the remaining members remain united.

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17 O. C. 242=25 I. C. 694.

A vendee, defendant in a pre-emption suit, occupied, when that suit was instituted against him, the position of a co-sharer with an absolute right of transfer and of enjoyment but subject to the danger of being attacked by a claim for pre-emption by virtue of recent purchases. A decree for pre-emption was passed against him in that suit. Before his appeal came to be decided a suit for pre-emption in respect of one of the other properties had been brought and had been dismissed and the decree had become final in his favour .

Held, that the vendee and the pre-emptors having become persons equally entitled to purchase the property in dispute before the case was finally disposed of in appeal, lots must be cast under section 9, Oudh Laws Act, in order to determine which of them shall exercise the right to buy the property.

In a pre-emption suit, in determining the right of the pre-emptor or of the vendee, appellate Court may consider any circumstances which have arisen during the pendency of the suit, in appeal, even though these circumstances may have come into being subsequent to the decree of the first Court.

Note.—R.—19 O. C. 110=36 I. C, 799.

Exp.—19 O. C. 153=37 I. C. 63.

17 O. C. 250=25 I. C. 688.

Held, that the relationship contemplated in section 9 of the Oudh Laws Act is a legitimate relationship.

17 O. C. 252=25 I. C. 701.

Held, that a suit for possession of land free of the house and trees wrongfully built and planted by the defendant as distinguished from a claim merely for the removal of trees is governed by Art. 142 of the Indian Limitation Act.

17 O. C. 254=25 I. C. 703

Held, that the provision of the Indian Limitation Act apply to appeals from the decisions of Court of Revenue to a District Judge.

Where the limitation for an appeal under section 119 A of the Oudh Rent Act expired on a holiday and the appeal was filed on the day following, *held*, that the appeal was filed within time.

17 O. C. 256=25 I. C. 704.

Where a decree describes the mortgaged property in more ways than one, and one description applies to one set of existing facts and another to another set of existing facts, the duty of the Court executing the decree is to ascertain by a reference to the record or other evidence to which description the decree was intended to apply.

Where two descriptions of the same subject matter conflict with each other or where two parts of the same description are in conflict, that which is more certain, stable, and the least likely to have been mistaken or inserted inadvertently, must prevail if it sufficiently identifies the subject matter.

17 O C. 260=25 I. C. 846.

Where a Magistrate made an order under section 488, Criminal Procedure Code, directing a Mohammadan to pay a certain monthly allowance towards the maintenance of his wife, *held* that, on a subsequent divorce of his wife by the husband that order became *functus officis*.

17 O. C. 263=25 I. C. 996

Held, that an order passed by a District Magistrate cannot be supported as an executive order in the absence of any statutory authority which would justify the making of it.

The authority of every Magistrate to do any act as Magistrate or as Collector, if such authority exists, must ultimately be found in the powers conferred by Parliament. The immediate power may be an executive order of the local administration, but the power of the local administration to make an order must be derived, either directly or indirectly, from Parliament and it is a mistake to assume that because an officer is an executive officer or a judicial officer, he has any power to interfere with private or public persons which cannot be derived from a lawful origin.

17 O. C. 267=25 I C. 708

Held, that the prohibition which is contained in section 16 sub-section (2) of the Provincial Insolvency Act is aimed at creditors to whom notice of the insolvency proceedings has been given and does not affect persons having claims against the insolvent to whom no notice whatever of the insolvent's application has been delivered.

Held further, that an order of discharge operates only to free debtors from the debts entered in the Schedule.

17 O. C. 273=25 I. C. 838

Where a Magistrate discharged an accused person without making any judicial investigation into the merits of the complaint, *held*, that he was competent to again enquire into the same charge on second complaint.

17 O. C. 276=25 I. C. 843

The real and substantial test by which to determine whether several offences are so connected as to form the same transaction depends on whether they are so related to one another in point of purpose, or as cause and effect or as principal and subsidiary acts as to constitute one continuous action, irrespective of the persons by whom the same may have been committed.

17 O. C. 284=25 I. C. 732

Held, that for the purpose of taxation of pleader's fees proceedings taken on reference under section 18 of the Land Acquisition Act should not be treated as a suit within the meaning of the rules contained in para 272 of the Oudh Civil Digest. Pleader's fees in such cases should be assessed under rule 9 of the latter paragraph.

17 O. C. 291=25 I. C. 599

Held, that there is nothing in the Court of Wards Act or in the rules made there under which are contained in the Court of Wards Manual which

gives any powers to District Officers or to a special Manager to make any grant of land out of an estate under the management of the Court of Wards for a hundred years for the planting of grove.

17 O. C. 294=25 I. C. 600

Held, that adverse possession can legally exist over a right of equity of redemption.

17 O C. 299=25 I. C. 855

Where the superior proprietor of a village executed deeds styled as *pattas* of *birt shanklap* purporting to grant peritable and transferable rights certain plots in lieu of a *nazrana* or premium taken in advance and an annual rent reserved thereby. *Held*, that the transactions did not amount to sales as to give rise to a right of pre-emption.

17 O C. 303=25 I. C. 905

Where the executant of a deed of mortgage executes a subsequent deed, by which he creates a personal covenant not to redeem the prior mortgage until he has satisfied the amount due on the subsequent deed, *held*, that the covenant be enforced against him personally, but not against a subsequent transferee of the mortgaged property.

17 O. C. 306=25 I. C. 907

Held, that there is no absolute necessity for a judgment debtor filing an application under O. XXI, R. 90 C. P. C., to set out in the preamable of application any formal arry of parties, and therefore such an application should not be thrown out simply because an auction purchaser was not shown therein as a party.

17 O C. 309=26 I. C. 1003

Proceedings in execution of decree are Judicial proceedings, and therefore a Court has jurisdiction to pass an order under S. 476, Cr. P. C., with reference to matter which have come to its knowledge in execution proceedings.

17 O. C 311=25 I. C. 1005.

Held, that the "employs" as used in S. 13 *(b)* of the Motor Vehicles Act (II of 1911) means "has" or "retains in his employ" and not takes into his employ.

Held further, that the section provides *imprimis* for the case of a man who at the time in question is driving a motor vehicle without a license and therefore clearly refers to the case of a license inforce at the time of such driving.

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17 O. C. 313=25 I. C. 912

As a general rule a mortgagor cannot compel the mortgagee to accept payment of the mortgage money before the date fixed for redemption where there is a covenant in the mortgage-deed that redemption shall not take place before that date. But a mortgagor cannot be precluded by any covenant from redeeming altogether and where the effect of a covenant is to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor or there are circumstances indicating that the covenant postponing redemption is unreasonable and oppressive and intended to felter the right to redeem, a Court may allow redemption irrespective of that term as it may think fit.

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17 O. C. 318=25 I. C. 917

1. That a member of a joint Hindu family is not competent to dispose of the joint family property by will.

2. That the word "married woman" as used in the Code of Civil Procedure 1882, referred to *fem me converte* as opposed to *fem me sole* and therefore did not apply to a widow.

3. That where a decree has been obtained against a Hindu father whose children are minors, upon a mortgage executed by him, it is for the sons who come into Court to escape liability thereunder to prove that the debt was contracted for an immoral or illegal purpose or that the debt was of an illusory character.

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17 O. C. 327=26 I. C. 503.

If a party to a suit files a document making it a part of the plaint or written statement with the object of relying on it, he cannot be permitted to reside therefrom afterwards without at least proving that it was filed owing to a bona fide mistake and that he had not intended to use it.

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17 O. C. 331=26 I. C. 526.

That the suit for a declaration that defendant No. 2 was not an illegitimate son of the plaintiff was maintainable.

17 O. C 336=26 I. C. 621.

A *mahant* of a *math* or *sangat* though required to observe celebacy is not disqualified from acquiring property for his own personal benefit if he has funds of his own.

The evidence afforded by the subsequent treatment of the property for several generations by the parties concerned may in certain cases be legitimately used for determining the nature of the interest sought to be created. Where there was no sufficient evidence to establish that the particular property in dispute was purchased from the income of the *sangat* or was dedicated to it by the founder of the *sangat* after his purchase and the succession to the pro-property had not been consistent with its being endowed property, *held*, that the land in dispute did not form part of the endowed property.

17 O. C. 339=26 I. C. 517.

Where certain lands held in under-proprietary tenure situate in a village consisting of only one Mohal within the meaning of section 9 of Act XVIII of 1876 were sold to persons who owned a proprietary share in the village but not related to the vendor and a suit for pre emption was instituted by the appellants who also owned a proprietary share in the village and were also related to the vendors, *held*, that the appellants could claim pre-emption as co-sharer in the *mohal* under clause (2) and as they were related to the vendors while the vendees were not related to the vendors the appellants had a right preferential to that possessed by the vendees.

17 O. C. 343—26 I. C. 242.

The defendant was a co-sharer in village. His share was sold by auction and was purchased by the plaintiff. At the time of the auction sale he was cultivating some land and he continued to cultivate the same thereafter without payment payment of any rent. *Held*, that the right of the landlord to claim rent for the use and occupation of the land came into existence for the first time after the sale was confirmed and as no consent was given by him at that time or after-wards he is entitled to have the rent determined under section 127 and claim its recovery under section 108, Rent Act, in one and the same suit.

Notes.—Dist-4 O. L. J. 448=42 I. C. 41.

17 O. C. 347=25 I. C. 752

Held, that the right of a mortgagor to pay in the amount due under a decree *nisi* is a continuing right and can be exercised at any time until an

order absolute is passed. Such application cannot be treated as one under article 181, 182 or 183 of Schedule 1 of the Limitation Act.

Note.—R. 19 O. C., 30=34 I. C. 349.

17 O C. 354=25 I. C. 908

Three Mohammadan plaintiffs instituted a suit against four Hindu defendants for obtaining a declaration "that the plaintiffs and the other *Sunni* Mohammadan of the town of Bilgram are entitled to slaughter cows inside their houses at all times for purposes of sacrifice as well as for other necessities." This declaration was sought against the defendants "and other Hindus of Bilgram." An application made by the plaintiffs purporting to be under Order 1, Rule 8, to have the suit treated as a representative suit was dismissed by the lower Court. The result of the trial was that the lower Court gave a decree to the plaintiffs as against the defendants declaring that they have the right claimed—namely, "to kill cows in their houses for sacrifice or other purposes provided that the exercise of such right they do not commit a nuisance or offend any rule or regulation lawfully promulgated and applicable to Bilgram."

Held, that although every one enjoys the general common law right embodied in the maxim (sic) *utere* tuo ut alienum non laedas that is to say a man is entitled to enjoy his own property in such manner as he chooses provided that in doing so he does not invade the legal rights of his neighbour. Yet the bare denial of a general right of this character does not amount to such an invasion as would justify the granting of declaratory relief.

Further the nature of the relief awarded in the case being purely declaratory and the decree being incapable of execution, it leaves the parties exactly where they were before.

Held further, that in view of the facts alleged and proved there was no ground upon which the discretion could be properly exercised in plaintiff's favour so as to give them the decree.

The general policy of section 42 of the Specific Relief Act appears to be to enable the Courts to grant relief where no relief at Common Law is available and is not intended that the Courts should make declarations of abstract rights exclusive of any practical equity.

17 O. C. 363=27 I. C. 196

Where the statements of certain prosecution witnesses were taken by a Tahsildar-Magistrate under section 164 of the Code of Criminal Procedure

behind the back of the accused and in respect of which the accused had no opportunity of cross-examining, *held*, that they could not be used as evidence against the prisoner. They were admissible only for the purpose of contradicting the statements made by the witnesses in Court and were not admissible for any other purpose.

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17 O. C. 369=27 I. C 354

The plaintiff-appellant obtained a mortgage decree entilling him to bring to sale certain lands held by the mortgagor under the terms of a Government grant free of payment of land revenue. In execution of the mortgage decree the plaintiff-appellant applied for sale of the land, but the Local Government refused sanction to the sale on the ground that in view of the terms of the grant the property was inalienable. The plaintiff-appellant then instituted the present suit against the Secretary of state, the judgment-debtor and a subsequent transferee praying for a decree against the Secretary of State declaring that the right, title and interest of the other defendants in the land in question was liable to sale in execution of his decree, and that the judgment-debtor had an alienable interest in the property. The Subordinate Judge dismissed the suit holding that the Civil Court had no jurisdiction to take cognizance of such a suit, that the suit was not maintainable and that he should not in the exercise of his discretion give such a declaration.

Held, that although the Local Government as an executive authority had an unfettered discretion to refuse sale in such a case, yet the declaration made by it in the same order as to the terms of the grant must be treated to have been made in its capacity of a grantor and could be challenged and the suit was maintainable in respect thereof.

Held further, that the Civil Court has jurisdiction to hear the suit.

Held also, that the question of discretion possessed by the Court in the matter of granting declarations could not be considered until the case had been heard upon its merits.

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17 O. C. 374=27 I. C. 363.

The appellant obtained a decree against two persons I H and A H. I H and A H along with two other persons held a decree against M M and M L. The appellant applied for execution of his decree by attachment of the interest of I H and A H in the decree which they along with two other persons held against M M and M Z. This application was refused.

Held, that M M and M Z being no parties to the appellant's decree the questions arising between them and the appellant could not be taken as questions relating to the execution of the decree held by the appellant. The order refusing the application did not therefore fall under section 47, Civil Procedure Code, and was not appealable,

Held further, that the provisions of order XXI, rule 53, sub-rule (3) refer to the stage at which execution of the attached decree is being sought and nat to a case where the application for attachment of the decree has been disallowed.

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17 O. C. 377=27 I C. 419.

Held that a Court has no jurisdiction to extend the period fixed for payment in a pre-emption decree, whether the application for extension is made before or after the expiration of the period permitted.

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17 O. C. 379=27 I. C. 420.

One M a mortgagee obtained a decree for foreclosure in respect of certain under-proprietary lands on the basis of his mortgage but he failed to give the notice required by section 10, Oudh Laws Act. At the time of foreclosure there were outstanding certain arrears of rent which inspite of his objections were realized from M by the Taluqdar. Subsequently the appellants instituted a suit for pre-emption and claimed a decree on payment merely of the sum which was found to be due under the foreclosure decree,

Held, that after M had obtained the under-proprietary tenure by foreclosure, it was impossible for him to escape the statutory liability cast by sections 152 and 154 of the Oudh Rent Act both upon the transferee and upon the land which came into his possession.

Held further, that plaintiffs who are seeking to have themselves placed in the situation in which M stood at the time he obtained foreclosure cannot avoid any liability to which M was then subject.

Held also, that the payment made by M were in the nature of salvage made to save the property from sale and on that principle also the plaintiffs were bound to pay the amount.

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17 O. C. 386=27 I. C. 424.

Held, that a party cannot resile from a reference to arbitration at his sweet will and pleasure and it cannot avail him to show that having once agreed to the reference he afterwards repented of his action.

Where the parties to a suit referred the case to arbitration and a decree was made in accordance with the awards of the arbitrators, *held*, that no appeal lies from such a decree except where the decree is in excess of or not in accordance with the award.

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17 O. C. 388=27 I. C. 427.

Held, that section 62 of the Transfer of Property Act is a special section supplementary to the general provisions of section 60. It provides summary remedy which is available to a mortgagor in two special cases of usufructuary mortgage (a) where the mortgagee is authorised to pay himself the mortgage money from the rents and profits of the mortgaged property, (b) where the mortgagee is authorised to pay himself from such rents and profits the interest of the principal money. It cannot apply to cases where from the condition contained in the mortgage accounts have to be made up between the parties.

Held further, that section 62 contemplates the existence of only one transaction and does not at all touch the case where a usufructuary mortgage having been, executed other mortgages by way of further charge have been executed by the same mortgagor.

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18 O. C. 1=28 I. C. 184.

Held, that omission to specify the time of sale under order XXI, rule 66 (2) is an irregularity with in the meaning of order XXI, rule 90 and, if substantial injury has been sustained by reason of it, the sale should be set aside.

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18 O. C. 5=28 I C. 236.

Held, that speaking generally, the *lambardar* is the manager of the common lands entitled to collect rents, settle tenants, eject tenants, procure enhancement of rents and do all necessary acts relating to the management of the estate for the common benefit.

Held, further, that in the case of joint estates or under-proprietary or other tenures in which a division of lands has not been made among the sharers, the manager referred to in sub-section (1) of section 126 of the Oudh Rent Act must be the *lambardar*.

Where the plaintiff purchased a certain fractional share in an undivided village, *held*, that it did not absolve the *Lambardar* of his duty to take all

steps to collect the rents from all persons who were liable to pay rents and, in cases of failure to obtain rents, it was his duty to take steps to have the persons in default ejected.

Held also that, where there has been no division of lands amongst the sharers, every co-sharer is entitled to have his proportionate share of every rupee of profit which is collected by *lambardar*.

18 O. C. 10=28 I. C 161.

The terms of a mortgage-deed were, that the mortgage was made for three years bearing interest at 2 per cent. per mensem payable every six months and is default mortgagees were entitled to charge compound interest and to make realization by a suit or in any other way that they may wish, that the mortgagor will redeem at the expiration or before the close of the fixed period by paying of the total amount due thereon and in the event of the mortgage not being redeemed within the fixed period the mortgagor undertook to place the mortgagees in possession for a period of four years, during possession the profits were to be taken in lieu of interest, the mortgagor reserving the right to redeem at any period during these four years by paying up the amount due and that if the mortgage be not redeemed on or before expiration of the said 4 years, complete proprietary title shall pass to the mortgagees.

Held, that the document was an anamolous mortgage, being a combination of a simple mortgage, a usufructuary mortgage and a mortgage by conditional sale.

Held further, that according to the terms of the deed it evidences an intention that interest will not run after expiration of the 4 years and therefore interest could not be allowed after that date.

18 O. C. 30=28 I. C. 171.

Where redemption takes place privately or out of Court, it is at the option of the parties to adjust the accounts and settle their differences amicably or to allow redemption to be effected on payment of the principal money secured by the mortgage under protest, leaving the other matters in difference between them to be adjusted thereafter through Court.

Where redemption had taken place out of Court and there was nothing to indicate that any adjustment of accounts had been made or that the payment had been accepted in full satisfaction of all liabilities arising out of the mortgage, *held*, that a suit for surplus profits was maintainable.

18 O. C. 34=27 I. C. 118.

Held, that the privilege conferred by section 6 of the Indian Limitation Act on minors is not transferable and an assignee from a minor must file the suit either with in the ordinary period provided for the suit, or on the date of the transfer if the transferor's right subsits till that date.

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18 O. C. 38=27 I. C. 389.

Held, that a *defacto* trustee or a trustee *de son tort* is subject to the same liabilities, while he is so acting as a trustee nominated by the author of the trust or appointed in accordance with his directions and a suit under section 92, C. P. C. lies against a trustee of an express or constructive trust whether such trustee be *de jure* or *de son tort*.

Held further, that a person who is not *sui juris* and requires a guardian to look after his property cannot be entrusted with the management of a trust.

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18 O. C. 43=28 I. C. 855.

Where possession in fact is undetermined possession in law follows the right to possession in other words possession follows title.

Held further, that no presumption of possession can be raised in favour of a trespasser.

Where the plaintiffs' title to the land in suit was acknowledged and it was found that the land was under water for sometime during 12 years before suit, *held* that the presumption as to possession must be in favour of the plaintiffs even though the defendants were in actual possession immediately before and after the period during which the land was under water.

Notes.— Explained and Distinguished—19 O. C., 374=37 I. C. 715.

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18 O. C. 48=28 I. C. 859.

Held, that section 108, clause (10) of the O. R. Act has no application where the contest is one between rival tenants, claiming to cultivate the same land.

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18 O. C. 51=27 I. C. 938.

Where a petition of compromise filed in a mutation case was relied upon as a family arrangement, *held*, that it did not require to be registered

under section 17 of the Registration Act as it did not create or confer any fresh title but was only in the nature of an agreement by which an antecedent title in the parties was acknowledged and defined.

Notes.—R. 19 O. C., 75=35 I. C. 770.

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18 O. C. 55=27 I. C. 72.

In suits on mortgages the proper course is to confine the preliminary decree to decree under order XXXIV, rule 4 of the C. P. C. But where a Court goes further and passes a combined decree under Order XXXIV, rules 4 and 6, a separate decree under the latter rule is not necessary.

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18 O. C. 58=28 I. C. 862.

A suit for possession of the mortgaged property brought by a puisne mortgagee against the prior mortgagee was compromised. It was agreed that the claim for possession should be allowed on condition of the puisne mortgagee paying a certain amount by a fixed date. In default of payment on the date mentioned, the prior mortgagees were to be allowed to take possession. On the date fixed for payment the puisne mortgagee applied for extension of time which was granted by the lower Court.

Held, that no extension of time could be granted either under section 148, C. P. C. or order XXXIV, rule 8, C. P. C.

The power to enlarge time by the proviso to rule 8 of Order XXXIV, C. P. C. can be exercised only in cases to which the rule strictly applies, namely; to cases in which a suit has been brought for redemption and in which both a preliminary and a final decree for redemption have been passed.

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18 O. C 61=28 I. C. 357.

A died leaving 3 daughters and certain nephews and grand-nephews. The latter alleged that daughters were excluded by custom. The nephews were not, however, in a position to fight out the matter singly. They consequently entered into an agreement with the grand-nephews whereby they agreed to unite and claim the entire property from the daughters and to divide it amongst themselves *per stirpes*. They jointly sold a half share of the property to one P who had agreed to supply money to meet expenses of the litigation. A suit was thereafter filed and decreed and possession recovered. The present suit was filed afterwards by the nephews against the grand-

nephews to oust them from the share decreed in their favour on the allegation that the plaintiffs were the nearest reversioners and were entitled to inherit in preference to the grand-nephews.

Held, that the agreement was based on the recognition of an existing right and whether that recognition was correct or mistaken, it was not open to the plaintiffs to go behind it and therefore the plea of estopped oprated as an effective bar to the plaintiffs' claim.

18 O. C. 64=26 I. C. 714.

Where there is only an application for leave to sue in *forma pauperis* but no suit is pending in Court and the applicant dies before the leave is granted *held*, that the right to make such an application being obviously a personal right cannot survive in the legal representative of the deceased applicant.

18 O. C. 66=27 I. C. 121.

Sections, 13 and 17 of the Guardian and Wards Act are wide enough to cover an enquiry into any of the matters which can legitimately form the subject of opposition to the grant of a certificate of guardianship to a particular individual and any orders passed in regard to the appointment or refusal to appoint a person as a guardian in the course of such enquiry are either open to an appeal, *qua* the persons to whom notices should have been sent or who had a right to offer opposition under section 47 (*a*) of the Act or are open to revision, *qua* such persons as may not be entitled to appeal under section 115, C. P. C.

18 O. C. 69=29 I. C. 669.

Held, that the Judicial Commissioner's Court having no authority to revise proceedings except the authority given to it by the Cr. P. C. has no authority to set aside an order passed by a Magistrate under Section 145.

18 O. C. 70=27 I. C. 670.

The District Magistrate of Fyzabad issued a general order on 10th November 1913, in which he set out that whereas separate orders had been issued to 36 persons forbidding them to sacrifice cows or bullocks, but as there was reason to believe that other persons to whom such orders were not issued, were intending to sacrifice cows or bullocks in connection with the *Bakrid* festival it was ordered that no person should sacrifice or cause to be

sacrificed any cow or bullock in any place within the boundaries of the city of *Ajudhya* at any time on the 9th, 10th, 11th or 12th of November. This order was duly promulgated.

Held, that the order, as it was issued, was a legal order and that applicants, when disobeying it, rendered themselves liable to prosecution under section 188, I. P. C.

Held also, that the order was further justified by section 118 of Act I of 1900, (Municipalities Act).

18 O. C. 74=28 I. C. 366.

In computing the period of limitation prescribed for an appeal the time taken in obtaining a copy of the decree and the time taken to obtain a copy of the judgment must both be excluded except where those two overlapped and where they overlapped, the time overlapped shall be excluded only once.

18 O. C. 76=27 I. C. 509.

Held, that section 4 of Bengal Regulation XI of 1825 was intended to apply not merely to cases of alluvion and dereliction arising between the owners of properties situated on opposite banks of a river but also to a case like the present in which the dispute is between Government on one side as the owner of the bed of the river and proprietor whose land abuts on the river.

18 O C. 80=27 I. C. 543=2 O. L J. 51.

Held, that Revenue Courts have no jurisdiction to make a partition of buildings or materials thereof. Section 118 of the Land Revenue Act confers no authority on the Revenue Courts to make an actual division of a building.

Held further, that such a jurisdiction cannot be conferred upon the Revenue Courts by a failure, on the part of one of the parties interested to raise an objection in bar of the jurisdiction.

Note.—R. 20 O. C., 92=39 I. C. 400.

18. O. C. 84=27 I. C. 567.

Where a family carries on a business or profession and maintains itself by means of it, the member who manages it for the family has no implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the finance of the business, so long as that business

forms the purpose of the debts in order to bind the whole family thereby because the power to contract debts is incidental to the carrying on of the business, from which the family derives its means of subsistence and support.

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18 O. C 86=27 I C. 540.

Where a deed provided that if the obligee desired to recover his money he should be at liberty to realize it whenever he wished, *held*, that for the purpose of determining the starting point of limitation it must be taken that the money became due immediately upon the execution of the bond. The doctrine is that in a contract like this there is an immediate duty imposed upon a promisor and that no demand on the part of the promisee is necessary in order to render performance due.

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18 O. C. 90=27 I. C. 609.

(1) *Held*, that the Court has full authority to direct the addition of parties in an appeal, under Order XLI, rule 20 of the C. P. C. (2) *Held* further, that when a Court takes action under this rule no question of limitation can arise.

Notes.—R. 20 O. C., 67=4 O. L. J., 92=39 I. C., 135.

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18 O. C. 92—28 I. C. 158.

Where the burglars had disposed of different portions of the stolen property to different persons and the various disposals were separate and unconnected with each other, *held*, that the offences of the persons receiving the same could not be said to form the same transaction and their joint trial was therefore bad in law.

Held further, that the defect of their being tried jointly was not an irregularity which could be cured under section 537 of Cr. P. C.

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18 O. C. 95=30 I. C, 193.

This was a suit for pre-emption of a mortgage, dated 2nd October, 1835. The time of redemption provide for in the deed was to be the time when both the crops were cleared in 1860 or any year afterwards.

Held, that there was a term fixed within which the property might be redeemed and therefore a suit for redemption of the mortgage was maintainable under section 6 of Act I of 1869.

Where a suit for redemption was instituted in respect of the mortgage which resulted in a compromise to which the plaintiff's father with whom he was joint received benefit but the plaintiff himself also received benefit and made no attempt to set up a title conflicting with the terms of the compromise for 30 years at least from the period when he obtained majority, *held* that he adopted and ratified the arrangement and is estopped equitably from now asserting a right to redeem.

18 O. C. 104=30 I C. 285.

Where a clause in a sale-deed purported to prohibit a transfer to any person other than the vendee under the deed, *held*, that in effect it confers a right of pre-emption on the vendee.

18 O. C. 105=30 I. C. 377.

The terms of a mortgage-deed were that if the interest for four six monthly instalments was not paid in full or if the entire amount of principal and interest was not paid on the due date the mortgagee was to be given possession over the mortgaged property for 12 years and redemption was not to take place until the mortgagee had been in possession for the latter term. On breach of the above conditions the mortgagee instituted a suit for possession of the mortgaged property. The mortgagor claimed an opportunity to redeem before the mortgagee was awarded possession.

Held, that it was not open to the mortgagor to obtain a right of redemption which would have the effect of defeating the mortgagee's claim for possession. There was nothing in the provisions of the T. P. Act which would give the mortgagor a right to redeem other than the right which he agreed to accept under the terms of the deed.

18 O. C. 109=30 I. C. 232.

Where a person assigned his equity of redemption in consideration of the assignee transferring to him proprietary rights over certain other lands, *held*, (1) that the transaction was an exchange and that no right of pre-emption could be exercised with respect to it. (2) that an equity of redemption would fall within the definition of the word "thing" in section 118 of the T. P. Act. (3) that neither the equity of redemption nor the rights in lands which formed the subject of exchange could be treated as "price" within the meaning of section 54 of the T. P. Act.

Notes.—R. 18 O. C., 367=33 I. C. 622.

18 O. C. 114 30 I. C. 492.

In a foreclosure suit the mortgagees obtained a preliminary decree for foreclosure. The defendant or his transferee deposited the decretal amount in Court and prayed for a decree under Order XXXIV rule 3 (1), C. P. C. which was passed. The mortgagee filed an appeal against it.

Held, that if any proceedings, which have terminated in a final decree under Order XXXIV rule 3, are made the subject of appeal, the appeal must be treated as an appeal from the decree and must be stamped accordingly and an *ad valorem* fee should be paid.

18 O. C. 115=30 I. C. 200.

Held, that a minor, though not competent to enter into a contract, is not debarred from taking property under a transfer of sale.

18 O. C. 121=30 I C 497.

Held, that an *ad valorem* fee is payable on appeals against decrees passed under Order XXXIV, rule 6 of the C. P. C.

18 O. C. 122=28 I. C. 180.

Held, that (1) 'standing trees' and 'standing timber' are not covertible terms (2) where a deed speaks of transfer of plots of land containing trees and there was no intention that the trees should be severed and used as timber and on the contrary it appears to have been contemplated that the plots should be maintained as groves which they were at the time of transfer, *held*, that there was clearly a gift of immoveable property and the deed required registration. (3) the fact of the existence of a particular legal relationship may be established by oral evidence although the terms which govern the relationship may be expressed in writing.

18 O. C. 125=30. I. C. 694.

Where in an insolvency proceeding a proposal is made on behalf of the insolvent for scheme of arrangement of his affairs the District Judge must, under the provisions of section 27 of Act III of 1907, fix a date for consideration of the proposal and issue notice to all creditors and put the scheme before them. If a majority in number and three fourths in value of all the creditors whose debts are proved and who are present in person or by pleader resolve to accept the proposal, it is the duty of the Court to consider whether it shall or shall not approve the proposal. The fact that

the proposal is approved by the creditors does not involve approval by the Court. But if there is no such majority in favour of the proposal it will stand rejected whatever be the opinion of the Court as to its merits.

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18 O C. 131=30 I. C. 253.

Held, that the principle, that a party to a fraudulent transaction cannot be allowed to plead his own fraud when the fraud has been carried into effect, applies also to a case of the defendant pleading his own fraud so as to escape liability under the claim made by the plaintiff.

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18 O. C. 134=30 I. C. 261.

Where land formerly held by an unprivileged tenant on a cash rent was given to another tenant on a grain rent, *Held*, that latter cannot be compelled to pay a rent which amounts on a cash valuation to more than 17/16ths of the rent paid by his predecessor. Section 47 of the Oudh Rent Act is intended to protect an unprevileged tenant by laying down a maximum rent and directing that the tenant shall not be liable to more than that maximum.

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18 O. C. 138=30 I. C. 295

Held, that (1) the waiver of rights referred to in the letter of the Financial Commissioner, dated the 7th August, 1868, was only with regard to the inhabited area within the *Mohallas* of the Lucknow City and not with regard to the inhabited area within the villages included within the Municipal limits of Lucknow City (2) *kundri* though included within the Municipal limits of Lucknow is not a *Mohalla* of the city, but a village, as the papers prepared for this area at the time of settlement were prepared as though it were a village and not a portion of the city.

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18 O. C. 145=30 I. C. 768.

On 6th January, 1904, while U. P. Act III 1899 was inforce a decree was obtained personally against K. who was a person disqualified from managing his estate and whose property was under the Superintendence of the Court of Wards.

Held, that (1) the Ward personally is in the eye of law no body for the purposes of suits brought by or against him and therefore the decree in question is a nullity as it was not obtained against any legal personality representing K. (2) the collector could not be substituted in place of K. so as to execute the decree against him.

18 O. C. 147=30 I. C. 269=2 O. L. J. 313.

Where a document, which by independent testimony is conclusively proved to have been executed by a *parda-nashin* lady, was attested by a witness, who did not actually see the lady sign the deed owing to the fact that the *parda* intervened between them and her, *held*, that this circumstance did not afford reason for invalidating the deed, where there was no fraud and the witnesses were in a position to know that the document had been executed by her.

18 O. C 154=30 I. C. 371.

Held, that where money is advanced on a mortgage by a single individual, release of the mortgage debt by one of the heirs of the deceased mortgagee on payment to him of the entire mortgage money does not bind the other heirs of the mortgagee.

18 O. C. 157=31 I. C. 724.

These suits were brought for the recovery of moneys due to the plaintiff Bank on promissory notes executed by one M. deceased who at the time of his death was a member of the plaintiff Bank. The defendant No. 1, who was the son of M. became member of the society on the death of his father. One of the bye-laws of the plaintiff society laid down ".....If the heir successor in interest is elected all rights and liabilities of the deceased member shall devolve on him." *Held*, that defendant No. 1 by joining the society as a member, having accepted the bye-law in question, was bound to pay the liabilities of his father to the Bank irrespective of the assets which he received from his father.

18 O. C. 160=30 I. C. 279.

Held, that section 66 of the C. P. C., only applies to ordinary *benami* purchases at execution sales but does not affect purchases of property by one member of a joint Hindu family in his own name but with joint funds.

18 O. C. 162=31 I. C. 717.

Where a Hindu father who was found to have had no co-parcener on the date of the sale made a sale of the ancestral property *held*, that the sale could not be impugned by his after born sons as they acquired a vested interest only in such family property as existed on the date of their birth.

18 O. C. 168=32 I. C. 728.

A *Jagir* granted by Wajid Ali Shah, the then King of Oudh, to his eldest son for the maintenance and support of the Prince and his children was

maintained by the British Government after the annexation of Oudh. The *sanad* granted by the British Government provided that it having been established after due enquiry that the villages had been held in rent free tenure under the former Government, the Chief Commissioner is pleased to maintain the tenure in perpetuity so long as there are lineal heirs subject to the conditions of loyalty, etc. specified in the *sanad*.

Held, that (1) the grant in question conferred a heritable and transferable estate. The duration of the grant was to last as long as the grantee had lineal descendants existing and the grant was to lapse or to be resumed on the happening of any of the contingencies specified therein and no other (2) a grant of villages revenue-free in consideration of the rights held by the grantee prior to the confiscation does not amount to a pension within the meaning of Act XXIII of 1871. (3) A document which is not enforceable as a mortgage may be used in evidence for a collateral purpose unconnected with the mortgage. (4) Although as a rule the deelings of a *de facto* guardian of a Mohamedan minor with the minor's property do not bind the minor, there might be cases of urgent and imperative necessity where a transaction entered into for the benefit of the minor may be binding on him. (5) According to the general principles of Mohammadan Law alienation of the minor's property by an unauthorized guardian even if it was not made for a valid cause was neither void nor voidable but its validity or invalidity is only determined by the minor adopting or not adopting after he has attained majority though the effect of his decision will relate back to the date of the inception of the transaction. (6) In the case of a continuing obligation such as the engagement of a servant or the continuance of a tenancy, an absence of repudiation or the acceptance of service or rent with full knowledge of the facts implies an undertaking to adhere to the obligation and operates as a ratification or renewal of the old contract by the party accepting the service or rent.

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18 O C. 188=31 I. C. 748.

The *Maniarpur* Estate was held, at the time of annexation of Oudh, by one *Sughra Bibi* a *Bachgoti Khanzada* of *Shia* faith. The summary settlement was made with her and a *sanad* in the ordinary primogeniture form was subsequently granted to her. She died on the 11th November 1865, but her name was entered in the first and second lists framed under section 8, of Act I of 1869. She executed a will on the 29th June, 1862, bequeathing her whole estate to her youngest half brother *Akbar Ali*

Khan who succeeded to the estate on her death. At the date of the execution of the will and at the date of her death her eldest half-brother *Jafar Ali Khan* was alive. *Akbar Ali Khan*, transferred on the 23rd July, 1869, by a *hiba-bil-ewaz* 39 villages to his wife *Ilahi Khanam*. On 29th June, 1871, sixteen days before his death, *Akbar Ali* made a will by which he bequeathed the remaining 43 villages in the estate to *Ilahi Khanam*. At the time of *Akbar Ali Khan's* death on the 15th July, 1871, his nephew, *Ghulam Husain Khan*, son of his second brother *Hasan Ali Khan*, was alive. *Ilahi Khanam* died intestate on 20th April, 1899, leaving six daughters *Ummatal Fatima, Bibi Batul, Kaniz, Asghari, Ruquaiya* and *Haidari* who took joint possession of the estate on the death of their mother.

Two suit were now brought, one by *Ghulam Abbas* son of *Bibi Batul* and the others by *Mohammad Jafar* son of *Ummatul Fatima*, both claiming possession of the Taluqa under the rule of primogeniture, asserting that succession to the estate was governed by the terms of the *sanad*. The Subordinate Judge found that *Ghulam Abbas* was born before *Mohammad Jafar*. This finding was upheld on appeal.

[Per Stuart, A.J.C.] *Held*, that (1) litigation which took place subsequent to the death of *Ilahi Khanam* to which her daughters were parties could not operate as *resjudicata* in the present suit as the daughter's son were not parties to them. (2) Ilahi Khanam was neither a *Taluqdar* nor an heir or legatee of a *Taluqdar* and that succession at her death was not governed by the provisions of section 22 of Act I of 1869. (3) The amendment made by U. P. Act III of 1910 in the definition of legatee, as given in section 2 Act I of 1869, could not be given retrospective effect in the present case as it would have the effect of divesting persons who would otherwise be entitled at least to a portion of the estate. (4) that the words "would have succeeded" as used in section 14 of Act I of 1869 are not equivalent to might have "succeeded" and must be confined to persons in the special line of succession that would have been applicable to the particular case if the transferor or testator had died intestate and the death had occurred at the date of the transfer or, in the case of gift by will, at the time when the succession opened. (5) A transfer as to a person coming under any of the clauses of section 22 does not bring the transfer within the provisions of section 14, if that person would be excluded by a senior member in his own class. The grouping in the clauses of section 22 cannot be held to bind the rule of section therein. (6) At the time of *Sughra Bibi's* death her eldest brother and the son of her second brother

having been alive, the bequest made by her to her fourth brother *Abbas Ali Khan* had the effect of breaking the prescribed line of succession and so the provisions of section 14 could not be applied. (7) Explanation to section 3 of U. P. Act III of 1910 refers only to the succession to the estates of a Talukdar and therefore could not apply to *Ilahi Khanam*. (8) That the rule of primogeniture laid down in the *sanads* granted by *Lord Canning* meant the rule of lineal primogeniture as known to English Law. (9) That the estate created by the aforesaid *sanad* is not an estate known to English Law. To a certain extent it resembles an estate *in fee simple* but is differentiated from it by the fact that under its terms no female can succeed. It bears some resemblance to an estate in *tail male* but is differentiated from that by the fact that a collateral can succeed under the *sanad* whereas no collateral can succeed to an estate in *tail male*. (10) The word "successors" as used in the *sanad* means "successors on death" and includes both heirs and devisees but not transferees during lifetime. (11) The words "nearest male heir" cannot be interpreted as meaning nearest male heir according to the personal law of the grantee." (12) The meaning of the *sanad* with regard to succession may be summarized as follows:—In event of intestacy the case of all relatives of legitimate descent would be considered, all females and those claiming through females would be excluded and the succession would go to the surviving representatives of the highest line however, collaterals only being admitted in the absence of the survival of descendants. (13) Although succession to the estate is regulated under the terms of the *sanad*, neither of the plaintiffs-appellants as daughters sons, have any title under its terms.

[Per *Kanhiya Lal*, A. J. C.] *Held*, that (1) the word "successors" as used in the *sanad* denotes successive heirs or persons succeeding to the intestate or undisposed of residue rather than persons in whose favour a transfer or bequest might be made by the owner in his lifetime. (2) In the hands of *Akbar Ali Khan* and *Bibi Ilahi Khanam* the estate was governed by the Mohammadan law and the plaintiffs as sons of the daughters ar entitled to the estate in preference to the daughters. (3) Exclusion of daughters by the *sanad* does not mean exclusion of the daughter's sons. The disability attaches to the sex and not to the line. (4) Among sons by different daughters the preference is to be determined by seniority of the line and the age of persons representing the senior line. But no question of age arises where the persons claiming are not of the same line.

18 O. C. 256=32 I. C. 424.

Held, that (1) the right of pre-emption created by the Oudh Laws Act is a personal right in the owner incident on the ownership of land and is heritable. (2) A person, who had no right of pre-emption at the date of sale but who inherited the property by reason of the ownership of which the right of pre-emption arose from a person who had such a right, can claim pre-emption.

18 O. C. 263=32 I. C. 362.

The defendant-respondent after the death of her husband brought suit for recovery of Rs. 16,000 which she stated was owing to her on account of her dower. In her plaint she had stated that the amount of her dower was fixed at Rs 51,000 that she was in possession of the estate left by her husband, that she was the legal heir to $\frac{1}{4}$ of his estate, and that she was entitled to recover $\frac{3}{4}$ of the dower amounting to Rs. 38,000 odd from the remaining $\frac{3}{4}$th of the estate, but she confined her claim to one for Rs. 16,000. She got a decree for the full amount claimed and it was realized by sale of certain portions of the estate. The plaintiff as one of the heirs of the defendant's husband brought the present suit to recover possession of his share in the estate. The plea raised in the defence was that the defendant was in possession with a claim for the unpaid portion of the dower debt. *Held*, that the lien for the dower debt had been extinguished by the decree for dower obtained by the defendant and therefore she was not entitled to raise this defence.

18 O. C. 268=32 I. C. 429.

Some creditors of a judgment debtor applied for his adjudication as an insolvent. Subsequent to this application some property to the judgment debtor was sold in execution of a decree for money held by another creditor. The sale proceeds were realized by the Court executing the decree before the order of adjudication was passed, but the sale was not confined till sometime later. *Held*, (1) that the receiver of the estate of the insolvent was not entitled to claim payment of the sale proceeds for rateable distribution among the creditors of the insolvent. (2) If the title of the insolvent to the property sold had determined by order of adjudication, it was of no consequence whether the money was paid to the creditor by set off or was laying in Court awaiting the confirmation of the sale.

18 O. C. 272=32 I. C. 432

Held, that the payee of a promissory note the consideration of which has failed cannot by endorsing it after maturity give any rights to the endorsee as against the maker or his representatives.

18 O C. 275=32 I. C. 451

Where at a meeting, *held* under the provisions of section 153 of Act VII of 1913, of the creditors of a Bank which had stopped payment, a majority in number, representing ¾in value of the creditors present in person or by proxy, agreed to a scheme for its re-opening and the conduct of its business and the arrangement having been sanctioned by the High Court came into force accordingly and one of the creditors had, between the date when the creditors noted upon the proposal and the date when the High Court sanctioned the arrangement, obtained a decree in respect of his debt, *held* that the agreement was binding on him. Such an agreement when it has been sanctioned takes effect from the date when it is arrived at and not merely from the date of sanction.

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18 O. C 280=32 I. C. 341=I O. L. J. 488.

Held, that a usufructuary mortgagee with whom money is left for redemption of certain prior mortgages to enable him to obtain possession of the mortgaged property cannot, after making default in paying that money be allowed to sue the mortgagor for possession of that property when the latter pays the money due to the prior mortgagee and obtains possessions.

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18 O. C. 282=32 I. C. 465.

Held, that the title of persons entitled to a property under an award of arbitrators cannot be impugned because the award was not filed in Court or because no deed of conveyance had been executed to give effect to its terms.

Notes.—Relied upon-4-O. L. J. 487=42 I. C. 116.

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18 O. C 289=33 I. C. 371.

The estate of the Hindu or Mohammedan female referred to in article 141 of the Second Schedule of Act IX of 1908 need not be an estate created in the same way as the particular estate upon which the estate in *remainder* or reversion contemplated by article 140 leans, that is to say by grant or devise, nor need it necessarily be an estate characterised by the same incidents which attach to such a particular estate,

Limited estates of the type of the estate taken by a Hindu female in property inherited from a male or not life estates in the sense in which that term is understood in English law but they present certain points of resemblance to them which have let the Legislature to assimilate them for the purposes of limitation to life estates in the strict sense of the term.

When successive trespassers have been in possession of a estate adversely to the claimant, the subsequent trespasser if his title was not quite independent of the previous trespasser, can in pleading limitation as a bar tack the period during which the previous trespasser has remained in possession on to the period during which the estate was *held* by the subsequent trespasser himself.

In ascertaining the single heir to the estate of an Oudh Taluqdar, whose name was entered in list 2, the case being one to which the special provisions of clauses (1) to (10) of section 22 of Act I of 1869 do not apply, the limitation in the *sanad* granted to the Taluqdar cannot be appealed to as all such limitation had been wholly superseded by the Act.

The rule of primogeniture does not regulate the succession to a separate property as between collaterals who have not been coparceners with the *propositus* in a joint family governed by *Mitakshara* Law all the more so when the property in dispute has not been property of a joint family since its grant by the British Government made after the annexation even if it be presumed to have been such property before it.

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18 O. C. 340=33 I C. 357.

Held, that a suit for a contribution in respect of costs is not maintainable.

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18 O. C. 341—33 I. C. 361.

Held, that a Hindu governed by the *Mitakshara* Law can adopt without the consent of his wife. Such an adopted son has all the rights of a natural son with regard to the wife of his adoptive father who has not consented.

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18 O. C 343=33 I. C. 365.

Where an Assistant Collector taking action under section III of the Land Revenue Act, directed the plaintiffs to file a suit in a Civil Court within three months to establish the right which they were claiming, *held*, that the Civil Court could not take cognizance of the suit unless it had been brought within three months from the date of the decision of the Assistant Collector.

Note.—R. 4 O. L. J. 553.

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18 O. C. 345=33 I. C. 367.

Held, that a decree-holder auction purchaser can maintain a suit for possession irrespective of the remedy provided by s. 21 rule 95, C. P. C. and section 47 does not bar such a suit.

Held further, that questions relating to the possession of property after sale has taken place cannot be deemed to be questions connected with the execution, discharge or satisfaction of decree, within the meaning of section 47, C. P. C.

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18 O. C. 347=33 I C. 243.

Held, that (1) an auction purchaser who has purchased property at a Court sale in execution of a decree on a simple mortgage obtained by a prior mortgagee cannot obtain possession against a *puisne* mortgagee who was not a party to the suit in which that decree was obtained, and who is in possession under the terms of a usufructuary mortgage of a later date. (2) The rights of a *puisne* mortgagee cannot be affected by the provisions of a decree to which he was not a party. (3) Such a purchaser cannot obtain a right greater than the right possessed by the prior mortgagee. He can do exactly what the holder of the prior mortgage or the mortgagor could do—no less and no more.

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18 O. C. 353=32 I. C 202.

Where a proprietor has leased his lands to tenants and those tenants have been evicted by a trespasser, *held*, that the (1) dispossession of the tenants is the dispossession of the landlord and entitled him to relief under section 9 of the Specific Relief Act. (2) Where tenants in actual possession of the land have not been evicted although they have while remaining tenants of the proprietor attorned in favour of another person and refused to pay rent to the proprietor there has been no such effective dispossession of the proprietor as could enable him to maintain a suit under section 9, Specific Relief Act. (3) It is possible things to arise where a proprietor can be dispossessed within the meaning of section 9 without dispossession of the tenants although in such a case something more than attornment to a third party would be necessary, *e. g.*, forcible removal of the rent collectors of the proprietor and introduction of his own collecting agency.

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18 O. C. 359=33 I. C. 557.

Held, that an application made by a decree-holder for payment of money which had been realized in execution and deposited in Court was a step in aid of execution and application for execution made within three years of the date of such application for payment was not barred by limitation.

18 O. C. 361=33 I. C. 560.

Where a tenant who had been ejected from his holding was readmitted to holding with an increased area on enhanced rental, *held*, that section 47 of the Oudh Rent Act did not apply to the case and the contract for increased rent could not be challenged on the ground of its being against the provisions of that section.

18 O. C 363=33 I. C. 615.

Held, that a *benamidar* can maintain a suit in his *own name*.

18 O. C. 364=33 I C. 619.

Where after the case has proceeded to trial and evidence recorded at considerable length and the stage of argument had been reached, it appeared necessary to the Munsif to have an enquiry made as to the value of the property in suit and on the value ascertained through a commissioner being found to exceed the pecuniary limits of his jurisdiction the Munsif returned the plaint for presentation to a competent court, *held*, that (1) as the defendant had deliberately admitted the estimated value of the suit and as there had been reckless or dishonest valuation for the purpose of working a fraud upon the law the defendant in view of his pleadings would not be heard to say that the Munsif had no authority to dispose of the suit. (2) Although parties cannot by their consent invest a Court with a jurisdiction which has not been conferred upon it by law, yet the consent which is to be deduced from an admission regarding the valuation of a suit is not a consent given to jurisdiction where none exists but relates to the facts of the market value.

18 O C. 367=33 I. C. 622.

Where a Mohamedan transferred certain property to his wife in lieu of his relinquishment of her claim to dower the amount of which was specified, *held*, that (1) the transaction was not one of sale but of *hiba-bil-ewaz*. (2) A *hiba-bil-ewaz* is not a sale within the meaning of section 9 of Act XVIII of 1876 and confers no right of pre-emption under Chapter II of that Act.

18 O. C. 369=33 I. C. 657.

The defendant purchased part of a mortgaged property from the mortgagor during the pendency of the suit filed by the mortgagee to enforce his mortgage. The mortgage was a simple one. Subsequently the mortgagee got a decree for sale and in execution of it himself purchased the property and instituted the present suit for possession against the defendant.

Held, that (1) the defendant was a representative of the mortgagor and as such was not competent to set up adverse possession against the plaintiff. (2) The suit being brought within 12 years of the purchase was within time.

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18 O. C. 372=33 I. C. 661.

A registered power-of-attorney is admissible in evidence to prove the agency under section 85, Indian Evidence Act and unless its genuiness is suspected in which case proof of its execution can be called for, the agent should be allowed to appear and act within the meaning of O. III, rule 2 of the C. P. C.

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18 O. C. 374=33 I. C. 663.

Held that, in order to enable a decree to be executed inspite of the fact that execution is time barred it is necessary to establish that notice requiring the judgment-debtor to show cause why the decree should not be executed as against him and that he has thus been in a position to raise the plea of limitation, that court has expressly or impliedly decided by a final order the question of limitation in favour of the decree-holder and that there has been an effective order of adjudication.

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18 O. C. 377=33 I. C. 258.

Held, that there is no special rule of succession applicable to exproprietary rights in Oudh and they are governed by the personal law of succession applicable to the person possessing such rights.

Where a Hindu widow made a mortgage of her husband's property and on a sale made on the basis of that mortgage acquired ex-proprietary rights, *held*, that the ex-proprietary rights could not be regarded as her self-acquired property or *stridhan* and the heir who would succeed to such rights on her death would not be her heir but the heir of her deceased husband.

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18 O. C. 380=33 I. C 555.

Where a settlement decree awarded a *Nankar* allowance of 10 per cent on the *hasilat nikasi* of a particular village, *held*, that the specification of the property on the rental of which the *nankar* was to be calculated indicated the stock out of which it was to be paid and must therefore be deemed to be a charge upon the village.

Held further, that money charged on the rents and profits of land is treated as money charged on immoveable property for the purposes of article 132

of the Indian Limitation Act read with section 3, clause (25) of the General Clauses Act (X of 1897.)

19 O. C. 1=3 O. L. J. 144=34 I. C. 257.

One G and his ancestors were in possession of a village which they had obtained under a *birt* deed from the Taluqdar. After the annexation of Oudh, the first summary settlement was made with G. Thereafter G died and his interest devolved on his nephew S and on the death of the latter the entire family property devolved on his widows R. and M-R. and M. jointly with the widow of G claimed the village at the regular settlement on the strength of its having been granted to the ancestors of their husbands by the Taluqdar. The Settlement Court granted them a decree subject to the rights of their co-sharers.

Held, (1) that as all the three ladies lived jointly and the widow of G never set up any title adverse to R. and M. her joint enjoyment of the property with them was not prejudicial to their interest. (2) That the widows were given the villages respresenting a certain stock or body of proprietors with the details or particulars of which the government did not care to concern itself, - that the settlement decree did not confer on them greater rights than they had before the confiscation, that their possession even after the decree was only as Hindu widows, and the rights of reversioners were not prejudicially affected by the decree.

19 O. C 12=3 O L. J., 120=34 I C. 266.

A mortgagor left a portion of the mortgage-money with the mortgagee to pay off a prior mortgage but the money was not paid to the prior mortgagee. Thereafter the mortgagor sold his equity of redemption to the plaintiff. After the sale the mortgagee paid to the mortgagor the portion of the mortgage-money which had been left with him for payment to the prior mortgagee.

Held, that any dealings between the mortgagor and the mortgagee made after the plaintiff's purchase could not affect his rights and therefore the plaintiff could not be liable to pay the money paid to the mortgagor after his purchase.

Held further, that the law does not require the purchaser of a property which has been mortgaged to give notice of his purchase to the mortgagee.

19 O. C. 15=34 I. C. 263.

Held, that though a committee is entitled to collect subscriptions for the purpose of maintaining a public institution they are under no obligation what-

ever to the general public to accept any subscriptions which may be offered to them.

19 O. C. 17=34 I. C. 280.

Held, that the issue of a notice under S. 248 of Act XIV of 1882 corresponding to Order XXI, Rule 22 of the present Code gives a new start for limitation even though the preceding application upon which the notice was issued was defective or irregular.

19 O. C. 18=3 O. L. J. 14=33 I. C 820.

The right of private defence of property can only exist in favour of the person who possesses a clear title to that property and where no such title has been determined no right of private defence of property can exist. But a person whose legal title is beyond dispute is while in possession of property entitled to resist an attempt to deprive him of his property by force provided that he does not exercise greater violence than the circumstances of the case warrant.

19 O. C 23=34 I C. 281.

Whether a document is one which the law requires to be attested or not, it is necessary in all cases to prove that the document has been executed, that is to say, signed by the party making the transfer.

Section 70 of the Evidence Act refers only to admissions made in the course of the trial and any admission which can be availed of under section 70 is only evidence against the party himself.

Held further, that the endorsement of the Registrar cannot be relied upon under section 60 of the Registration Act in proof of the execution of the document.

Notes.—R. 20 O. C, 18=38 I. C., 605.

19 O. C. 27=35 I. C. 441.

Held, that (1) Rule 10 of the Rules appended to the Sub-settlement Act (XXVI of 1866) is not exhaustive of the manners in which under proprietary rights can be acquired. (2) A grant can be presumed from acknowledgment by the Taluqdar.

Where the defendants appellants had been in the enjoyment of *dihdari* rights within the knowledge of the previous superior proprietors, paying

rent as such, and mortgaging the same from more than twelve years prior to the suit, *held*, that it was no longer open to the successor of the superior proprietors to question them.

A *dihdar* was generally a person to whom a certain portion of the property sold was assigned by the vendee for his subsistence.

19 O C. 30=36 O. L. J., 189=34 I. C. 349.

On 30th May, 1904 a decree for redemption was passed in favour of several plaintiffs. On 6th September, 1913 one of the plaintiffs put in an application depositing the amount made payable by the decree and praying that notice should issue to the mortgagees to withdraw the money.

Held, that the right to redeem could be exercised at any time before order absolute for sale had been passed and therefore the deposit was valid even though made long after the expiry of three years from the date of decree.

19 O. C. 32=35 I. C. 444.

Held, (1) that an intervener who has not received rent in good faith cannot be joined as a defendant under section 138, Oudh Rent Act. (2) Intervener under section 138, cannot appeal against a decree passed against the tenant if the tenant judgment debtor does not appeal. (3) The inquiry under section 138 of the Oudh Rent Act relates to the period prior to that for which the rent is claimed by the plaintiff.

19 O. C. 36=33 I. C. 756.

A suit was disposed of by the first Court on the preliminary grounds of estopped and limitation without taking evidence. On appeal, it was *held* that on the allegations made by the plaintiff, if true, there could be no estoppel, and that the question of limitation could be not be decided till the evidence was gone into. A remand was made directing those points to be determined after the evidence relevant to them was gone into.

Held, that this was not a final order or decree within the meaning of S. 109 of Act I of 1908 and no leave to appeal to His Majesty in Council against it could be granted.

19 O. C. 39=35 I. C. 434.

Where a prior mortgagee obtained a decree for sale on the basis of his mortgage without impleading the puisne mortgagee and the puisne mortgagee subsequently brought a suit for redemption of the prior mortgage and impugned

there in the correctness of the account contained in the previous decree, *held*, that the proper course in such a case is to proceed on the basis of the mortgage to find out whether the amount declared in the privious decree to be due to the mortgagee was excessive and if it was to re-adjust the account as if no such decree had been obtained. The puisne mortgagee, in such a case, is entitled to repudiate his liability for anything beyond what is actually due on the mortgage.

19 O. C. 44=3 O. L J. 441=35 I. C. 439

Held, that the mere giving of renewal security as distinguished from cash payment by one of two debtors in discharge of a debt for which two persons are jointly liable, does not give him a cause of action for a contribution suit as against the other debtor.

Note.—R. 19 O. C., 347.

19 O. C. 48=33 I. C. 737.

When points of law are referred to arbitrators, they have a right to decide them and their decision cannot be questioned on the ground that it is not in accordance with the received interpretation of the law.

19 O. C. 49=33 I. C. 461.

A right to receive a cash *Nankar* out of the profits of a particular village is a benefit to arise out of land and is therefore "immoveable property" as defined by section 3 of Act X of 1897 and is at all events a *haq* of the nature contemplated by the explanation appended to Art. 132 of the Indian Limitation Act.

Held also, that it must be treated as money charged upon immoveable property.

19 O C. 55=4 O L J. 1=33 I. C. 681.

Property assumed for management by the Court of Wards under the Oudh Land Revenue Act (XVII of 1876) is protected, against execution in respect of any decree following upon a debt of the ward, incurred while the property was under the superintendence of the Court, even after it has been released from such superintendence.

19 O. C. 58= 15 I. C. 446.

A notice of ejectment was successfully contested in the Revenue Court on the basis of a document declared to be a *Shankalap Patta*. The landlord, there-

upon, instituted the present suit in the Civil Court for a declaration (1) that the defendant had no superior or under proprietary right in the land and (2) that the *patta* set up was null and void against the plaintiffs and that the defendant could not acquire any right in the land under it. *Held*, that is competent for a Civil Court to adjudicate in a case of this kind upon the validity of a document of title. The jurisdiction to give a final adjudication upon the validity of a document of title rests with the Civil Court.

19 O C. 60=3 O. L J. 140=34 I. C. 360.

Lending money to a person after he has obtained a decree of redemption on the Security of the property to be redeemed is not the purchase of an actionable claim. The advancing of money by a pleader to his client a part of which is meant for the prosecution of the suit in which the pleader is engaged is a violation of the restrictions placed by law upon dealings between pleaders and their clients and must be deemed to be against public policy and so void under section 23 of the Contract Act.

Notes.—Dist. 20 O. C., 67=39 I. C. 135.

19 O. C. 64=35 I C. 427.

Where a person intervening unsuccessfully as an objector in execution proceedings on the strength of a document of title is obliged to bring a suit to establish his title, *held*, that he must give *prima facie* evidence that the document represents a *bona fide* transaction in order to get rid of the order which has been passed against him.

19 O. C. 67=36 I C. 623.

Where a suit to contest a notice of ejectment was dismissed by the Revenue Court, but the plaintiff before being actually ejected from the land instituted a suit in the Civil Court for a declaration of his status as an under proprietor.

Held, that the fact of his being in possession of the land at the date of suit would not take his case out of the general rule and the suit could not be entertained until he had exhausted his remedy in the Revenue Court under S. 108, Cl. (10), Oudh Rent Act.

19 O. C. 69=3 O L. J. 677=36 I C 643.

Where a finding has been arrived at on a certain issue and it is sufficient to dispose of the case, other findings on other issues cannot be treated as a final decision of the matter covered by them so as to operate as *resjudicata*.

Held further, that by the law of the *Shia* sect of Mohammadans as well as by that of the *Sunni* sect a valid *waqf* can be created by will.

19 O. C 75=3 O. L. J. 339—35 I. C. 770.

Held, that transactions in the nature of family arrangements or settlements are binding on the parties and must be enforced.

Held further, that in order to constitute a binding family arrangement it is necessary that there should be any formal contract between the parties.

In order to decide whether a petition by way of compromise presented to Revenue Court in the course of mutation proceeding requires registration or not, one must consider the situation of the parties at the time when the document was presented and deduce from surrounding circumstances what the parties intended by laying the petition before the Court.

If it purports to be nothing more than an admission or acknowledgement of title already in existence, it does not require registration. On the other hand, if it amount to a declaration of an agreement which was to regulate the respective interests of the parties in the property not merely in *presenti* but in futures, then the document is one registration of which is compulsory under s. 17, Registration Act.

Held also, that the word "declare", as under in s. 17, Registration Act, implies a declarotion of will and not of a mere statement of fact.

19 O. C. 89

Held, that a Court is not bound to defer taking action and awarding punishment, where necessary, in respect of acts and omissions mentioned in section 43 of Act III of 1907, until the insolvent applies for an order of discharge.

19 O. C. 91=36 I. C 835.

Held, that a decree-holder has no *locus standi* to apply for revision of an order of the Judge of Small Cause Court; refusing to invoke the aid of Criminal Court in the matter of an alleged assault upon process servers of the Court made in the course of their executing the decree by attachment of the judgment-debtor's property.

19 O. C. 93=36 I. C 629.

Section 90 of the Evidence Act leaves it to the discretion of the Court whether or not in certain circumstances it will make the presumption there contemplated.

Where the original is not said to have been lost or to have been missing or to be in the custody of any person who declined to produce it and only a copy of it is produced, it would not be wise to raise a presumption regarding such original.

When certain members of a joint Hindu family bring a suit for possession of certain property—as belonging to that joint family—and allege, in their plaint, a separation some years prior to the date of the suit, there is no presumption remaining that the family remained joint up to any particular time and it is for such plaintiffs to prove separation at such a period in the family history as would entitle them to the decree sought.

19 O. C. 100=3 O. L. J. 237=34 I. C. 738.

There is nothing in the Hindu Law to prevent the head and manager of a joint family comprising only minor members, from doing anything in the interests of the family which any other prudent manager may have done under similar circumstances. It would be in the highest degree *deleterious* to the interests of such minor member if the head and managing member of the family were restrained from doing anything, however beneficial to their interests, which necessitated the raising of a loan on the security of the ancestral property till the minors attained majority.

Held further, that a transfer made in the interests of the family, that is to enlarge means of its subsistence might thus be as binding as one made to pay antecedent debts or to meet an immediate necessity.

Where the father acting as manager mortgaged ancestral property in order to acquire by pre-emption on advantageous terms property belonging to a distant branch of the family; *held*, that the transfer was binding on the minor sons.

19 O. C. 108=3 O. L. J. 38=34 I. C. 335

Held, that the Court of the District Magistrate was for the purposes of revision a Court inferior to that of the Sessions Judge.

19 O. C. 110=3 O. L. J. 580=36 I. C. 799.

When certain persons who had no share in the *thok* in which the property sold was situated, at the date of the sale acquired some share in it subsequently under a deed of gift and claimed a preferential right of pre-emption on the basis thereof, *held*, that the subsequent acquisition could not invest them with a retrospective right in respect of a sale effected before they acquired the share.

Held further, that a defence, which may be available to person in possession, may not be available to a person seeking to oust him, and no man can be allowed a decree for pre-emption in preference to another who has a superior right, on the basis of a title acquired after the right to sue accrued.

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19 O. C. 113=3 O. L. J. 11=33 I. C. 601.

Held, that in a joint Hindu family of *Thakurs* governed by the *Mitakshara Law* money raised to meet the expenses of the marriage of a daughter of a deceased member to whose property the remaining male members had succeeded by survivorship must be held to be money borrowed for a family necessity.

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19 O. C. 115=3 O. L. J. 187=34 I. C. 353.

Where a decree passed by the Settlement Court on the admission of the superior proprietor declared the predecessor-in-interest of the defendant to be entitled to under-proprietary rights subject to the payment of an annual rent without any power of mortgage or sale, held, that the condition in the decree restraining alienation was inconsistent with the grant of under-proprietary rights and ought to be regarded as void and ineffectual.

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19 O. C. 117= 3 O. L. J. 175=34 I. C. 426.

Held, that the rights of any ordinary tenant in Oudh, are non-transferable.

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19 O. C. 119=3 O. L. J. 585=36 I. C. 811.

Held that although a minor is entitled to impeach a decree passed against him during his minority for sufficient reasons such as fraud or collusion, yet if no such special reason exists the decree passed against the minor is just as good and conclusive a decree as a decree passed against an adult.

Held, that the mere fact that the guardian *ad litem* did not appear on the date of hearing and allowed an *exparte* decree to be passed against the minor would not suffice of itself to justify a presumption of gross negligence against the guardian.

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19 O. C. 122=3 O. L J. 313=36 I. C. 57.

Held, that although the principle laid down by their Lordships of the Privy Council in I. L. R., 29 All., 331, namely, that a sale could be set aside on payment of amount borrowed for legal necessity where a portion of

the purchase money was justified by any legal necessity is one which must ordinarily apply in cases of alienations by a Hindu widow, yet exceptional circumstances may arise, such as where almost the whole of the consideration money is proved to be paid for legal necessity, and only a small amount remains unaccounted for where alienation should not be set aside.

Where legal necessity was found to have been proved for Rs. 3,782-4-9 out of a total consideration of Rs. 4,000, *held*, that the alienation should not be set aside.

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19 O. C. 131=3 O. L. J. 45=36 I. C. 807.

A question of law will not be deemed to be involved in an appeal under section 110, C. P. C. if it be not necessary to decide it for the disposal of the appeal and if such question is likely to arise only in certain contingencies.

The word "involved" as used in section 110 implies a considerable degree of necessity.

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19 O. C. 136=17 I. C. 308.

Section 439 of the Cr. P. C. does not confer upon any High Court any power to take any proceedings: it only sets out the powers of revision that the High Court possesses in cases which have come before it.

If an applicant can show to the Court by copies of the proceedings or perhaps by affidavit, that the Magistrate in question was not a first class Magistrate or a Sub-divisional Magistrate exercising jurisdiction or that there was on information that a dispute existed likely to cause breach of the peace concerning any land or water or boundaries thereof then he will have shown *prima facie* to the Court that the proceedings in question were not proceedings under Chapter XII at all, whether or no the Magistrate might have called them so and in that case the Court of the Judicial Commissioner would have power under s. 435, cl. (1) of the Cr. P. C. to call for the record and satisfy itself as to the correctness, legality or propriety of the order passed and as to the regularity of the proceedings.

There is nothing in s. 435 (3), Cr. P. C., to prevent the Court of the Judicial Commissioner interfering in proceedings which purported to be proceedings under Chapter XII in a case where the Magistrate has initiated the proceedings without jurisdiction to do so.

A mere omission by the Magistrate to set out in the preliminary order that he was satisfied that a dispute existed does not affect his jurisdiction.

19 O. C. 141=4 O. L. J. 4=35 I. C. 958.

Held, that in a suit for ejectment of a defendant who was in possession, the plaintiff would have to prove a better title in himself to the possession of the property than the title of the defendant. Where theplaintiff who was in possession sued for a declaration of title and obtained it from the first court and on appeal it was admitted by the defendant that he himself had no title to the property, *held*, that, under the circumstances, the defendant having no title to protect had no interest which could give him a right to contest the declaration of title obtained by the plaintiff.

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19 O. C. 145=36 I. C. 814.

Held, that a mortgagor is not liable to pay interest for the future after he has made a deposit in compliance with the terms of s. 83, T. P. Act, and taken all the steps to pay the money to the person entitled to it.

Held further, that if through the fault of the person or persons entitled to it, it is not clear exactly to whom the money is to be paid the mortgagor cannot be deprived of the right conferred on him by the section on account of the Commissions and errors of such persons.

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19 O. C. 151=36 I. C. 832.

Trees growing upon land subject of partition by revenue authorities may properly be partitioned by those authorities along with the land.

The addition of provisions to the Land Revenue Act (III of 1901), which did not exist in Act XIX of 1873 have not altered the law on the subject and ousted the jurisdiction of Revenue Courts in the matters of the partition of trees.

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19 O. C. 153=3 O. L. J. 683=37 I. C. 63.

On foreclosure of certain property one of several persons equally entitled to pre-empt the property obtained a decree for pre-emption in a suit to which others who were also equally entitled to pre-empt were not made parties. Subsequently one of these others brought a suit for pre-emption against the person who had obtained the previous decree for pre-emption without impleading the person who had obtained the original decree for foreclosure. His claim for pre-emption was decreed, but the unsuccessful party filed an appeal against it and during the pendency of the appeal the decree-holder transferred the property acquired by pre-emption to a third person who was joined as a respondent.

Held, that (1) the first decree for pre-emption furnished a cause of action to persons equally entitled along with the decree-holder, inasmuch as the latter obtained the property by pre-emption to the exclusion of others who had an equal right to pre-empt the same. (2) The mission to implead the person who had obtained the decree for foreclosure, in the subsequent suit for pre-emption, was not a fatal defect. (3) After a decree for pre-emption has been passed and payment made in pursuance of it the right to pre-emption fructifies into a title to the property forming the subject of the claim, though that title may be subject to the result of an appeal which may be filed in the case by an unsuccessful party.

The decision in *Onkar Singh* v. *Bhagwan Dat Singh* (17 O. C. 242) cannot be taken to lay down that the person who has obtained a title by virtue of a decree for pre-emption case by his own subsequent act prejudices the position of one to whom he may have wholly or in part made a transfer based upon that title

Notes.—R. 20 O. C. 196 (41 I. L. 909.)

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19 O. C. 159=36 I. C. 916.

In cases of mortgage of the family property by a member of a joint Hindu family not only has a discretion but is under an obligation to vary the rate of interest if the creditors fail to establish that the necessity of the family justified the high rate of interest agreed to and entered in the deed. To a certain extent the fixing of the rate must remain within the Court's discretion, but the decision on the point can be challenged in second appeal.

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19 O. C. 161=37 I. C. 75.

Where the defendant first offered to abide by the plaintiff's oath and then resiled from it, *held*, that the plaintiff could not be entitled to a decree merely on that ground.

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19 O. C. 161=3 O. L. J. 271=35 I. C. 799.

The plaintiff obtained a preliminary decree for redemption against the defendant who was also the *lambardar*. The decree directed the mortgage money to be deposited in or before September. As a matter of fact the money was paid into Court in August, but actual possession over the share was not delivered to the plaintiff until a date *kharif* became payable. It was admitted that there was no accounting for *kharif* profits in the redemption suit.

Held, that a plaintiff in redemption suit being entitled to possession as soon as he had deposited the money, the plaintiff's title to the profit in the

present case arose from the date on which the mortgage money was put into Court.

19 O C. 165=3 O. L. J. 727=37 I. C. 14.

In a case governed by a custom under which the property was distributed among the sons of a person according to the number of their mothers, the question arose whether the descendants of the sons of one of them could succeed collaterally to the property left by the descendants of another of them, so long as the other descendants, though lower in degree of the same stock, were alive.

Held, that the result of such custom was to constitute brothers by the same father and mother and their descendants persons of one stock for the purposes of inheritance and as a logical result of the custom the persons who are descended from a different mother, though nearer in degree are not entitled to preference.

19 O. C 166=3 O. L. J 244=34 I. C. 745.

When after executing a mortgage by conditional sale the mortgagor put the mortgagee in possession of the property mortgaged under an oral agreement, authorising the mortgagee to enjoy the profits and devote the amount realized towards satisfaction of the interest, *held*, that there was nothing illegal in the agreement, and evidence to prove it was admissible. There is nothing in such an agreement which varies, contradicts or adds to the terms of the original deed. On the other hand it merely provides for the satisfaction of one of the conditions of the deed.

19 O C. 169=37 I. C. 116.

Held, that a *riyaya* can maintain a suit for the recovery of possession of the village land appurtenant to his dwelling house against another *riyaya* who has ousted him from it.

17 O C 171=3 O. L. J 298=36 I. C. 49.

Held, that the cause of action for a claim for dower is distinct from the cause of action for a share in the inheritance.

Where a Muhammadan husband sued for the recovery of his share out of the property left by his wife on her death in possession of her mother and the mother did not plead as a defence the non-receipt of her share out of the dower which fell due on her daughter's death, *held*, that it did not operate to bar as *resjudicata* a subsequent claim by the mother for her share in her daughter's dower money.

Held also, that in fixing the amount of dower under s. 5 of the Oudh Laws Act, the Court is not to take into consideration the means of the husband at the time he entered into the contract of dower, but his means at the time it is sought to enforce the contract.

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19 O. C. 183.=3 O. L. J. 720.—37 I. C. 181.

Where a mortgagee who was stranger to the village, obtained a decree absolute for foreclosure and before the institution of the suit for pre-emption based upon the foreclosure decree executed a deed of relinquishment of the property in favour of the ex-mortgagors, *held*, that it could not extinguish the right of pre-emption which accrued on the passing of the decree absolute for foreclosure.

Held, further that a right of pre-emption after it has once accrued cannot be defeated by any thing that happens afterwards.

Notes.—Dist. 20 O. C. 160.

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19 O. C. 185=37 I. C. 170.

The general principles laid down by the Allahabad High Court regarding law of pre-emption, which prevails in the province of Agra, cannot be applied so as to effect the scope of the the Oudh Laws Act which regulates the law of pre-emption in Oudh.

Where rival pre-emptors, having the right to pre-empt, claim the same property in exercise of such right, the right to acquire the property must, under s. 9 of the Oudh Laws Act be decided by lot.

Notes.—Dist 20 O. C. 160 see. 19 O. C. 183.

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19 O. C. 192=4 O. L. J. 22=36 I. C. 104.

Where a person executed a deed of trust in respect of his property, which contained a settlement in favour of his wife and the deed recited that an agreement had been entered into between the settler and his wife to the effect that she would accept the provision made for her in satisfaction of her claim for dower, but the deed did not contain any formal release of the wife's right to dower, *held*, that the agreement mentioned above being the only valuable consideration for the grant, unless and until the agreement was proved the grant and conveyance to the trustees must be taken to be a purely voluntary gift.

Held further, that although in such a case the wife might, acting with full knowledge of her right, deliberately elect to take the benefits conferred upon her

by the deed in lieu of her dower and if she did so, she would be bound by the choice thus made, but the subsequent election could not be *held* to be a substitute for the original consideration.

Held also, that the term "gift" as used in section 3 of the Oudh Laws Act (XVIII of 1876) includes gifts in trust.

According to Mohammadan Law, a holder of property may in his lifetime give away the whole or part of it if he complies with certain forms, but it is incumbent on those who seek to set up such a transaction to prove that those forms have been complied with, and this will be so, whether the gift be made with or without consideration. If the latter, then unless it be accompanied by delivery of the thing given, so far as it is capable of delivery, it will be invalid. If the former, delivery of possession is not necessary, but actual payment of the consideration must be proved and the *bona fide* intention of the donor to divest himself *in presenti* of the property and to confer it upon the donee must also be proved.

Held further, that the rule of law laid down above was not altered or qualified by the provisions of the T. P. Act and the Indian Trust Act.

Held also, that the provisions for mutation contained in the Oudh Land Revenue Act impose upon the public officials concerned administative duties of a *quasi* judicial character, and in the absence of evidence showing a failure of duty on their part the maxim *omnia presumuntur recte esse acta must* be applied to such proceedings.

Held also, that under the Mohammadan Law no statement made by one man that another (proved to be illegitimate) is his son can make that other legitimate, but where no proof of that kind has been given such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement provided his legitimacy be possible.

Held further, that according to Mohammadan law if a member of a family makes statements touching the sonship or heirship of a person, those statements are good evidence of the family repute concerning him.

By the 141st section of the Civil Procedure Act, 1877, repeated in the Civil Procedure Code of 1882 and practically re-enacted in O. 13, R. 4 of the Rules and Orders passed under the Code of Civil Procedure of 1908, it is provided that a presiding Judge shall endorse with his own hand a statement that it (*i. e.*, a document proved or admitted in evidence) was proved against

or admitted by the person against whom it was used. Their Lordships with a view of insisting on the observance of the wholesome provisions of these statutes will, in order to prevent injustice, be obliged in future on the hearing of Indian appeals to refuse to read or permit to be used any document not endorsed in the manner required.

Notes.—R. 19 O. C., 246=37 I. C. 203.

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19 O. C. 221=4 O. L. J. 49=36 I.°C. 941

I a suit by a Hindu reversioner to recover property after the death of a widow the plaintiff at first claimed title through his father who was alleged to have survived the widow. Subsequently it was alleged that the plaintiff's father predeceased the widow, but that his uncle survived her and the plaintiff amended the plaint, claiming title through the uncle.

Held, that as it was not essential that the plaintiff should have named any intermediate reversioner through whom he claimed title and there was no substitution or addition of a new plaintiff, amendment of the plaint after the period of limitation prescribed for a suit had expiried did not bring into operation, S. 22 of the Limitation Act.

Held further, that a *Chaukidar's* pocket book, if regularly kept, has not much probative value as to the date of any birth or death, the Head constable writer, whose duty it is to make the entries in this pocket book, not being bound to require the exact date on which the man, woman or child supposed as born or dead, was born or died.

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19 O. C. 236=3 O. L. J. 578 =37 I. C. 169.

Where certain crops attached in execution of a Small Cause Court decree were, pending, decision of an objection made against attachment, placed in charge of a certain person and after decision of the objection in favour of the objector the crops were ordered to be restored to him but the person put in charge failed to restore the crops and the objector instituted a suit for damages in respect of them, *held*, that such a suit was not cognizable by the Court of Small Causes under Act 35 (J) of the second schedule of Act IX of 1887 as amended by Act VI of 1914.

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19 O. C. 237=37 I. C. 142.

Held, that it is not desirable to except under very exceptional circumstances that a counsel who has been engaged to conduct a case from start to finish for one party should be allowed to appear for the opposite party.

19 O. C. 239=37 I. C. 313.

Held, that section 256 of the Cr. P. C. provides, in the trial of warrant cases, for the recall of witnesses for the prosecution for cross-examination, after the charge has been farmed. The section does not apply to the enquiry into cases triable be Sessions Court. In such cases the evidence of each witness will ordinarily be concluded as each witness is examined and the accused has no right to have his cross-examination concluded after the charge has been framed.

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19 O. C. 240=37 I. C. 198.

On a partition between sons and stepsons, governed by the *Mitakshara law*, a mother is entitled to a share equal to that of her son.

Held further, that an estoppel against estoppel setteth the matter at large.

Where the mother acting as guardian for her minor son entered into an agreement for reference to arbitration for the purpose of effecting a partition and in the course of partition claimed maintenance which was allowed to her by the arbitrator but this portion of the award was afterwards set aside by the Court on the objection of the step son, *held*, that the effect of the modification of the award was to that extent to restore the status *quoante*, and that it was no longer open to the step son to say that the mother had become estopped by her previous conduct from claiming a share.

Held also, that there might be cases where the possession of separate property as *stridhan* by the mother might have the effect of reducing *pro tanto* the share to which she may be entitled on partition.

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19 O. C. 246=37 I. C. 203.

Held, that it being a clear principle of Mohammadan Law applicable alike to *Shias* and *Sunnis* that the estate of a deceased Mohammadan is, before its distribution among the persons who are entitled as heirs, liable for the debts which were owing by the deceased at the time of his death and that the claim of the wife for dower is a debt which is chargeable against the general estate of the deceased husband, where the claim is made after his death, it is competent for the widow of a deceased Mohammadan to put forward her claim for dower in a suit brought by one of several heirs for his share in the estate of the deceased.

Where a husband and wife during the subsistence of a *mutah* marriage entered into a marriage in the *nikah* form, but before doing so the husband

surrendered the unexpired portion of the *mutah* period, *held*, that the second marriage by *nikah* was valid.

Held further, that under section 5 of the Oudh Laws Act the first matter to be considered is whether the sum agreed upon is excessive with reference to the means of the husband, if it is not found to be so it is unnecessary to go any further and there is no occasion to discuss the status of the wife for the purpose of reducing the amount.

Held also, that the expression "means of the husband" as used is section 5 of the Oudh Laws Act signifies the value of the husband's estate at the time of his death, in cases where the claim is made by a widow.

Held further, that the principle matters to be considered indetermining whether any sum fixed for dower is reasonable or excessive are the extent and nature of the claims of the various persons who, as heirs, are entitled to divide the estate. If it were made to appear that the payment of a certain sum on account of dower would reduce the divisible estate to such an extent as to leave the heirs poorly provided for it might reasonably be *held* that such a sum was excessive.

It is a settled law that a childless *shia* widow is not entitled to any share in the landed property of her deceased husband. But where the property consists in the right to receive a fixed annual sum of money in the nature of a rent charge, the widow is not excluded by the rule of *Shia* law from participation in property of this description.

Conduct of Counsel, in the matter of cross-examination of witnesses examined on commission, commented upon.

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19 O. C 290=4 O. L. J. 8=36 I. C. 299.

One J. was in possession of Taluqa Deogaon at the time of the annexation of Oudh under a *firman* of the deposed King. The Summary Settlement was made with him in 1859 and a *Taluqdari Sanad* in the primogeniture form was granted to him in 1861. He died in 1865; his name, however, is found entered in the lists 1 and 2 mentioned in Act 1 of 1869. He was succeeded by his son A. who acquired between 1868 and the time of his death considerable non Taluqdari property, moveable and immoveable. A died in 1899 leaving two sons M. and the present plaintiff. M. as the elder succeeded to the estate by the rule of primogeniture and also obtained possession of the non-Taluqdari property and *held* the same until his death in 1909 when he

was succeeded by his son, the defendant. The plaintiff brought this suit for a half share in the non-Taluqdari property on the allegation that it was not subject to the rule of succession by primogeniture, but was governed by the ordinary Musalman law of inheritance. The defendant pleaded that the property in dispute was an accretion to the ancestral estate and was therefore subject to the same rule of descent as the *Taluqa* and that a part from it his father and on the death of his father he himself became under the old family custom solely entitled to the said property.

Held, that J. had acquired, as declared by S. 3 of the Oudh Estates Act "a permanent heritable and transferable right" in his estate and was unquestionably a Taluqdar within the meaning of the Act. His death before the Act was passed into law makes no difference in his status or in his rights.

Held, further, that the use of the word "ordinarily" in the description of list 2 in S. 8 of the Act clearly implies that an occasional variation would not affect the "custom" of devolution.

Held also, that it does not follow from the difference in the phraseology of S. 8 relative to lists 2 and 3 that descent by primogeniture is confined to cases coming under list 3.

Held further, that the provisions of S. 10 of the Act mean that the Courts shall regard the insertion of the names in those lists "as a conclusive evidence" of the fact on which is based the status assigned to the persons named in the different lists. For example in lists 2 such Taluqdars alone are included whose estates according to the custom of the family "on or before the 13th February 1856 ordinarily descended upon a single heir." Their title to have their names inserted in that list is based on the specific family custom set out in the section, under S. 10 the Courts are bound by the statute to regard as conclusive the fact that there was such a pre-existing custom attaching to these estates on which their inclusion in list 2 was based.

Held also, that the provision as to conclusiveness contained in S. 10 is confined to estates within the meaning of the Act; it does not apply to non-Taluqdari property. The existence however of the pre-existing custom gives rise to a presumption.

Unless there be a custom by which self-acquired properties in a *Mitakshara* family become part of the ancestral estate, or unless it be shown that the person acquiring the same intended to incorporate such acquisitions with the

estate, they descended by the ordinary law of inheritance. The onus of establishing that a custom debars the ordinary rule in such a case would lie on the person asserting it. But the Mohamadan Law makes no distinction between ancestral and self-acquired property and recognises no principle of differentiation in the matter of lineal and collateral succession as is the case under the Matakshara which divides inheritance into unobstructed and obstructed heritage." All classes of property, whether ancestral or self-acquired follow one rule of devolution. If a custom governs the succession to the ancestral estate the presumption is that it attaches also to the personal acquisitions of the last owner left by him on his death; and it is for the person who asserts that these properties follow line of devolution different from that of the Taluqa to establish it.

A *wajib-ul-arz* is a village administration paper, prepared by a village official in which are recorded the statements of persons possessing interests in the village relative to existing rights and customs. As such they are of considerable value in the determination of such rights and customs. But statements which merely narrate traditions and purport to give the history of devolution in certain families not even of the narators, stand in no better position than any other tradition.

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19 O. C. 306 = 3 O. L. J. 552 = 37 I. C. 188.

One D together with his father and uncle formed a joint Hindu family. The father and uncle applied to have their property placed under the superintendence of the Court of Wards. The application was granted and after the necessary notification the Court of Wards assumed management of the family property.

Held, that section 55 of the Court of Wards Act (IV of 1912) prohibits a ward from suing and being sued not merely with respect to such property of his as is under the management of the Court of Wards but in respect of every possible cause of action cognizable by a Civil Court.

Held further, that D who did not make the application did not become a 'ward' within the meaning of the Act.

Held also, that the disabilities imposed by section 55 apply only to the actual wards and not to other members of the family whose interests in the joint family property are managed by the Court of Wards.

Held further, that a member of a joint Hindu family holding a share in the joint family property is a co-sharer within the meaning of section 9 of the Oudh Laws Act, although his name does not appear on the *khewat*.

19 O C. 314=3 O. L. J. 538 = 37 I. C. 84.

Held, that a suit by a landlord against this *Ziladar* and *Mukhtar* for recovery of sums collected as rent of shops and for the price of grain realized as *bazar* dues was not entertainable in the Rent Court and was rightly brought in the Civil Court.

Held further, that the suit not being entertainable in a Rent Court no period of limitation prescribed in the Oudh Rent Act could apply so as to bar the entertainment of the suit by a Civil Court.

Where on the date of issues the plaintiff made an application asking that a date might be fixed to allow the filing of documentary evidence and the Court simply ordered the application to remain with the record, *held*, that it was the duty of the Court to decide on the date when the application was filed what was to be done with reference to the request made for the reception of documentary evidence.

19 O C. 319=3 O. L. J. 639=37 I. C. 423.

Where a testator devised certain landed property to his widow subject to the conditions that she was to have no power to transfer the property, that she was to hold it for life and that on her death the property instead of devolving on her heirs was to devolve on a certain Z, held, that the terms of the will could not be interpreted as meaning that the property was devised to Z with a usufruct for life to the widow.

Held further, that according to the law governing dispositions amongst *Sunni* Mohamedans the effect of a disposition such as the above is to confer complete proprietary title. Under the principles of the law such a disposition must be complete. If it is not complete it is not a disposition and it is well established law that where the testator endeavours to affix condition on to the disposition it is treated as unconditional and the conditions are treated as null and void.

19 O. C 321=3 O L. J. 560= 37 I. C. 138.

Where in order to establish a pedigree reliance was placed upon a genealogical table put in at the time of settlement, but it was not established that the document was prepared by a member of the family or an official

whose duty it was to record it or that any member of the family was privy to its preparation or that its contents were admitted by the members of the family and there was evidence that the entries in the *khewat* made at the time of settlement where not recorded upon its basis, *Held*, that the genealogical table was inadmissible in evidence.

The signatures of persons appearing on documents more than 30 years old and produced from proper custody can be presumed to be in the hand writing of persons in whose handwriting they purport to be. But it cannot be presumed under any provision of the Evidence Act that a person signing on behalf of another had authority to make the signature on his behalf.

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19 O. C. 326 = 38 I. C. 89.

Held, that a co-sharer who is not the *Lambardar* of the village, being under no obligation towards the other co-sharers to collect the village rent, cannot be made to surrender any portion of the amount he has collected to another co-sharer if his collections do not exceed his own share of the profits.

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19 O C. 328 = 3 O. L J. 462 = 37 I. C. 23.

Where a simple mortgage-deed provided that the principal money carried no interest and simultaneously with the execution of the mortgage-deed the mortgagor executed a lease in favour of the mortgagee for period of six years which was the term fixed for payment in the mortgage-deed, *held*, that the lease and mortgage could not be treated as constituting one transaction, namely that of a usufructuary mortgage.

In this case the mortgagee was ejected from the property on the expiration of the lease, but was subsequently restored to possession of a portion of the property. It was alleged that the arrangement between the parties was that the mortgagee was to enjoy the profits, crediting them to the repayment of the principal money.

Held, that the alleged arrangement, which was not one for satisfaction of the terms of the deed of mortgage, but in direct contradiction of the terms of the deed of mortgage, could not be proved under section 92 of the Evidence Act.

Held further, that section 76, cl. (h) of the T. P. Act has no application to a case where the mortgagee has not been shown to be in possession *qua* mortgagee.

19 O. C. 334 = 3 O. L. J. 501 = 36 I. C. 746.

Held, that the principle laid down in sec. 11 of the C. P. C. is substantially modified by the provisions of sec. 44 of the Indian Evidence Act and the principle of resjudicata does not operate in the case of a decree obtained by fraud.

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19 O. C. 339 = 3 O. L. J. 408 = 36 I C. 664

The predecessor-in-title of the defendants obtained a decree from the Settlement Court against the predecessor in interest of the plaintiff's for confirmation of their right to possess and occupy the village subject to the payment of the rent assessed after deduction of 10 per cent. on account of *Dahiyak*. The decree gave to the Taluqdar the power to assess and vary the rent.....The plaintiffs brought the present suit for possession and mesne profits on the allegation that the defendants had failed to accept the enhanced rent fixed by the Taluqdar which had the effect of terminating their rights to remain in possession of the village.

Held, that the defendants being perpetual hereditary lessees and no under-proprietors, under the decree of the Settlement Court, a suit for possession or damages against them is not maintainable in the Civil Court.

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19 O. C. 347=3 O. L. J. 447=36 I. C. 774.

Where the plaintiff, who was one of several joint executants of a simple deed on the basis of which a decree had been passed against him, satisfied the decree by executing a deed of usufructuary mortgage in favour of the decree-holder and brought a suit for contribution against the other joint executants of the deed, *held*, that the suit was maintainable.

The principle of Maxwell *v.* Jameson relied in 19 O. C., 44, would not apply to a case such as this where the plaintiff has executed a deed of usufructuary mortgage and has assigned valuable property to the creditor in order that the profits may be enjoyed in lieu of interest and that the property may be held as security for the payment of the debt. This *ratio decidendi* in Maxwell *v.* Jameson was that the plaintiff had satisfied the debt by giving his individual promise to pay and had parted with nothing and had done nothing more than undertake of fresh obligation.

Held further, that although the suit of the creditor against one of the executants was dismissed as barred by limitation, yet the plaintiff was entitled to claim contribution against his heirs in respect of the amount which he has paid over and above the amount that was due from him.

19 O. C. 353=3 O. L. J. 398=36 I. C. 705.

Held, that the position of a District Judge under the provisions of Indian Lunacy Act (IV of 1912) is partly Judicial and partly administrative.

Held further, that the functions of the District Judge in making an inquisition under s. 82 of the Act are clearly to satisfy himself as to the estate of mind of the person concerned. He issues notices to relatives likely to be interested in the result of his action, but those relatives are not treated in any way as parties to legal proceedings. They are treated rather as *amici curix*. They are allowed to be heard and to make representations and suggestions both as to the calling of evidence and otherwise but they have no right to call evidence and therefore cannot plead in appeal that the evidence which they wished to adduce was not heard.

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19 O. C. 357=37 I. C. 92.

The essential requisite of an operative order under O. 21, rr. 58 to 62 which would necessitate the institution of a suit within one year is that there must be some investigation. If there is no investigation of any kind there can be no operative order and the bar of one year's limitation does not apply to such a case. But there is no authority for the proposition that where a Judge has passed an order after a perfunctory investigation such an order is not an operative order. The order is equally operative whether the investigation has been satisfactory or unsatisfactory.

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19 O. C 363=38 I C. 67.

Held, that a *fard hissa kashi bagh it* drawn up at the first regular settlement is a document admissible in evidence to prove the matter contained in it.

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19 O. C. 367=36 I. C. 702.

Held, that the provisions of sec. 14 of the Limitation Act are not be applied indiscriminately to extend the period in all cases in which the plaintiff has acted without fraud.

Held further, that although it is not intended to lay dawn any hard and fast rule on the subject, yet as a general criterion the rule should be that indulgence under the section should be granted only in cases where the error is one that might be committed by a reasonable and prudent man exercising due diligence and caution.

19 O. C. 370=3. O. L. J. 630=37 I C. 462.

As between an ordinary tenant and a person whom he is willing to treat as a subtenant, the relationship is of the same nature as that between a proprietor of the land and the tenant thereof; and if an ordinary tenant is entitled to claim rent from a sub-tenant he must treated, in the absence of anything in the subject or context to the contrary, as a landlord for the purposes of the Oudh Rent Act.

Held further, that there is nothing in the subject or context of section 127 of the Oudh Rent Act to exclude the case of an ordinary tenant, claiming the rent of his land from a person who had trespassed on his tenancy from its purview.

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19 O. C 374=3 O L J. 595=37 I. C. 715.

Held, that a presumption of ownership would exist in favour of the holder of a perfect title during the period that the land remained *derelict*. But no such presumption can be made for the benefit of a holder of an imperfect title. Thus a trespasser whose title has not become perfected by adverse possession cannot tack on to his period of possession the period during which the land has remained derelict.

Held further, that the requisite factor for the application of this principle is the factor of abandonment and the question to be asked is, did the land remain or did it not remain derelict. Such a principle cannot be applied to a case in which there has been no actual submersion of the land in the proper sense of the term and no abandonment but in which it has only been flooded in parts by temporary floods which interfered from short periods with the use to which it could be put.

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19 O. C. 394=38 I. C. 71.

Held, that a vendee, who is not a co-sharer in the sub-division in which the share sought to be pre-empted is situated, cannot resist a suit for pre-emption brought by a co-sharer in that sub-division merely because he holds a share in a *shamilat patti* which contains some land appertaining to that sub-division

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20 O. C. 1=38 I. C. 821.

Sons in a joint Hindu family are liable for the satisfaction of a surety debt incurred by the father even when no money has been advanced.

20 O. C. 4=39 I. C. 334.

On the day after the *Diwali* festival the house of a respectable Hindu gentleman was raided, and about 42 persons found in the house were arrested. It was found that their object was merely to indulge in a common friendly amusement, and that the idea of making a profit by levying a commission was not present to the mind of the person owning the house.

Held, that the necessary elements constituting an offence under sections 3 and 4 of the Gambling Act were not made out.

Section 11 of the Gambling Act allows the acquittal of an approver only if a disclosure made is believed to be true and faithful.

20 O C. 8=38 I C. 814.

In Oudh, in cases to which the Oudh Rent Act (XXII) of 1886 and the Land Revenue Act (III of 1901) apply, the Court of Revenue has the exclusive jurisdiction to determine what is the status of a tenant of lands and what are the special or other terms on which such tenant holds, and the Civil Court has the exclusive jurisdiction to decide whether or not a person in possession of lands holds a proprietary or an under-proprietary right in the lands.

In a Civil suit by the plaintiff, whose title as proprietor of a village within the meaning of that term in the Oudh Rent Act (XXII of 1886) and U. P. Land Revenue Act (III of 1901) is not disputed, against the holder of the village for a decree for possession thereof and for a declaration that the defendant has neither proprietary nor under-proprietary rights therein, on proof that the defendant is merely a tenant, the claim for a decree for possession must be dismissed for want of jurisdiction, but the plaintiff is entitled to the declaration prayed for.

Where a Revenue Court decided that the holders of a village were in 1852 owners of *zemindari* rights in the village that they had not lost those rights, that it must be presumed that they were not ordinary tenants, and that the proprietor of the village should prove in the Civil Court that they were ordinary lessees, and the proprietor then brought a suit in the Civil Court for a declaration that they had no proprietary rights of the nature of *zemindari*, superior, or inferior in the village and also for a declaration that the decision of theRevenue Court did not affect his rights:

Held, that the decision of the Revenue Court, which was subsequently acted upon in the preparation of the *khewat* of the village, made it necessary

for the proprietor to bring the suit, and that the fact that the holders of the village did not in their written statement in the suit set up that they had any proprietary or under-proprietary right did not disentitle the proprietor the declaration which he claimed.

Notes.—R. 20 O. C. 182=41 I. C., 15; 4 O. L. J. 577.

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20 O. C. 13=38 I. C. 582.

If during the pendency of a pre-emption suit instituted by an inferior pre-emptor the vendee enters into an agreement to sell the property, the subject matter of the suit to a superior pre-emptor on the ground of his preferential right, the agreement, though an acknowledgment of right within the meaning of section 19 of the Limitation Act, offends against the rule of *lis pendens* and is, therefore, unenforceable inasmuch as the creation of a contract capable of specific performance, though not an alienation by itself, is a mode of dealing with the property pregnant with the very mischief which section 52 of the Transfer of Property Act seeks to obviate.

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20 O. C 18=38 I. C. 605.

Section 69 of the Evidence Act requires proof that the signature of the executant is in his hand-writing but this fact may be proved indirectly by a contemporaneous admission of execution made by the executant or by other relevant facts, such as his subsequent conduct, just as well as by the evidence of a witness who directly swears to his signature. Such an admission recorded by the Sub-Registrar in his registration endorsement can be accepted in evidence as proof of execution.

Where a Sub-Registrar is dead the endorsement made by him under section 58 of the Registration Act can be read under section 32 *(2)* of the Evidence Act as his statement, it being an entry made by him in the discharge of his professional duty.

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20 O C. 25=38 I C. 610.

A usufructuary mortgage contained a covenant that the mortgagee should after deducting the interest stipulated for in the mortgage-deed from the collections, pay over the balance annually to the mortgagor, the property being redeemable on payment of the principal money on the expiry of seven years. After redemption of the mortgage according to the terms of the deed without the intervention of the Court, a suit was brought by the mortgagor for the

recovery of the balance of collections which remained in the hands of the mortgagee after deducting the interest for the years during which the collections had been made.

Held, that the suit having been brought within 3 years from the date of the restoration of possession to the mortgagor, fell within the purview of Article 105 of the Limitation Act and was, therefore, within time.

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20 O. C. 31=38 I. C. 511.

The provisions of Order XXII, rule 10, Civil Procedure Code, are not applicable to cases in which there is an assignment of an interest, which is the subject of litigation, between the date of decision of the first Court and the filing of an appeal. Such an assignee, however, ought to be allowed to join in the appeal under section 46 of the Procedure Code.

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20 O C 33=38 I. C. 671.

Possession obtained by a vendee is a sufficient delivery of the property within the meaning of section 54 of the Transfer of Property Act.

The existence of an unregistered sale-deed in the case of tangible immoveable property of the value of less than Rs. 100 does not estop the vendee from relying upon his title by delivery of possession, if the transaction of sale was accompanied by such delivery.

Where a disposition of property is not required by law to be reduced to writing and no question arises as to the *terms* of such a disposition, if reduced to writing, oral evidence intended to prove the existence of such a disposition cannot be excluded.

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20 O. C. 37=38 I. C 677.

Jurisdiction cannot be conferred upon a Court, which does not possess it, by agreement of the parties to the effect that it does possess such jurisdiction; and it is the duty of a Court to refuse to entertain a suit which does not lie within its jurisdiction, whether the point is raised by the parties or not.

There is a distinction between *mauſi* and *guzara* in Oudh. Where the relationship of landholder and tenant does not exist between the parties there may be a *guzara*, but where the relationship of landholder and tenant does exist between the parties there is a *muaſi*.

The provisions of Chapter VII A of the Oudh Rent Act apply to a suit for possession of land *held* as rent free *muafi* and not by way of *guzara*, and the Civil Courts have jurisdiction to entertain such suit.

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20 O. C. 40=38 I. C. 794.

A deed of gift in consideration of useful services rendered by the donee to the donor in the past and natural love and affection creates a binding *hiba-bil-ewaz*.

Under the *Hanafi* Law revocation of a gift cannot be permitted unless the donor makes out a good case, and it will not be permitted if the wish to revoke is the result of a mere whim or loss of temper.

Where the donee did good work in the past and in consideration thereof the donor made him a present which she could well afford, but subsequently losing her temper wished to revoke the gift after 2½ years:

Held, that she could not be allowed to do so even if it were not a *hiba-bil-ewaz*.

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20 O. C. 49=38 I. C. 800.

In suits under section 92, Civil Procedure Code, for the removal of a *Mahant*, the consent of some of the plaintiffs-respondents in appeal to let the property be managed by the original *Mahant* cannot affect the validity of the suit on the date on which it was instituted or the jurisdiction of the Court to hear the appeal.

A party who wants to repudiate an admission of fact made by his Counsel, if it was not justified by his instructions, should do so at the earliest opportunity.

A Vakil's general powers in the conduct of a suit include the power to abandon an issue, which in his discretion he thinks it inadvisable to press.

Apart from its history, the Court may consider the nature of the traditions or the usages of an *asthal* to determine whether the trust is a private trust or a public trust of a religious or charitable nature.

The *Ashthal* Gomtidas at Lucknow is a public religious and charitable trust, and the properties attached to it were granted to the *mahant* of the *asthal* for specific religious and charitable purposes.

If no member of the cult to which the founder of an *asthal* belonged can be trusted to take charge of the *asthal* property without the possibility of recurrence of mismanagement once experienced, it is proper that the administration of the trust should be vested in an independent committee which shall have the power to select, appoint and depute a qualified member of the cult of the founder or other person of the monastic order to continue the religious instruction, if and when it can conveniently arrange to do so.

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20 O. C. 61 = 38 I. C. 764.

The statement of a medical witness, taken and attested by a Magistrate in the presence of the accused, is admissible as evidence in the Sessions Court although the medical witness is not himself called. It ought, therefore, to be recorded with the utmost care and accuracy.

Such evidence should be carefully scrutinized by the Sessions Judge and if it appears that the deposition is essentially deficient or requires further explanation or elucidation, the Judge should summon and examine the witness.

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20 O. C 66=39 I C. 191.

When a suit is dismissed under order IX, rule, 3, C. P. C. it is open to the plaintiff to apply for an order to set the dismissal aside and also to bring a fresh suit. If he chooses to avail himself of one remedy, he is not debarred from availing himself of the other.

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20 O. C 67 = 39 I. C. 135 = 46 O L. J. 92.

When the manager of a joint family dies after the institution of a suit for the recovery of money advanced out of joint funds his sons, who are the managing members of the family, are competent to represent other members of the family, and if they apply within time to carry on the suit, it does not lapse by abatement, irrespective of the fact that some other members of the family are impleaded as parties to the suit beyond the period of limitation.

A loan transaction entered into between a pleader and a person not his client is not against public policy and is, therefore, legally enforceable.

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20 O. C 72 = 39 I C. 186.

Where one of several mortgagors redeems an usufructuary mortgage, it is essential that he should obtain possession of the property before the provisions of section 95, Transfer of Property Act, can be applied in his favour.

For the application of section 43 of the Transfer of Property Act a finding to the effect that the transferee has believed in and acted upon the erroneous representation is not essential. Nor is it necessary that the person who has the right to exercise the option under that section should do so immediately after he obtains that right.

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30 O. C. 79 = 39 I. C. 392.

[Per Kanhaiya Lal, A. J. C.]—There is generally in cases of partition an implied warranty both as to title and soundness, and if either from defect of title or unsoundness as to a part of the property divided, a loss is caused to either party, that loss should be borne by the parties equally unless the loss was due to the *laches* of the former or to any act or omission on his part done or made after the partition. The loss may be due either to the ignorance of one or both the parties to the partition as to the nature of their rights in any of the properties which are the subject of division or to a misunderstanding or fraud by one party or another.

Where the property in dispute, being mortgaged property, was treated by the parties as their proprietary interest and partition was effected in that capacity, but subsequently it passed out of their possession under a decree for redemption obtained by the mortgagors and the plaintiff's lost much more than the defendants.

Held, that under the circumstances the plaintiffs were entitled in equity to some kind of redress, unless they had gained to the same extent in the partition affecting the other properties.

A suit is not maintainable in the Civil Courts for a declaration that the parties to a partition held under the U. P. Land Revenue Act are entitled to re-open the same on the ground that during the partition proceedings certain land was treated as being held by them in proprietary right, though in fact they were only owners of certain mortgagee rights therein, and that it had passed out of their possession on redemption by the mortgagors.

[Per Kendall, A. J. C.]—A plaintiff can come to the Civil Courts for the definition of a title which has arisen subsequently to a Revenue Court partition and if he has such a title defined to him by a decree, he can then approach the Revenue Court to amend the *khewat* accordingly and can then seek a fresh partition from that Court. This would not amount to a re-partition.

Where a number of properties had been the subject of partition and several of them, which had been treated by the parties as held in proprietary right therein, passed out of their possession on redemption by the mortgagors and the plaintiffs instituted a suit in respect of only one such property and expressly kept all the rest of the mortgaged properties out of the plaint.

Held, that the suit as laid was imperfect and could not succeed.

20 O. C. 92 = 39 I C. 400.

A Civil Court has no jurisdiction to disturb a partition of grove land, tress as well as land, made by a Revenue Court.

A claim to possession of a bazar, as distinct from the question of proprietary right in the land on which it stands, does not come within the bar of section 233 (k), U. P. Land Revenue Act, and can be entertained by a Civil Court not with standing a previous decision in partition proceedings.

Revenue Courts have authority to make a partition of the land of a *mohal*, but they would be exceeding their authority in making a partition of miscellaneous income, *e. g.*, income derived from a market and fair, or of the buildings standing on the land.

20 O. C. 97 = 39 I. C. 593.

An agreement between the parties to a mortgage, subsequent to the execution of the mortgage, where by the period for redemption is extended cannot be said to be a clog on the equity of redemption.

The doctrine of clog relates only to dealings which take place between the parties at the time when the original contract of mortgagee is entered into. Parties are at liberty to deal subsequently with each other so as to vary the terms upon which redemption of the original mortgage can be had.

The nature and extent of a restriction placed on the right to redeem may be taken into account in determining the question whether the mortgage transaction was a harsh and unconscionable one.

20 O. C. 104=39 I. C. 598.

At the first Regular Settlement certain persons claimed sub-settlement of a village, which was refused, but as a matter of favour, with the consent of the *talukdar*, a decree was passed in their favour granting them a heritable and non-transferable lease at a rent which was to leave a clear 12½ per cent. profit to the lessees. The amount of rent was to be calculated on the gross assets

and was liable to revision at the end of every ten years. It was stated in the judgment of the Commissioner who passed the decree that no new proprietary right was to accrue to the lessees owing to this concession of the lease, and it was further laid down that in default of payment of the rent fixed under the lease the Courts were at liberty to cancel the lease in accordance with the provisions of the law relating to leases held by persons having an under-proprietary tenure.

Held, that the decree did not confer under proprietary rights on the persons in whose favour it was made.

The Revenue Law in the United Provinces contemplates the partition of *mahals* in the occupation of persons holding settlement decree as heritable, non-transferable lessees and Settlement Officer.

Section 138, sub-section (4), of the U. P. Land Revenue Act, relates only to the case of the partition of *taluldari mahals* which is referred to more particularly in sub-section (2).

There is nothing in Chapter VII of the U. P. Land Revenue Act which would justify the conclusion that a Revenue Court can split up the joint and several liability of lessees holding as joint tenants without the consent of the superior proprietor.

A superior proprietor is not necessarily a party to partition proceedings taken under Chapter VII of Act III of 1901, for the purpose of effecting a division amongst lessees holding a *mahal* the rent of which was fixed by the Settlement Officer, except in cases where the partition of a *taluqdari mahal* is carried out.

In construing the provision of an Act in force, which in themselves are perfectly clear, reference should not be made to the language of a former Act on the subject which the Act in force superceeded.

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20 O. C. 115=39 I. C. 613.

An entry in the revenue records made during partition proceedings to the effect that certain land is subject to a mortgage, is not bar to the maintainability of a suit in the Civil Courts for a declaration that the persons entered in the revenue papers as mortgagees have no mortgagee rights in the land.

Though a mortgagee may for fiscal purposes of the Revenue Law be treated as a proprietor, a question relating to mortgagee rights cannot be treated as a question of proprietary title.

20 O. C. 123=39 I. C. 986

Proceedings under section 43 of the Provincial Insolvency Act are in the nature of Criminal proceedings, in which the Judge ought to proceed with the formality which is required in dealing with investigations into the commission of offences. There ought to be definite charges made against the person whom it is proposed to deal with and evidence ought to be taken in support of the charges as also any evidence which the accused person may desire to put forward on the other side.

An insolvent cannot be punished under section 43 on evidence given on behalf of creditors when they were opposing his application for an adjudication of insolvency.

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20 O. C. 126=39 I C 428.

Where a notice of ejectment issued by the plaintiff against the defendant is cancelled by the Revenue Court and the plaintiff sues for a declaration that the defendant has no proprietary or under-proprietary rights in the land, the period of limitation for the suit begins to run from the date of the adverse order, but so long as that order is *sub-judice* or is being challenged by an appeal to a higher Tribunal, limitation cannot be deemed to run from the date of the order, because the order still forms the subject of appeal to a Tribunal which has the power to set it aside. In such a case the cause of action accrues when the adverse order is made final.

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20 O. C 129=40 I. C. 299=4 O. L J. 143.

Section 110 (*a*) of the Criminal Procedure Code does not apply to the cases of a person who has the reputation of habitually bringing false claims in the Civil Courts.

A person who brings a claim in the Civil Court which he knows to be false, commits an offence punishable under section 209 of the Penal Code, but he does not by so doing commit an offence either, if he succeeds, of extortion, or if he fails of attempting to commit extortion.

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20 O. C. 132=40 I. C. 232=4 O. L. J. 341.

A covenant empowering the mortgagee to sue for payment on the happening of a certain event or to wait till the period originally fixed for payment has expired, gives him an option which cannot be taken a way by statute unless there is anything to show that the grant of such an option is illegal or forbidden by law.

The option is for the benefit of the mortgagee and if he waives it, limitation cannot start runing against him in spite of that waiver.

A mortgage bond provided for payment of principal money with interest in two years and contained a stipulation that if the interest was not regularly paid every month, the mortgagee shall be at liberty *(ikhtiar hoga)* either to sue for the unpaid interest or for the entire money due on the mortgage and further provided that, on the expiry of the period fixed for re-payment *ba surat inqizai wada* the mortgagee shall be at liberty to recover the entire money due to him by the sale of the mortgaged property.

Held, that there being alternative contracts provided for in the mortgage bond; it was open to the mortgagee to forego the one and sue to enforce the other.

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20 O. C. 136=40 I. C. 742.

The trial of an accused does not necessarily come to an end as soon as he offers a plea of guilty, and where a Judge does not convict on such a plea the only other course open to him is to proceed with the trial of the accused.

When a plea of guilty is entered by one of several co-accused who are to be tried jointly, a Judge has, under section 271 of the Code of Criminal Procedure, a discretion to decide either that the accused be convicted on such plea or that he should be put on his trial in spite of his plea of guilty. The proper procedure to follow in such cases is that if the Judge convicts the accused on his plea of guilty, he should be removed from the dock in which case he can be called as a witness against the other accused; or the Judge should put it on record that he decides to put the accused on his trial in spite of his plea of guilty.

The Judge is bound to read and explain the charge to the accused and he ought to satisfy himself by interrogation of the accused, if necessary that he fully understands the responsibility which he assumes in making a plea of guilty. Having done so, the Judge is then in a position to exercise properly the discretion which the law allows and to put upon record the reasons which guide his discretion. The course which it is intended to pursue should not be left in doubt.

If is, however, not illegal for the Court to proceed with the trial of an accused who has pleaded guilty without previously placing upon record its reasons for doing so.

Though the law does not contemplate or authorise inquisitorial procedure by a Magistrate who is called upon to record a confession under section 164 of the Code of Criminal Procedure he is not forbidden to ask questions to satisfy himself that the statement proposed to be made is voluntary or for the purpose of making clear and intelligible any particular passage of a statement made to him.

A Magistrate not trying a case can only record the confession of an accused person if voluntarily made under section 164 of the Code of Cr. Procedure and it is not permissible for him to question the accused closely and at great length for the purpose of extracting statements to be afterwards used as evidence.

The statement of an accused elicited by the Magistrate in this way is not admissible in evidence.

In a case while the trial of several accused, one of whom had made a confession, was in progress, the Sessions Judge went himself to the scene of the crime accompanied by the assessors and the confessing accused, who showed him over the ground and made certain additional statements by way of comment or illustration of his confession and the Judge made notes of them.

Held, that the Judge was wrong in allowing the accused to make these additional statements which ought not to have been regarded.

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20 O. C. 152=40 I. C 229.

Where an unregistered bond executed on the 1st of July 1906 provided that the borrower was to pay interest yearly and the principal sum was to be paid within a period of six years and the general clause relating to what was to happen in case of default was, "*dar surat wada khilafi mahajan mazkur ko ikhtiar hasil hai ki jaidad manhula wa ghair manhula se wasul karlen.*"

Held, that on the proper construction of these words, the plaintiff had a cause of action for a suit for the principal sum; if he brought it within three years from the period fixed for payment, but that the suit for interest which had not been paid for more than three years was barred.

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20 O. C. 160=4 O. L. J. 459=41 I C. 9.

Where property in respect of which a right of pre-emption exists in favour of a co-sharer is sold to a stranger but before a suit for pre-emption is brought, it passes back into the hands of a co-sharer, a suit for pre-emption cannot be maintained, unless the person instituting the suit can establish his right as

against the co-sharer, if the former has a right superior to that of the latter to have it.

A purchaser may use a title acquired by him subsequently to the origin of the cause of action as a defence against a suit for pre-emption instituted after his acquisition of the said title.

A re-sale of property acquired by a person to the man from whom it was obtained stands on a different footing from the sale of that property to a person who has a preferential right of pre-emption and who is in a position to enforce that right within the time allowed by law for that purpose. The former is a voluntary act, while the latter is more or less an acknowledgment of the right of another to acquire that property in preference to the person by whom it was purchased accompanied by a surrender in his favour.

A vendee against whom a right of pre-emption is asserted by another is not required to sit quiet till the latter has brought a suit to enforce his right or all possible claimants have turned up to assert their rights. If he acknowledges the right of a pre-emptor and sells the property to him to obviate the trouble and expense of meeting a suit for pre-emption, he does so at his own peril, but his act cannot on that account be treated as wrongful.

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20 O. C. 171=40 I. C. 200.

An under-proprietary holding, whether rent free or otherwise, being heritable, and transferable, is, by its very nature, not capable of resumption. When it is rent free, the remedy of the superior proprietor is to apply to the Settlement Officer to have assessed to rent under section 79 of the U. P. Land Revenue Act, unless the assessment is barred by a previous Judicial decision or otherwise. If it is assessed to rent, and the rent is not regularly paid, the superior proprietor can only bring it to sale in execution of a decree for his arrears but cannot eject the under proprietor.

The Revenue Board has power under section 234 to frame rules, laying down the manner in which the rent is to be determined, but it has no power to exclude any class of under proprietors, whether paying rent or not, from the operations of section 79, for section 234 does not permit the Board to frame rules inconsistent with the U. P. Land Revenue Act and section 79 does not recognize rules other than those relating to the determination of rent. The suggestion made in rule 18 that where no rent is reserved, a superior proprietor can apply to resume the rent free under-proprietary holding, is not, therefore, justified by the provisions of section 234 or 79 of

the U. P. Land Revenue Act, and in so far as it excludes rent-free under-proprietors from the operation of section 79, is devoid of any legal authority.

The propriety of an order of a Revenue Court granting or refusing under-proprietary rights under section 107 H of the Oudh Rent Act, according as the conditions laid down there are satisfied or not, cannot be challenged in a Civil Court. But a declaratory suit on the ground of a pre-existing under-proprietary right in the presence of an adverse order of the Revenue Court is maintainable in the Civil Courts.

The conditions contained in rule 1 of Circular No. 63 of 1863 that groves planted by proprietors should, after the village has passed out of their hands, be deemed to be their under-proprietary holdings, if they have remained in possession of them, should be proved in each case, and cannot be inferred from uncertain *data*.

The principle underlying the resumption or assessment is that the state is entitled by the ancient law of the country to ascertain amount of the produce of the soil, for which revenue payable in cash has now been substituted, and it cannot be deprived of the same by any action of the owner of the soil, and that the latter is similarly entitled to recoup himself from the occupier or actual cultivator, unless the effect of the recoupment is to stultify his own contract for valuable consideration.

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20 O. C. 182=41 I. C 15.

Where a tenant in a suit to contest a notice of ejectment claimed to be a perpetual lessee and relied on a perpetual lease which was upheld by the Revenue Courts and the notice was cancelled, and a suit was then brought for the cancellation of the lease or for a declaration of its invalidity on the ground that it was a forgery or that it was executed by a person who had no authority to execute the same.

Held, (1) that the decision of the Civil Court on either of those points could not affect the validity or otherwise of the decision of the Board of Revenue in regard to a matter with which it was competent to deal. (2) that a declaratory decree militating against the decision of a competent Court having exclusive jurisdiction to decide the matter should not be granted.

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20 O. C. 192=4 O. L. J 499=41 I. C. 903.

Order VI, rule 16, of the Civil Procedure Code, authorises a Court at any stage of the proceedings to direct that any matter in any pleading which

may tend to prejudice embarrass or delay the fair trial of the suit be amended or struck out. But the Court is not to dictate to the parties how they should frame their cases.

All it has to see is that the parties do not offend against the rules of pleading, which have been laid down by the law, and introduce what is unnecessary or tends to prejudice, embarrass, or delay the fair trial of the suit. The object of permitting alternative reliefs to be claimed in one litigation is to obviate the necessity of another litigation to dispose of the same controversy or the subject-matter of the same relief, though the ground upon which the relief is claimed may be different.

Where a plaintiff prayed for a declaration that he was entitled to irrigate his land from a certain tank, basing his claim on his alleged joint ownership of the tank and also on a right of easement enjoyed by him through his tenants for a period of more than 20 years, and the lower Court threw out the suit on the ground that the pleas set forth were inconsistent.

Held, that the suit did not offend against the rules of pleading and that alternative claims on the ground of ownership and prescriptive right were entertainable.

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20 O. C. 196 = 4 O. L. J. 483 = 41 I. C. 99.

Where after a suit for pre-emption had been filed the defendants-vendees acquired some property by gift, which lay in the same sub-division in which the property sold was situated, and set it up as a defence in the suit.

Held, that they could not be allowed to use this transfer, which was effected subsequent to the filing of the plaintiff's suit, as a shield and thus defeat his claim.

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20 O. C. 200=42 I. C. 225.

A person dedicating property to an idol has a right to nominate the members of his family as managers and to allow them some remuneration.

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20 O. C. 205=41 I. C. 858.

An application for a decree absolute made under Order XXXIV, rule 5, sub-rule (2), of the Civil Procedure Code, is an application under the Code and is governed by Article 181, Schedule 1, of the Limitation Act.

Under the provisions of Order XXXIV, rule 5, Civil Procedure Code, the right to make an application begins as soon as the period limited in the

decree expires and once time begins to run it must continue running, so that if an appeal is preferred against the decree, the limitation for making an application for a decree absolute is not thereby extended.

20 O. C. 208 = 41 I. C. 862.

Where a person has been in possession of land in the open assertion of a definite and specific right as mortgagee, it is not open to the owner of the land to question his right after the expiry of more than twelve years from the date when such open assertion was made within his knowledge or within the knowledge of his predecessor-in-title.

20 O. C. 211= 40 I. C. 988.

A, a member of a Hindu joint family, whose home was at Lucknow, practised as a pleader at Hardoi, and made considerable savings from his professional earnings. He eventually became managing member but was all along entrusted with the management of the joint family property in Hardoi district. Throughout he kept the accounts of the joint property and of his own earnings in one account book. He purchased sundry properties out of the fund so entered in the name of his son-in-law stated that he made such purchases to provide for B.

Held, that, by blending his private earnings with the receipts and payments on joint account, he showed an intention to make them joint property but that it was not conclusive that all purchases entered in the book were made for the joint family and that as regards the purchases in the name of B. A's statement that they were made to provide for B was a statement against his own interest and as such admissible in evidence, and that coupled with the other evidence in the case it established B's title to such properties as against the joint family.

20 O. C. 223=42 I.C. 131.

In Oudh the Court of the District Judge is the principal Court of original Jurisdiction within the meaning of S. 195 (7) of the Criminal Procedure Code. An application for revision from an order of Subordinate Judge, exercising powers of Small Cause Court, refusing sanction to prosecute for perjury, lay to the District Judge.

20 O. C. 226 = 42 I. C. 21.

In pre-emption suits the defendant pleading a custom of excluding right of pre-emption relied on an entry in the Wajib-ul-arz which said," *"har hissedar ko apne apne hisse ke rehn wa bai ka ikhtiar hai."*

Held, that the entry set out the general law of the land and that on a true construction of this document it did not afford any evidence of a custom including pre-emption.

20 O C. 229= 42 I. C. 132

An order under S. 17 of Act V of 1861 appointing certain persons as special constables is of an executive nature and not an order made in a criminal proceeding and cannot be made the subject of revision under S. 435 of the Code of Criminal Procedure.

20 O. C. 232=4 O. L. J. 535=42 I. C. 27.

A lease granted by a Hindu widow in possession of a widow's estate does not necessarily become void on her death, but is only voidable. The lessee does not become a trespasser by the mere avoidance of the lease.

Where a Hindu widow without legal necessity executed a perpetual lea e of certain plots of revenue paying land and the next reversioner after her death filed a suit in the Civil Court for the possession of those plots contesting the validity of the lease:

Held, that the Civil Courts could not give a decree for possession, as the defendant was a tenant and entitled to hold on till he was ejected under s. 108 (4) of the Oudh Rent Act.

20 O. C. 237=41 I C. 974.

Where a plaintiff files a suit under section 9 of the Specific Relief Act basing his right to relief merely on the fact of his previous possession and pays half the usual Court-fee for the determination of his right to that relief, neither the Court nor the defendant has any power to enlarge the scope of that suit or to treat it as if it were an ordinary suit resting on a ground of title.

Where in spite of the limited character of such a suit the Court gave a decision upon the question of title and an appeal was also wrongly filed from that decision.

Held, that in a subsequent suit brought by the defeated party to establish his title to the same property the decision in the previous suit did not operate as *res judicata*.

20 O. C. 241=4 O. L. J. 479=42 I. C. 8.

S. 233 (K) of the U.P. Land Revenue Act is no bar to a suit brought by a person who had no *locus standi* to appear in and was no party to partition proceedings.

20 O. C. 243=42 I. C. 18.

Under S. 35 of the Transfer of Property act a person taking no benefit directly under a transaction need not elect, and a person who in his own capacity takes a benefit under the transaction may in another dissent therefrom

20 O. C. 249=42 I. C. 37=4 O L J. 540

A false statement by a vendor that he is transferring immovable property, while in reality all that he is alienating is a right to recover possession of property to which he has a claim, does not give rise to a right of pre-emption—The doctrine of estoppel not applicable:

20 O. C 256 = 42 I. C. 793.

A sale of property under the Land Acquisition Act operates to effect "destruction" of the mortgaged property within the meaning of section 68, Transfer of Property Act, and after that the mortgagee's remedy is only to require the mortgagor to give him within a reasonable time another sufficient security for the debt, and on his failure to furnish such security to sue his mortgagor for the mortgage-money.

There is no authority in the Transfer of Property Act for the proposition that when a mortgaged property is acquired under the Land Acquisition Act the mortgagee has a charge on the purchase-money.

20 O. C 265 = 42 I. C. 794

An arrangement among the *Maha Brahmans* of a place regulating the turns in which they shall act or the method in which offerings shall be collected or divided, and which does not control or restrict the discretion of the persons to whom the services are to be rendered or by whom the offerings or gifts are to be made, is valid and binding between the parties to that agreement.

A person who has derived advantages in times past by the enforcement of such agreement cannot be allowed to resile from it when it becomes the turn of another to receive benefit therefrom.

20 O. C. 268 = 42 I. C. 750.

An application for passing a final decree in a suit for foreclosure is an application in a suit as distinguished from an application for execution of the preliminary decree, and on such an application being made notices ought to be issued to all the parties concerned.

20 O. C. 271=42 I. C. 812.

Property inherited from collateral relations by brothers living as members of a joint family is held by them as tenants-in-common and not as joint tenants, and it does not descend to co-heirs with the incident of survivorship attached to it.

20 O. C. 277=42 I. C. 742.

An alienation of his share by a member of a joint Hindu family in favour of the remaining member or members is valid and as good as a transfer made to a stranger with the consent of all the members then existing.

30 O. C. 285 = 42 I. C. 937.

A *patta sankalp* was followed by possession of the grantee for over two generations.

Held, (1) that in the absence of other reliable evidence a lawful authority for the grant could be presumed.

(2) that from the reservation of nothing except *barbaste* or the rent specified therein, and the evidence pointing to the grantee having populated the land, cut the jungle and founded a *purwa*, the intention to grant under proprietary rights in consideration thereof could in the circumstances be inferred with the meaning of rule 11 of the Oudh Sub-Settlement Act XXVI of 1866.

20 O. C. 290.

Held, that the payment of the purchase money adjudged by Court in a pre-emption suit is no bar to the maintainability of an appeal against the decree by which the payment is directed if the appellant disputes either the amount payable or the method of payment.

20 O. C. 295.

Where a Muhammadan wife obtained, in lieu of dower from her husband who was heavily indebted, a transfer of his house and thus forestalled his other creditors, *held*, that the transaction could not be declared fraudulent solely because shortly after the transfer the husband put in an application for being adjudicated insolvent.

20 O. C. 299.

Held, that a custom entitling the *zemindar* of a town to eject the occupants of the houses built in the town area at any time on payment of ¾ths

of the cost of the materials of their houses was unreasonable and the Court should not sanction the enforcement of such a custom.

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20 O. C. 300.

The next friend of a minor plaintiff died during the pendency of the suit. The Court subsequently dismissed it on the ground that the plaintiffs' relatives were not eager to prosecute the case but were in fact throwing obstacles in the way of its prosecution and ordered that the defendants costs be realised from the estate of the deceased next friend.

Held, that the order as to costs was made with out jurisdiction.

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20 O. C. 304.

A suit was brought against an undischarged insolvent in respect of a debt which he mentioned in the list attached to his application and of which notice was duly served on the creditor, who did not, however, prove it before the insolvency Court. *Held*, that the suit was not maintainable without the leave of the Court.

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20 O. C. 306.

Where a mortgagee who was ousted from the mortgaged property by the mortgagor before the period fixed for the mortgage had expired, brought a suit seeking to be restored to possession or in the alternative to be given a money decree for the sum advanced, and during pendency of the suit it was found that the deed under which he had been put *in* possession was not enforceable as a mortgage for want to proper attestation, *held*, that quite apart from section 68 of the Transfer of property Act, the Court could grant him a money decree under section 65 of the Indian Contract Act.

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20 O. C. 311.

Where there is no suggestion that the debt was incurred for the benefit of the joint family, it is only the father's share and not the entire family property including the share of the sums that can be sold in execution of a personal decree against the father, while the father is alive.

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20 O. C. 318.

Held, that the wide proposition laid down in I. L. R., 42 Cal. p. 690 *viz.*, that where there is ample security any thing above 10 Pc. is an excessive rate of interest, has no application in this part of India where a rate of 12

Pc. per annum is looked upon as a normal rate even in cases where the security is abundant.

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20 O. C. 327.

Held, that the terms of section 144 C. P. C., read with section 35 (3) of the Code of Civil Procedure are wide enough to empower the Court to award a decree-holder interest on costs which the judgment-debtor may be liable to refund to him.

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20 O. C. 329.

A judgment-debtor, who makes an application under O. XXI R. 90 of the Code of Civil Procedure which is dismissed for default, is not thereby disqualified from subsequently applying for getting back his property under rule 89, Order XXI of the Code.

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20 O. C. 332.

Held, that the payment of process fee by a decree-holder being merely an act supplementary to an application for execution cannot be treated as equivalent to an application to the Court to take some step in aid of execution.

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20 O. C. 336.

In suits for ejectment, in which legal relation between the parties concerned has arisen out of partition proceedings carried out by a Revenue Court and the defendant pleads that his possession as evidenced by entry in the partition record is that of a mortgagee holding under an ancient mortgage, such entry in the partition record cannot be treated as conclusive evidence of the mortgage relation much less of the incidents of that relation.

Held further, that the defendant who pleads that he is in possession under a mortgage "of very long standing" or a mortgage which was executed "in the time of native rule" cannot be allowed to fence with the plaintiff and to resist his claim with vague and inconclusive statements. *Prima facie* the title being with the plaintiff the defendant if he desire to hold on to the property in dispute must adduce proof of a definite, title to do so.

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20 O. C. 350

A District Judge cannot transfer a suit of Small Cause Court nature to a Subordinate Court not invested with the powers of a Small Cause Court, that is not competent to try it as such as long as the Small Cause Court capable of trying it is in existence.

A suit of the nature cognizable by a Court of Small Causes was filed in the Court of a Munsif who had the jurisdiction of a Small Causes Court Judge. The suit was transferred for hearing by the District Judge under the provisions of Sec. 24 Act V of 1908 to the Court of a Probationary Munsif who had no powers of a Judge of Small Cause Court. The latter dismissed the suit. An appeal was filed to the Court of the District Judge who decreed the suit. The defendant-applicant applied in revision on the ground that the District Judge had no jurisdiction to hear the appeal. *Held*, that the transfer of the suit to the Court of the Probationary Munsif who did not exercise Small Cause Court powers was not warranted by law and therefore the trial of the suit by the Probationary Munsif was illegal.

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20 O. C 356.

Held, that among *Agarwala Banias* the nonperformance of *Datta Homam* does not vitiate an adoption.

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20 O. C. 360.

S. 15 of Act I of 1869 is a declaratory section, operating both prospectively and retrospectively.

Held, by *Lindsay, J. C.*, that the effect of S. 15 was to put the *sanad* out of consideration altogether, and that the succession to the estate of a legatee who was neither a Taluqdar nor a grantee, nor a person who would have succeeded to the estate would be governed by the rules of the ordinary law, irrespective of the rules of succession contained in the *sanad*.

Held, by *Kanhaiya Lal*, A. J. C., that the effect of that section was to relieve such a legatee from the disability imposed by the act on taluqdars and grantees in the matters of transfer and succession, and not from any rules which might be applicable independently of the act, and that the succession to him would be governed by the rule of succession laid down in the *sanad* as restricting or qualifying the personal law.

(1) *Held*, by the Bench that the rule of succession contained in the *sanad* was inapplicable to a person who got the estate otherwise than by inheritance.

(2) *Held further*, that a document sent by a person, containing the particulars relating to the history of his estate and a declaration as to who was to be his successor in pursuance of an advertisement appearing in a paper announcing the intention of the advertiser to prepare a compitation, showing

the family history of the Taluqdars of Oudh could for the purposes of Hindu Law be treated as testamentary declaration by him of his intention with respect to his property which he desired to be carried into effect after his death.

20 O. C. 398=4 O. L. J. 193.

In a suit for partition between brothers who were members of a joint Hindu family it was admitted that the wife of the plaintiff during his absence from home which lasted for a considerable time was, on account of her quarrelsome disposition, sent to live in a portion of the family house and to have her meals separate, *held*, that this did not constitute such an admission of separation in estate among the members as would relieve the defendant from proving that the property in dispute was his separate property.

Printed by T. N. Sopori at the N. N. Sivapuri Press,—Lucknow.

INDEX.

Abadi.

(1) See jurisdiction. (2) Land in city of Lucknow obtained by Nuzool 9 O. C. 249. (3) See Pre-emption.

Abandonment.

(1) Of claim, 8 O C 65—12 O. C. 347. (2) Of claim by mortgagee against property encumbered beyond its value. Right to obtain personal decree See O. XXXIV r 6 C. P. C. (3) Of heritable interest, 15 O C. 67. (4) As to grounds of relief, 2 O. L J. 335. (5) Of grove by groveholder, 20 I C. 40 (6) Statement in mutation proceedings, 12 O. C. 288. (7) Escheat, 12 I. C 409. (8) Or compromise of disputed claims, 20 I. C 429

Abatement.

(1) Of declaratory suit by reversioner on his death, 8 O. C. 124 (2) Only as against deceased respondent 1 O L J. 581. (3) Of appeal, order as to, setting aside of 24 I C. 275. (4) Right of descendants of a *Karta* to carry on a suit, 10 O. C 121. (5) Order by which persons are brought on the record as legal representative not appealable, 16 O. C. 350 (6) Remedy of widow whose application for being brought on the record rejected, 9 O C 354 (7) See O. XXII, r. 5 C. P. C.

Abetment.

See S. 108 Exp 4 I. P. C.

Absence.

(1) Of evidence of prosecution, S. C. 294. (2) Of express words of inheritance, S. C. 291 (3) Of sanad 2 O. C. 213, 7 O C. 254. (4) Of tender of amount due on mortgage 5, O C. 127—6 O. C. 223—40 I. C. 581. (5) Of witnesses on dates fixed 4, O. C. 408. (6) Of mutation of names-Inference, S. C. 204, 209. (7) Effect of opium found in accused house during his, 1 O. L J. 141. (8) Occupation of house by defendant during plaintiff's, 1 O. L. J. 527. (9) Of Affidavit, 13 O. C. 123. (10) Of attesting witnesses, 11 I. C. 225 (11) Of consent of landlord to tenant's occupation, 1 O. L. J. 574. (12) Of consummation—Dower, 16 O. C. 325 (13) Effect of order passed in absence of landlord, 8 I C. 710. (14) Of one arbitrator at hearing, 2 O. L J. 365. (15) Of plaintiff, 29 I. C 33. (16) Of sanction, 15 I. C, 780. (17) Temporary of defendant from home, 16 I. C, 600.

Absolute.

(1) Interest, grant of O P. J. 587. (2) Alienation by widow with reversioners consent, 14 O C 170. (3) Condition in restraint of abenation, 1 O. L. J. 421. (4) Hindu mother succeeding to her son, 14 O C 170. (5) Grant, 18 I. C. 127. (6) Order, application for, in liew of a portion of decretal amount, 10 O. C 354. (7) Right under sanad, O. P. J. 392, 400. (8) Title under *sanad* O. P. J. 591. (9) Order, time to begin from. Pre-emption, 10 O. C. 374 (10) Order against some of defendants, 10 I. C 174. (11) Power of Hindu widow, 1 O L J 225, 319, 421—2 O L. J. 466

Accomplice

(1) Statement made by 13 O. C. 309. (2) Evidence of 12 O. C. 418. (3) Corroboration, 13 O C 243.

Account.

(1) Adjustment of 18 O. C 30. (2) Suit for rendition of 1 O L. J. 561. (3) Settlement of 9 O. C 221 (4) Suit for 29 I. C. 679 (5) Prayer for taking of 1 O L. J. 281. (6) Filed in previous suit for possession. 11 O. C 126 (7) Not written from day to day, 11 I. C 95.

Account book.

(1) Certificate of administration, S. C. 145. (2) See Talukdar, O. P. J. 288. (3) Signed by one not authorised. Acknowledgment filed for the first time. Plaintiff abstaining from giving evidence, O P J. 738. (4) Admissibility of 11 I. C. 95 (5) Lamberdar's failure to produce, 1 O. L. J. 184. (6) See Books of account.

Accretion.

(1) To taluka or grant When considred to be, 1 O. L. J. 397. (2) To nucleus of joint family property, 2 O. L J. 237.

Acknowledgment.

(1) Written by Hindu widow to extend limitation, 16 O. C. 272. (2) To prove legitimacy, 1 O. L. J. 281. (3) Showing fresh contract, 11 O. C 152. (4) Of Antecedent title, 18 O. C. 51. (5) Of paternity, 9 O. C 246, 13 O. C. 255. (6) Of under proprietary rights, 8 I. C. 407. (7) In a letter of missing bond, O P. J 37. (8) Of Cosharer's right, O. P. J. 724.

Acquiescence.

(1) Mortgage with possession—Suit for redemption, 14 O C. 257. (2) Notice 1 O. L. J. 387. (3) Estoppel by 21 I. C. 256. (4) In a plea by the party affected by such plea, 10 O. C. 343. (5) In transfer by tenant 18 I. C. 383. (6) For 1).
years in order now impeached O P. J. 175.

Act XXXIII of 1839. See Intest Act.

Act XVIII of 1850. Officer Commanding Cantonment exercising police powers—Lunatic—Distinction between mistake of fact and mistake of law, O P. J 404.

Act XXXV of 1858. (1) Court of Wards. Oudh. Manager Lease exceeding 5 years, O. P. J. 506. (2) Application of to members of joint Hindu family, 12 O C. 209.

Act VIII of 1859. (1) Resjudicata, O. P. J. 553. (2) Mere right to sue, S. 205, O P. J. 64 (3) Ss 205, 206, 216. 236 Commented on O. P. J. 249. (4) Ss 324, 326, 327. Application to have award filed in Court—objection to award—alleged misconduct and miscarriage of arbitrators. Party chancing favourable award must abide by result. General rule of Privy Council as to dealing with pleadings. Talukdar-Will-Sufficient cause in S. 327 defined, O. P. J. 254. (5) T. 333—See Act XXIV of 1870, O. P. J. 308. (6) S. 350. See mortgage O. P J. 114. (7) S. 377 See Review O. P. J. 185.

Act XIV of 1859. (1) S. 1, Cl. 2 and 3. See Compromise O. P. J. 158 (2) S. 1 Sub-section, 13. See Hindu Law, O. P J. 154. (3) Mortgage, 16 O. C. 157.

Act XXVII of 1860. S. 3—See Muhammedan Law, O. P. J. 116.

Act II of 1863. S 1—ActXXXII of 1871. S. 4. Appeal to Privy Council Act I of 1869. Talukdar Constituting himself a trustee. Hindu Law joint family. Special leave to appeal granted, O. P. J. 264.

Act XXII of 1864. S. 11. See Act XVIII of 1850 O. P. J. 404.

Act X of 1865. See succession Act.

Act XVI of 1865. See Revenue Courts Act 1865.

Act X of 1877 S. 13. Res Judicata. Competant Jurisdiction means concurrent jurisdiction, O. P. J. 411.

Act XVI of 1865. (1) Act XIII of 1866. See Birt, O. P. J. 364. (2) Retrospective effect. See joint interest, O. P. J. 72

Act XXVI of 1866 (1) See Act I of 1869 O, P J. 314. (2) See Birt, O. P. J. 364 (3) Rules 2 and 3. See under proprietary right, O. P. J. 312. (4) See Sub-Settlement Act (Oudh).

Act XXXVII of 1867. S. 1. Judicial Commissioner, no power to leave to appeal from his decision rejecting a petition to review. Financial Commissioner's Judgment, O. P. J. 215

Act XIX of 1868. Ss. 41, 83, Cl. 4. See Sub-Settlement, O. P. J. 540.

Act I of 1869. See Oudh Estate Act (I of 1869).

Act I of 1870. See Court Fees Act.

Act XXIV of 1870. (1) S. 10. Appeal. Limitation. S. 333 of Act VIII of 1859 not applicable, O P. J. 308. (2) S 25. See Hindu Law, O, P. J. 466.

Act VII of 1871. See Registration Act. 20 I. C. 429.

Act IX of 1871. See Mortgage, 16 O C. 157.

Act XXIII of 1871. (1) Jagir granted by the King of Oudh, 18 O. C. 168. (2) Wasiqa allowance whether a pension or not 12 O. C. 323.

Act XXXIII of 1871. See Act II of 1863. O. P. J 264.

Act I of 1872. See Evidence Act.

Act IX of 1872. See Contract Act.

Act X of 1873. See Evidence Act. 10 O. C. 337.

Act IX of 1875. See Indian Majority Act.

Act XII of 1876. See Punjab Laws Act.

Act XVII of 1876. (1) Estoppel, 12 O. C 288. (2) Sub-settlement, O. P J 540. (3) Necessary parties Court of Wards Manager, O. P J. 659. (4) See Oudh Land Revenue Act, 12 I C 331.

Act XVIII of 1876. See Oudh Laws Act 20 I. C. 474—13 O. C. 631.

Act I of 1877. See Specific Relief Act

Act III of 1877. See Registr ation Act.

Act XV of 1877 See Limitation Act.

Act XI of 1878. See Army Act.

Act XVIII of 1879. See Legal Practitioners Act.

Act V of 1881. See Probate and Administration Act.

Act XXVI of 1881. See Negotiable Instrument Act.

Act IV of 1882. See Transfer of Property Act.

Act IV of 1882. Or Regulation Act XVII of 1806 Proceeding necessary to extinguish title of mortgagor, 9 I. C 431.

Act XIV of 1882. (1) Application by judgment debtor to be declared insolveent, 10 O. C. 139, 321. (2) Proof necessary to establish execution by parda nashin Lady, 15 O. C. 271.

Act XXII of 1886. See Oudh Rent Act.

Act XXVI of 1886. See Sub-Settlement Act, 8 I. C. 407.

Act IX of 1887. (1) See Provincial Small Cause Court, Act (2) Grounds for revision, 15 O C. 319.

Act VII of 1889. See Succession Certificate Act.

Act IX of 1889 (1) See Kanoon gos and Patwari's Act.

Act VIII of 1890. See Guardian and Wards Act.

Act IV of 1893. See Partition Act

Act I of 1894. See Land Acquisition Act.

Act X of 1897. See General Clauses Act.

Act V of 1898 See Criminal Procedure Code.

Act II of 1899. See Stamp Act.

Act III of 1899 See Court of Ward's Act.

Act IX 1899 (1) 1 Persoonal deer against a ward 18 O. C. 145 (2) Suit for recovery of Patwari rate. 11 O. C. 326

Act I of 1900. See Municipalities Act.

Act III of 1901. See U. P. Land Revenue Act.

Act III of 1907. See Provincial Insolvency Act

Act V of 1908. See Civil Procedure Code

Act IX of 1908. See Limitation Act

Act XVI of 1908. See Registration Act

Adjournment.

(1) For examination of certain witness 4 O. C. 408. (2) Condition, refusal to, on failure to comply with 6 O. C. 41 (3) application for sum monses too late-2. O. C. 34-8. I. C. 418. See Oudh Civil Digest (1912) Paras 101-156

Admission.

(1) Of document 4. O. C. 318-11 I. C. 289. (2) Of Counsel on point of law 8. O. C. 233. (3)Of father during minority of son, 18 O. C. 95 (4) See Guardian (5) Of legitimacy, 1. O. C. Sup. 49—(6) Of one defendant whether, binding upon others 1. O. C. Sup. 49. (7) Regarding genuinness

and validity of deed—4 O. C. 408, (8) By mortgagee to make a mortgage redeemable 11 O. C. 285, (9) By ancestor of one party, of the right and title of plaintiff—O. P. J. 175, (10) In a former period of suit, defendant not bound, O. P. J. 262(11) In settlement proceeding that property in one's prossession belonged to another O. P. J. 1015, Of debt, O P.J. 13, 054 (12) Withdrawal of 1 O. L. J. 81—(13) In pleadings 2 O L J. 208, (14) Of mortgage debt 9. I. C. 56 (15) Of claim, 1. O L. J. 541,547 29 I. C. 33—(16) Of execution—17 I. C. 309, 21 I. C. 8. (17) By one set of defendant 1. O L. J. 597—(18) Of vendor in sale deed 9. O C. 308—(19) whether decree can be based, on 9 I. C. 56, (20) against one's own interest 1. O L J. 591.

Adverse possession.

(1) Of mortgage. 16 O. C. 163-12 O C. 45 (2) Competency of purchaser of part of mortgaged property to raise question of—18 O. C. 369 (3) What constitutes, 8 O C 177—41 I. C. 80. (4) Presumption as to possession of waste land, 9 O. C. 33. (5) What amounts to setting up of adverse title, 8 I. C, 708. (6) Possession follows title. 12 O. C. 58 (7) Burden of proof, 5 O. C 97—1, O L J. 591—2 O. L J 549. (8) Possessory title heritable and transferable, 11 O. C 337 (9) Mortgage kept out of possession, 12 O C. 45. (10) Mortgagee denying right of redemption, 15 O C. 40. (11) Mortgagee's possession after expiry of period fixed for foreclosure decree, 8 O. C. 33—9 I. C. 431- 25 I C, 752. (12) Obligation to release property settled on payment of money, 14 O. C. 95. (13) Between mortgagor and mortgagee, 15 O. C. 39. (14) By successive trespassers, 9 O. C. 230. (See Trespasser). (15) From mere mutation of names in favour of Guardian, 8 I. C. 728. (16) Tenant erecting temporary structure-ownership of soil 8 I. C. 708—8 O. C. 177. (17) Among Co-owners. Repudiation of title of Co-owner. Non receipt of profits, 9 I. C. 425, 3 O. L. J. 438—39 I. C. 498. (18) By a Hindu widow. Possession of mother to be reckoned as possession of son Reversioner can not sue for possession during life time of mother, 11 I. C 93. (19) See auction purchaser, 35 I. C. 753. (20) Of equity of redemption, 11 O. C. 1—17 O. C. 294. (21) When not to be tacked on to that of another, 18 O. C. 61 (22) Partition of joint family, 24 I. C. 633. (23) See settlement, 14 O. C. 95—O P. J. 1015. (24) See Muhammedan Law, O. P J 1024—15 O. C. 49. (25) By a Hindu widow O. P J. 652—18 I C. 367. (26) Of considerable duration, not to be disturbed on a deed of conveyance only, undue influence, vendor's want of title O P. J. 77. (27) A title and pre-emption, O P J 646. (28) Land acquired adjacent to the land held from before Nature of rights, 3 O. L J. 170. (29) Perpetual lessee. Payment of uniform rate of rent, 2 O. L J 320. (30) Possession of limited interest Acquisition of mortgagee rights by prescription, 20 O. C 208. (31) Possession of lien holder, 1 O. L J. 225 (32) Fore closure suit, 1 O. L. J. 433. (33) Oudh Sub-Settlement Act, 22 I C, 125 (34) Pleadings, 10 O. C. 17. (35) Talukdari Sanad, 14 O. C. 95, (36) Qualified, 2 O. L. J 320. (37) Possession in representative capacity, S D 20 of 1912. (38) How far affected by rejection of application for correction of *Khewat*, 16 O. C. 163. (39) Possession of joint Hindu family, 9 O. C. 55. (30) Of mortgaged property, 12 O. C. 45. (31) See Possession.

Agent.

(1) Joint, not to act severally, 1. O. C 159. (2) Managing, to issue notice of ejectment R. A. R, 39. (3) Misconduct of, O. P J. 502 (4) Valuable services of, O P. J. 716. (5) Presenting document for registration, 6. O. C. 9. (6) Fully represents in dealing with others, 3. O. C. 55—11

O. C, 191—16, I. C. 999 —

Agreement.

(1) To discharge previous debts in consideration of prompt receipt of shorter sum, 20. I. C. 544. (2) For reward to procure wife, 2. O. C. 365. (3) Not to execute decree, 5 O C 217. (4) Second suit for, 3. O. C. 165. Diss 4. O. C, 284. (5) To hold property in defined shares, 11. O. C, 381. (6) Between Cosharers, O. P. J. 559. (7) Before lower Court, binding even when appellate Court decree silent, O P J 917—6 O. C 275. (8) Between adoptive mother and natural father, O. P. J. 576. (9) Not amounting to a present assignment of any share, right to sue on the basis of, O. P. J. 1045 (10) To make good any loss that might occur through agent of promisor, O P. J. 502 (11) To share the property in suit, O P. J. 633. (12) Between decreeholder and judgment debtor and a third person not party to the decree for satisfaction of decree, 3 O C. 165, 4 O. C. 284 (13) Between pleader and client for payment of fee, 4 O.C 229. (14) By a pleader to accept less than ordinary legal fee, S. C. 136 (15) To pay indefinite reward to pleader, S C. 15. (16) Between proprietor & under proprietor as to propartionate liabelity for payment of local rates, 6. O. C 299 (17) Entered in course of partition proceedings, not enforced by subsequent suit, 5 O. C 140 (18) Entered into in proceedings in suit subsequent to Decree, 2 O. C 45—6 O. C. 175—9. O. C. 219—34 C. 83. (19) Not to infringe patent, 7. O. C, 103. (20) To share property the subject of suit, 20. C. 843. (21) Admissibility of in evidence without registration, 13. I. C 500. (22) Circumstances to be looked into, 2, O. L. J. 402. (23) Conditional for sale, whether gives right to sue for sale, 13. O. C. 219. (24) Right to sue on the basis of, 16. O. C. 136. (25) Force of, 2—O. L. J. 137. See S. 92, 93 Exidence act. (27) Oral to execute lease for 7 years, 9. O. C. 296. (28) Qualifying previous mortgage deed 20 I. C. 544. (29) Refusal to perform one's part of, 10. O. C. 173 See compromise, 13. O. C. 241. (30) Special S. D 5. of 1909. (31) Holding under, 1. O L J. 419. (33) Merely reciting property previously mortgaged, 20 I C 544. (34) Subjecting the right of redemption to certain conditions, 15. O. C. 285. (35) Voluntary, 1. O. L J. 719. (36) Amounting to transfer of an expectancy of succession, 15. O C. 122 (37) By lessee, 17. O. C, 193 (38) By majority of creditors to reopen and conduct Bank's business, 18. O C. 275. (39) By nephews & grand nephews to bring a claim jointly (40) By vendor to pay specific rent on exproprietary holding, S D 7 of 1913. (41) Complete before formally written, 13 I. C. 500. (42) Conferring right of pre-emption, 13. O. C. 241. (43) Not verified before the Court, 7 I. C. 337, (44) Extred into on behalf of minor, 14 I. C. 6. (45) Mentioned in a mortgage deed, Cancellation of registerred sale deed by, 2. O. L. J, 338. (46) For partnership, 17 O. C. 193. (47) Of reference to arbitration, 14 I C. 6 11 O C 116—13 I C 500. (48) In respecet of civil liability involving offence of public nature, 17 O. C 213 (49) Made to pay on mortgage, 11. O. C 217. (50) Not to eject tenant so long as rent was paid, 29 I C. 656—1. O. L. J 246. (51) To provide fund for litigation, 8. O. C. 155 11 O. C. 301—14 O. C. 139—9 I. C. 243—8 I. C. 500.10 O. C. 173, (52) To pay commission to mortgagee, 2. O. L. J. 402. (53) To pay rent not proved 2. O. L. J. 382. (54) Opposed to public policy 14. O. C. 139. (See) Ss. 15, 16, 23. Contract Act.

Agricultural.

(1) And non agricultural leases mixed 1. O. L. J. 124. (2) Leases for agricultural perposes S. D. O. 6 of, 1905. (3) Profits, when due to

cosharers, R. A. R. 70. (4) Determination of, leases granted by mortgagee, 14. O. C. 204.

Alluvion & Diluvion.

(1) Meaning of Gradual accession S. C. 290—27 C. 768 ; 8 O, C. 293 ; 28 all 647. (2) See Dhardhura O. P. J. 386 (3) See Bengal Regulation O. P J. 880. (4) Govt as owner of river bed and land abutting on river, dispute between, 27 I. C. 509. (5) Acquisition of occupancy rights in accretion—limitation 29 I. C. 37. (6) Reparian owner—Custom of Dhardhura, 23. I. C. 224.

Always or for ever.

Used in a grant O. P. J. 762.

Amendment.

(1) Of plaint, new case, 8. O. C. 266—11 O. C 225 13 O. C. 152. 2. O. L. J. 383, 402.—S. C. 92 (2) Plaintiff not minor at institution, 5. O. C. 355. (3) Plaintiff entered as minor by mistake, 7. O. C. 234. (4) Suit instituted by minor without next friend, 11. O. C. 159. (5) In first appeal, 4. O. C. 314. (6) In second appeal, S. C. 214 (7) Of decree after appeal, S. C. 182. (8) Of Issues, after trial on issues originally framed, 8. O. C. 317—1. O. L.J. 204 (9) Of decree; 9. I. C. 433 (10) Of error in record when ever noticed S. D. 4. of, 1909. (11) Of issues after trial on issues originally framed, 1. O. L. J. 204. (12) Of judgments, decrees or orders, 13 O. C. 114. (13) See Plaint.

Anamalous.

See 10. O. C. 14 ; 18 O. C. 10, 24 ; 2. O. L. J. 165, 372.

Appeal.

(1) Decided *exparte* by the Privy Council, petition for rehearing O. P. J. 304. (2) To Privy Council See act II of 1863, O. P. J. 264. (3) Delay in depositing costs of transcript special lave to appeal granted, O. P. J. 996. (4) Certificate defective, O. P. J. 805. (5) No statute or Charter in Oudh. O. P. J. 1 (6) With drawn in the lower Court, readmission of, O. P. J. 565. (7) To the District Judge where power given to subordinate Courts to entertain applications for succession Certificate, 16. O. C. 197. (8) Separate against two decrees passed in the same suit, 5. O. C. 146—21. I. C. 264 (9) Cross objection—limitation, S. C. 160.—(10) Redemption suit, jurisdiction, S. C. 267—9. O. C. 96. (11) Forum of, Decree of a subordinate Judge in a suit valued at more than Five thousand rupees S C, 187, 193. 211, 293. 1. O. C. 160—10 O C. 42—10 O. C. 291. (12) In pre-emption suit,6. O. C. 255, 12 O. C. 31 ; 9. I C. 414. (13) Whether in appeal prayer for simple money decree can be allowed, 34. I. C 757. (14) Plea of law taken for the first time in, 3. O L. J. 508. (15) Raising new point in S. C 222 Opening a new case upon Sanad, 8. O. C 45 (51) Setting a new & inconsistent case not made out in the plaint 8. O. C. 116 ; 1. O. L. J. 38—Plea taken for the first time in, 2 O. C. 209 4. O. C. 207—appellant not entilled to set up in argument fresh story different from that given in the grounds of appeal, 30 I. C. 374, New relief claimed for the first time in, 3. 6. C. 254—2 O L. J. 73 (16) Reference to Court of cnflicting claims to compensation, Land Acquisition Act. 1870,— S. C. 250. (17) In suit for recovery of property subject to charg for unknown amount, valuotion 10 O. C. 42. 291. (18) Where the plaintiff has misrepresented the true volue or has acted recklessly in voluing his suit, 6. O. C. 255, 12. O. C. 31 ; 9 I. C. 414. (19) Preliminary objection that appeal does not lie can be raisid at hearing, R. & P. NO 36. (20) Dismissal in difault, appeal treated as an application for revision 8. O. C. 261 ; 11. O. C. 144. (Contra, 1. O. C. Sup, 22) —4. O. L. J. 374. (21) Dismissal of Jail appeal—Subsequent, presented by accused's Counsel—Entertainability of, 3. O. L J. 326. (22) In a suit instituted in Small Cause Court and tried as regular suit, 7 O. C. 144. (23) Submission to

the order returning plaint, 11 O. C. 98. (24) Against order refusing documentary evidence, 19 O. C. 314 (25) When two Courts differ only as to costs, S. C. 139; 10 O. C 65; 9 I. C. 1040 (26) Against order about Haq Jethwansi in partition proceedings, 6 O. C. 372, Dist. 7 O. C. 161. (27) Decree for redemption on payment of deed of further charge, 12 O. C. 130—Diss. 13 O C. 62; Not F. 15 I. C. 746—16 O. C 354. (28) Under S 75 Oudh Land Revenue Act 1 O. C. 301; 6 O C. 372. (29) Suit by reversioner for possession and also for redemption—Redemption on payment of certain sum, 15 I. C. 746. (30) From decree passed on compromise, 9 O. C. 365—9 I. C. 426. (31) From two decrees in the same suit, 5 O. C. 146 Dist. 21 I. C. 264 (32) From an order dismissing application for default, 10 O C. 171; 353. (33) From order refusing to file agreement to refer to arbitration, 11 O. C. 116—*Contra* 9 O. C. 205. (34) From order of Subordinate Judge on application for succession certificate, 16 O. C. 197. (35) From order declining to enquire into correctness of account, 1 O. C. 45 (36) Against order of remand—Order of remand carried out, 15 O. C. 43—33. (37) Order passed without, Jurisdiction of Settlement Court, 9 O. C. 301. (38) Partition, objection raising question of title, appeal to the District Judge, 2 O. C. 359, 6 O. C. 372; 7 O. C. 161. (39) Small Cause Court suit transferred to other Court, 4 O. L. J. 71. (40) Objection by respondent against a party not appellant in the appeal and having distinct interest, 11 O. C. 93 Dist. 16 O. C. 213. (41) Objection as to want of necessary parties in, 9 O. C. 233 (42) Second, for costs only, 6 O. C. 52; 8 O. C. 251. (43) Point raised in defence but not tried, 18 I. C. 367. (44) Power of Court of second, to interfere with discretion of Lower Court, 17 I. C. 315. (45) Finding as to custom. Right to challenge, 4 O. C. 71—15 I. C. 247. (46) Question of fact or Law—Misinterpretation of documentary evidence—Interference on second appeal, 13 I. C. 629. (47) Power of interference of the High Court—Question of law—Legal evidence, 11 I. C. 536. (48) Question as to good faith mixed question of law and fact (second), 3 O L J 387. (49) Accused jointly tried and convicted—appeal on one petition and one Judgment, 4 O. L J. 82. (50) Second Question of law—Summary dismissal, 40 I C. 139 (51) Pre-emption—Effect of payment of money adjudged by Court, 20 O. C. 290 (52) Consolidated from two cross decrees—Duty of Appellate Court—Election of appellant—Dismissal of appeal—Res-Judicata, 4 O. L. J. 512—5 O. C. 146. (52a) Variation in Judgment gives right to, 10 O C. 65, 9 I. C 1040. (53) No—lies to the Deputy Commissioner against the order of a Deputy Collector confirming the sale of underproprietary tenure in execution of decree for arrears of rent, No. 63 R. A R. (54) Right of, created by statute law, no constitutional right of—Memo not considered as an application for review, No 64 R. A. R. (55) Under Land Revenue Act III of 1901 filed without copy of the order appealed against—Limitation, S. D. 14 of 1913. (56) Point not explicitly taken in memorandum of, but raised in argument, 4 O. L. J. 708. (57) (Criminal)—Improper expression in memo of appeal, S. C 166. (58) Finding of fact. (*a*) When to be questioned in second, 21 I C. 251, 554—37 I. C. 27—34 I. C. 745—1 O. L. J. 644—14 I C. 12—10 I. C. 188—30 I C. 380—375—24 I. C. 633—42 I. C. 53. (*b*) When binding in, 16 I. C. 887. (*c*) Arrived at only in first, 30 I. C. 503. (*d*) When admissable, 1 O. L. J. 383. (*e*) Credibality of evidence not to be considered 1 O. L. J. 470. (*f*) Sufficiency or insufficiency of evidence no ground for interference, 9 I. C. 427. (*g*) Based upon incorrect view of

law, 11 O. C. 264—24 I. C. 633. (59) See Oudh Civil Courts Act—General Clauses Act—Ss. 47, 100, 102, 104, 105, 110, 111 C. P. C. Act and Appellate Court. (60) Treated as application for revision, O. C. Sup. 22.

Appellate Court.

(1) Indefinitely reserving Judgment on point, raised in appeal, O. P. J 46. (2) Construction of document, 32 I. C. 748 (3) Admissibility of documents rejected by Lower Court, 2 O. L J. 27. (4) Contents of Judgments of, 1 O. L. J 334. (5) See "Court" and "appeal"

Application.

(1) Of law by second Appellate Court, O. P. J. 795. (2) For substitution of name by representative of a deceased party, O. P. J 1050. (3) To have award filed in Court, O. P. J. 254, 9 O. C. 205. (4) For summonses too late, 2 O. C. 34; 8 I. C. 418. (5) Effect of dismissal of, for want of prosecution, 15 O. C. 153. (6) Fresh or ancillary to the previous one, 18 I. C 727. (7) Illness whether a ground for refusing, 14 O. C 36. (8) Making of, when deemed to be complete, 10 O. C. 141. (9) Preamble of, necessity of formal array of parties, 17 O. C. 306. (10) Notice based upon defective proceedings, 13 O. C 303. (11) Presentation of, to Munsarim, 10 O C. 141. (12) Second for ejectment, 31 I. C. 472. (13) Withdrawal of, before order passed, 10 O. C. 141. (14) For transfer of decree, 16 O C 70. (15) See S. 114 C. P. C. (16) Can be heard even if Court fee not paid, 8 I C. 695. (17) For decree absolute, 14 O. C. 217. (18) For correction of *khewat* rejected by Revenue Court, 16 O. C. 163 (19) For ejectment, whether an application for execution, 15 O. C. 381. (20) Ordinary action supplementary to, 14 O. C. 124. (21) See Benami. (22) To the Court realizing money, 13 O. C. 291. (22) See extension of time. (23) For guardianship, 1 O. L. J. 761. (24) See S. 55 C. P. C. (25) By pauper See 028, 1[illegible], 044 C. P. C. (26) For leave to appeal to Privy Council, 2 O. L. J. 208—13 O. C. 302—10 O. C. 308—9 I. C. 1040—1 O. C. Sup. 18—2 O. C. 235. (26) For mutation by persons obtaining possession by succession or transfer, S D. 4 of 1909. (27) For order absolute in lieu of a portion of the decretal amount, 10 O. C. 354. (28) For personal decree, 14 O. C. 62. (29) For possession by mortgagor, 14 O. C. 10. (30) For rateable distribution, 10 O. C. 129—13 O. C. 282. (31) Dismissal of, on the ground that property was not liable to sale, 14 O C. 62. (32) For revision, See S. 115 C P. C. (33) For substitution of legal representative, 9 O. C. 281—14 I. C. 711—1 O. L. J. 709—16 O. C 194. (34) Of Limitation Act 17 O. C. 254—11 O C. 220—13 O. C. 103, 179, 16 O C. 211. (35) Of provisions of Indian Succession Act, 11 O C. 102. (36) Of sanad 13 O. C. 316. (37) Of Section 6 to S. 31 Limitation Act, 18 I. C. 306. (38) Of S 11 Suits Valuation Act, 16 O. C. 257. (39) Refusal to accept for different date on stamp 17 O. C. 148. (40) To send notice to mortgagee to withdraw the mortgage money, 14 O. C. 10 (41) To set aside *exparte* decree under S 90, T. P. Act 9 O. C. 288. (42) To set aside sale 10 O. C, 171—14 O. C. 33—17 O. C. 91. (43) Under S. 145 Oudh Rent Act, 13 O. C. 103.

Approver.

His evidence, 13 O. C. 243—12 O. C. 418—12 I. C. 513.

Arbitration.

(1) Appointment of arbitrator O. P. J. 182. Private agreement to refer to—Matter covered by pending suit, 4 O L. J. 131. (2) Refusal to accept nomination, O. P. J. 1021. (3) Whole case referred to. Power to arbitrator to award money or impose other conditions when asked to divide property—Duty of Court in

dealing with award when fairly made, 15 I. C. 321—Mere arbitrary revocation not allowed, S. C. 17—4 O. C. 17—17 O. C. 386—Grounds for appeal against decree passed on appeal 17 O. C 386—Reference to, by appellate Court S C 25—Reference by agent having no express power to refer—Ratification, 8 O. C. 263—9 I. C.—412—Reference on question of law, 33 I. C. 737—Order refusing to file agreement to refer, appealable, 11 O. C. 116, Contra 9 O. C 205—Consent once given to refer to, 2 O. L. J. 129—Delegation of power by Court to extend time, 9 I. C 241—Reference by Court to, 13 O C. 341—14 O. C. 289—Reference to, resiling from 17 O. C. 386—Superseded before receipt of award, 17 I. C 320—Jurisdiction of Court on the refusal of one arbitrator to nominate another. Superseding arbitration without nominating arbitrator 14 O C. 289—No application in writing signed by the parties. Ratification by conduct, 8 O. C. 263—9 I. C. 412—Agreement in writing to refer differences to—2 O. C 355—Arbitration without intervention of Court Reference after institution of suit Revocation 4 O. C. 17—See award.

Arbitrator.

Power and duties of; rounds for setting aside of award; questions to arbitrator; 14 O. C. 308—1 O. L. J. 249—18 I C. 72—Misconduct of. Principle of upholding arbitration, 18 I. C. 92—5 O. C. 13—16 I. C. 595—12 O. C. 40—Reluctant party not bound to accept award of not appointed by him, O, P. J. 18—Power of, to direct payment by instalment, 12 O. C. 23—Whether bound to make notes of proceedings, 17 O. C 120—Discretion of, 1 O. L J. 249—Examination of, 17 O. C. 120—Irregularities of procedure, 1 O. L J 249—Jusisdiction of, 16 O. C. 233—Impproper action of, 2 O. L. J. 365—Dishonesty or partiality, 1 O. L. J. 249—Refusal to accept the nomination, 14 C. C. 289—Absence of one, at hearing, 30 I. C. 384—See "award"—"Arbitration."

Arrears.

Suit to establish right to annuity, and to recover arrears; suit to establish a periodically recurring right. Limitation, S. C. 306; 2 O. L J 113—Of land revenue, land described in sale deed "*bila lagan*," but subsequently assessed, 1 O. C. 222—2 O. C. 273. Dist, 3 O. C. 310—5 O. C. 70 (74)—6 O. C. 184 (187)—15 O. C. 25—Of maintenance, 1 O. C. 93—Of rent against maintenance holder. Jurisdiction of Rent Court, 9 O. C 179—Of rent, transferee from underproprietor, 10 O O. 36—Limitation far suits for arrears of rent by assignee, 10 O. C. 21—Of time barred debt O. P. J. 956—See S. 108 O. R. Act.

Arm.

Definition of, 1 O. L. J. 559.

Arms Act (XI of 1878).

Ss. 4, 20. Definition of "arms." Weapon dangerous and probably to cause death if used, 26 I. C. 133—Military officer. Cause of action. Jurisdiction, S C. 113.

Assessor

Persons not summoned to act as, acting as such. Want of objection by accused, 13 O. C. 337—See S. 537 Cr P C.

Assignee and Assignment.

Of decree. Inconsistent position, 3 O. C. 32, 4 O. C. 199, 4 O C. 408—Assignment pending suit—application to make assignees porties, 5 O. C 91—By Court of Wards of villages without consideration, 23 all 394—By husband in favour of wife in lieu of dower debt, 3 O C. 277—Of mortgage 4 O. C. 210—Where an assignee proves his assignment, adverse party can not take objection, 2 O. C 149—Grounds on which defendant can question validity of contract between plaintiff and third party, 7 O. C 1815—From minor. Limitation, 18 O. C. 34—1 O L. J. 747—Of money decree obtained by the mortgagee, right of, to sell in contravention of S. 99 T. P.

Act—11 O. C. 231—Of mortgaged property, 2 O. L. J. 291—Of rent, whether can maintain suit in Revenue Court, 2 O. C. 388—10 O. C 21—Of mortgagee rights, 16 O. C. 136—18 I. C. 389—Of rights under a decree by registered document, 16 O. C. 70—Right to plead invalidity, 21 I. C. 8.

Asura.

Suit for recovery of money paid in consideration of marriage. Jurisdiction, 3 O. C. 241.

Attachment.

See C. P. C. S. 64 and O XXI r 62 C. P. C—Enforcement of attachment against property received in lieu of one originally attached, 20 I, C. 43—Objection to. Limitation Act 6 O C. 44—17 O. C. 94—By Court without Jurisdiction 13 O. C. 43—Sequestration of property by, Right of creditor. Personal liability of heirs at law. Rights of heirs to profits, 17 O. C. 207.

Auctioner Purchaser.

1. Sale in execution of simple money decree—sale of hypothecated property—Rights of S. C. 13—14 O. C. 89—Purchase of mortgagor's rights by mortgagee at sale in execution of decree of third party 7 O. 307—12 O. C. 45—Property though encumbered sold subject to no encumbrance, 2. O. L. J 225—Limitation, when made party, 1 O C 83—Right to pre-empt property sold to another person prior to comfirmation of sale, 8. O. C. 202 Respective rights of, purchasers at two sales, 14 O. C. 89—35 I C. 753—Right of, before confirmation of sale, 10 O. C. 273—16 O. C. 9—As party in mortgage suit 5 O. C. 91—See S. 47. C. P. C.—Representative of decree holder or judgment debtor, 12. O. C. 175, 14 O. C. 89, 70 2. O. L. J. 57—Purchase, subject to mortgage—Purchaser of mere equity of redemption as distinguished from purchaser of property, 15. O. C. 211—Collusive and fraudulent procceding, 16. O. C. 225—12 O. C. 175—Mortgage charge not notified in proclamation sale, 1. O. L. J. 175—Liability of, 2. O. L. J. 225—18 I. C. 461.—Position of, 2 O. L. J. 22, 327—16 O. C. 148—Relief against, 2 O L. J. 57—Entilled to whole property, 21 I. C. 262—Redeeming prior mortgage entilled to subrogation, 16 O. C. 148. Taking possession, of property not sold 14 O. C 70 89—See S. S. 64, 65, 151, O XXI. r. 84 C. P. C. & S. 47 C. P.

Aulad.

Meaning of, 17O C. 68, O. P. J. 1072 6 O. C. 132.

Authority.

Duly consituted, presumption as to notice issued by, 7 O C. 51, 68—Given to another to make bequest, 4 O. C 203—Of guardian to contract S. C. 264—Of mortgagor to sign, 6 O. C. 279—Absence of statulory, 17 O C. 263—1 O. L. J 481—Implied, of manager, 2 O. L. J. 55—Of agent, 16 I. C. 999—Mortgage executed without, 18 I.C. 229—Of wife to purchase goods, 10 I C 9

Award.

Court has no power to refer against the protest of one of the parties, 10 M. I A. 413—Construction of, 23 Cal. 838—By British Indian Association, 7 O C. 90—12 I. C. 324—Court fee on application for filing, S. C. 32—Arbitration without intervention of Court. Revocation, 4 O. C. 17—Decree in terms of award Grounds of setting aside. Appeal, 5 O C 13—14 O C 308—2 O. C. 355—Made within time fixed but reaching Court late, 16 O. C. 94—Not made by all arbitrators, 16 O. C. 94—17 I. C. 320—Decree not in terms of, 5 O C. 27—In excess of questions referred to arbitration 23 All. 394—O P. J. 776—Meaning of, 12 O. C. 23—Made by Collector without giving objector opportunity of stating his case before him—8 O C. 118—9 O C. 311—Made by Financial Commissioner in dispute regarding maintenance, 7 O C. 218—Not filed in Court within 6 months, 7 O. C. 369—Not filed in Court. Title of persons under, 18 O. C. 282—Objection to

filing of, 2 O. C, 355—Whether compulsorily registerable. Made without intervention of Court. Whether filing in Court necessary, 18 O C. 282—4 O L. J. 487—Of a body of talukdars within S 33 Oudh Estates Act, 26 Cal. 81—Order rejecting application for. Appeal, 1 O. C. Sup. 22—Order to file. Amendment of decree Jurisdiction, 4 O. C 82—Partly inoperative, 23 All 383—3 O. L J. 137 Rights in an inchoate. Expectant claim, 14 M. I. A. 40—Invalid, 1 O. C. 181—Under *anjumani hind* Rules S. C. 42—Grounds of appeal against order enforcing private, 12 O. C 40—16 I. C. 595—Construction of. Finality, 17 O. C. 33—Notice of filing, to parties, 15 O. C. 294—16 O. C 233—32 I. C. 345—Date to file. Defect in the order of reference fatal. Question in appeal, 16 O. C. 233—32 I. C 345—Where separable portion of it bad, 17 O. C. 120—Principle of upholding, 18 I C. 92—Deed not executed to give effect to terms of 18 O. C. 282—Oral, effect of 17 O. C. 108—Order refusing to file, appeal, 9 O C. 205—11 O. C. 116—Suppression order set aside on receipt of 17 I C 320—Validity of—2 O. L J 497, 365—9 I. C. 241—16 O. C. 94, 233—16 I. C. 595—18 I. C. 92—1 O L. J. 249—Void—17 I. C. 320—16 O. C. 94—When it can operate to transfer property 17 O C. 108—Not filed in Court 18 O. C. 282—Parties not given apportunity to present their case 30 I. C. 384—Grounds for remission of 3 O L. J. 258—Permission to withdraw after—32 I. C. 347—See Arbitration, arbitrator.

Bad Ahdi.

Meaning of O. P. J. 178.

Banker and Customer.

Mortgage held by Banker against customer. Payment from Customer's current account. Banker's duty—Interest, 9 C. W. N. 745—O. P, J. 869.

Benami.

Transaction. Burden of proof, O. P. J. 526—See Evidence, 15 Cal 20—Purchase. Whether property was held benami for the claimants or was a gift to the holder Evidence of ownership Source of purchase money. 26 Cal, 227—O. P. J 716—Onus of proof Purchase *Ism farzi* Proof of the actual transaction, 25 C. 473—O. P. J. 526—Transaction, Presumption, 2 O. L J. 584—Mortgagee can sue in his own name, 18 O, C. 363—Transfer to one person for consideration paid by another, S C. 228—Transaction-validity of—a effect of absence of mutation of names, S. C 204, 209—No suit by third party against certified purchaser, 8 O. C. 306—suit by holder of a Promissory note, I O C 10—Application for execution by Benamidar, limitation, 10 O. C. 263—7 O. C. 229—Benami and Fictitious sale deed, 9 O. C. 196—Purchase, 18 O C 160—2 O. L. J. 283- On the death of Benamidar real purchaser not entitled to Mutation, 1 O L, J. 452—Name recorded in annual registers, 1 O L J 452.

Bengal Regulation.

XI of 1825 S. 4, Oudh Laws Act XVIII of 1876 Alluvion and diluvion. Change in the Course of river-ownership of land, O P J 880—18 O. C. 76—Dispute between Government as owner of bed of river and a proprietor, 18 O. C. 78—XVII of 1806 Mortgage by conditional sale, 28 All 496.

Bequest.

In favour of the Collector, whether a bequest in favour of Government, 8 I. C. 695—Of Taluqdari estate, 1 O. L. J. 591—Of life interest to woman, 9 O. C. 119—Of self acquired property, 14 O. C 244—See Will.

Bill of Excharge.

Holder and acceptor. Acceptor as surety, 13 O. C. 206.

Birt.

Deed. Pre-emption in respect of a sale deed creating a *birt* right, 8 O. C. 121—14 O. C. 41 Dist, 17 O. C. 299—Heritable and transferable right, 4 O. C. 31—10 O. C, 318—14 O. C. 41—8 I. C. 407—1 O. C. 124—1 O. L.

J, 463—*Sankalp*, C. Cal. 218—As to respective rights and liabilities of those who have been decreed a *birt of haq chaharum* in the *nikasi* of a whole village and their talukdar, *R. A. R. No 62*—Birt Limitation *O. P J. 364*—Birt rights. "Bai Birt" meaning of. Birt Zamindari in Gonda Under proprietary rights, Record Rights, 10 O. C. 318—14 O. C. 41—1 O. L J 463—Birt rights, admission of by Court of Wards, O P. J. 687—Birt Zamindari, O P J 314—Liability of *Birt dar* for payment of rent payable to Taluqdar, 14 I C. 117—Not sub-division of a tenure, 20 I C. 474—Liability of Birt dar for payment of rent, 14 I. C 117—Birt holder in *mohal* not a cosharer, 13 I. C. 631—Right of, whether saleable in execution of decree, 14 I. C. 117.

Birth.

And death register of Chaukidar, 14 O. C. 68

Bonafide.

Intention of gift, O. P. J. 909—Enquiries as to legal necessity by transferee, 5 O C 18—Fixing of price See Pre-emption, 4 O. C. 247—6 O. C. 327—14 O. C 1—Mistake, institution of suit through, 2 O C 133—4 O C 372, 5 O. C. 384—15 O. C. 22, 14 I C. 321—21 I. C. 264—Mistake, sufficient cause. See S. 5 Limitation Act 3 O. C 265, 2 O. L J. 325—Possession of person dispossessed, 6 O. C. 110—28 I. C. 440—Relief. See 9 C. 341—Meaning of, 3 O. C 265—Purchaser from mortgagee, 9 O. C 373—12 O. C 84—29 All 471—31 All 300, contra, 29 I. C. 403—Purchaser for value, 11 O. C. 310—1 O. L J. 175, 43—9 O. C 373—14 O C. 295.

Bona vacantia.

Meaning of, 1 O. C. 42—Effect of, 20 I. C. 40.

Bond.

Interest to be paid every year. Entire money to be paid within fixed period. Suit instituted after fixed period, 41 I. C. 423—Authorizing obligee to realize whenever he wished, 18 O. C. 86—Acknowledgment, in letter of missing bond. Interest at contract rate. Practice of Indian Courts not be allow interest exceeding the principal. Settled accounts not to be reopened, 11 M. I. A. 120—Given for payment of judgment debt, 4 O. C 284—Security, money due on, realizable in execution side, 7 O.C. 210—11 O. C. 345—Suit on, "Single bond" and "bond subject to a condition" Limitation, 8 O. C. 77—Bond debt. Joint family, 1 O. C. 112—Stipulating repayment of money borrowed within time fixed for redemption of a previous usufructuary mortgage, 8 O C. 132, 227—Default in payment of instalments, 14 O. C 129—16 O C. 45—Right to sue in default of any of the conditions of the bond, Limitation, 16 O. C. 45—See 14 O C. 129, 18 O C. 86—Suit for money due on, Payment pleaded. Burden of proof, 2 O. L. J. 498—See 15 O. C. 278—Authorizing suit on default of payment of yearly interest, or of principal after fixed period. Suit for interest barred, 20 O C 152.

Books of account.

See evidence Act S. 34 and account book.

Brothers.

See Act 1 of 1869 S. 22 Cl. (6) O. P. J. 851—7 O C 248—Elder failing to execute decree as next friend, 4 O. and A L R. 561—Illegitimate, succession of one to another, 14 O. C. 227—Of the husband, complaint by, 11 O C. 148—Effect of entry of name of only one of two, 22 I C 129

British Indian Association.

Power of as private arbitrator—award, 30 I. C. 249; 13 O. C. 74; 7 O. C. 218, 9 O. C. 179.

Building.

—Erected by one owner without the consent of the other S. C. 270—Erected without sanction See N. W. P. and Oudh Municipalities Act of 1900, S. 147, 8 O. C. 249 Diss 11 O. C. 122—Notice for repair, 7 O. C. 51, 68—Effect of minority of landlord at the time of 10 I. C. 186—Removal of, 9 O. C. 29—Not objected to in

time, 10 I. C. 186—On a *sahan*, right of tenant for, 10 I C, 186—Partition of, 18 O. C. 80—Demolition of, by co-sharer 7 O. C 336, 362; 11 O. C 355; S. C. 270—30 Cal. 901 (903)—5 All. L J 93.

Buredn of proof.

Account between debtor and creditor, 19 Cal. 174—In suits for arrears of rent, 3 O. C 65—that negotiable instrument was not induced by undue influence, 5 O. C. 307—suit to set aside document and for declaration that the defendant is not under proprietor, 6 O C. 142, 8 O C. 145—Mortgage by widow-suit by representative, legal necessity, 23 Cal 766—That the rent reserved is favourable, S. C 263—Malicious prosecution, S. C. 294—Mortgage relied on by plaintiff-Defendants admission not sufficient, 3 O. C 173—Nazul land, suit for possession of, 7 O. C. 65—Plaintiff bound by case set up in plaint, 6 O C. 119—Possession of ancestral property sold during plaintiff's minority, 2 O C. 348—As to tenant status in suit contesting notice of ejectment, R. A R. No 8 -suit to set aside deed executed by "*parda nashin*" woman S C. 272—In case of adoption S C 116—When it is pleaded that redemption of mortgage is barred, S C. 129—Legal necessity for sale of joint family property, S. C 173—Plea of minority, S C 173—Plea of minority S. C. 265—When *parda noshin* woman denies execution of deed, 7 O. C. 292 Property in possession of widow—Property claimed through thirid person, 2 O. C 286—Absence of undue influence. 18 Cal 545—Consideration for promissory notes, 5 O C. 307—Ownership of husband, 26 Cal. 871 Transaction with disqualified proprietor—Undue influence, 12 O C. 300 Illegitimacy of plaintiff set up by the defendant—Extract from *khewat* produced in proof of legitimacy, 1 O L J 895, 4 O. L. J 556—Shifted in appeal, 1 O L J 366—*Bona fide* purchaser for value, 11 O C. 310, 16 O. C. 359, 22 I. C. 702—In case of old mortgage, 11 O. C. 285—In suits to set aside auction sale, S C. 215, 295, 8 O. C 409, 12 O C. 47, 297, 299,—Possession within limitation, Jungle-grove-tank-scattered trees, 2 O. L. J. 549—Property of religious institution, alienation by manager, 13 O. C. 79, 11 I C. 166—Money borrowed for immoral purposes, 4 O. C 277—Exclusion became known to the plaintiff more than 12 years before suit, 2 O. C 348 In Suit by taluqdar for declaration of proprietary title and ejectment of tenant 6 O. C 119, 8 O.C 145—See pre-emption—Profits-Evidence of actual collection, 4 O C 1—Undue influence, 1 O C. 63, 5 O. C. 307, 5 I C 486, 10 I. C. 37 (38)—See adverse possession—Illegitimacy of plaintiff set up by defendant, presumption Extract from *Khewat* produced in proof of legitimacy 23 I C 972, 30 I. C 220—That a purchase of the subsequent mortgagees rights was made prior to a latter decree, lies on the purchaser, 3 O L. J 529—See "Consideration."

Cancelment.

Of lease, possession, declaration that lessee is liable to ejectment through Rent Courts, 6 O C. 289, 14 O. C. 225, 24 I C. 281—Of adhesive stamp, 15 O C 58—Of ejectment notice on the ground that the person was more than a tenant, 14 O. C. 196—Of mortgage 11 O C. 89—Of ejectment notice on technical ground, 12 O C. 15—Of notice of ejectment on person not heir of deceased tenant S D 11 of 1914.

Canning's Proclamation of 1858.

See 7 O. C. 65—Result of, 4 O. L. J. 648.

Cantonement.

Illegal detention, Lunatic. Protection of Judicial Officer—Liability of public servant. for illegal acts, 9 Cal 341—Act III of 1880. S14—European soldiers S. C. 104—Code, 1899, Ss 83, 85. Notice for repairs of building. "Insanitary state" and "defects", meaning of, 7 O. C. 51, 68.

Catalogue.

Whether offer or not. Place of suing, 12 O. C. 17.

Cattle.

Right as to slaughter of, 1 O. L. J. 496—Under proprietor's right to graze in waste land, 20 I. C. 467.

Cause of action.

Interruption light and air, 8 O C. 356—See Limitation Act s. 4, 4 O C. 293—Right to Mahabrahmoni collections, 5 O. C. 225, 8 O. C. 339, 11 O. C. 212—See "Pre-emption" 4 O C. 397, 8 O. C. 275—See Specific Relief Act ss 39, 42, 1 O C. 18—See stamp act, 3 O C. 195—See Succession certificate Act, 1889, s. 9—2 O. C 17—10 O. C. 218, 10 I. C. 190 (192)—Suit for rent or in default for possession of land, 6 O. C. 341—Suit for value of crops by subtenant against tenant, 7 O C 351—Suit to establish right in property against co-sharers in possession thereof, 6 O. C 379--9 O C 339—Suit for declaration of under proprietary right 8 O. C. 30, 11 O. C. 240, 12 O. C 164, 8 I. C 710, 10 I. C 11 (13) 24 I C 381—arising on different dates and referring to different properties, 8 O. C. 65, 4 O. C. 293, 4 O. C. 293—5 O. C. 304,—12 O C. 347—For declaratory suit against tenant setting up under proprietary title, 12 O. C. 15—In a suit for a dower as distingueshed from that in a suit for estate, 21 Cal. 157—Identity of, 13 O. C. 19, 14 O. C. 117—Misjoinder of, 9 O. C. 326, 15 I. C. 744, 1 O. C. 80, 3 O C 176, 10 O C. 33, 4 O. C. 71—Meaning of, 5 O. C. 304, S. C. 111, 8 C C. 389, 1 O. L J. 561, 14 O. C. 327—Suit against Secretary of state, 4 O. C. 29—To reversionary heir, 7 O. C. 239—8 O. C. 21, 81—Same though different relief prayed for, O. P. J. 536—In declaratory decre O. P. J. 845—See s. 5 Limitation Act—Joint Hindu family, 11 O. C. 334—Mortgage with possession, Redemption, 14 O. C. 257. Absence of, 16 O. C 178—Difference between accrual of—S. D5 of 1913—Disability or inability to suet afe accrual of, 18 I. C. 306—Remedy with respect to one, 10 O. C. 44—Suit for a share in inheritance. Subsequent claim for for dower, 11 O. C. 69—Suit upon wrong, 1 O. L J. 147 Title acquired subsequent to, 11 O C. 290—When arises, 29 I C. 24—For contribution, 10 O. C. 108, 13 O. C. 23—See S 11 and O II, r 2 C. P. C.

Caveat Emptor.

See T. P Act S 55—Covenant as to title. Warranty-Fraud-Misrepresentation, application to sales in India 8 O. C. 345, 14 O. C. 343.

Certificate.

False. Endorsement of O C. 153—For appeal to Privy Council, 1 O C. 205, 1 O. C 18—Sup 10 O C. 18—15 O. C. 55—For ged, issue of 5 O. C. 232—Fresh, of transfer of decree after appeal, 4 O.C. 334—Of admi3nistration. S C. 145—19 W. R. 15 (P C.)—Of sale granted by Deputy Commissioner, 5 O. C. 228—Of Sale, no mention of incumbrance, 6 O C 76—Order to supply security before grant of, 5 O C, 76—Order to supply security before grant of, 5 O. C. 213—To cllect debts on succession, S C. 137—Of sale, not obtained, 25 I. C. 8—Of registering officer, 14 O. C. 80.

Certified.

Copies of khasras admissible, 3 O. C. 205 Entries by Patwari in the remark column, 11 O. C. 195—Copy of a registered deed, admissibility of, to prove existence, condition and contents of the original, 7 O. C. 327, 365—Purchaser buying *benami*, 3 O. C. 229, 8 O. C. 306—Copies of evidence, right of counsel to refer to, at the hearing of appeal, 11 O. C. 360—Copy of extract from settlement record, mistake in, allegation as to, 1 O. L. J. 583—Copy of pedigree, when admissible in evidence, 18 I. C. 250.

Cess.

See Land Revenue Act 1876, Ss. 52 and 53 and ss 56, 86—Effect of payment of 22 I. C. 125—Payable by an under proprietor to a superior proprietor, 12 I. C. 331.

Champerty.

Agreement to share property, the subject of suit. Claim for works done and expenses properly incurred, 20 Cal. 843, 8 O. C. 155—Specific Englisn law not introduced in India 2 O. C. 149, 8 O. C. 155—Gambling in litigation 8 O. C. 155, 10 O. C. 173, 14 O. C 139, 16 O. C. 136, 21 I. C 8—Purchaser for value without notice 6 O C 305—See Sale deed O, P. J. 856—Law of agreement to share the property in suit O. P. J 633—Maintenance, Wager, Guarantee, Conditional promise. Agreement to advance money for letigation, 8 I. C. 500—See Agreement.

Chaukidar.

Register of births and deaths, admissibility in evidence, 14 O C 68, 15 O C. 351—Implied contract for maintenance of, 7 O C. 35—*Chaukidari* rate from under proprietor, 5 O. C. 43, 9 O. C 63.

Chaupal.

Meaning of, 10 I C. 186.

Circumstantial.

Evidence, 1 O. L J 255, 281, 13 O. C. 1, 309.

Civil Court Act (XIII of 1866)

Suit for redemption. Decree of Settlement Court giving proprietary possession, adverse possession Limitation, 7 O. C 259. Dist 18 I. C 383—Possession of land by demolition of houses therein, 11 O. C. 45.

Civil Courts Act (Oudh) XXXII of 1871.

Ss. 4 to 6. Declaration of legitimacy though no right to property or to the status of legitimacy involved, 2 O. C. 57—S. 28, Fyzabad Settlement Courts. Suit for land-jurisdiction, S C. 39—Ss 29 and 30, Period for redemption, S. C. 14—S 31—See Oudh Estates Act I of 1869, S. 22, cls. 1 to 11, S. C 10

Civil Courts Act (Oudh), XIII of 1879.

S. 17 Grant of land for maintenance. Valuation-jurisdiction S. C. 237, 4 O. C 163, 10 O. C 136, 14 O. C. 189, 1 O, L. J, 421—Valuation for jurisdiction, 11 O. C. 45—Order passed in proceedings commenced before passing of Act XX of 1890 appeal to Court of District Judge, 1 O. C. 160—Appeal, where value exceeds 5000, 4 O C. 255—Mortgage, suit for redemption, value, appeal, S. C. 267—Jurisdiction of Subordinate Judge, as regards appeals preferred to his predecessor, 7 O. C 321. Suit for redemption. Pleader's fee how to be calculated, 6 O. C. 130.—S 19, See s. 132 Oudh Rent Act, 6 O. C. 104—S. 20, See Oudh Land Revenue Act Ss. 52 to 55 S C. 259—S. 21—See appeal, S C. 211—Court of first appeal modifying decree of Court of first instance as to costs only. Second appeal. Objection to jurisdiction, S. C 55, 139—Right of appeal when two Courts differ only as to costs—10 O C 65, 9 I C 1040—Second appeal in Civil Courts, mistakes or irregularities of Court, S C. 54—Second appea by the defendant, plea of minority. Burden of proof, *Wasikanama* deposited by minor's father in *Wasika* office, S. C 265, 8 O. C. 94—S 27, Decree of Judicial Commissioner dismissing suit for dissolution of marriage whether appealable, 18A. 375—S37, Onus of proof in redemption suit, 18 I. C. 229.

Civil Courts.

Rules prescribed for a Civil Court, S C 23

Civil Digest (Oudh 1912).

Pleader's fee See para 272, 7 O. C. 43—Presentation of plaint or application Date not coinciding. Duty of munsarim, 17 O C. 148—Para 272 R 9—17 O. C. 284—Vol. I. Chapter VII. Para 272, Rule 3, 2 O. L J. 607—Rule 8, 9 O. C. 65—Rule 24, 17 O. C 148—Rule 573. Signature of general agent, 1 O. L. J. 356.

C. P. C. (Act V of 1908).

S2.

Definition of decree. Order striking off certain defendants to be treated as order dismissing the case, appeal, 8 I. C 409—47; O. XXI, r. 16, a party cannot take up inconsistent

positions. 3 O. C 32, F 4 O.C 199, 4 O. C 408—Legal representative Grove holder and tenant dying without heirs House and grove escheating te Zamindar, 12 O. C. 197, 1 O L J 86. Hearing of a petition under S. 187 Municipalities Act is not a suit, 16 O. C 36—See O VIII, r. 10 XXI, r 5 C P. C.—Order dismissing pre-emption suit for non-payment of purchase money within time whether appealable as decree, 17 O. C. 14.

S9.

Plaintiff pleading his own fraud, 8 O. C. 278.

S11

Exp 4, See 4 O. L J. 648—Redemption, suit for possession, previous suit for alternative relief, right to redeem, 2 O C. 139—See 2 O C 51—Omission to bring forward a defence in a prior suit "Final decision" R A R. 70—Withdrawal of suit, Notice 1 O. C 97, 8 O. C. 57, 10 O. C 145, 8 O C. 389—Fresh suit after Withdrawal with permission to bring a fresh suit, 8 O C. 389—10 O C. 44—13 O. C 19 withdrawl, plea of res-judicata 22 I.C. 918—Question in issue but not heard and finally decided in previous suit, 3 O C. 273—Execution of decree Limitition Mesne profits Pleading and judgment referred, to O P. J. 618 - Suit for profits by under proprietor. Decree in terms compromise, 2 O C. 28—Claim in part included in former dismissed suit, 19 Cal 159—Causes of action arising on different dates and referring to different properties, 8 O. C. 65—12 O. C, 347—10 I C. 29 (31)—Suit for rent or in default for possession, 6 O C. 341—Deft not bound to raise the defence in former suit, 19 O. C. 171—Relief claimed in subsequent suit which could have been claimed in previous suit, 5 O.C. 173—8 O C 389—10 O C. 44—13 O C 19—Mean-ings of "matter which ought to have been ground of defence or attack" "litigating under the same title", 12 O. C. 347—10 I C, 29 (31)—14 O. C 117—Previous decree for redemption, directing payment into Government Treasury, Loss of money. Fresh suit if maintainable, 9 O C. 7—Effect of redemption decree where no foreclosure provided for 1 O. C. 289—Not F 6 O. C. 367—See 8 O. C. 361 -Matter directly and substantially in issue. Finding on point beyond scope of case, 9 O. C 377 Expl, 4 O L J 75—4 O. C. 145—Decree for redemption on payment of a sum, suit for possession on payment of such sum, S. C. 256, Dist 1 O C 289, F 6 O C. 239, 8 O. C. 261 R. 14 O C. 257 (263, 264)—Suit for redemption of mortgage, 6 O. C. 239—Suit for share in inheritance. Subsequent suit for dower, 11 O. C. 69—Award of Committee of Taluqdars not res-judicata, 10 O C 343—Meaning of "matter" and "Litigating under the same title"—12 O. C. 347 14 I C. 12—Defendant omitting to put forward plea, 10 I C 29—Finally read and decided, 1 O C. 22—Admission of vendor in sale deed and written statement as to part payment of price Decision of question as to payment of price between vendor and vendee in a suit for pre-emption, 9 O C 308 Decision erroneous in law over ruled by latter decision, 9 O C. 243—Where previous decree was not intended to grant consequential relief, 6 O C. 239, 8 O. C 361, 15 O. C, 99—First suit on basis of gift, second as heir, 9 O. C 235, 12 O C. 347—Dismissal of suit as previous mortgage not offered to redeem Second suit for redemption for prior mortgage and sale, 10 O. C. 145, 12 O C 347, 10 I. C 29 (31)—Second suit for redemption by sons of the mortgagor, 14 O. C. 257—Suit for possession against lessee. Subsequent suit for declaration, 10 O. C, 44—Dist 13 O. C 19—Court deciding previous suit not competent to try subseqent suit, 2 O. L. J. 44—"Ought" explained, inconsistent pleas when barred, 17 I O. 334—Pre-emption suit. Property subject to mortgage Covenant by vendor to discharge previous mortgages, 17 I.

C. 318—Pre-emption suit. Decree determining same matter, one of which decrees has become final 5 O C. 384, F. 15 O. C. 22, 14 I. C. 321—Second appeal only against one of two decrees in cross appeals disposed of by one Judgment when maintainable, 21 I C 264—Plea of limitation regarding previous application for execution, 13 O C 90—See custom, 14 I. C. 12 Property subject to mortgage, 17 I. C. 318—See Resjudicata, 14 I. C 321, 22 I. C 918, 10 I. C 29—See s 47 C P. C. and O II R. II C. P. C. and "Res judicata"

S13.

Mortgage with possession. Suit for redemption, 14 O C 257.

S. 15.

Revision against order directing a person to be added as defendant, 15 O. C. 304.

S18.

No objection as to jurisdiction in appeal, 1 O. C. 51.

S19.

Value of the subject matter of suit for pre-emption, 6 O. C. 255, 12 O. C. 31, 9 I. C. 414

S20.

See Cause of action, S. C. 111, 34 I. C. 191—Place of payment Principal and agent, 11 O C. 191—Catalogue, whether offer or not. Place of suing 12 O. C 17—Proper Court, Place of suing 26 I.C 225—See jurisdiction, 1 O L. J 561.

Ss. 22, 23.

The Court can not pass order for transfer on Judgment creditor's application, 10 O.C 139, 10 I C 29(30) Application for transfer of suit, suits triable in Courts subordinate to different High Court, 20 I. C. 758—Grounds for transfer, 34 I. C. 686.

S24.

Transfer of suit, S. C. 293—Transfer of partition case, 7 O.C. 142—Transfer of execution proceeding, Meaning of "suit", 1 O. C. 117—Small Cause Court suit transferred to other Court, Appeal, 20 O. C. 350, See 2 O. C. 143, 6 O C. 81.

S34.

Interest after the date fixed by decree 3 O. C. 129. Courts' power to allow interest at contract rate till realisation, 1 O. L J. 544—See ss. 108—141 Oudh Rent Act, 9 I. C. 223

Ss 35; 144, O XX, r 6.

See costs.

Ss. 36, 37.

See Art. 182 Limitation Act—See Benami.

Ss. 38, 39.

See execution of decree, 13 O. C. 119.

S41.

Discretionary power to grant letters of administration in respect of whole or any portion of the property 14 O. C 14.

S42.

Decree transferred without order of execution Objection as to decree-holders' right to proceed against property not mentioned in decree. Power of executing Court, 2 O. L. J. 18.

S47.

Mesne profits, separate suit S. C. 124—Suit for possession by decree-holder purchaser, 18 O. C 345—Decree for redemption containing no bar. Remedy whether by second suit or execution of decree, S. C 256, 1 O C. 289, 6 O. C 239, 8 O. C. 236, 361, 11 O. C 291—Court could not retry the suit, 1 O C. 22—Questions to be determined in execution of decree, separate suit relating to property sold in execution. Legal representative, Sup. O. C 60, F 8 O. C. 405 (408)—Separate suit for value of crops cut while under attachment. 2 O. C. 315—Applies to disputes after and before the execution of decree, 2 O C. 366—Appeal, 4 O. C. 255—Redemption of mortgage, condition upon which redemption was allowed, not carried out second suit for redemption, S. C. 132. Dist. S C. 238 app. S C. 256 1 O. C. 289—Not F, 6 O. C. 367, 14 O C 257. Previous decree for redemption directing payment into Government Treasury,

loss of money, 9 O. C. 7 (P. C.) 15 O. C. 7, 10 O. C. 81—Question as to who was legal representatives of the decree holder, 5 O C. 133—Application under s. 89 T. P. Act is application for execution, 4 O. C 123, Dis. 6 O. C. 114, 9 O. C. 288, 10 I. C. 21—Execution of decree against minor no guardian appointed 7 O. C. 199—Decree holder taking possession of property not comprised in the decree, S. C. 299, 7 O C 213—Suit for half the amount due upon the mortgage at the date of the previous decree and in default of payment, foreclosure of right to redeem, 7 O C. 137—Plaint treated as application under s. 47, 8 O C. 327—Sale of ancestral land in excess of that sanctioned by Government, 8 O. C 409—Inconsistent position, 3 O. C. 32, 4 O C 199, 408—Suit for lands allotted under partition 2 O. C. 51—Transferee of Judgment debtor not his representative, 8 O C. 370—Strangers to the decree, 14 O.C 89, 2 O L J. 57—Objection by Judgment debtor. Small Cause Court suit, Second appeal. Revision, separate suit, 8 O. C 405—Restitution of mesne profits to Judgment-debtor, 8 O. C. 254—Decree capable of execution though no time fixed, 14 O C 100. Question of fraud in execution sale, 12 O C. 175—Declaratory decree, suit not barred 15 O C. 99—Possession given to purchaser (decree-holder), satisfaction of decree and restorotion of property to mortgagor, remedy for recovery of mesne profits and interest, separate suit, 13 O. C. 180, S. C 124 Sale in execution of decree of inferior Court by order of Court of higher grade, 11 O C 41—O XXI, r. 50, Objection by Judgment debtor, how to be treated, objection on the ground that Judgment debtor, was holding property as trustee for religious purposes, appeal, 12 I. C 411—Does not contemplate, application by Judgment-debtor against auction purchaser, 27, I C. 570, See 8 O.C 370, Judgment-debtor bound to show that his application was within time. Judgment debtor's neglect of property taken possession of by decree holder in execution, 20 I. C 538—Question of payment or non-payment of pre-emption price is not a question of execution open to appeal, 11 O C 144, 28 I. C. 374—Courts power extend time, 16 O. C. 5, 17 O.C 14, 28 I C 379-Question only betwcen judgment-debtors, 18 I. C. 312—Separate suit, questioning propriety of order passed in execution proceeding, 3 O L. J. 756—See decree, construction of, 15 O. C. 99. See execution of decree, 14 O. C. 70—17 O C. 374—See Limitation Act S. 18, Art 181, 20 I. C 538—Pre-emption 2 O L.J. 151—See S 2, S 13, C P. C and "Auction purchaser".

S48.

Application for execution—Limitation, S C. 56—Provision of S 19 Limitation Act V can not affect, against granting application after 12 years, 11 O C 220—Application for execution, on the last day of 12 years, 11 O. C 57, 220, 8 I C. 127—See Limitation Act, 13 O C 303—Fraud of judgment debtor in preventing execution by frivolous devices, 14 O C 238—O XXI, r 11 Effect of striking off execution application, attachment, subsisting, removal of. Fresh application or one ancillary to the previous application—Twelve year's rule to be strictly observed, 8 O. C. 152, 8 I C. 727—Mortgage decree. Proceedings against one of several mortgaged properties Obstruction. Revival and continuance of proceedings, existence of other property, 3 O L. J. 706—See mortgage, 18 O. C. 58.

S50.

Question of liability of joint family property could not be decided in execution proceeding, 6 O. C. 271. Death of father does not give creditor a fresh cause of action agaist son, 11 O C. 334.

S51.

See OXLI, r 1, 16 O. C 238—See O. XXI, r. 10—3 O. L. J. 570.

S52.
Amendment of decree after appeal, S. C. 182—See attachment, 17 O. C. 207—See O XX, r 6 C. P. C

S54.
Suit for partition, jurisdiction, 8 O. C. 59—See O. XX, r. 18, jurisdiction, 30 I C. 209.

S55.
Arrest of judgment debtor, pending his application for insolvency, in other execution proceeding, arrest before discharge for debts scheduled in application for insolvency. Order to furnish security, 9 O. C. 42—See also, 10 O. C 139

S59.
See O. XXI, R 37.

S60.
Allowance of Ward granted by Court of Wards, 7 O C. 174—A Wasika allowance is a political pension, 12 O. C. 323—Attachment of salary of Honorary Commissioned officer employed in Indian Subordinate Medical Department—Political pension. Payment under King of Oudh's treaty, O. P J. 608.

Ss 63, 73.
Explained, 13 O. C. 291, 14 O C. 38.

S. 64.
Order of attachment can not subsist after confirmation of sale, 8 O. C. 409—Mortgage affected during the course of attacment in insolvent proceedings, 15 I C 860—Order directing application to be struck off the file does not necessarily involve removal of attachment, 8 O C. 152, 8 I. C 727-See "Auction purchaser" aud "Attachment".

S. 65.
See auction purchser—Court sale confirmed, sale certificate not obtained Title of auction purchaser not vitiated 25 I. C 8.

S. 66.
Certified purchaser buying *benami* 3 O. C. 229. Dist 8 O. C. 306—Presumption as to *benami* translation, 32 I. C 365—Property released on objection of third party and no suit brought, *resjudicata*, 8 O. C, 306—Property purchased at Court sale. Purchase by any member of joint Hindu family. Benami puprchase, 18 O. C. 180, 2 O. L J. 584—Applicability of, 3 O. L. J. 508.

S. 70.
See O. XXI, r. 62

S 73,
See S63, 13 O C 291, 14 O. C 38 Test of, 8 O C. 86—Right of decree holders to rateable distribution where decrees against estates of different persons, 10 O C 129—Notice to rival decree holders, 13 O. C. 282. Sale of property subject to mortgage, 6 O C. 76—Decree holder seeking rateable distribution need not apply for execution to Court holding assets, 14 O. C. 38, 13 O C 291, 282.

Ss 79 & 80.
Suit against Government, suit against State Railway Notice, 4 O C. 133—Notice of suit to Public officer, Amendment, 9 O. C. 275, 10 O. C. 49.

S. 86.
Application for letters of administration. Court fees before any further proceedings, appeal, 4 O C 84

S. 92.
Suit against *Mohant* alleging various breaches of trust, and asking for removal of *Mohant* and declaration that the property was trust property, 13 O C. 177, 5 O. C. 110—sanction granted by Legal Remembrancer, "Persons interested", *Pujari* of temple, 15, O. C. 202, Dist 30 I. C. 240—Maintainability of suit Trustee *defacto* or *de son tort* subject to same liabilities as trustee *de Jure*. Position of minor as trustee, 18 O. C 38—Appeal by one surviving plaintiff Death of some plaintiffs after institution of suit 30, I. C. 240—Terms of trust giving a sort of right or charge, 15 O. C. 202—Mallsoleim, mosque, and Khankhah. Title to offerings, 4 O. L J 174—Relief against stranger not contemplated. Trespasser, whether to be made defendant, suit for recovery of posses-

sion, 14 O. C. 65, 1 O. L. J. 548—Suit for removal of *mahant*, appeal, consent given in appeal by some plaintiffs to maintain original *mahant*, 30 I. C. 240, 38 I. C. 800 S. 93—Suit against dismissed *mahant*. by his successor, for possession, 3 O. C. 299.

Ss. 94 95.

Compensation for improper injunction, malice, 13 O. C. 357.

S 96.

See O. IX. r. 13, 12 O. C. 25.

S. 98.

Power of 2nd Additional Judicial Commissioner to deal with point of law, 16 O. C. 247.

S. 99

See O 32, r. r. 1, 4, 15 O C. 153—Suit instituted without next friend, effect of attainment of majority by removal of certificated guardian, 11 O. C. 159.

S 100.

See appeal, 11 O. C. 264 Diss 24 I. C. 633—Objection filed in second appeal—7 O. C. 49—Grounds of second appeal S. C. 268, 8 O. C. 290 (291), 1 O. L. J. 334, 6 O. C 39, 7 O. C. 49—Second appeal against the order for costs, 6 O. C. 39, 52, 7 O. C. 49, 8 O. C 251—New point in appeal, S. D. 9 of 1893. See appeal

S. 101.

Substantial compliance with the provisions of S. 100 imperative, S. C. 268, 8 O.C. 990 (291), 1 O. L. J 334.

S. 102.

Suit for damages for breach of contract against Secretary of state for India. Second appeal, 5 O. C. 403—Second appeal Order passed in execution of decree of Small Cause Court nature, 18 I. C. 245—Suit as originally framed to be looked to, trespasser, damages, 13 I C. 493.

S. 104

Joint Hindu family, an order declaring a person not to be legal representative appealable, right of descendant of *karta* to carry on suit, 10 O C, 121. No appeal from order dismissing for default, application to set aside, sale, 10 O. C. 171—Objection as to remand order, second appeal, 9 O. C. 80, 235—Application for reference to arbitration. Court finding one of defendant unwilling to refer. Order rejecting application for reference, whether appealable, 27 I. C. 721—Appeal not maintainable when decree in confirmity with award, 16 I. C. 595—See O. XXI, r. 92, 4 O. L. J. 372.

S. 105.

Appeal against order of remand. Decision of first Court on remand no bar to appeal, 15 O. C. 33. Order of remand carried out, no bar, to appeal, 15 O. C. 43

S. 107.

Plaintiff's right to withdrawl of suit pending before appellate Court. Issues not required to be determined in order to give plaintiff relief sought effect of decision upon. *Res-judicata*, 20 I C. 17.

S. 109.

Leave to appeal to Privy Council. Final decree, S. C. 105—An order rejecting an application for review not appealable, 16 O C. 264—An order for remand not a final decree, 1 O.C. 205, 11 O C. 169, 33 I. C 756, 1 O. L J. 26 Appeal to His Majesty in Council Application for setting aside of order of dismissal for default rejected. High Court on revision ordering re-admission of case. Case fit for Privy Council, 24 I. C. 620—See s. 110 and s. 111 C. P. C.

Ss. 110, 111.

Application for leave to appeal, 15 O. C. 55—Meaning of "decree" 4 O. C. 66—Case not fit for appeal, 4 O C. 234—Order rejecting appeal for failure to furnish security for costs "Final order", 13 O C. 59. F 14 O. C. 40, 16 O. C 264—Right of appeal, the two Courts differ only as to costs, 10 O. C. 65, F. 9 I. C. 1040 Meaning of "substantial question of law", 10 O. C. 308—Whether second suit for redemption maintainable is substantial question of law, 18 I. C. 327—Meaning of "decision", appeal to Privy Council, Certificate defective

O. P. J 805—Meaning of "involved" Nature of question of law, 19 O. C. 131

S. 113

Reference by Deputy Commissioner, S. C 72

S 114

No appeal against order admitting application for review, application by representative of a deceased party for review of exparate decree 9 O C. 35, 16 O C 264—Application filed before filing of appeal, 7 O C 299—Appeal against decree passed on review on the ground of want of jurisdiction, 14 O C 108—Meaning of "evidence" 5 O C 59 Grounds, Court fee on appeal, 7 O C. 315—See O XLVII, r. r 1, 2, 39 I C 117—

S 115.

Jurisdiction to decide whether sale was valid or invalid, 3 O C 321—Neglect to invoke the order of the Court, S. C 231 Judge does not concur in a decision of his predecessor, S C 67—Substantial injustice from material misapplication of law, S C 292, 302, 5 O. C. 91—Refusing to add parties, 13 O C 109, 15 O C 361, 24 I. C 871—Omission to consider part of defence owing to erroneous view of law, 10 O C 8, 13 O C 109—High Courts power, against order of Revenue Court, 14 O C. 38 In the absence of application by party 12 O C 78—Superintendence of High Court, 16 Cal. 749—Meaning of "Cause" 2 O C. 67, 12 O. C. 405, 13 O C 109, 15 O C. 304, 24 I C 871, 15 O C 311—6 O C 216—Application for permission to sue as a pauper in a case—12 O. C 381.—Irregularity or want of jurisdiction—Order erroneous—11 O. C. 238—11 Cal. 6—11 I. A 237—No application against interlocutory order 12 O C 405, 9 I C. 83 (85)—20 I. C 73—12 O C. 381—Contra 2 O. C. 67—When other remedy open 12 O C 109—Alternative remedy 13 O C. 311—15 O C. 304—10 O C 129—Execution of decree—attachment—objection by judgment debtor under O XXI, r 58—1 O. C Sup 11—Objector to be given chance of adducing proof 3 O L J. 583—Wrong decision on point of law—15 O C 234—Error of law not connected with the jurisdiction of Court—9 O C 107—3 O L J. 159—18 O C. 43—Order, directing issue of commission and refusing to decide preliminary issue of law not irregular—5 O. C 151 or declining to correct clerical error—11 O C 208—6 I C 537 (540)—Notice of time and place to parties—1 O C 66—Mistake or fault of officials of Court—6 O C 68—S 108 cl 9 (c) O R Act Jurisdiction of Civil Court 8—O C 257—Order rejecting plaint for deficiency of Court fee—5 O C 319—Application headed as one under S 435 Cr P C taken as one under this section—No reason stated—Illegality—4 O C 96—17 O C 25—Memorandum of appeal treated as application for revision Sup O C 22.—Award under Ss 3 cl (c), 9, 11, and 18 Land Acquisition Act of 1894—8 O C 118 See O XXI, r 89 Judicial Commissioner's jurisdiction to revise order passed by Deputy Commissioner purporting to cancel the sale of under proprietary tenure in R A R. No 63—No 68—Board has not power of a High Court—S D. 20 of 1891. Where Appellate Court ordered the first Court to proceed with the suit which was cognizable exclusively by the Rent Court—8 O C 257. See O. IX, r. 8 C. P C.—14 I. C. 711. —Application for guardianship of

person and property of minor—Interested person not made party—Right of revision of person not party to case—1. O. L. J 416, 761.—Order under 476 Cr. P. C. passed by Small Cause Court.—Revision by High Court as Criminal Court—17 O. C. 25.—Application for restoration, by an heir of deceased plaintiff meaning of " proper presentation "—No restoration without proof of sufficient cause—Jurisdiction to grant application without such proof, 6 O. C 34—14 I. C. 221.—Stranger to mortgage ordered to be impleaded as party to suit—High Court's power to interfere—15 O. C. 304—I. O. L. J. 261.—Order for warrant of attachment against property of witness—Interlocutory orders—4. O. L. J. 150.—Order returning plaint for presentation to proper Court—Delay—4. O. L. J. 551.—See Guardian and Wards Act Ss. 13 and 17—18 O. C. 66.—See 13 O. C. 341, 12 O. C. 381, 405.—Revision of an order refusing to add parties 13 O. C. 109.—Revision of order of Court of Revenue, 14 O. C. 38—

Ss. 122, 129, 130, 131.

Legality of holding brief for another. 9 O. C. 65.

S. 132.

Refusal to issue process on wrong and insufficient ground Exclusion of evidence—Grounds for remand—Fixation of limit of time for cross-examination, 8 I. C. 418.

S. 141.

See S. 144—9 O. C. 101.

S. 144.

Mesne profits—Res judicata—Redemption—9 O. C. 254.—Restitution of possession of property taken in execution of decree. 9 O. C 101.—Restitution against a person not party to decree passed on appeal—8 O. C. 115—Dist. 16 O. C. 225.

S. 145.

Security for performance of appellate decree, 11 O. C. 343—7 O. C. 210.—See Surety.

S. 146.

See O. XXII, R. 10—20 O. C. 31.

S. 148.

Provisions relate only to proceedings antecedent to passing of final decree.—See extension of time—7 I. C. 36, 8 I. C. 812, 13 O. C. 28, 16 O. C. 5, 17 O. C. 14, 377, 23 I. C. 379, 458—11 O. C 44, 18 O. C. 58.—See O. XXI. R. 89 C. P. C.

S. 151.

Courts inherent power to rectify mistakes—16 O. C. 194.—Extension of time for diposit of ¼th purchase money—Court sale vitiate on failure to deposit—Power of Court to set aside its own order—Limitation 30 I. C. 230.

S. 152.

Meaning of " at variance with the judgment " can not be converted into application for review of judgment—S C. 262.—Limitation for application—11 O. C. 208.—Test of—13 O. C. 114—28 I. C. 920.—Extension of time—16 O. C. 5.—O XX, R. 6—when decree in confirmity with award—4 O. C. 82—Amendment of decree—Arithmetical error—Rectification. 9 I. C. 433.—Decree in confirmity with judgment 28 I. C. 920.—Not applicable to surety for performance after the decree—11 O. C. 342.

O. I, R. 1.

Joinder of the plaintiff as purchaser of half the property.—2 O. C. 149.—Meaning of "Cause of Action" 3 O. C. 176.—Pre-emptor joining with himself one having no right of pre-emption.—1 O. C. 308.

O. I, R. r. 3 and 9.

Pleadings.—Plea of non-joinder of co-plaintiff.—Dismissal of suit on plea not raised.—21 J. C. 182—R. R. 3-10.—See 15 O. C. 304. —Suit to establish right to share in property against co-sharers.—Necessary parties.—6 O. C. 379.—9 O. C. 339.—Suit for settlement of accounts—all the co-sharers necessary parties.—1 O. C. 215.—Misjoinder of causes of action.—Withdrawal of suit.—42 I. C. 856.—26 I. C. 228. —34 B. 358.

O. I, R. 4.

See O. I, R. 1.

O. I, R. 8.

Addition of real creditor as plaintiff 1 O. C. 10.—Suit by persons suing in their own names, for themselves and for others.—Permission of Court.—3 O. C. 351.—Necessary parties to a suit for possession by mortgagee.—5 O. C. 94 I. O. L. J. 261.—24 I. C. 871.—Application to set aside sale.—Purchaser a necessary party.—S. C. 289.—25 I. C. 907.—Declaratory suit 17 O. C. 355.

O. I, R. 10.

Application by plaintiff disclaiming interest, for substitution of names of another person.—3 O. C. 347.—Suit commenced through bonafide mistake 7 O. C. 193.—See O. I, R. 8.—Addition of name as plaintiff, in a suit brought by one not entitled to sue.—7 O. C. 78.—Dist 7 O. C. 193.—Application to be made defendant too late 2. O. C. 25.—Revision of an order to add parties.—13 O. C. 109.

O. I, R. 13.

See O. I, R. 1.—Misjoinder of parties and causes of action—objection to be taken at the earliest opportunity but not in appeal.—15 I. C. 744.

O. II, R. 1.

Mortgage by father—son not made party.—1 O. C. 53.—4 O. C. 98, 178.—6 O. C. 101; 7 O. C. 137.—Suit seeking declaration that property is saleable in execution of decree.—Frame of suit.—Meaning of "Consequential relief."—S. C. 225, 302.

O. II, R. r. 2, 3, 4, 5 and 6.

Relief claimed in the subsequent suit, which could have been claimed in previous suit 5 O. C. 173.—10 O. C. 44.—Dist 13 O. C. 19.—Omission to sue for one of several remedies.—Meaning of "Cause of Action."—5 O. C. 304.—8 O. C. 389.—Omission to make claim in former suit.—13 O. C. 183.—Cause of action not complete when first suit filed.—Cause of action against.—Administrator differs from that against trespasser. 2 O. C. 17.—Test about the application.—Identity of causes of action 13 O. C. 19.—8 O. C. 389.—Separate suit for mesne profits.—9 O. C. 224.—Suit for possession subsequent to suit for mesne profits 9 O. C. 322.—Suit for redemption after refusal to accept the deposit—subsequent suit for profits from date of deposit to possession.—12 O. C. 152.—First suit for possession—second suit for declaration 10 O. C. 44.—Dist 13 O. C. 19.—Suit for possession by mortgagee entitled to foreclosure as well.—Plea raised for the first time in second appeal.—12 O. C. 21.—Subsequent suit for share, in the property not included in the general suit for partition.—15 O. C. 81.—Suit for sale by puisne mortgagee.—Dismissal on the ground that previous mortgage was not offered to redeem.—Second suit for redemption of prior mortgage and sale.—10 O. C. 145.—12 O. C. 347.—First suit on the basis of unregistered deed of gift.—Second suit as heir.—9 O. C. 235—12 O. C. 347.—Effect of relinquishment of a

portion of claim 15 I. C. 296.—Suit for ½ share instead of whole share—15 I. C. 833.—Separate suits in respect of partitioned and joint properties—4 O. L J. 520.—See S. 136 O. R. Act.—13 O. C. 54 and "Cause of Action."

O. III, R. r. 1, 2, 3, 4, 5.

Refusal by pleader to accept notice of date of hearing.—7 O. C. 303—Legality of holding brief for another.—9 O. C. 65.—Agent allowed to appear and Act.—18 O. C. 372.

O. V. R 10.

Withdrawal of suit with permission to bring fresh suit.—8 O. C. 389.—See O. II, R. 2.—10 O. C. 41—13 O. C. 19

O. V, R. 17

Exparte hearing—affixing of summons to outer door of house—Temporary absence of defendant.—Want of agent or male member.—16 O. C. 83—13 O. C. 54.

O. V, R. 19.

Ejectment, Insufficient notice—Exparte decree.—31 I C. 479.

O. VI, R. 16

Amendment of plaint.—Inconsistent allegations.—40 I. C. 488—20 O. C. 192.

O. VI, R. 17.

O. VII, R. 11.—Use of forms for the plaint.—S. C. 93, 120.—Interest to be paid by way of damages.—12 O. C. 140.

O. VII, R. 10.

Return of plaint for presentation to proper Court, jurisdiction to grant relief.—41 I. C. 125.

O. VII, R. 11.

Insufficient stamp on plaint—Question when to be decided.—S. C. 118.—Suit when may be said to be properly instituted.—Plaint returned for amendment.—Courts' power to extend.—4 O. C. 108—8 O. C. 241 (244).

O. VII, R. r. 14, 18.

Application for filing documentary evidence at a late stage.—19 O. C. 314.

O. VII, R. 17.

Documents filed with plaint or written statement, party filing not permitted to resile therefrom.—17 O. C. 327.

O. VIII, R. 10.

Courts' power to pronounce judgment when written statement not filed.—15 O. C. 78.

O. IX.

R. 3.—Remedies available to plaintiff.—20 O. C. 66.

O. IX, R 6.

Summons—service of—Defendant not found—Summons served by being affixed on defendant's door whether sufficient service.—29 I. C. 564.

O. IX, R. r. 8 and 9.

Application by representative of deceased plaintiff for an order to set aside dismissal in default.—6 O. C. 34—9 O. C. 35—14 I. C. 711, 221:—Plaintiff declining to appear on the date fixed for argument.—Dismissal of case in default—appeal.—5 O. C. 294—6 O. C. 50—10 O. C. 171.—O. XXI, R. 91—Appeal from an order refusing to set aside the order dismissing an application for setting

side the sale in default.—10 O. C. 353.

O. IX, R. 12.

Opportunity to prove cause of non-appearance.—3 O. L. J. 712.

O. IX, R. 13.

Application to set aside exparte decree under S90 T. P. Act, 9 O. C. 288.—No notice before passing order absolute for foreclosure.—4 O. C. 238.—Decree for sale of moveable property not required to be made absolute.—4 O. C. 301.—Grounds for setting aside exparte decree.—14 O C. 111—12 O. C. 95.—Exparte decree against debtor and his surety.—Surety alone applying for setting aside of decree.—Decree set aside against both.—24 I. C. 115.—Application by representatives of a deceased party for review of exparte decree—appeal.—9 O. C. 35.—Default of defendant on adjourned hearing—Decision on merits—Remedy 34 I. C. 865.

O. X, R 4.

Order for personal attendance not appealable 3 O. C. 31.

O. XI, R. r. 11, 21.

No order until there has been omission or refusal to answer interrogatories—8 O. C. 172.

O. XIII, R. 4.

Court should strictly comply with the provisions of 19 O. C. 192.

O. XVI.

See S. 132 C. P. C.

O. XVIII, r3.

Order dismissing suit is a decree—Power of Appellate Court confined to appeals before it.—10 O. C. 245.

O. XX, Rr. 3, 14.

See S. 152 C. P. C.

O. XX, R. 6.

See S. S. 52, 152 C. P. C.

O. XX, R. 12.

Decree awarding possession, of immoveable property with mesne profits from certain date—No enquiry directed by decree—Construction of decree—S. C. 283.

O. XX, R. 14.

Extension of time by Appellate Court to pay money—S. C. 157.—See S. 2 C. P. C.

O. XX, R 15.

Preliminary decree, discretion of Court in passing—17 O. C. 193.

O. XX, R. 18.

Decree holder's remedy in case of decree not being in proper and correct form 24 I. C. 113.

O. XXI, R. 1.

Sanction of Court as to agreement relating to judgment debt. 4 O. C. 284.

O. XXI, R. 2.

No security could be demanded from managing member of joint Hindu family—11 O. C. 246.—Applicable to payments of money under decree of Rent Court under execution—S. D. 1 of 1891.—Effect of uncertified payment—15 O. C. 234.

O. XXI, R. 3.

Joint family—suit by manager—Death of plaintiff—Legal representative—Abatement—20 O. C. 67 See 18 O. C. 90.

O. XXI, R. 4 (3)

Abatement of appeal—Death of one of respondents—Legal representative not brought upon record—1. O. L. J. 581.

O. XXI, R. 5.

Order bringing legal representatives on record not appealable—16 O. C. 350.

O. XXI, R. 9.

See S. 48. C. P. C.

O. XXI, R. 10.

Execution of decree by stranger—Compromise—Court fee to be charged 3. O. L. J. 570.

O. XXI, R. 11

See S. 145. O. R. Act—9 I. C. 240. —See S. 18 C. P. C.

O. XXI, R. r. 13; 66, 70.

Decree holder putting property to sale without disclosing lien—Purchaser—11 O. C. 206.

O. XXI, R. 16.

Effect of assignment or transfer of decree on power of original decree holder to apply for execution—Validity of application made by decree holder—"Application in accordance with law"—16 O. C. 70—Right of assignee of a money decree obtained by the mortgagee, to sell, in contravention of S. 99 T. P. Act 11 O.C. 231—Assignee of decree—Inconsistent position—3 O. C. 32—4 O. C. 199, 408.—Power of Court to which decree has been transferred to grant permission to continue execution proceedings begun upon the application of decree holder since deceased—11 O. C. 112.

O. XXI, R. r. 19, 20.

Decree for sale of mortgaged property—costs awarded to judgment debtor—Set off—24 I. C. 376.

O. XXI, R. 22.

Notice issued—Property attached—No decree under S. 90 T. P. Act obtained—6 O C. 59.—Plea of limitation regarding previous application—13 O. C. 90.—Issue of notice gives new start for limitation though application defective—13 O. C. 503 F. 19 O. C. 17.

O. XXI, R. r. 23, 25.

Order passed under wrong rule—9 I. C. 431.

O. XXI, R. 28.

See S. 42. C. P. C.

O. XXI, R. 31 (1) to (4)

Mistake of parties—Decree for execution of conveyance—Execution of sale deed in accordance with decree—5 O. C. 370.

O. XXI, R. 36.

Landlord and tenant—Adverse title—Decree for possession S. C. 176.

O. XXI, R. 37.

Application to arrest judgment-debtor—Illness, whether ground for refusing 14 O. C. 36.

O. XXI, R. 38.

See S. 55 C. P. C.

O. XXI, R. R., 46 to 53.

Procedure under wrong section—Loss to Judgment-debtor—Compensation—S. C. 112.—Attachment of soldiers' pay—14 O. C. 82—47 O. C. 99.—Exparte decree, setting aside of—Meaning of "executing process for enforcing judgment"—Notice to person in possession of—15 O.C. 289

—Applicability of R. 53—17 O. C. 374.—Right of pre-emptor to execute decree passed in favour of vendor—8 O. C. 186.—See S. 47 C. P. C.

R. 54.

Private alienation of immoveable property ordered to be attached—1 O. L. J. 549.

O. XXI, Rr. 58 to 63.

Suit not cognizable in Court of Small Causes, S.C. 89—Order on objection not appealable—1 O.C. Sup. 11.—Order conclusive if suit not brought within one year, 11 O.C. 180—19 O. C. 357—Claim to property under attachment—S. C. 204.—Suit on the basis of document of title—Burden of proof—12 O. C. 74.—Suit by objector for recovery of the price realised by sale of attached property—appeal—8 O. C. 281.—Suit for declaration without consequential relief—1 O. C. 272—5 O. C. 304.—R 63—suit for recovery of amount realized from sale of property attached not cognizable by Court of Small Causes—5 O. C. 190.—R. r. 58 to 62—Operative order—Investigation, however little, sufficient—19 O. C. 357.—R. r. 62, 63—Rules framed under S. 70—Execution—Objection—Power of Court to amend application—37 I. C. 78.—R. 63—Burden of proof—what plaintiff must prove—19 O. C. 67.—R. 62—Encumbered property sold subject to no encumbrance—2 O. L. J. 225—See "attachment."

O. XXI, R. r. 66 to 90.

Sale proclamation—Question of profits when once settled cannot be questioned again—4 O. C. 329.—R. r. 67, 68 and 90—Material irregularity—sale—subsequent inquiry—strict proof of—O. P. J. 637.—See XXI, R. 13.—O. 21 R. 66—Encumbrances notified without preliminary enquiry—sale subject to liens—Order passed whether conclusive—whether auction purchaser entitled to question validity of liens—56 I. C. 732.—Purchase of mortgagor's rights by mortgagee at sale in execution of sale of third party—Fair price—Leave of Court to bid at auction—7 O. C. 307—8 O. C. 327.—For feiture of deposit not made within 15 days—Time of application under O. XXI, R. 72 and inaplicability of provision of O. XXI, R. 85 when decree-holders are purchasers—3 O. C 240.—Application under O XXI, R. 72 is a step in aid of execution—8 O. C. 161.—R. 88—Co-sharer bidding same amount as the person preceding him and asserting his right of pre-emption—3 O. L. J. 405—Order under O. XXI, R. 83 appealable—Applicable to decree for sale of mortgaged property—3 O. C. 42.—O. XXI, R. r. 88, 89.—Meaning of "applies"—Presentation of application to Munsarim—Withdrawal of application before order passed—10 O. C. 141.—Tender retained by Court official—Incorrect number of suit given—whether money tendered within time—9 O. C. 214.—Insufficiency of deposit due to wrong information by officer of Court—Extension of time—1 O. C. 193.—8 O. C. 241 (245).—Purchaser of property after attachment can apply to set aside sale—8 O. C. 189.—Order under O. XXI, R. 89—Appealable—5 O. C. 377.—Mistake or fault of officials would not injure parties—Application to set aside sale on deposit of debt—6 O.C. 68.—Sale not to be set aside at the instance of judgment-debtor who sells the property after Court sale—14 O. C. 33.—Joining a stranger—Permission to bid granted subject to certain conditions, validity of—Fraud—Substantial loss.—16 O. C. 86.—Material irregularity—Substantial injury 1 O. C. 155.—No direct evidence re-

quired 6 O. C. 61.—Sale of land in excess of that sanctioned by Government Order of attachment cannot subsist after confirmation of sale—8 O. C. 409.—R. r. 66. (2), 90—Omission to specify time of sale, whether irregularity—18 O. C. 1.—Restitution of possession of property taken in execution of decree under orders passed in appeal did not amount to decree—9 O.C 101.—Purchaser a necessary party—S C. 289—25 I. C. 907.—Order of sale not proclaimed by beat of drum—Inadequacy of price—1 O. C. 186.—Dist. 6 O. C. 61.—Proof of substantial injury.—S. C. 188—Right of judgment-debtor to object to sale—4 O. C. 379 See 1 O. C. 155,—6 O. C. 61.—Appeal from order dismissing application for default—10 O.C. 171—R. 66—Property decreed to be sold—Charge notified in sale proclamation—Position of auction purchaser. 2. O. L. G. 22.—Right of vendee to contest validity of encumbrance on property sold—2 O. L. J. 140.—Liability of auction purchaser to discharge encumbrance merely proclaimed at auction sale—18 I. C.461.—Sale adjourned for more than 7 days—Fresh proclamation not issued—Irregularity—25 I. C. 17.—Formal array of parties in preamble of application, necessity of—17 O. C. 306.—Application to set aside sale on deposit after application to set aside sale on the ground of irregularity—5 O.C. 137—10 O.C. 141.—R. 89,90—Transfer before confirmation of sale by auction purchaser to the sons of judgment-debtor—Pre-emption—10 O.C. 273—16 O.C. 9.—Permission to decree-holder—Purchase without abiding the conditions—15 I. C. 888.—R. 89—Insufficiency of deposit due to wrong information given by officer of Court—Extension of time—1 O. C. 193—8 O. C. 241 (245)—16 O. C. 5.—Sale of superstructure of house—Tender made by judgment-debtor—3 O. C. 236—22 I. C. 605.—Application under 0, 21 R. 90 dismissed for default—maintainability of subsequent application under 0, 21, R. 89—20 O.C. 329, R. 90—Right to object to sale after it has taken place—Misdescription in sale proclamation—absence of witnesses—4 O C. 379—Auction sale of property both ancestral and self acquired—Sanction of Government for sale of ancestral property—14 O. C 115.—See S. 151 C. P. C.

O XXI, R. 92.

No second appeal—4 O. L. J. 372.—See also 18 O C 1.—Whether auction purchaser necessary party—25 I. C 907.

O XXI, R. 94.

See S 65.

O XXI, R 95.

See S. 47 C. P. C.—33 I. C. 367.—Auction purchaser of Naukar not required to apply for possession—3 O. L. J. 436.—See S. S. 64, 65 C. P. C.

O XXI, R. r. 100, 193.

Conflicting execution sales—S. C. 194, 215.—Proof—Dispossession of grantee's mortgagee in execution of decree obtained by grantor against grantee—6 O. C. 110—28 I. C. 440.

O. XXII, R. 3.

Jurisdiction of Court to which case has been remanded—Representative of deceased Appellant—7 O. C. 17.—Death of applicant before leave granted—Legal representatives not entitled to continue.—18 O. C. 64. Order declaring a person not to be legal representative, whether appealable—Right of descendant of a Karta to carry on a suit—10 O. C. 121.—Forma pauperis—1. O. L. J. 709.—See. S. 104 C. P. C.

O. XXII. R. 4.

Sec. S. 5. Limitation Act.

O. XXII, R. 5.

Application of widow for being brought on the record rejected—Her remedy—9. O. C. 354—10 O. C. 121—16 O. C. 300.

O. XXII, R. 9.

Setting aside of order as to abatement of appeal—Saving of limitation—Presumption—Duty of Appellant to keep himself informed of respondent's death—24 I. C. 275.—Redemption suit by one co-parcener—Abatement—Fresh redemption suit—3. O. L. J. 23.

O. XXII, R. 10

Application to make assignees parties in case of assignment pending suit—Auction purchaser as party in mortgage suit—5 O. C. 91—20 O. C. 31.

O. XXII, R. 11.

See "Compromise."

O. XXIII, R. 1.

Permission to withdraw suit is not decree.—S. C. 278—6. O. C. 48—Plaint, returning of, for presentation to proper Court—Frame of suit—5. O. C. 367.—Validity of order not objected to in appeal or revision—1. O. C. 97. See 8 O. C. 37—10 O. C. 145.—Withdrawal without obtaining leave—9 O. C. 164—Withdrawal after production of evidence—Additional evidence—20 I. C. 542.—Institution of fresh suit after withdrawal 12 I. C. 323.—Pedigree, filed with plaint, wrong—Formal defect—30 I. C 3[illegible].—Omission to consider question of costs, S. D. 1 of 1915.

O. XXIII, R. 3.

See O. XXII, RR. 10 and 11 C. P. C.—Suit for share of profits—Compromise—Res Judicata—2 O. C. 112—Compromise—9 I. C. 426.—Stamped paper for compromise—29 I. C. 511.—Court could only pass a decree on the compromise so far as it related to the suit—2 O. C. 330.—Appeal from decree passed on compromise—9 O. C. 365—9 I. C. 426.—Compromise—Court's power to introduce new terms when all the terms not settled by compromise—9 I. C. 426.—Applicability to Ss. 52 and 53 of Act XVII of 1890—2 O. C. 67.—Suit for share of profits—Compromise 2 O. C. 112.—Limitation—Payment of Court fee before enquiry finished 4 O. C. 250.

O. XXVI, R. 9.

Commission for local investigation Illegitimate use of powers.—Report and evidence of Commissioner whether admissible—S. C. 247—S. C. 66.

O. XXVI, R. 14.

Difference between arbitrator and commissioner—Objection to partition made by commissioner—25 I. C. 227.

O. XXVII, R. 1.

See S. 79 and 80 C. P. C.

O. XXXII, RR. 1, 4. (2.)

See "Guardian" "Minor" 11 O. C. 159, 15 O. C. 153, 1. O. L. J. 708.—Credit of witnesses 2. O. L. J. 562.—RR. 3 and 4.—1. O. L. J. 708. See "Minor."

O. XXXII, R. 7.

See Guardian.—Compromise void able 2 O. C. 45—6 O. C. 175 (179)—9 O. C. 219—Void—8 O. C. 191.—

Reference to arbitration—Sanction of Court implied from facts on record—Leave for sanction in express terms not necessary—14 I. C. 6.—The provisions apply to all proceedings subsequent to the decree—2 O. C. 45.—Limitation for suit by minor alleging that he was not bound by the compromise or decree passed thereon—8 O. C. 191.—Minor—Compromise—Leave of Court—Suit to set aside a compromise—Form of decree—O. L. J. 922.—16 O. C. 247—22 I. C. 923.

O. XXXII.

R. 15—Right of manager to sue until order appointing him cancelled—16 I. C. 885.—R. 3 (4.)—Requires very strict consideration—32 I. C. 380.

O. XXXIII.

Can not be combined with S. 92 C. P. C., 15 O. C. 202.

O. XXXIII, R. 1.

Withdrawal of suit—Effect of award—2. O. L. J. 497.

O. XXXIII, R. 2.

O. XLI, R. 1—Application containing no schedule and without verification—11 O. C. 19.

O. XXXIII, R. R. 5 and 7.

Applicant must prove that he has good subsisting *prima facie* cause of action—11 O. C. 67.

O. XXXIV, R. 1.

See S. 85 T. P. Act.—

O. XXXIV, R. 2.

See S. 86 T. P. Act.

O. XXXIV, R. 3.

See S. 87 T. P. Act.

O XXXIV, R. R. 4, 5.

Compromise extending time fixed under preliminary decree—14 O. C. 147.—Preliminary decree combined, in suit for sale of mortgaged property, and for recovery of balance due on mortgage—Separate decree for recovery of balance due on mortgage—1. O. L. J. 742—second clause of R. 4 can not over-ride the provisions of S. 98 T. P. Act. 18 I. C. 24—See Ss. 88 and 89 T. P. Act.

O. XXXIV, R. 6.-S. 90, T. P. Act.

Mortgage occupancy tenant—Decree for sale—Dismissal of application property not being saleable—Application for personal decree—14 O. C. 62—See also O. XXXIV, R. R. 4, 5—Order treated as application under execution proceeding to which Art. 18 Limitation Act applies—10 I. C. 21—6 O. C. 114.—Right of decree-holder to recover balance due on mortgage without bringing mortgaged property to sale—34 I. C. 48.—Abandonment of claim by mortgagee against property encumbered beyond its value, personal decree—14 O. C. 217.—Stamp necessary for appeal—18 O. C. 121.—Decree for sale of mortgaged property and personal decree—17 O. C. 153.

O. XXXIV, R. 14, S. 99 T. P. Act.

Right of mortgagee to attach property before bringing it to sale—18 I. C. 201.—2. O. L. J. 614.—Simple money decree for rent of mortgaged property—Execution of decree by mortgagee—Attachment of mortgaged property—*Res judicata*—4. O. L. J. 571.

O. XXXVIII.

Attachment before judgment—Same or different Courts—S. O. 18.

O. XXXIX, R. 1.

Absence of regular attachment—Alienation in breach of temporary

injunction—Effect of dismissal of application—S. C. 295.—Removal of attachment on account of application being struck off—8 O. C. 152.—Grant of temporary injunction—Stay of sale in execution—25 I. C. 9.

O. XXXIX, R. 3.

Granting injunction without notice to the opposite party illegal —11 O. C. 151.

O. XL, R. R. 1—6.

Order appealable—1 O. C. 168.—Grounds for appointment—16 O. C. 238.—Where Court refused to pass order for sale as property was heavily encumbered, application for appointment not allowed.—10 O. C 268.—Copy of judgment not filed—Dismissal of appeal 3. O. L. J. 209.

O. XLI, R. 1.

An order rejecting memorandum of appeal appealable. 3 O. C. 234 —applicability of—16 O. C. 238 —S. D. 14 of 1913—Application without schedule and verification 11 O. C. 19.—Grounds for second appeal S. C 268—8 O. C. 290.—O. XLI, R 11, C. P. C.—9 O. C. 32.

O. XLI, R. R. 4, 33.

Heirs not brought on record—35 I. C. 743.

O. XLI, R. R. 5 and 6.

Order appealable—1. O. C. 102. See S. 145 C. P. C.

O. XLI, R. 10.

Security for costs—appeal—S. C. 269.—Order rejecting appeal for failure to furnish security for cost—appeal—13 O. C.59.—14 O.C. 40—16 O. C. 264.

O. XLI, R. 11.

Dismissal—Writing of judgment when appeal dismissed 9 O. C. 32 and R 31—Appeal—Particulars in judgment, S. C. 108.

O. XLI, R. 12.

When applies—11 O. C. 169.—R. R. 17, 19—Appeal—Dismissal in default on the adjourned date—Appeal treated as application for revision—8 O. C. 261—appellant absent —appeal dismissed—order of dismissal not stating appellant's absence as reasons for dismissal—Cross objection adjudicated upon on merits, illegality of—Order of dismissal to be considered as one on preliminary point—Second appeal —Remand—Fresh proceedings—25 I. C. 916.—R. 20—Party in lower court not impleaded in appeal—Limitation for adding party in appeal —Power of court to direct addition of parties in appeal—18 O. C. 90.—R. 22———Cross objection, right to file within one month—5 O. C. 235—Grounds—7 O. C. 49—Cross objections maintainable only with respect to principal appeals—10 O. C. 214.—R. 26—Failure to take cross objection—4 O. L. J. 101.—R. 27—Additional evidence admitted in appeal to discredit the evidence of a witness———————16 O. C. 386. —R. 23—O. XLIII, R. 1—Challenging validity of remand order in second appeal—9 O. C. 80—9 O. C. 235—9 O. C. 362—S. C. 90—1. O. C. 172.—Power of Court to whom case returned to form opinion irrespective of any finding arrived at by his predecessor—14 O. C. 321.—Suit decided on a particular point —4 O. C. 23.—In appeal from decree passed after remand, appellant not allowed to reopen the decision on which remand was made—10O. C. 350.—Order of remand not a

final order—1 O. C. 205—11 O. C. 169.—Remand for decision after recording evidence of certain witnesses—New documentary evidence—Record of depositions of witnesses—S.C. 59.—R.26—Appellate Court's omission of, to fix time for filing objections to findings of lower Court. —1 O. L. J. 681.—Finding returned by lower Appellate Court—High Court's power to consider question of fact—13 O. C 352.—Additional evidence—Substantial cause—S. C. 241, O. P. J. 568—Grounds for admitting— 1 O. C. 199—Power of Appellate Court to—14 O. C. 327—Reason for such admission—Proof of important point not sufficient reason—15 O. C. 253—Additional evidence to discredit the evidence of witness—16 O. C. 386.—Examination of documents and witnesses by Court of Appeal—1. O. L. J. 57—Admissibility in Appellate Court of documents rejected by lower Court—Fresh evidence—Admissibility of documentary evidence at late stage—Discretion of Court—27 I. C. 516.—R. 31—Judgment of Appellate Court—Procedure in recording it—8 O. C. 44—290—25 I. C. 596 (See also 8 O. C. 290)—19 O. C. 319—Appeal against order of remand—Order of remand carried out—15 O. C. 33—43.—Power of Appellate Court to alter decree—Effect of failure to file cross objection—4. O. L. J. 532.

O. XLIII.

See O. XXII, R. 3.—Appeal on merits—13 O. C. 248.—Appeal against order refusing or accepting documentary evidence—19 O. C. 314.—Appeal against order of remand—Decision of first Court on remand no bar to appeal—15 O. C 33.—Order refusing to sanction appointment of receiver—not appealable—1. O. C. Sup. 21.—Order of Appellate Court returning plaint for amendment appealable—2 O. C. 5.—Order setting aside *ex parte* decree in a resumption suit, whether appealable—34 I. C. 702.

O. XLIV.

Pauper appeal—Matters to be considered in determination of, 13 O. C. 302.—Leave to appeal as pauper—Refusal of, when open to revision, 30 I. C. 86=2. O. L. J. 254.

O XLV.

R. 2—Meaning of "Substantial question of law" 10 O. C. 308—5 O. C. 168, 13 O. C. 59.—R. 3—Application for leave to appeal to Privy Council —5 O. C. 168—Application by next friend—4 O. C. 98.—R. 5—Application for leave as to appeal, real or market value of subject matter of suit—Effect of admission in pleadings—30 I. C. 204.—R. 13—Order prescribing manner and conditions, for execution of decree not a "final decree" or "order"—S. C. 105.—R. 15—Appeal—Stay of execution —3 O. C. 243.

O. XLVI.

R. 1—Reference by Deputy Commissioner—S. C. 72—Conflicting rulings no sufficient ground—15 O. C. 380.—R. R. 6 and 7—Jurisdiction of District Judge to refer 3 O.C. 20

O. XLVII.

R 1—Application filed before filing of appeal—7 O. C. 299—14 O. C. 168.—Meaning of "new and important evidence"—5 O. C. 59—Court fee on appeal, admission of application for review not to be challenged in appeal, 7 O. C. 345.—R. R. 1 and 2—Review by another judge—3 O. C. 316—363.—See O. IX, R. 13—9 O. C. 35.—Ob-

jection to jurisdiction after decision on merits—3. O. L. J. 267.—R. R. 7 and 9—Appeal against order admitting review—12 O. C. 151—Powers of Revenue Courts—27 I. C. 587—39 I. C. 147.—See application.

Sch. II.

Meaning of "and in such case shall proceed with the suit," 13 O. C. 341.

Sch. II.

See Arbitration, Arbitrator, and Award.

Sch. II (21)

Certificate granted—15 O. C. 55.

Sch. II R. R. 318.

See 9 I. C. 241.

Sch. III.

Saving period of limitation, 13 O. C. 303.

Clog.

On equity of redemption—Deeds of further charge on property previously mortgaged—8 O. C. 132—Dist. 8 O. C. 227(232)—R. 2. O.L.J. 601.—Condition that the mortgagor should not be entitled to redeem within 20 years, 6 O.C. 167. 7 O.C. 11, 10 O. C. 218. 16 O. C. 90—18 I. C. 286.—Covenant for mortgage money being paid up from the surplus profits—13 O. C. 128.—Consolidation of mortgages—6 O. C. 167—15 O. C. 285 2. O. L. J. 601—16 O. C. 267—11 O. C. 248—17 O. C. 303—3. O. L. J. 643.—Redemption practically impossible—38 I. C. 454—Doctrine explained—20 O. C. 97.—Fitter to equity of redemption, 2. O. L. J. 601.

Co-accused.

Admissibility of confession against, 11 O. C 328.—Retracted confession how far evidence against, 12 O. C. 418.—Remaining unwilling spectator of offence by accused, O. L. J. 360

Co-defendant.

Decision between, when necessary—12 O. C. 260—Evidence of defendant not operative against, 1. O L. J 447—Not obtaining opportunity as to cross-examination of defendant, 1. O. L. J. 447.

Codicil

Executed after Act I of 1869—Proof of execution of 4 O. C. 408.—See Will.

Coercion.

Fraud and undue influence.—Proof of.—1 O. C. 63, 15 O. C. 192.—See S. 111 Evidence Act and S. 15 Contract Act.

Company's Act (VII of 1913).

S. 153—Meeting of creditors after Bank stopped payment.—18 O. C. 275, S. 171. Jurisdiction—maintainability of suit.—3 O. L. J. 641.—Arrangement—acceptance by creditors not present at meeting.—Majority—4 O. L. J. 160.

Compensation.

Lease executed by guardian—negligence of guardian.—Consent of plaintiff to the construction of well.—2 O. C. 233.—Illegal enforcement of payment of *nazrana*, 8 O. C. 200.—No, for breach of contract in mortgage deed, 2 O. C. 24, 10 O. C. 218.—Application to determine amount of.—R. A. R. 33.—For improvement.—R. A. R. 20, 44, 26 28, 41, 5, 35.—For acts done for benefit

of another.—6 O. C. 212.—For breach of implied contract between mortgagor and mortgagee, suit for, 8 O. C. 166.—For breach of covenant for title, 5 O. C. 78.—For improvements. —8 O. C. 13—12 O. C. 164—24 I. C. 381.—For lands allotted in partition 5 O. C. 140.—For Revenue paid by *Lambardar* on account of joint *Lambardar*, 7. O. C. 14.—For use and occupation of land.—12 O. C. 140.—5 O. C. 222, 9 O. C. 362—296, 10 I. C. 2.—For wrongful sale of timber, limitation. 3 O. C. 340.—Suit for, against Railway administration, 5 O. C. 153.—See Mortgage, 12 I. C. 407.—In respect of what period to be allowed.—2 O. L. J. 735.—Pecuniary damage must be such as can not be met by 15 O. C. 170.—Possession of land by demolition of house 11 O. C. 45.—Reasonable assessment of 2 O. L. J. 402.—Reasonable for work done, 2 O. L. J. 332.—Suit for 31 I. C. 447.—Suit for, loss resulting from an injunction, 13 O. C. 357.—In respect of sir land, 10 O. C. 43.—On account of illegal ejectment, 2 O. L. J. 735.—See "Damage."

Complaint.

Discharge without making any investigation 17 O. C. 273.—No decision on merits 1 O. L. J. 487.—Fresh. —17 O. C. 18.—Order for further inquiry—Notice to accused not necessary.—11 O. C. 261.—Second, inquiry into the same charge on a—17 O. C. 273.—Withdrawal of, on execution of bond, 1 O. L. J 553.—Of person not affected, 20 I. C. 233.

Compound

See Interest.—20 I. C. 667—11 O. C. 126—307—10 O. C. 92, 69.

Compromise.

Agreement to continue in possession of holding as long as certain amount of rent paid - Rights not extended to heirs of tenant.—24 I. C. 789.—Construction of—Rule of interpretation.—12 I. C. 413.—Operated as *res judicata* 2 O. C. 28, 112, 7 O. C. 169.—Operated as estoppel, 8 O. C. 143.—Leave to guardian before finally accepting, 2 O. C. 67.—Court could pass decree on, so far as it related to the suit, 2 O. C. 330.—By guardian without leave of Court. —Suit for possession by minor—limitation. 8 O. C. 191.—Certain stipulation not embodied in decree.—4 O. C. 78.—Petition or pleading given effect to.—6 O. C. 362—7 O. C. 181.—Filed before a Revenue Court giving right of pre-emption, 13 O. C. 241.—In Court; 31 I. C. 449.—Manager competent to enter into, 1 O. L. J. 456.—See agreement.—17 O. C. 213. —In Settlement Court not equivalent to a mortgage, 10 O. C. 17.—To the detriment of minor's interest, 16 O. C. 247.—Abandonment of disputed claim, whether constitutes valid consideration, 20 I. C. 429.—By next friend without leave of Court, 2 O. C. 45—F 6 O. C. 175 (179).—Proof when compromise, to which minor was party, is challenged.—16 O. C. 247, 9 O. C. 219—34 Cal 83.—Leave, no inference of, in the absence of direct evidence.—10 O. C. 321.—Leave for sanction in express terms not necessary.—14 I. C. 6.—Procedure when one of the parties objects to its being recorded by Court. —5 O. C. 49.—Decree passed in, valid, until set aside, 5 O. C. 9.—Petition, stating that matter had been compromised could not be said to contain terms of contract between the parties.—1 O. C. 301.—Power of Court of Wards to enter into.—S. C. 200.—See condition in restraint of alienation, 14 O. C. 189—Minor—Suit to set aside O, P. J. 922—3 O. C. 84.—Construction of deed of. estoppel burden of proof.—O. P. J. 158.—As basis of decree.—O. P. J.

846.– Construction of O. P. J. 628.—12 I. C. 413.—Court's decree passed on, effect of O. P. J 864.—Petition filed in mutation proceeding.—Whether registration obligatory, 19 O. C. 75—See 27 I. C. 97; 18 O. C. 51; 2 O. L. J. 67—39 I. C. 545 - 13 O. C. 241—14 I. C. 29—4 O. C. 78.—Power of Court to introduce new terms, 9 I. C. 426.—Appeal.—9 O. C. 365.—Binding effect of, 2 O. L. J. 228.– Decree, based on, when can be set aside 22 I. C. 923.—Decree passed upon, 13 O. C. 98.—Interpretation of, 1 O. L. J. 421, 246.—Duty of Court in sanction of, 11 I. C. 105.—By next friend of minor 11 I. C. 105.—Finality of 9 O. C. 365.—Grounds of avoiding, fraud or undue influence, 1 O. L. J. 456.—Maintainability of suit for redemption in the absence of breach of 15 O. C. 285.—Maintainability of suit for pre-emption on decree passed on 10 O. C. 374.—Petition of, in mutation case relied on as family arrangement.—18 O. C. 51.—Ratification of, after attaining majority, 18 O. C. 95.—Right of minor to challenge, 11 I. C. 105.—Between mortgagee and his transferee, binding on the heirs, 20 I. C. 61.—By complainant and accused.– 17 O. C. 92.—Entered into by minors' father.—2 O. L. J. 228.—Extending time for payment, 14 O. C. 147.—See "Guardian" and "Minor," "Appeal."

Concurrent findings of facts.

See Dower.–O. P. J. 58.—Point in appeal taken for the first time before the Privy Council, but not permitted.—O. P. J. 140.—Right of redemption.—Burden of proof.—O. P. J. 108.—See Sub-Settlement, O. P. J. 353.—See Fraud.—O. P. J. 456.—See confiscation, O. P. J. 493.—*Razinamah*, O. P. J. 512.—Though part of evidence not considered by lower Court.—O. P. J. 592.—See Oudh Estates Act, O. P. J. 649.—See Privy Council, O. P. J. 897.—See Oudh Land Revenue Act, O. P. J. 923.–Privy Council not disturbing, O. P. J. 1040.—But on different grounds. O. P. J. 899.

Condition.

Restraining alienation, 10 O. C. 136—4 O. C. 163 14—O. C. 163—14 O. C. 189–25 I. C. 743–34 I. C. 553—15 O. C. 345. —Subsequent subjecting right of redemption—15 O. C. 285.—One sided in a mortgage deed, 2 O. L. J. 1.—Jurisdiction, 17 O. C. 224.—Imposed on permission to bid, 16 O. C. 86.—Necessary for Appointment of *guardian ad litem*.—10 O. C. 321.—For appointment of a receiver.—10 O. C. 268.—See S. 15, 16 Contract Act.

Confession.

See S. S. 24, 25, 26, 27, 30, 21, 164, 342 Cr. P. C.—By accused while in custody of Police.—S. C. 81.—Retracted confession, evidence against co-accused, 12 O. C. 418—12 I. C. 513.—S. C. 98—11 O. C. 328.—Made to a person not police officer and when accused not in police custody—8 O. C. 395. Made before prosecution witnesses out of Court and not recorded by Magistrate, 1 O. L. J. 200.—Made to Police officer.—5 O. C. 321.—Not recorded in the language of accused, S. C. 277—10 O. C. 112.—Recording of, by Magistrate—Power to put questions—Inspection of scene of occurrence. Additional statement by confessing accused, 20 O. C. 136.—Corroboration of, 4 O. C. 69—F. 6 O. C. 204 (209)—Diss. 11 O. C. 328, R. 12 O. C. 418—12 I. C. 513—1 O. C. Sup. 13.—Use of—S. C. 153.—Record of—S. C. 102.—Of co-accused, conviction resting upon—statement made by accused

—6 O. C. 204.—Care necessary in recording of,—1 O. L. J. 407.—Magistrate's satisfaction as to voluntariness of.—1 O. L. J. 407.—Statement in, inconsistent with medical evidence.—1 O. L. J. 407.—Disagreeing with other evidence, when to be ignored.—2 O. L. J. 468.—Made to some person in presence of police officer.—1 O L. J. 686.—Of accused, 13 O. C. 243.—Of judgment.—1 O. L. J. 490.

Consent.

By common treatment of party wall, 15 I. C. 270 - Effect of withdrawal of—1 O L. J. 574 —Element necessary to prove.—18 I. C. 289.—Implied in planting of trees – S. D 7 of 1912 - Impossibility of landlord to have given, 1 O. L. J. 574.—Suit for removal of building.—11 O. C. 355.—Given during last illness, 14 O. C. 49.—Of all joint mortgagees to a valid discharge, 14 O. C. 45.—Of parties about jurisdiction 2 O. L. J. 321.—Of reversioners 14 O. C. 170—9 O C. 104—11 O. C. 78—18 I. C. 289.—To transfers—attestation of deed —1 O. L. J 225.

Consideration.

Decree on, execution not proved, 6 O. C. 16.—Onus of payment when execution admitted, 9 O. C. 315.—Resistance by third party, 2 O. C. 149—7 O. C. 181 (183)—8 O. C. 155—16 O. C. 136—21 I. C. 8—14 O. C. 139.—Of bond, 9 Cal. 439.—Of promissory note, burden of proof—5 O. C. 30.—17 I. C. 307.—Past benefits, no sale.—7 O. C. 31.—Suit for recovery of a portion of—8 O. C 283—9 O. C. 308.—Want of—2 O. C. 149—3 O. C. 181 (183)—2 O. L. J. 1—O. P. J. 865—21 I. C. 8, 581—18 O. C. 272—27 I. C. 581.—Inadequacy of—O. P. J. 46.—Partly for legal necessity, decree on payment of—O, P. J. 936.—Alienation for, 12 I. C. 401.—Burden of proof 15 O. C. 58, 9 O. C 196.—Definition of 15 O. C. 314.—Forbearance to prosecute appeals, 15 O. C. 314.—Presumption as to receipt of 14 I. C. 136.—Where portion left in the hands of the mortgagee.—14 I. C. 136—Question as to payment of, 21 I. C. 554.—Receipt of admission—21 I. C. 8.—Sale, right of mortgagee to question payment of—21 I. C. 8.—Transfer not in good faith though with, 11 O. C. 197.—Abandonment or compromise of disputed claim, 20 I. C. 429.—Money left with transferee.—1 O. L. J. 475.—Payment of portion of —2 O. L. J. 488—Of *hiba bil ewaz*, 2 O. L. J. 758.—Plea of failure of by third party.—8 O. C. 155.—Plea as to non-receipt of, recital as to receipt of 15 O. C. 58—3 O. L. J. 473.

Construction.

Deed of trust of 1839—"heirs" explained—Interpretation of later deed by the help of former deed—8 O. C 270—24 I.C. 73—1 O. L. J. 204 Of one document in light of other —18 I C. 461—1 O. L. J. 204.—Use of words "always" or "for ever" 23 All. 324.—Of Government order—24 All. 1.—Use of the words "proprietor" and "for ever"—23 All. 194 —Of agreement 20 Cal. 45.—Of agreement entered into before an Act. 7 O. C. 116.—Of ambiguous order—6 O. C 351.—Of an Act, marginal notes—7 O. C. 248.—Of appellate decree merely dismissing appeal—5 O. C. 35.—Of award 23 Cal. 838.—Of contract guaranteeing conduct of person employed as agent 12 Cal. 145.—Of decree—6 O. C. 239—S. C. 283—2 O. L. J. 269—12 O. C. 293—15 O. C. 99—14 O. C. 100.—Of decree—Decree of Appellate Court affirming and adopting part or whole of decree of lower Court—5 O. C. 373.—Of decree—12 O. C. 293—28 I. C. 307—14 O. C.

6,335.—Of deed 4 O. C. 6—Oral gift by Taluqdar O. P. J. 999.—"Proprietor," and "For ever" meaning of O. P. J. 753.—Of document S. C. 155, 215—Inconsistent passages in a document 4 O. C. 387. Of deed of compromise—O. P. J. 486.—Of gift 13 Cal. 401.—Of hypothecation bond 1 O. C. 191.—Of instrument of mortgage—11 Cal 237.—Condition in lease raising presumption of perpetuity—4 O. C. 139.—Of lease for life—8 O. C 164—12 O C. 164—24 I C 361—See 25 All. 1.—Grant for maintenance in perpetuity—7 O. C. 90—12 I. C. 324—13 O. C 332—18 O C. 168.—Of mortgage deed—26 Cal 395—3 O.C. 105—9 O C. 292—10 O. C. 163, 5 O. C 155, 286—O. P. J. 718, 928—11 O C. 126, 323—Of promissory note. See Negotiable Instrument Act S 4, 4 O. C. 318—Of *razi namah* disposing of estate with word *naslan bad naslin*—14 Cal. 296, O. P J. 512—158.—"Issue and heirs"—Pension in perpetuity O. P. J. 583.—Of Revenue Court decree by Civil Court—7 O. C. 372.—Of sale deed—2 O. C. 336.—Of *Sanad*—3 O C 250.—Of Settlement Court decree—S. C. 282,—6 O C. 94—7 O. C. 265—23 I. C 231—5 O. C. 118.—1 O. C. 289—34 I. C. 353.—Of special agreement—S. D. 3 of 1903—16 O. C. 136.—Of Statute—5 O. C. 256—7 O. C 254—3 O. C. 325.—Of the term "*barkhur dar*"—1 O. C. Sup. 49—Of the word "issue"—17 Cal. 234.—Meaning of "*Aulad pisari*" and "*Aulad dukhtari*."—6 O. C. 132—3 O. C. 258—1 O. L. J. 470.—Rules of Practice O P. J. 993.—Power of appointment given under the will—"Heir" meaning of 15 O. C. 270.—Of a document.—Non-testamentary—Family arrangement.—O. P. J. 1018, 1072. Rules of, O. P. J. 1068, 474.—Of the sections of an Act.—Admissibility of the proceedings of Legislative Council—13 O. C. 55.—Of document containing two clauses, one repugnant to the other.—14 O. C. 189.—Of document.—Interpretation of sale deed—Plots omitted inadvertently—34 I. C. 390.—Of decree—Mortgage or charge—10 O. C. 17—2 O. L. J 500.—Usufructuary mortgage deed.—Meaning of *Malguzari*—4 O. L. J 148—Of award—1 O. L. J. 159—17 O. C. 33—22 I. C 129—Of bye-laws of Village Co-operative Bank—18 O C. 157.—Of compromise—12 I. C 413.—Of deed—13 O C. 172—21 I C 256—Of document—18 O C 10—11 O. C 41—1 O. L J. 591—2 O L J. 402—2 O. L J. 607—18 I. C. 461—1 O L J. 703—18 I. C 127—12 O. C 97—275.—Of document see condition in restraint of alienation.—Of document—Sale of share, exclusively "*Sir bila lagan*"—Covenant to pay rent when assessed—15 O C. 25—Of document as a whole—14 O. C 189—Of Hindu will—9 O. C. 119.—Of will by tenant without permission—15 O C. 170—See Wajib-ul-arz.—See Will—

Consolidation of mortgages.—

See Clog

Constructive.

Knowledge of principal—3 O C. 55—Or actual delivery by donor—20 I C. 286—1 O. L J. 133—13 O. C 369, 347—See "Possession."

Contentions

See *Lis pendens*

Contract.

See Mahabrahmani.—Affirmative and restrictive 6 O. C. 184.—Between mortgagee, and mortgagor of occupancy holding, S. D 5 of 1901.—Between plaintiff and third party, 7 O. C. 181—9 O. C. 97—11 O. C. 1—15 O. C. 49 5 O. C. 235.—Breach

of—1 O. C. 270—3 O. C 22—7 O. C. 116 (P. C.)—2 O C. 25—S. C. 128—15 I. C. 526—5 O C 403, 406—Breach of—Choice of remedy with person affected 20 I C. 783.—By disqualified proprietor, 4 O. C. 28—5 O. C. 256—9 O. C. 18—8 O. C 210—14 O. C. 144—15 O. C. 67.—For sale of property, 2 O. C. 7, 140—5 O. C. 17.—Implied for maintenance of *Chaukidar*—7 O. C 35.—Incomplete—S. C. 204—In writing and registered, limitation—S. C. 128.—Made by proprietor during term of annulment of settlement, effect of—5 O. C. 30.—Made in course of partition proceedings, 5 O. C. 140.—Of dower, S C. 96.—For sale—Breach of,—Earnest money—Forfeiture of—19 All. 489—23 B 56—33 All. 166, 33 M. 375.—Of service between master and his domestic servant, S. C.107.—Penal S. C. 168.—Respecting minor's estate—See "Guardian" and minor.—Revocation of—3 O. C. 195—6 O. C. 16—7 O. C. 166—11 O. C. 152, 21 I. C. 199.—Suit to enforce registration S. C. 62.—To procure wife—2 O. C 365.—To supply funds for carrying on litigation, 2 O. C. 149—8 O. C 155 (P. C.)—10 O. C. 173 178)—14 O. C. 139—16 O. C. 136—21 I. C.8.—Void, 1 O. C. 78—5 O. C. 193—30 I. C. 261—Which has become impossible to perform—17 Cal, 432.—Enforcement of, by one not party to it—5 O. C. 235.—Undue influence—O. P. J. 613, 923, 984.—Dangerous articles, installation of Duty to take precaution—Liability— proof—5 I. C. 64.—Alleged, not proved—2. O. L. J. 332.—Continuing breach of S. D. 2 of 1914.—Failure to comply with, reasonable time for execution of order, 12 I. C. 339.—Essence of—17 O. C. 218.—See S 39 Contract Act.—Acknowledgment evidencing fresh, 11 O. C. 152.—Implied—1. O. L. J 147.—8 O C. 166.—Joint, effect of alteration of position 16 O. C. 285.—Mortgagee's failure to perform his own part of, 11 O. C. 89—10 O. C. 69.—Personal to pay mortgage money, 12 O. C. 275.—Revocable, breach of—20 I. C. 783.—Special—S. D. 7 of 1912.—Meaning of special—11 O. C. 75.—Time of delivery—3 O. C. 143. Whether can create right of pre-emption.—2. O. L. J 289.—By under proprietor with superior proprietor to pay *Patwari rate*, 9 O. C. 63—6 O. C. 299, 3 O. C. 94.—Debt for family business, manager's power to—18 O. C. 84.—To convey property after decree in lieu of expenses of litigation—14 O. C. 139.—Forbidden by law, 10 O. C. 243.—Not to claim exproprietary rights, 10 O. C. 43—Of marriage by sick man, 16 O. C. 325.—Personally with manager, 14 O. C. 127.—Rate of interest, 1. O. L. J 544.—To indemnify—15 O. C. 25—To lend money—specific performance of, 11 O C. 217.—To resume grove by portion—9 O. C. 109—To sell property liable to pre-emption, if complete—10 O. C. 273.—To transfer immoveable property, 10 O. C. 218.—To treat acceptor as surety, 13 O. C. 203.—Over-ruled by law as to resumption 1. O. L. J. 325.—To make Testamentary disposition, 9 O. C. 55.—See agreement.

Contract Act.

S. 2 (d)

Consideration—Forbearance to prosecute appeal—15 O. C. 314.

S. 11.

Sale to minor—validity of—18 O. C. 115.

S. 12.

Unsoundness of mind—27 All 1.

S. 15.

Coercion—Duress—Proof of coercion—mere threat to bring criminal charge—15 O. C. 192—1. O. C. 63.

S. 16.

Undue influence—Ratification of contract—5 O. C. 256—9 O. C. 188 8 O..C. 210.—7 A. L. J. 655—11 O. C. 295—19 O. C. 300.—Money advanced under pressing necessity—8 O. C. 193.—Promissory note—consideration for, burden of proof—17. I. C. 309, 5 O. C. 307.—Necessary condition of undue influence, 11 O. C. 295.—Disqualified proprietor O. P. G. 934.—Interest—high rate of, 22 I. C.—129—9 O. C. 188—Debt borrowed under arrest for payment of Government revenue—O I. C. 203—Money lent to helpless widow to establish right to maintenance, 6. I. C. 439—Presumption where the lender is in a position to dominate the will of the borrower, 6 I. C. 572—7 All. L J. 655—10 I. C. 14, 37—12 O. C. 300—5 I. C. 486.

SS. 16 and 17.

See Gift 23 Cal 15.

SS. 16, 19 and 23.

Contract by undue influence but benefit received by defendant 5, O. C. 256—See Oudh Land Revenue Act, SS. 173, 174 9 O C. 188.

SS. 23 and 24.

Agreement by tenant to pay enhanced rent, 1 O. C. 78—5 O. C. 193—30 I. C. 261.—Condition forbidding transfer contained in the settlement decree—14 O. C. 144—Distinction between restrictions on transfers imposed by the Legislature and restrictions imposed by contract or decree, 15 O. C. 67—Agreement that if judgment-debtor did not appeal against the decree the respondent would not execute it, 5 O. C. 217.—Agreements to stifle prosecution in respect of offence of public nature—17 O C. 215—Lease for farm and sale of drugs—Agreement by lessee to transfer portion of profits or losses resulting from lease—17 O. C. 193—Barred debt—Consideration, 21 I. C. 69.—Agreement to advance money for litigation—Consideration—Public policy—8 I. C. 500—Right of judgment-debtor to challenge decree in execution proceedings 14 I. C. 29—4. O..C 78, 6 O. C 362.—See S. S. 92, 94 Evidence Act 21 I. C. 69—*Qabzadari* without right of transfer.—14 O. C. 144.—See Champerty 8 I. C. 500.—See Contract, disqualified proprietor.—Pleader advancing money to client on mortgage—19 O. C. 60—20 O. C. 67.—See Agreement.

S. 24

Effect of one of several unlawful considerations. 39 I. C 540.

SS. 38, 45.

Release of mortgage debt—2. O. L J. 361.

SS. 39, 55.

Refusal of mortgagee to advance money—Suit for cancelment of mortgage, S. C. 280.

SS. 39, 49, 99

Refusal to take delivery of all the goods—Damages, 10 I. C. 18.

SS. 39, 54.

Suit to recover mortgage money not a suit for specific performance, 10 O. C. 69.

SS. 41, 69 and 70.

Vendor and purchaser—Wholesale price not paid—Sale pre-empted—Vendor paid by pre-emptor—Discharge of lien by payment made by third person, 16 O. C. 1.

S. 53.

See Specific Relief Act, S. S. 35 and 39.

S. 55.

See Mortgage—4. O. L. J. 334.

S. 56.

See Contract—17 Cal. 432 (P. C.) —Contract impossible of performance, damages for breach O. P. J. 589.

S. 63.

See S. 68 Evidence Act 20, I. C. 544.

S. S. 64, 65, and 125.

Transfer of minor's property by one who is not guardian—Ratification, 11 O. C. 1.—See S. 68. T. P. Act.

S. 68.

Suit for money advanced to minor —Registered bond executed by guardian, Limitation—10 O.C. 38.

S. 69 and 70.

Suit for arrears paid by mortgagee—4 O. C. 369—Applies to the case of co-sureties as well as to the case of joint promisors—Limitation —Right of suit for contribution, 13. O. C. 23.—Purchaser's liability to arrears of Government revenue, 11 O. C. 279.—Suit against reversionary heir for recovery of money paid to redeem mortgage of his predecessor in title—6 O. C. 212. Reimbursement of person paying money due by another, 7 O. C. 146—11 I. C. 227.—Payment of revenue by puisne mortgagee, on behalf of first mortgagee, 7 O. C. 146—4 O. L. J. 514—See Contribution—3 O. L. J. 494—Vendor and Purchaser—17 I. C. 288.—See Contract—30 I. C. 223.

S. 73.

Arrears of rent—Breach of Contract—Damages—Interest—1 O. C. 270—7 O. C. 116 (P. C.)—Not applicable to a case under S. 108 (15) Oudh Rent Act, 6 O. C. 89—6 O. C. 346 (349)—9 I. C. 221.—Liability to pay interest either by way of damages or under the Interest Act —12 O. C. 140—O. P. J. 847.—See Oudh Rent Act, S. 141, 21 I. C. 82.—See Interest.

S. 74.

Stipulation for payment of *deorha* —10 O. C. 214.—Commission agreed to be paid to mortgagee, 2 O. L. J. 402.—Deed of further charge executed by one only, 20 I. C. 667.—See. Interest.

S. 78.

Pre-emption—1 O. C. 75—3 O. C. 110.

S. 91.

Non-receipt of goods purchased—Measure of damages—38 I. C. 404—3 O. L. J. 737.

S. 127.

Absence of consideration, 33 I. C. 732.

SS. 120, 139.

Suit against surety alone. A. W. N. 1882, p. 132—1886 p. 306.

S. 135.

Agreement to avoid the effect of O. P. J. 714—23 All. 137.—Surety discharged by giving time to principal judgment debtor 9 O. C. 28.

S. 209.

See Oudh Rent Act S. 108 (5). 29 I. C. 679.

S. 229.

See Lease—25 All. 1.—

Contribution.

See S. S. 55, 82, 95, T. P. Act. Redemption by one of the parties

—Claim against part transferee of mortgaged property—Party impleaded as owner found to be trespasser —34 I. C. 367.—Between persons equally liable—11 O. C. 279.—Doctrine of, 16 O. C. 285.—Right of original creditor time barred at the time of, 16 O. C. 285.—Of Revenue, suit by one co-sharer against other co-sharers for, 3 O. C. 308.—Right to, for costs—21 Cal. 496—10 O. C. 108, 18 O. C. 340.—Right of defendant *inter se*—2 O. C. 303.—Right to sue when accrues, limitation—13 O. C. 23.—Satisfaction of deed by one joint executant—Suit on deed against one of joint executant—3. O. L. J. 447.—Suit for—Agreement to contribute—Execution of fresh security, whether amounts to payment—19 O. C. 44.

Co-operative Societies Act (II of 1912.)

Debts due to a village Bank by one of its members—Liability of successor in interest—Construction of bye-laws—18 O. C. 157—S. 42 (2) and (6) Jurisdiction—Fee certificate, 4 O. L. J. 583.

Co-owner.

Injunction—Sole occupation of part of joint property by one—5 O. C. 171.—See also—26 All. 588—27 All. 88.—28 All. 161—18 Cal. 10. Demolition of building constructed by one only—7 O. C. 336, 362—8 Cal. 708, 14 Cal. 236, 30 Cal. 901 —See "Building."

Co-sharer.

See Co-owner.

Costs.

And interest, decree for—Liability of son—4 O. C. 93.—In redemption suits—4 O. C. 347.—Of application to High Court to revise proceedings under S. 145 Cr. P. C. S. C. 227.—Second appeal S. C., 55—6 O. C. 39, 52.—7 O. C. 49—8 O. C. 251.—To be set off—Pre-emption suit, 3 O. C. 323—6 O. C. 24.—See S. 145, Oudh Rent Act—1 O. C. 141.—See Evidence—16 Cal. 62 (P. C.)—Appeal as to, Court fees extra—6 O. C 135—12 O. C. 171.—See Will—O. P. J. 544.—See Construction—O P. J. 583.—How to apportion—2 O. C. 199.—The Court of Small Causes dismissing the suit as not cognizable ought not to order the plaintiff to pay costs, 19 O. C. 236.—In pre-emption suits decided by drawing of lots —5 O. C. 399.—Interest on—2 O. C. 37—3 O. C. 129—1 O. L. J. 544.—Of the suit in the decree for foreclosure treated as part of consideration, 2 O. C. 103—3 O. C. 184 (190) —1 O. L. J. 470.—Mortgagee entitled to, when exact amount not tendered—6. O. C. 135—Appeal praying for distinct reliefs as to—12 O. C. 171, 130—13 O. C. 62—15 I. C. 746—16 O. C. 354—Not allowed to party who acts wrongfully—7 O. C. 213.—Of suit for enhancement of rent, liability of co-sharers to *lambardar* for, 5 O. C. 298.—Ordered to be paid for adjournment, 6 O. C. 41—Plaintiffs—Question as to, referred in arbitration by agent of judgment-debtor without power to refer, 8 O. C. 263.—Disallowed to the successful party for having raised a false case—O. P. J. 114.—To be deposited in the registry of the Privy Council O. P. J. 42.—Refusal of deposit by mortgagee 4 O. C. 387—Security for—S. C. 269. —Of Funeral against decree-holder's claim for mesne profits—S. C. 258. Pleader's fee—Suit withdrawn—5 I. C. 121.—Court fee paid or withdrawn part of claim, 23 I. C. 231. —See S. 100 C. P. C. etc., Mortgage, —Discretion of Court—32 I. C. 291 —2 O. L. J. 502—10 O. C. 65—6 O. C. 39, 52—8 O. C. 251.—Death of next friend of minor plaintiff,—

Liability of next friend's estate for, 20 O. C. 301. Of collection, right as to *haq lambardari* independent of —1 O. L. J. 156—Of improvement—Pre-emption, 10 O. C. 49.—Of stamp paper required for sale deed—10 O. C. 49.—Court fee when payable on —12 O. C. 171.—Different Judgments about, 10 O. C. 65—Right of contribution as to—10 O. C. 108.—Separate applications for execution of decree as to, and as to mesne profits, 2 O. L. J. 327—when defendant not entitled to, 2 O. L. J. 402. —When can be questioned in appeal, 1 O. L. J. 156.—Awarded to judgment-debtor, 24 I. C. 376.—For adjournment, plaintiff's failure to pay, order as to dismissal, 3 O. L. J. 167.—Of collection, reasonable to be allowed, 1 O L. J. 184.—Of proceedings under S. S. 146, 147 Cr. P. Code, 13 O. C. 66.—Recoverable under S. 90 T. P. Act, 11 O. C. 377.

Court Fees.

Ad valorem, revision for order to pay.—5 O. C. 319.—Appeal, memorandum of, 3 O. C. 164.—In suits for arrears of rent.—R A. R. 37—Extra, appeal as to costs—6 O. C. 135—12 O. C. 171.—How calculated when appellant seeks to escape payment of a sum decreed and to recover a sum from respondent.—7 O. C. 345. —In appeals in pre emption cases. 2 O. C. 87—9 O. C. 153—16 O. C 354. —In suits to contest notice of ejectment, R. A R. No 38.—In suits to redeem property subject to more than one deed of mortgage.—7 O. C. 152 —11 O. C 173.—Of mesne profits accruing after institution of suit, 6 O. C. 351—Once paid, appeal by co-defendant, 3 O. C. 164—Order of Court to make up deficiency of. 4 O. C. 108—Partition—appeal—6 O. C. 372.—Payable on notice issued against heir of deceased tenant—S. D. 1 of 1900.—Payment of, by pauper subsequent to filing of his application 4 O. C 250.—Plea as to insufficiency of—value of allegations in plaint—30 I. C. 73.—Amount of, payable on appeal—Redemption of usufructuary mortgage—30 I. C. 322.—*Ad valorem* fee—appeal, 18 O C. 114—See Damages, 15 I. C. 526—Additional not paid, 2 O. L J. 549.—Can subsequently be declared to be inadequate. 1 O. L. J. 281.—Payability of, 15 I. C. 746.—Proper to be paid on plaint, 1 O. L. J. 281—Suit for possession and also for redemption —Redemption ordered on payment of particular sum—Appeal—Court fee payable—15 I. C. 746.—Labels, date of presentation of plaint or application not coinciding with that on which are purchased, 1 O. L. J. 223.—See costs—On memoran lum of appeal, how computed—9 O. C. 153.—Payable on appeal, 12 O. C. 130.—Payable on appeal denying plaintiff's right of redemption and claiming amount due on a deed of further charge—16 O. C. 354.—Sufficient to cover correct rent—2 O. L. J. 298.—Decree for possession.—Conditional on payment of a sum disputed in appeal—13 O C. 62.—Memo of appeal insufficiently stamped as co-defendant has paid full, on memo of, 3 O. C. 164.—On memo of appeal, against order under, S. 47 C. P. C. 6 O. C. 86.—Distinct payable on alternative reliefs.—11 O. C. 173.

Court Fees Act,

S. 7.

Ad valorem fee, suit for sale, appeal to make properties exempted by lower Court liable for amount of decree, 17 O. C. 90.—Suit on mortgage deed for declaration of lien on and sale of hypothecated property, S. C. 34.—Suit for declaration that deed of gift and sale be declared void—S. C. 225.—Suit for redemption, ap-

peal, 2 O. C. 87—9 O. C. 153—16 O. C. 354.—Decree conditional on payment of certain sum, appeal—13 O. C. 62.—Suit to redeem property subject to more than one deed of mortgage, 7 O. C. 152—11 O. C. 173.—Suit to redeem deed of further charge, appeal, 12 O. C. 130—13 O. C. 62—15 I. C. 740—16 O. C. 354.—See "Jurisdiction, Generally."—Suit for recovery of property subject to certain charge, appeal, 10 O. C. 42, 291.—Application for filing award, claim for possession of land in terms of award —S. C. 32.

SS. 7 and 11.

Court fee found to be sufficient, subsequently declared inadequate, 1 O. L. J. 281—See, S. D. 5 of 1883. —On mesne profits accruing after institution of suit—5 O. C. 351.—Additional Court fee on mesne profits—1 O. C. 8.

S. 13.

Order of refund of stamp, R. A. R. 74.

SS. 16 and 17.

Cross objection, 2 O. C. 87—3 O. C. 163.—See S. 7 Court Fees Act.—Alternative relief—11 O. C. 173.

S. 19.

No bar to hearing of application, if proper fee not paid, 14 O. C. 14. —Will 8 I. C. 695—14 O. C. 14.

Sch. I.

Application for review of judgment, 2 O. C. 302.

Sch. II.

Partition—Appeal.—4 O. C. 289. —6 O. C. 372—1 O. L. J. 81.—Appeal against order in execution of decree when amount of mesne profits has to be determined—6 O. C. 86.—See S. R. Act S. 39.

Court.

Held in camp—Notice to parties, S. C. 165.—Personal knowledge of, 6 O. C. 204.—Ambiguous order of, 6 O. C. 351—See award —See "Review" —Construed as meaning Court of Wards—4 O. C. 31.—See Costs.—Discretion of—7 O. C. 239—3 O. C. 335.—Sale, not in execution of decree—Irregularity, no defence in a suit for possession by dispossessed purchaser unless sale is set aside, O. P. J. 164 —Action taken by, at the request of a party, 14 O. C. 327.—Appellate, additional evidence in; when improper, 1 O. L. J. 57.—Appellate, judgment of—2 O. L. J. 299.—Appellate; Lower Court not to add to terms of decree as passed by 1 O.L. J. 193.—Power and jurisdiction of appellate 22 I C. 128.—Power of appellate, to act under S. 158 C. P. C., confined to appeals before it—10 O. C. 245.—Effect of decision of, upon mutation proceedings S. D. 18 of 1912.—Competent to pass decree for prompt dower, 15. O. C. 127.—Parties consent can not confer jurisdiction to 2 O L. J. 321.—Defect in constitution, of, 13 O. C. 337.—Delegating power of extending time to arbitrator 9 I C. 241.—Discretion of, (*a*) in awarding interest from date of decree to that of realization—3 O. C 129—26 I. C. 177—3 O. C. 22.—(*b*) in decreeing redemption in suit for possession, 4 O. C. 257.—(*c*) in presuming genuinness of old deeds —7 O. C. 290.—Executing decree, power of, to stay execution—3 O. C. 243 —Fixing price at fair market value if fictitious price entered in sale deed—4 O. C. 158.—Held on tour, 1 O. C. 166 —Jurisdiction of 7 O. C. 213—Inspector, seat of when conducting cases—7 O. C 82.—Making out a new case by—7 O. C. 287 —Discretion of—2 O. L. J. 27—57. 402. 629. 502—25 I. C. 329—1 O.

L. J. 496, 544, 344—16 O. C. 238, 268—14 O. C. 36.—Duty of—1 O. L. J. 564, 582, 591.—2 O. L. J. 383, 402, 321 502, 729, 140, 491—30 I. C. 73—12 I. C. 518—15 I. C. 321—11 I. C. 105—16 O. C. 261.—Enlargement of time by—13 O. C. 28.—Inherent powers of—11 O. C. 235—O. P. J. 1050.—Jurisdiction of—10 O. C. 139, 363—17 O. C. 309, 377—2 O. L. J. 497. 212—25 I. C. 41—9 O. C. 107—16 O. C. 257—9 I. C. 414.—Compromise without leave of—9 O. C. 219.—Lower (*a*) Discretion of not to be interfered with in second appeal. 11 I. C. 289 (*b*) Documents on record but not discussed in, point arising on the face of—16 O. C. 136 (*c*) Not to add to terms of Appellate Court decree, 1 O. L. J. 193.—No limitation for application to deposit money in 1 O. L. J. 433.—Mistake or fault of, effect on suitors, 6 O. C. 8.—Not bound to consider *suo motu* question of jurisdiction 3 O. C. 32 - Power to appoint new arbitrator.—Order of, to make up deficiency in Court fee 4 O. C. 108.—Permission of, to sue on behalf of others—3 O. C. 351.—Power of, in respect of voidable contract, 5 O. C 256.—Power of, tendering pardon—3 O. C. 191—Power of, to proceed with the execution after deciding the question of legal representative—5 O. C. 133.—Recording compromise by, one party withdrawing consent—5 O. C. 49.—Refusing to decide preliminary issue of law—5 O. C. 151.—To which decree is transferred for execution, 4 O. C. 333.—Trustee purchasing minor's property without permission of—6 O. C. 252.—Payment of purchase money out of—14 O. C. 85.—Power of—2 O. L. J. 584—549—611—291—20—402—216—14 I. C. 711—13 O. C. 28—11 O. C. 144—9 I. C. 426—8 I. C. 418.—Uniform practice of 10 O. C. 201.—Appointing guardian *ad litem* —13 O. C. 123.—Below, decision of, affirmed, 10 O. C. 65.—Below, point not raised in 11 O. C. 126.—Deciding previous suit not competent to decide subsequent suit. 2 O. L. J. 44.—Failing to exercise jurisdiction, 10 O. C. 129.—Of appeal—16 O. C. 281—9 O. C. 254, 101—15 O. C. 33.—Of Judicial Commissioner, 18 O. C. 69.—Of Sessions, appeal against conviction by 13 O. C. 335.

Court of Wards.

See Lunatic Estates Act 1858—13 Cal. 81 —See Minor 23 Cal. 934.—See Oudh Land Revenue Act 1876—25 All. 195.—District Officers not to deal with suits preferred by themselves—R. A. R. 42—Attachment of allowance of ward—7 O. C. 174.—Disqualified proprietor borrowing money without sanction of—5 O. C. 256—9 O. C. 188—8 O. C. 210—Notice of adverse title set up by third party given to, effect of, 6 O. C. 142.—Power of, to admit claim, S. C 199—S. C. 233—4 O. C. 31.—Power of, to enter into compromise, S. C. 200—S. C. 233—8 O. C. 202—10 O. C. 273.—Property under management of, 4 O. C. 18.—Suppression of facts by manager appointed by—24 Cal. 853.—Disqualified proprietor—7 O. C. 176.—Ward not allowed to sue in respect of property not under management of, 19 O. C. 306.—Execution of decree after release of estate from management of, 14 O. C. 6.—Manager of—O. P. J. 659.—Power of, to assign Wards' property without consideration—O. P. J. 776.—Power of District Officer or Special Manager—Grant of land for hundred years for planting grove—17 O. C. 291.—Decree against Deputy Commissioner, 14 O. C. 6.—Failure to assume superintendence of estate of lunatic, 15 I. C. 265.—

See U. P. Court of Wards Act and "Ward."

Criminal Procedure Code.

S. S. 4 and 410.

European British subject—Appeal against conviction—13 O. C. 335.

S. S. 14, 146 and 147.

Application of—16 O. C. 192.

S. 35.

Validity of concurrent sentences—16 O. C. 370.

S. 52.

Procedure when part of evidence recorded by one Magistrate and then transferred to another - Consent of the accused—6 O. C. 192.

S. 103.

Search by Police—New plea taken in appeal, 2 O. C. 99.

S. 106.

Not appealable because of orders for security—7 O. C. 338.—Intention to commit breach of peace at the time of committing offence essential—9 O. C. 381.—Invalidity of order passed by Appellate Court when first Court had no such power—10 O. C. 287—16 O. C. 281.

S. 107.

Religious procession—S. C. 77.—Cancellation of bond—Jurisdiction—Revision—Question of fact when to be considered in revision, 1 O. L. J. 541.—Malicious prosecution, 9 O. C. 357.—Security for, 1 O. L. J. 541—S. C. 77—5 O. C. 313.

S. 109—110.

Value of evidence as to suspicion—Ex-convict—4 O. L. J. 319.—Joint trial—Proceedings under, not to be amalgamated with those under SS. 110, 112—8 O. C. 91—9 O. C. 69—15 O. C. 263.—Evidence of general repute—9 O. C. 69—12 I. C. 518—10 O. C. 168, 365.—"Habitual offender"—Joint trial—5 O. C. 243.—Special diaries—5 O. C. 203.—Evidence as to character given by those Police officers who did not speak from personal experience—5 O. C. 203.—Value of evidence—Statement of accused caste fellows and neighbours—12 I. C. 518—5 O. C. 203—9 O. C. 69—10 O. C. 132, 168.—Joint trial—Evidence against each person—Persons of bad character seen with accused—Sureties not to be rejected merely on Police report—15 O. C. 263—7 O. C. 113—11 O. C. 267—8 O. C. 245.—Evidence of "general repute," meaning of—5 O. C, 203—9 O. C. 69—10 O. C. 132, 168. 12 I. C. 518.—Duty of Appellate Court—4 O. L. J. 141.—Extortion and mischief—Habitually bringing false claim in Civil Court - 20 O. C. 129.

SS. 110 and 112.

See S. 526 Cr. P. C.

SS. 112—115, 117, 118, 537.

Omission of substance of information in the order directing to give security, 5 O. C. 313.

SS. 112 and 118.

Order absolute at variance with conditional order—Enquiry about sureties—11 O. C. 267—15 O. C. 263.

S. 117.

Rejection of sureties—7 O. C. 113—8 O. C. 245—11 O. C. 267—15 O. C. 263—6 O. C. 199—S. C. 70—10 O. C. 132—12 I. C. 518.

S. 118.

Appeal—2 O. C. 307.—Procedure to be adopted by Session's Judge, 15

O. C. 354.—Failure to record order under—10 O. C. 365.

S. 124, 125 and 126.

Order passed without notice to parties, 8 O. C. 245.—Intention at the time of committing, 9 O. C. 381.

S. 142.

Appeal under, S 421—11 O. C. 360.

S. 144

Cow sacrifice—General order—18 O. C. 70.

S 145.

No copy served under cl. (3) Defective prelimissary order—7 O. C. 334.—Meaning of "then"—S. C. 115.—Criminal revision, 5 O C. 1.—Nature of enquiry into title—1 O. L J. 242—S. C. 127, 227.—Costs of proceedings—Time for making order for costs—13 O. C. 66.—No jurisdiction when dispute about the collection of rent—10 O. C. 89.—Omission to publish order—12 O. C. 400.—Application of S. 526 Cr. P. C. 11 O. C 61.—Criminal revision—Power of Judicial Commissioner's Court—10 O. C. 69.—Jurisdiction of Magistrate acting under—19 O. C. 136.—Review, 16 O. C. 192.—Transfer of case under 11 O. C. 61.—Revision, 18 O. C. 69.

S. 147.

Object of—16 O. C. 192.—Jurisdiction—1 O. L. J. 481.

SS. 147, 203, 437 and 438.

Dismissal of complaint—Further enquiry—Reference—Apprehension of breach of peace—S. C. 64.

SS. 148, 435.

Attachment of property pending decision, S. C. 227.

SS. 157 and 173.

See S. 195 Cr. P. C.—6 O. C. 1.

S. 159.

Jurisdiction of High Court—15 O. C. 177.

S. 161.

Right of the accused to inspect and obtain copies of statements recorded by Police Officer—S. C. 189—13 O. C. 7.

S. 162.

Refreshing memory by Police Officer with reference to statement recorded by him—13 O. C. 7.

S. 164

See SS. 21, 24, 25, 26 and 27 Evidence Act and "confession"—Recording of statement of accused before evidence for prosecution—Examination of accused in the nature of cross-examination—7 O. C 191.—Statement recorded in English, 10 O. C. 112.—Evidence to be used against accused, contradiction of statement made in Court, 17 O. C. 363.—Joint trial, plea of guilty by one, 20 O. C. 136.—Corroboration of approver's evidence, 12 O. C. 418.—Confession, 25 I. C. 833—Statement behind the back of accused, 17 O. C. 363.

S. 172.

See S. 162, Cr. P. C.

S. 179.

Accused where triable, 4 O. C. 376

S. 190.

"May take cognizance of an offence" explained—Dismissal of complaint without examining complainant—Sanction to prosecute—4 O. C. 127.—See 20 I. C. 233.

SS. 190 and 556.

See S. 154, I. P. C.—8 O. C. 418.

S. 191.

Evidence recorded by successor—Trial of case—S. C. 110.

SS. 194 and 361.

Recording of statement of accused before evidence for prosecution—7 O. C. 191.

S. 195.

See SS. 190, 202 Cr. P. C.—See Penal Code S. 211.—Want of sanction or complaint—Jurisdiction of Magistrate ordering prosecution under S. 182 Penal Code—Prosecution for making false charge on Police report—6 O. C. 1, 5 O. C. 164.—High Courts power of revision of District Judge's order granting sanction to prosecute, 6 O. C. 216.—Prosecution for offence in relation to future proceedings in Court—5 O. C. 46.—False evidence—Alternative charges—S. C. 232.—Jurisdiction of High Court—Extension of period—Proof—15 O. C. 177.—Registrar not Court, 11 O. C. 358.—Sanction to prosecution once availed of—Fresh sanction necessary for fresh complaint—17 O. C. 18.—No previous sanction necessary in proceedings under SS. 465, 467 Penal Code—8 O. C. 313—Meaning of "document"—8 O. C. 313.—Meaning of "principal Court of original jurisdiction" revision, Subordinate Judge exercising powers of Small Cause Court, 20 O. C. 223.—Trial by Court before which offence committed, 4 O. L. J. 492.—Application, delay to be accounted for, 18 All. 204, 25 I. C. 329.—Private grudge, 13 I. C. 448.

S. 198.

Meaning of "persons aggrieved"—11 O. C. 148.

S. 200.

Application to maintenance cases, appearance of *pardanashin*, S. C. 142, 4 O. C. 127.

S. 203.

Dismissal of complaint—Case subsequently forwarded to the Magistrate by Police—Magistrate bound to entertain case—S. C. 230.—Grounds for dismissal of complaint—Order for further enquiry—Notice—11 O. C. 261.—Revision of order passed—Notice to opposite party—13 O. C. 289.

S. 211.

Sanction to prosecution—Stopping cross-examination of witness—S. C. 119.—See S. 439 Cr. P. C.

S. 239.

Joint trial—Misjoinder of parties—1 O. L. J. 141.

S. 256.

Accused has no right to cross-examine after framing of charge in inquiries into cases triable by Sessions Court—19 O. C. 239.

S. 259.

Case of non-compoundable offence struck off for complainant's absence—discharge—17 O. C. 18.

S. 263.

Summary trial—Magistrate bound to record reasons for conviction—16 O. C. 357.

S. 287.

Acquittal without taking whole evidence tendered by prosecution—Re-trial—1 O. C. 84.

S. 288.

Use of evidence of witness taken before committing Magistrate, S. C.

229.—Discretion of Judge to believe depositions made before the Committing Magistrate in preference to those made before himself—4 O, and A. L. R. 325.

S. 289.

Mode of recording statement of accused—S. C. 95, S. C. 98—Meaning of "no evidence"—S. C. 274—1 O. C. 84, See S. 287.

S. 307.

Trial by Jury—Power of High Court—S. C. 234.

S. 309.

Imprisonment in default of payment of fine—S. C. 28.

S. 326.

Assessor—13 O. C. 337.

SS 337, 338, 339.

Conviction of accused to whom pardon tendered, without any finding as to his non-compliance with conditions of pardon, 3 O. C. 245—Withdrawal of tender of pardon—Trial illegal—6 O. C. 236—Revocation of pardon—3 O. C. 191.

S. 342.

Confession of co-accused, conviction resting upon, 6 O. C. 204, 11 O. C. 328 See S. 287—1 O. C. 85.—Statement of accused in answer to questions put by Magistrate, admissibility of, in evidence against accused—1 O. L. J. 168.—Examination of accused before completion of prosecution evidence contrary to law—1 O. L. J. 238.

S. 345.

Collector deciding objections to assessment of income-tax as Revenue Court, prosecution ordered for false statement 22, I. C. 146.

S. 356, 537.

Evidence not recorded in language of Court, effect of—Irregularity—Fresh trial—6 O. C. 73—Former statements—S. C. 86.

S. 364.

See S. 164 Cr. P. C.

S. 366.

See U P. Excise Act, 1 O. L. J. 487.

S. 367.

Record of proceedings in pencil—Initial in lieu of signature—S. C. 192.—Nature of findings to be supported by reasons, 40 I. C. 297.—See S. 424 Cr. P. C.

S. 369.

Does not permit a review—16 O. C. 192.

S. 403.

Plea of previous acquittal, in criminal trial upon the same facts—6 O. C. 153—Discharge without making any judicial investigation into merits of complaints. Inquiry into second charge on second complaint—17 O. C. 273.

S. 406.

See S. 118 Cr. P. C.—2 O. C. 307.

S. 413.

Joint trial by first class Magistrate—appealable sentence against one accused only—Right of appeal of ather accused—15 O. C. 386.

S. 417.

Appeal from acquittal—Position of Appellate Court—3 O. L. J. 477.

S. 421.

Right of Counsel to refer to certified copies of evidence at the hear-

ing of appeal—11 O. C. 360.—Writing of judgment in summary trial—13 O. C. 309.—Summary dismissal of appeal—13 O. C. 309.

S. 423.

Power of Appellate Court to set aside order of lower Court putting complainant in possession of land—7 O. C. 208.

S. 424.

Contents of judgment, 4 O L. J. 80.—Court's power to pass any order, 13 O. C 161.

S. 432.

Reference by Provincial Magistrate to High Court, S. C. 71.

S. 435.

See SS. 118, 145 Cr. P. C.—Offence committed in course of judicial proceedings—Preliminary inquiry—Order committing accused for false evidence—application for revision, 4 O. C. 96—17 O. C. 25.—Applicability of 19 O. C. 136.—Application for revision to District Magistrate after its rejection by Sessions Judge—Order for further inquiry—4 O. C. 119—Not adop. 5 O. C. 137.—Evidence of wilful neglect to pay maintenance to wife—Reference by Sessions Judge to High Court on point of law—5 O. C. 316.—See S. 145 Cr. P. C.

SS. 435, 439.

Maintainability of revision—42 I. C. 132.

S. 437.

See S. 435 and 437—Cr. P. C.—Order of discharge—Further inquiry—Notice to accused person—2 O. C. 363, Dist. 11 O. C. 261.—Revision—Power of District Magistrate, S. C. 88.—See 6 O. C. 262.

S. 438.

See SS. 147, 203, 435, 437 Cr. P. C.

S. 439.

See S. 403 Cr. P. C.—See SS. 83 and 85 Cantonment Code 1899—7 O. C 51, 7. O. C. 68.—Offence under S. 211 Penal Code—Notice to show cause against the institution of proceedings—High Court's power to remedy improper acquittals, S. C. 191—Revision of order of acquittal—2 O. L. J. 190.—Compoundable offence—Alteration of conviction, 3 O C. 314—13 O. C. 161.—Applicability of—19 O. C. 136.

SS. 465, 467.

See S. 195 Cr. P. C.

S. 476.

Order under, passed by Civil Court—Revision by High Court as Criminal Court—Record of Civil or Revenue Court, whether can be called by High Court as Criminal Court—Nature of proceedings under Section 476—17 O. C. 25.—See SS. 190, 202, 195, 476, 435 Cr. P. C.—Preliminary enquiry—S. C. 284—Execution of decree—Judicial proceedings—jurisdiction of Court—17 O. C. 309—19 O. C. 91 Proceedings by a Revenue Officer as distinguished from a Revenue Court—13 O. C. 198—17 O. C. 25.—Can succeeding Magistrate order prosecution—2 O. L. J. 546.

S. 477.

See S. C. 303, 172, 206.—See SS. 193, 195 Penal Code.

S. 488.

See S. 435—5 O. C. 316.—Order for maintenance of wife, divorce, enforcement of order—S. C. 239—17 O. C. 260—S. C. 239—Effect of subse-

quent Civil Courts' decree 9 O C 49 —17 O. C. 260—30 I. C. 433.—*Pardanashin* not to appear in open Court —S. C. 142.—Proof of wilful neglect —5 O. C. 316.—Illegitimate son—Declaratory suit—17 O. C. 331—30 I. C. 443.—See "Maintenance."

S. 495.

Malicious prosecution—Suit for damages—Charge false to the knowledge of complainant—Malice—Information to the Police, 11 O. C. 371.

S. 509.

Evidence of medical witness, 20 O. C. 61.

S. 522.

See S. 423 Cr. P. C.

S. 526.

Transfer of proceedings, 10 O. C. 165—24 I. C. 951, 595.—Meaning of Criminal Case.—3 O. C. 247—11 O. C. 61—when one Deputy Magistrate witness for prosecution—1 O. L. J. 271.—Grounds, 10 O. C. 165.—Accused's intention to apply for, notified when trial about to commence —Adjournment refused by Magistrate—Retrial—1 O. L. J. 218.

S. 528.

Evidence partly recorded by one Magistrate and transferred to another—6 O. C. 192.

S. 537.

See SS. 192, 195, 356 Cr. P. C. —Evidence not interpreted to witness—Right of prosecutor or accused to cross-examine witnesses called by Court—S. C. 275.—Persons not summoned to act as Assessors acting as such—13 O. C. 337.—Illegality of procedure in trial not cured by prisoner's consent—6 O. C. 192.—One trial instead of two—5 O. C. 243.—Joint trial—Property stolen at one and same theft and separately received by several accused—Irregularity incurable.—18 O.C. 92.—Joint trial, 2 O. L. J. 94.

S. 540.

Neither party can claim right to cross-examine, S. C. 275.

S. 548.

Right of accused to obtain copies during pendency of case—S. C. 141.

S. 550.

Order issued by Police Sub-Inspector to Station Master to detain certain logs—16 O. C. 371.—Right of counsel to refer to certified copies —11 O. C. 360.—Order for costs, 13 O. C. 66.—Transfer of Case, 11 O. C. 61.

S. 573.

See S. 52 Cr. P. C.

Criminal Revision.

Power of Judicial Commissioner's Court, 18 O. C. 69.

Criminal Tribes Act (III of 1911).

S. 23.

Enhanced punishment—Accused being member of criminal tribe at subsequent and not at previous conviction—3 O. L. J. 265.

Cross.

Appeals against one of two decrees, 21 I. C. 264.—Examination-fixation of limit of time for 8 I. C. 418.—Examination, questions put in —1 O. L. J. 591, 447 366.—Objections maintainable only with respect to principal appeal, 10 O. C. 214.

Crown Grants Act (XV of 1895.)

Applicability of primogeniture *sanad*, meaning of "successor," rule as to succession by lineal primogeniture—4 O. L. J. 193.

Cruelty.

Good defence in a suit for restitution of conjugal rights—15 O. C. 159.—See "Marriage," Restitution of conjugal rights."

Custom.

See 10 Cal. 557—Evidence as to, concurrent findings, 14 Cal. 236—Exclusion of females 8 O. C. 142, 94; 4 O. C. 71; 15 I. C. 247; 42 I. C. 199.—Setting up at a late stage a, different from that in written statement, 3 O. L. J. 327—Hearsay evidence, 8 O. C. 94, 15 I. C. 247.—Exclusion of daughters in *Chauhan thakurs*, 8 O. C. 94.—*Misl rawajam*, evidence of, 8 I. C. 728.—To eject tenant from house on payment of compensation—S. C. 245—20 O. C. 299.—Of entailing land upon heirs male of donee's body in case of gift of land for maintenance—S. C. 237, 4 O. C. 163.—See *Haq Chaharum*.—Of privacy, 7 O. C. 125.—Of inheritance, 5 Cal. 744.—Applicability of, obtaining in impartible estates to partible estates, 12 O. C. 304.—Citation of instances in proof of, 1 O. L. J. 78, 8 O. C. 142, 19 O. C. 363.—Effect of decision in previous suit against existence of, 22 I. C. 138.—Existence or non-existence of, *Wajibularz* relating to the clan, 4 O. C. 71, 17 O. C. 1.—Family, 2 O. L. J. 502; 18 I. C. 317; 22 I. C 138.—Finding as to, 15 I. C. 247, 16 I. C. 12—Finding of fact—13 O. C. 183.—Of *Dhardhura* S. C. 27, 9 O. C. 129, 23 I. C. 224.—Exclusion of daughter's son—12 O. C. 63, 22 I. C. 138, 14 I. C. 12, 22 I. C. 138.—Exclusion. or postponing of daughters, 12 O. C. 304; 13 O. C. 163; 18 O. C. 61; 14 I. C. 12; 22 I. C. 138; 30 I. C. 392; 15 I. C. 247; 22 I. C. 138.—Deducing existence of, by reference to various provisions of *Wajibularz*, 3 O. L. J. 327.—Supersedes general law, 11 O. C. 1.—Tenant's right in trees planted during continuance of tenancy, 16 O. C. 341; 12 I. C. 409.—Local, 2 O. L. J. 351, 370; 16 O. C. 290.—Claim for pre-emption decreed in absence of any defence as to, 1 O. L. J. 152.—Proof of, 2 O. L. J. 388, 607; 1 O. L. J. 532, 397, 470, 319, 12 I. C. 403, 11 I. C. 536.—Tribal, 2 O. L. J. 21, 629.—What does not constitute to establish, 17 O. C. 105.—In pre-emption among Co-sharers *inter se* 15 O. C. 389.—Entry in *Ikrar malikan deh* 23 I. C. 962 1 O. L. J. 78.—Wider than that recorded in *Wajibularz* may be proved 20 I. C. 40.—Oral evidence of witnesses outside family, 22 I. C. 138.—Elements necessary to establish, 15 I. C. 247, 8 O. C. 94, 17 O. C. 1.—As to non-transferability, right of grove holder to mortgage —15 I. C. 277; 2 O. C. 3.—Defined O. P. J. 221.—Judgment based on, not disturbed unless substantially wrong, O. P. J. 72.—Of impartibility—O. P. J. 1052.—Presumption as to, of pre emption, value of instances, 15 O. C. 389; 3 O. L. J 415, 17 O. C. 105.—Hindu law, succession, collateral, distribution among sons according to number of mothers, 19 O. C. 165.—Widow succeeding to her husband's property, 32 I. C. 291.—*Wajibularz* of other villages whether proof of family 17 O. C. 1.—Distribution among sons according to number of mothers, 19 O. C. 195.

Customary.

Difference between customary and

prescriptive rights—Continuous open and peaceful enjoyment for 20 years not necessary 20 I. C. 467—

Dacoity.

See Penal Code SS. 34, 392, 395, 396 and 397.—Identification of accused—Evidence—3 O. C. 72.—Persons said to be of bad character not necessarily a dacoit—15 O. C. 263. —Meaning of "belonging to gang of dacoits" 13 O. C. 235, 243.

Dahyak

Status of person holding Settlement Court decree for, S. D. 31 of 1891—S. D. 32 of 1891.—Right to receive—14 O. C. 335—23 I. C. 231 —28 I. C. 919, 929—30 I. C. 218 — Whether confers under proprietary right—30 I. C 218—23 I. C. 231—2 O. L. J. 241.—Decree for, does not connote any right to possession, S. D. 3 of 1891—14 O. C 335—28 I. C. 919, 929—2. O. L. J. 154.— Right, cash, connotes right to possession, 23 I. C. 231.—Transferability of—23 I. C 231.

Damages.

Suit for arrears of rent—Breach of contract—1 O. C. 270—3 O. C. 22 —7 O. C. 116.—Suit for recovery of money due on mortgage, 7 O. C. 11.— Suit for, against person put in charge who failed to restore—19 O. C. 236 —For breach of contract by Government, 5 O. C. 403.—For breach of statutory covenant for title, 5 O. C. 78.—For detention of crop until payment of rent—S. C. 4.—For exercise of Police powers by Officer Commanding Cantonments S. C. 19.—For landlord's entry on land to procure sub-soil products— S. C. 9.—For breach of Contract, O. P. J. 589—33 I. C. 746, 1 O. L. J. 147.—Measure of—8 O. C. 5— 5 O. C. 328.—Misuse of legal process—S. C. 112.—Possession of *Shamilat* land and demolition of construction thereon—7 O. C. 362. —Suit for the recovery of the *Jack* fruit forcibly taken—2 O. C. 256 —4 O. C. 89.—Suit for, against Railway Administration, 5 O. C. 153. —Well, construction by co-sharer without consent, proper remedy— 7 O. C. 336—11 O. C. 355—15 O. C. 170.—Mortgagee failing to discharge prior incumbrances—15 I. C. 526.—10 O. C. 69.—Suit for enforcement of transfer—Transfer illegal—Can consideration money be recovered as, 4 O. L. J. 425.— See S. 102 C. P. C.—13 I. C 493.— Consequent on legal proceeding, 13 O. C. 357.—Interest awarded as,— 14 O. C. 106—12 O. C. 140.—Liability to pay—12 I. C. 339—10 I. C. 18.—Suit for—11 O. C. 371—9 O. C. 275—10 O. C. 95—13 O. C. 357. —For planting of grove by tenants with mortgagee's permission, claim against mortgagee for, 9 O. C. 18. —With respect to malicious prosecution, 9 O. C. 357.—See Compensation.

Dasundh.

Under proprietary right—Ordinary tenant land held as, by *dasaundh* holder—28 I. C. 847.—Whether connotes right to possession or under-proprietary right in land—1 O. L J. 187.—Decree for—Possession proved—Decree against trespasser— Position of rightful holder—4 O. L. J. 463.—Right to, 2 O. L. J. 156, 154, 191.

Declaration.

See Hindu Law 13 I. C. 547.—As perpetual lessee, suit for, 3 O. C. 87, 365.—Against Secretary of State —Jurisdiction, discretion 17 O. C. 369.—By Civil Court leaves nature of tenancy undetermined, S. D. 3 of 1903. Concerning mortgage money when premature, 2 O. C. 145—1 O

C. 171.—Of existence of relation of landlord and tenant, 3 O. C. 365—5 O. C. 104—12 O. C. 164, 293, 24 I. C. 381—28 I. C. 307.—Of heir by a lady—2 O. C. 372.—Of legitimacy, 2 O. C. 57, 115—25 All. 236.—1 O. C. Sup. 49—17 O. C. 331.—Of mortgagee's rights in land sold in execution of decree of third party, suit for—6. O. C. 324.—Of non proprietary or non under-proprietary right, 5 O. C. 118—7 O. C. 372—12 O. C. 164 (170)—24 I. C. 381—30 I C. 207.—Of non occupancy right, 1 O. C. 210—2 O. C. 96—3 O. C. 87—12 O. C. 164—24 I. C. 381.—Of proprietary title and ejectment of tenant, 6 O. C. 119—8 O. C. 145—9 O. C. 167—8 I. C. 407, 691—14 O. C. 196—15 O. C. 33.—Of resumption by Judge, possession—6 O. C. 383.—Of resumption decree—5 O. C. 97.—Of tenancy at will—4 O. C. 180—12 O. C. 174—24 I. C. 381.—Of title. 5 O. C. 173—10 O. C. 44—13 O. C, 19.—Of trust in favour of joint family, 1. O. C. Sup. 24.—That defendant is an ordinary tenant, 7 O. C. 187—7 O. C. 372—12 O. C. 15—14 O. C. 196—10 I. C. 11.—That defendant was not proprietor 5 O. C. 104 or under-proprietor—23 I. C. 231, 3 O. L. J. 191—S. D. 3 of 1903 or ex-proprietor, 18 I C. 281.—That lessee is liable to ejectment by notice, 6 O. C. 289—14 O. C. 225—24 I. C. 281.—That sale by widow is not binding upon reversioner 8 O. C. 21—9 O. C. 104—14 O. C. 170.—As to right of irrigation—3 O. L. J. 40.—Plaintiff claiming to be collateral heirs of certain person—Failure of present interest in property—33 I. C. 183. See also 2 O. C. 57—2 O. C. 115.—Discretionary power of Court to grant—1 O. L. J. 344—10 O. C. 204—7 O. C. 239—8 O. C. 21, 81.—Subsequent suit for, 10 O. C. 44.—When maintainable—Reversionary interest not mortgaged but property itself 2 O. L. J. 195.—Withdrawal of suit for, without leave of Court, 9 O. C. 169.—Suit for possession and, 2 O. L. J. 549.—By Civil Court, maintaining a private partition, effect of, on the partition to be made by Revenue Court, 10 O. C. 204.—Cause of action for—14 O C. 196—7 O. C. 239—8 O. C. 21, 81.—Of a person as a mere *thekadar*, 11 O. C. 335.—Of proprietary rights, suit for, 12 O. C. 320.—Of right of inheritance—10 O. C. 23.—Of right on the basis of transfer of the chance of a relation obtaining property on the death of a kinsman, suit by transferree for, 9 O. C. 55—of under-proprietary rights—12 O. C. 225—11 O. C. 187—Refused on ground of plaintiff's misconduct, 9 O. C. 185.—That certain land is exclusive property of appellant, 10 O. C. 204.—That a person is not legal representative, right of appeal from an order of, 10 O. C. 121.—That document is false and void, 24 I. C. 381.—That plaintiff is entitled to get from his co-sharer the amount of the arrears of revenue 9 O. C. 232.—That thereafter the co-parcener shall hold in defined share, and that he has a lien over mortgaged share—10 O. C. 289.—That defendant was not illegitimate son of plaintiff, maintainability of—17 O. C. 331.

Declaratory.

Decree for possession of land on payment of specific sum of money—S. C. 238, 256—1 O. C. 289—8 O. C. 361 (367)—6 O. C. 239—11 I. C. 291—15 O. C. 99—14 O. C. 257.—Suit against order passed under Chapter VII A—O. R. Act 40, I. C. 200.—Consequential relief—*Res judicata*—6 O. C. 239—8 O. C. 361—15 O. C. 99.—Entry in Revenue registers adverse to plaintiff's title, limitation—3 O. L. J. 226.—Redemption, second Suit for—8 O. C. 361—14 O. C. 100—15 O. C. 99—Starting point of

limitation, 12 O. C. 15, 320.—Suit establishment of title—14 O. C. 170. Suit by persons suing in their own names for themselves and others—3 O. C 351.—Suit by reversioner against *Taluqdar's* widow, 7 O. C. 230.—Not obtainable by absolute right, 17 Cal 933.—Settlement decree—Redemption suit, 1 O. C. 289—6 O. C. 239—8 O. C. 361—9 O. C. 301—11 I C. 291.—No declaratory decree where suit under S 39 Specific Relief Act, and deed not proved, 1 O. C. 18.—Maintenance decree—Enforcement of such decree on execution side—1 O. L. J 403—Cancellation of notice of ejectment by Revenue Court on ground of perpetual lease—20 O. C. 182—Suit, when proprietary possession can be granted, 20 I. C. 147.

Declaratory Relief.

Suit by reversioner when nearest reversioner refuses to sue—3 O. C. 336—7 O. C. 239—8 O. C. 21 (22)—8 O. C. 81—9 . C. 326—15 I. C. 247.—Against tenant—4 O. C. 201, 207—8 I C. 30, 710—5 O. C. 18.—See Abatement, 8 O. C. 124.—See Art 120 Limitation, 8 O. C. 303—10 I. C. 11 (13)—20 I. C. 147—Discretion of Court—Mohammedan's right to sacrifice cattle—17 O. C. 354.—Suit to establish title, proof of—19 O. C. 64.—See SS. 39, 42 S. R. Act

Declaratory Suit.

By Judgment creditor for right to attach—S. C 194—Suit to set aside void sale—S. C. 215, 295—8 O. C. 409—12 O. C. 47, 297, 299.—Suit for, cause of action—Effects of decision in favour of plaintiff as a reversionary heir—O. P. J. 845.—By landlord against tenant setting up underproprietary title, 7 O. C. 372—12 O. C 15, 164—14 O. C. 196—16 O. C. 163—10 I. C. 11—7 O. C. 187.—Suit to contest adoption, O. P. J. 369.—Liability to pay rent.—2 O. C. 35.—Maintainability of, where paternity of an illegitimate son is denied, 17 O. C. 331.—To establish right to property in possession of the claimant—S. C. 226, 225.—For declaration of under-proprietary right, 8 O. C. 30—11 O. C. 240—8 I. C. 710—24 I. C. 381.—Establishment of title—14 O. C. 170—22 I. C. 129.—Declaration of proprietary right—Effect of entry as tenant in Settlement record—Cause of action—Limitation, 12 O. C 320.—See S. 42 Specific Relief Act.

Decree.

Right of heir of decree holder to execute—10 O. C. 378.—Right of purchaser of a portion of the property charged with payment of—10 O. C. 280.—Sale in execution of, before order of adjudication, 18 O C. 268.—Sale in execution of, of inferior Court by order of Court of higher grade—11 O. C. 41.—Sale of house in execution of—14 O. C. 4.—Separate, 18 O. C. 55.—Setting aside of, on ground of fraud—13 O. C. 388.—Settlement, 14 O. C. 225—18 O. C. 380—9 O. C. 249.—Settlement Court—10 O. C. 136.—Simple money, sale of mortgaged property, 14 O. C. 89—Restraining alienation—19 O. C 115.—Single, mortgagee holding on two mortgages—11 O. C. 379. Son's liability to satisfy—17 O. C. 318.—Step in aid of execution of, 9 O. C. 281—1 O C. 70.—Subsequent variation in, 16 O. C. 225.—Surety, 11 O. C. 342.—Time barred, requisites for the execution of—18 O. C. 374.—Transfer of, passed by Civil Court for execution of Rent Court, 13 O. C. 119, 291.—Transferee *pendente lite* can not question validity of—13 O. C. 50.—Validity of transfer in breach of terms of, 14 O. C. 144.—Whether it can be passed on plaintiff's title, 12 O. C. 183.—Wrong

amount entered in, 10 O. C. 179.—Against property represented by minor, 11 O. C. 319—Against Deputy Commissioner as Manager of Court of Wards, 14 O. C. 6.—Against father, the son not party to—11 O C. 334 Based on a prior mortgage, suit for possession by purchaser. 10 O. C. 314.—For foreclosure, 12 O. C. 314—17 O. C. 379—11 O. C 26.—For payment of arrears of rent—Cause of action, S. D. 5 of 1907.—For pre-emption, 16 O. C. 5—17 O. C. 14, 377—14 O. C. 85.—For prompt dower, 15 O. C. 127.—For redemption, 12 O. C. 130—16 O. C. 354.—For restitution of conjugal rights, 10 O. C. 11.—Silent as to mesne-profits, 11 O. C. 235.—For resumption—12 O. C. 225.—Joint and indivisible against all judgment-debtors, 10 I. C. 174.—Joint and several, 21 I. C. 262.—Though no time fixed for payment—14 O. C. 100.—Manager of a joint Hindu family, certifying payment of, 11 O. C. 246.—Money paid by mortgagor to discharge a portion of—10 O. C. 354.—Objection to attachment of—17 O. C. 374.—Dismissal of suit under S. 158 C. P. C. 10 O. C. 245.—Personal against a ward, 18 O. C. 145.—Personal against other property, 17 O. C. 153.—Personal—14 O. C. 62—16 O. C. 48—Declaring that in default of payment within certain period suit shall stand dismissed—default—dismissal—appeal, 17 O. C. 14.—Where there has been appeal decree to be executed is that of Appellate Court—Limitation—5 O. C. 301.—Ratification of—Mistake—Negligence—Carelessness—Right to sue—11 I. C. 537.—See S. 47 C. P. C—5 O. C. 133.—Extension of time fixed in, 8 O. C. 241—13 O. C. 28—14 O. C. 147—16 O. C. 206—See also, 7 I. C 36—8 I. C 812—11 O. C. 144—17 O. C. 377—18 O. C. 58.—Interpretation of—special agreement, holding under—Ejectment by notice vouchsafed by decree—Rights created under decree, whether personal—Position of successor in interest—1 O. L. J. 419.—Appeal against order enforcing private award—12 O C. 40—See, O. XXXIV, R. 6 C. P. C, 17 O. C 153—See Agreement—14 O. C. 139.—Amended, limitation in case of, 11 O. C. 22.—Application for appointment of receiver under attachment in execution of his own—10 O. C 268.—Application for transfer of—16 O. C. 70—Application of, to description of property, 17 O. C. 256—Assignment of rights under 16. O. C 70—See O. XXXIV, R. R. 4 and 6—18 O. C. 55—Construction of, 14 O. C. 29—6 335—100—15 O. C. 99—12 O C. 203—17 O. C. 153.—Date of, suit to recover the debt brought against the son more than 6 years after, 9 O. C. 350.—Definition of, 16 O. C. 350—8 I. C. 409.—Due diligence in execution—14 O. C. 238 (30)—*Exparte*, 12 O. C. 25—9 O. C. 35, 288—14 O C. 111—15 O. C. 289.—Execution of—11 O C 225—12 O. C. 175—13 O. C. 90, 180—17 O. C. 94, 256—18 O. C. 374—16 O C. 146—10 O. C. 263, 280—14 O. C. 6, 82, 111.—Decree against Hindu widow, whether binding on the reversioner—O. P. J. 908, 466.—Form of in redemption suit, 42 I. C. 66.—By consent against minor—Onus of proving authority to bind the minor—O. P. J. 682.—Setting aside compromise against minor—O. P. J. 922. Construction of—Decree directing realization of money by sale of property—Right of judgment-debtor to challenge decree in execution—14 I. C. 29.—Interpretation of—Appellate decree—Reference to pleadings—Statement contained in the judgment not based upon pleadings—14 I. C. 130.

Deed.

Construction of, 11 O. C. 126—13

O. C. 172.—Execution of, *pardanashin* lady—7 O. C. 292—2 O. C. 372.—Of adoption, 4 O. C. 6.—Of compromise, 11 Cal. 597—O. P. J. 486.—Of endowment—Right of trustee to recover money lent out of the profits of dedicated property, 8 O. C. 297.—Of gift—10 W. R. 25, O. P. J. 392, 334.—Gift in favour of the son of a paramour, 16 O. C. 378.—Gift of usufruct of property, 15 O. C. 345.—Admission of execution of—21 I. C. 8.—Attesting witness not seeing lady sign, 18 O. C. 147.—Effect of recital in—11 O. C. 301.—Enforcement of terms of the—18 O. C. 105.—Fresh, execution of, on non-payment of prior loan—15 O. C. 211. Mortgage, found to be invalid, suit to recover money secured by—13 O. C. 155.—Postponement of pre-emption for certain period as expressed in—17 O. C. 218.—Representatives in interest of parties to, 11 O. C. 95.—Subsequent, effect of, on intermediate incumbrancer—15 O. C. 211.—Subsequent, of mortgage creating a personal covenant not to redeem prior mortgage before the subsequent mortgage, 17 O. C. 303.—Of further charge—executed by one of several mortgagors, 20 I. C. 667—Suit for recovery of money due on deed of further charge—14 O. C. 129,—18 O. C. 86—8 O. C. 132—227—3 O. L. J. 714—8 All. W. N. 234—16 O. C. 354—11 O. C 73—17 O. C. 588, 383—12 O. C. 130—20 I. C. 667.—Construction of in light of others, 18 I. C. 861.—Of sale of share of taluqa in consideration of funds for suit to recover it—8 O. C. 155—10 O. C. 173 (178)—14 O. C. 139—16 O. C. 136—21 I. C. 8.—Registered, priority of—2 O. C. 74—14 O. C. 161.—Executed by boy of tender years—3 O. L. J. 746.—Starting point of limitation where obligee at liberty to realise whenever he wished—18 O. C. 86.—To rectify some mistakes in previous deed—8 O. C. 288.—Of dower—10 M. I. A. 252.—Attestation of—Notice—15 O. C. 67.—Unregistered—11 O. C. 248—10 O. C. 277.—Of conveyance—award—18 O. C. 282.—Of mortgage, courts power to allow redemption irrespective of unreasonable terms, 17 O. C. 313.—Of mortgage, oral evidence to prove description of property, 16 O. C. 213.—Of mortgage, plots not specified in, 17 O. C. 94.—Of mortgage, secondary evidence of terms of, 11 O. C. 285.—Of sale, *benami* and fictitious, 9 O. C. 196.—Of trust, 8 O. C. 270—24 I. C. 73—14 O. C. 356.—Purporting to be a mortgage, oral evidence to prove that it was intended to be a sale deed—11 O. C. 95.—Registration of—14 O. C. 133.—See SS. 43, 45 C. P. C., 9 O. C. 326.—Not enforceable as a mortgage whether admissible for collateral purposes, 18 O. C. 168.

Deed of further Charge.

See "Deed" and Art 132 and 65 Limitation Act "clog" and "Mortgage redemption."

Dhardhura.

Not applicable to Taluqdars—Suit by Taluqdar for possession of land by reason of,—S. C. 27—9 O. C. 129.—Custom of—23 I. C. 224—9 O. C. 129.

Dihdar.

Definition of 19 O. C. 27.

Discharge.

Operation of order of—17 O. C. 267—Order of—13 O. C. 94—Order of, operates throughout British India, 10 O. C. 305, Order of, when legal—17 O. C. 18—Necessity of consent of all joint mortgagees to 14 O. C. 45—Of a portion of decree, money paid by the mortgagor for, 10 O. C. 354—

Of claims, power of managing member to, 16 O. C. 146—Of dower debt not unlawful, 14 O. C. 356—Of surety by giving time to principal Judgment-debtor—9 O. C. 28—Inquiry into the same charge on second complaint 17, O. C. 273—By one not binding on other heirs of mortgage--18 O. C. 154.

Disqualified proprietor.

Competency of, to borrow money —25 All. 195—5 O. C. 256--8 O. C. 210—9 O. C. 188.—Suit against Collector as agent for the Court of Wards—22 Cal. 729.—Debt contracted by—4 O. C. 28.—Entry in record of the name of Collector after limitation, 7 O. C. 176.—Undue influence —6. I. C. 203, 439, 572—7. A. L. J. 655—10 I. C. 14—9 O. C. 188—12 O. C. 300—5 I C. 486—6 I. C. 439 —10. I. C. 37 (38).—Fraud—8 O. C. 10 See Court of Wards.

Document.

See "Deed"—Construction of—Intention of parties—14 O. C. 189—1. O. L. J. 421.—Filed by a party, not allowed to resile therefrom, 17 O. C. 327.

Dower.

See Mohammedan Law and S. 5 of Oudh Laws Act.

Easement Act (V. of 1882.)

Injunction—Perpetual—Interruption of light and air—8 O. C. 356.—Difference between easement and custom—Under-proprietor's right to graze cattle in waste land—20 I. C. 467.—Right of privacy—15 I. C. 270.—Superior proprietor's right over land held by under-proprietor —12 O. C. 106.—Of light and air—Proposed building rendering plaintiff's house less substantially useful —Injunction proper remedy - 20 I. C. 544.—Party wall—Treatment as such by common consent of wall built by one man—Evidence of conduct—Right of privacy—15 I. C. 270.

Ejectment.

See S.S. 54, 56 and S. 108 (8) Oudh Rent Act.—See O. V. R. 19 C. P. C.—31 I. C. 479—Formal, tenant holding on after—15 O. C. 311—Illegal, 12 O. C. 90—13 O. C. 188—S. D. 10 of 1914—2. O. L. J. 735.—Process of, not a process of execution, S. D. 5 of 1917—Right to make entry without a suit in, 15 O. C. 295.

Endorsement.

Made by registering officer, 1 O. L. J. 366—14 O. C. 80.—On promissary note after maturity, 18 O. C. 272.—See S. 32 Evidence Act and S. 58 Registration Act.

Escheat.

Grove holder absconding—1 O. C. 42—12 O. C. 197—12 O. C. 201—16 O C. 341—1. O. L. J. 86.—House —meaning of complete ruin—2 O. C. 195—12 I. C. 409.—Residence, change in, effect of—Meaning of "*Mafroor*"—2 O. C. 280—12 I. C. 409—35 I. C. 843. Right of, when exercisable—Abandonment of grove - 20 I. C. 40.

Endowment.

See "Mahant".

Estoppel.

By an action in Settlement Court, 5 O. C. 70, Dist. 15 O. C. 25.—Abandonment of claim—Cause of action arising on different dates and referring to different properties, 8 O. C. 65—12, O. C. 347.—10, I. C. 29 (31)—By representation or conduct—

3 O. L. J. 7—S. C. 38, 305—9, I. C. 415,—1 O. C. 254—5 O. C. 395—7 O. C. 61.—Admission in former suit as to genuineness of deeds. 4 O C. 408. —Attestation of correctness of *Khewat*—subsequent denial of status as under-proprietor, 5 O. C. 70—Attesting deed as witness—5 I. C. 252—See Compromise—By acquiescence —21 I. C. 256—10 O. C. 231.—Objection to execution taken after part of mortgaged property sold under decree—5 O. C. 251.—Plea of operated as bar to plaintiff's claim—18 O. C. 61.—Mere omission to buy—1 O. C. 254—5 O. C. 395—7 O. C. 61—10 O. C. 257.—Disclaimer of title will not operate as, 1 O. C. 22.—Mortgage of occupancy holding—Mortgagor not estopped from denying validity of—6 O. C. 331—12 O. C. 236—16O. C. 109.—Mortgagor estopped from denying truth of the construction pleaded by him on the former suit—S. C. 296.—No, when previous warrant of attachment either proved ineffectual or was not executed—1 O. C. 71—No, 19 O. C. 36—Effect of recital in a deed in an action collateral to it, 11 O C. 301—14 O. C. 139—15 O. C. 122—Allegation as to adoption—subsequent denial—10 O. C. 343 (P. C.).—Effect of plaintiff's knowledge as to falsity of claim—Fraudulent conduct—1. O. L. J. 92 —Statement in mutation proceedings not amounting to abandonment of legal right—12 O. C. 288—23 I. C. 860—1 O. L. J. 38, 81.—False representation by father—19 I. C. 55.—Fraudulent transfer—Fraud successfully perpetrated—Position of parties to fraud, 30 I. C. 253.—Separate holdings treated as one, 27 I. C. 382. —Hindu widow allowed to represent herself as owner—Plea as to invalidity of mortgage when not maintainable, 30 I. C. 388.—See Mahommedan Law, 11 O. C. 1.—See mortgage, redemption of—18 O. C. 95.—Belief in the representation necessary—11 O. C 176—Elements necessary to constitute—10 O. C. 257, 343—12 O. C. 236. —Plea of 18 O. C 61.—See "Custom," "Guardian," "Minor," "Preemption," "Fraud"—S. 115 Evidence Act.

Evidence.

Oral, to prove how the description in mortgage deed was related to existing facts—16 O. C. 213.—Whether mortgage or sale—11 O. C. 95—15 O. C. 1.—Oral, whether to be regarded with suspicion, S. D 9 of 1914.—Plea of having no duty to call, 17 O. C. 134.—Right of rebuttal—15 O. C. 253.—*Wajibularz* as of arrangement made for maintenance of the *Chowkidar*, 7 O. C. 35.—Certified copies of *Khasras*, 3 O. C. 204—Entries made in remark column—11 O. C. 195—Secondary of terms of a mortgage deed, 11 O. C 285.—Sufficient, of endowment, 17 O. C 336. Admissibility of dying declaration, S. C 29—A bare expression of opinion in judgment—7 O. C. 122.—See confession.—Additional admitted by Court of First Appeal, 1 O. C. 199. —See Will.—Of conspiracy, 5 O. C. 321.—Costs, 16 Cal. 62.—Doubtful character of—5 O. C. 59.—Of medical witness, S. C. 159.—Of insanity, S. C. 58.—Of divorce and subsequent marriage—Deposition in former criminal case—26 all 108.—Statement made before Magistrate other than committing Magistrate, S. C. 30.—See "Benami."—Practice —Principle of decision in cases where oral evidence conflicting—14 I C. 99.—Of rule of succession—12 O C. 304—13 O. C. 163—10 I. C. 448 (450)—10 I. C. 558—11 I. C. 316—1 O. L. J. 532.—Similarity of handwriting, how far evidence of forgery—13 O. C. 1, 17 O. C. 276.—Weight or value of—30 I. C. 279.—Admissibility of, 12 O. C. 304—16

O. C. 386.—See "Pedigree."—Admissibility of power of attorney in, 18 O. C. 372.—Certified copies of—11 O. C. 360.—Conviction based on circumstantial, 13 O. C. 309.—Definite against each accused in joint trial, 15 O. C. 263.—Further, in appeal, 15 O. C. 253—16 I. C. 887.—Oral, admissibility of—16 O. C. 185.—Oral, to establish existence of legal relationship, 18 O. C. 122.—Against co-accused, 11 O. C. 328—12 O. C. 418. Of accomplice—12 O. C. 418.—Of approver—13 O. C. 235, 243.—Against accused, 1 O. L. J. 163.—Of essential facts, 11 O. C. 169.—As a whole to be considered—1 O. L. J. 591.—Of expert, 13 O. C. 1—Of general repute, 10 O. C 168, 132—9 O. C. 69.—As to who struck the fatal blow—16 O. C. 19.—Of instances—13 O. C. 163—Of legal necessity, 9 O. C. 104.—Given by a police officer not based on personal knowledge—10 O. C. 168.—To prove custom—See Custom. Not to be discussed by second Appellate Court, 1 O. L. J. 352.—Of separation, 11 O. C. 381.—Recorded without administering oath—10 O. C. 337.—Required to prove endowment—16 O. C. 76.—To contradict terms of document not to be given by party to instrument—8 I. C. 501.—To prove that a grave-yard is of public nature, 16 O. C. 76.

Evidence Act.

SS. 4, 32, 90.

Credibility of witnesses, hearsay evidence—7 O. C. 290.

SS. 8, 32, 118 and 119.

Evidence of deaf and mute—5 O. C. 246.

SS. 10, 25, 145, 155.

Conspiracy—5 O. C. 321.

SS. 11, 18, 19, 20.

Admission against one's own interest when lose its force, 26 I. C. 547.

S. 13.

Judgment *inter partes* Expression of opinion—7 O. C. 122.—Admissibility of proceedings of other litigation, 10 I. C. 188.

SS. 18, 21.

Recital in mortgage deed, value of, 17 I. C. 644, 741.

SS. 19 and 80.

See, 26 All. 108.

SS. 21, 24, 25, 26 and 27.

Confession made to the residents of neighbouring village—8 O. C. 395.—See S. 32 Evidence Act.—See Confession.

SS. 24, 27.

Information given by accused to Police Officer on threat—Effect of retracted confession—32 I. C. 321.

SS. 24, 30.

See Confession—S. C. 153.

SS. 25, 26 and 27.

See Confession.—See S. 421, Cr. P. Code—13 O. C. 309.

SS. 26, 30, 45 to 51.

Confession of prisoner admissible against co-prisoner—Opinion of Police Officer as to points under enquiry—S. C. 98—24 I. C. 562.

S. 27.

See S. 21—8 O. C. 395—Information given by accused to Police Officer—24 I. C. 562.—SS. 26 and 27

explained—Statements made by accomplice elsewhere than before the Court—13 O. C. 309.

S. 30.

See S. C. 153.—See "Confession."—See S. 108 Penal Code.

S. 32.

Admissibility in evidence of statement in writing by person who could have been called as a witness but was not—Statement of deceased person. —25 All. 143.—See SS. 4, 32 and 90. Evidence Act.—See SS. 8, 32, 118 and 119.—Evidence Act.—Statement against party's interest, 20 O. C. 211. —Report or certificate by Medical expert, 7 O. C. 354 —Admissibility of proceedings of another litigation. Statement made by a woman as to her marriage with another person—10 I. C. 188.—See Pedigree.—Proof of signature of executant—Value of registration endorsement, 20 O. C. 18

SS. 32, 35 and 57.

See Custom.

S. 32.

Legitimacy—Declaration of relationship—Marriage includes "*Muta*"—2 O. C. 115—Admission used as evidence of fact stated there-in—8 I. C. 728.—Hearsay evidence to prove connection by fosterage, 1 O. L. J. 281.—Date of birth—Statement of deceased relative, S. C. 265.—See Pedigree.

S. 34.

Admissibility of books of account containing entries after transactions —27 Cal. 118.—Accounts not written from day to day, 11 I. C. 95—2 O. C. 311.—Meaning of regularly kept in course of business, O. P. J. 730.

SS. 35, 48 and 49.

Custom of inheritance—5 Cal. 744 —*Chaukidar's* Register of Births and Deaths—14 O. C. 68—95 O C. 351.

S. 44.

Principle of *Res judicata* substantially modified by.

S. 45.

Opinion of witness not examined as expert—4 O. C. 247—See SS. 26 and 30 Evidence Act.

SS. 57 (8) and 13.

Oudh Judicial Calendar as evidence of different dates of corresponding eras, 4 O. C. 180.

SS. 60, 67, 68 and 69.

Proof of document—Absence of attesting witness not accounted for—11 I. C. 225.

S. 65.

Document address to mortgagor by agent of mortgagee not secondary evidence, 20 I. C. 62.

S. 68.

Certified copy of registered deed 7. O. C. 327, 365—3 O. L. J. 482.—Attestation of agreement qualifying previous mortgage deed—20 I. C. 544.—Sale deed not required by law to be attested—10 I. C. 64—19 O. C. 23.—20 O. C. 18.—Scribe not attesting witness, 41 O. L. J. 101.—See S. 59 T. P. Act—39 I. C. 274.—See S. 115 Evidence Act—4 O. C. 408.—Proof of mortgage deed, 11 I. C. 225.—See S. 32 Evidence Act—20 O. C. 18.

S. 70.

Meaning of admission of execution—Whether Registrar's certificate proof of execution—19 O. C. 23.—See S. 68 Evidence Act.

S. 71.

Evidence of other persons (not attesting witnesses) not sufficient, 34 I. C. 397.

S. 74

See Sup. O. C. 36—Certified copies of *khasras*, 3 O. C. 205—11 O. C. 195.

SS. 76, 77.

See Burden of proof—23 Cal. 950

S. 80.

Statement recorded in English but no evidence to prove that statement 10 O. C. 112.

S. 85.

Admissibility of power of attorney —18 O. C. 372.

S. 89.

Attesting witness dead—Failure to produce deed.—Proof of execution 4 O. L. J. 365.

S. 90.

See 7 O. C. 290—Certified copy of *Fard Kashi Baghat*—19 O. C. 363—Presumption as to genuinness of Document 70 years' old—6 O. C. 142 —19 O. C. 92.—See "Pedigree."

S. 91.

See S. 9 Oudh Laws Act—4 O. C. 365.—Oral evidence as to the existence of document 1 O. C. 301, 16 O. C. 185.—Unregistered *Kabuliat*—9 O. C. 296, 362.—12 O. C. 140.—Proof as to existence of legel relationship, 2 O. L. J. 97. Registration endorsement, 14 O. C. 80.

S. 92.

See 1 O. C. 301.—Separate arrangement in contravention of terms of deed, 37 I. C. 231—See Fraud.—Verification or modification of terms of contract, what amounts to—10 I. C. 196 —Oral agreement converting mortgage by conditional sale into one of usufructuary mortgage—14 O. C. 321 and 19 O. C. 166—Real nature of transaction can be proved by oral evidence—See Pre-emption, 1 O. L. J. 714—21 I. C. 60, 69,—Oral agreement for enjoyment of portion in lieu of interest, 34 I. C. 745.—Redemption suit for, 10 I. C. 196.—Pre-emption suit for, 8 I. C. 501.—Admissibility of oral evidence 16, O. C. 185—Plea in pre-emption suit that sale was gift, 8 I. C. 501.

S. 93.

Oral evidence to prove that a mortgage deed was intended to be a sale, 11 O. C. 95.—Sale or gift 21 I. C. 60.

S. 94.

Admmissibility of extrinsic evidence, 40 I. C. 491—1. O. L. J. 714—21 I. C. 60, 69.

SS. 95 and 96.

Oral evidence to prove how the description in a mortgage deed was related to existing facts, 16 O. C. 213.

S. 101.

Burden of proof, 2 O. C. 59—6 O. C. 142.

SS. 102 and 110.

Plaintiff how far bound by case set up in his plaint—6 O. C. 119—8 O. C. 145—9 O. C. 167—4 O. C. 31—8 I. C. 407, 691—14 O. C. 196—15 O. C. 33.—Suit to set aside lease and for declaration as to defendants status —6 O. C. 142.

S. 108.

Missing person—Hindu Law.—S. C. 101, 276.

S. 111.

Coercion, force and undue influence, burden of proof—1 O. C. 63.—See S. 16 Contract Act.

S. 112.

Son born, 280 days after father's death—Presumption—38 I. C. 449.

S. 114.

Account not produced—16 I. C. 25.—Production of document with endorsement of payment, 15 O. C. 278.—Presumptions not confined to Illustrations—1 O. L. J. 95, 426.—Presumptions in respect of proceedings—1 O. L. J. 549.—See Presumption.—Plea of payment—Non-production of bond—loss, 2 O. L. J. 498.—Corroboration of approver's evidence, 12 O. C. 418.

S. 115.

See mortgage—S. C. 296.—See Pre-emption.—See Estoppel—Abandonment of claim—8 O. C. 65—12 O. C. 347—10 I. C 29, (31).—Interpretation of "Omission."—2 O. L. J. 22.

S. 118.

See "Witness."

SS. 118, 19.

See SS. 8 and 32—Evidence Act.

S. 123.

Defamation—3 O. C. 80.

S. 126.

See S. 13 Legal Practioners' Act, 20 I. C. 598.

S. 132.

Witness can not be prosecuted for defamation—3 O. C. 80—12 O. C. 308.

SS. 137 and 138.

Right of prosecutor or accused to cross-examine a witness called by Court, S. C. 275.

S. 144.

Non-production of account books, 25 I. C. 749.

S. 145.

Discripancies in present and previous statement—Duty of Court—2 O. L. J. 502.

S. 157.

Statement to Police Officer—Refreshing memory, 13 O. C. 7.

Excise Act (XXII of 1881) and IV of 1910.

Application of No. 20 of Excise Rules—1 O. C. 121.

S. 28.

Sale of land in default of excise revenue—Prior incumbrance—3 O. C. 79.

S. 39.

Employment of servant by licensed vendor, S. C. 179.—Suit by licensee—Jurisdiction—13 I. C. 566.—Every Police Officer is an excise officer, 17 O. C. 273.

Execution.

Application for, decree for recovery of balance of mortgage money, limitation—6 O. C. 114—9 O. C. 288—10 I. C. 21.—Renewal of proceedings—Decree of Rent Court, limitation, 2 O. C. 110.—Attachment of allowance of ward in—7 O. C. 174.—Beyond Court's local limits, objection to decree itself—5 O. C. 9.—By substitution of appellate decree, 4 O. C. 333.—Construction of appellate decree for, 5 O. C. 35.—See *Parda-*

nashin.—Suit for possession of land ascertained after decree, limitation, commencement of 12 years—19 Cal. 159 —Premia paid by decree holder on account of insurance, whether recoverable—32 I. C 754.—Objection —*Res judicata*—Estoppel—32 I. C. 754.

Execution of Decree.

Against representative of deceased judgment-debtor—Joint family property—6 O. C. 271—11 O C. 334.—Final, or order of Appellate Court —limitation, 3 O. C. 50—5 O. C. 143 —6 O. C. 48.—Where only one out of several defendants appeals, 5 O. C. 217.—Application for resale of mortgaged property, limitation, 6 O. C. 195.—Application to set aside sale (*a*) 1 O. C. 155—6 O. C. 61.—8 O. C. 409, S. C. 7—(*b*) in default, 10 O. C. 353.—Attachment of property in execution of supposed decree for balance of mortgage debt, 6 O. C. 59.—Beyond Jurisdiction Sup 1 O. C. 58.—Application by judgment-debtor to raise decretal amount by sale or mortgage—3 O. C. 42.—Partition of land in S. C. 156.—Proceeding in, 3 O. C. 84.—Property not comprised in the decree, decree-holder taking possession of, not through Court, 7 O. C. 213.—Setting off costs awarded to decree-holder against sum payable by him—6 O. C. 23.—Simple money decree, application to execute, in, for sale of mortgaged property—5 O. C. 108.—Application, made to another Court —9 O. C. 281.—Time for making application for fresh process, R. A. R. 23, 24.—Liability of other properties charged when a portion of property sold subject to entire charge —10 O. C. 280.—Deposit of additional sum by mortgagor—lapsed amount, to be given credit for, by mortgagee—16 I. C. 830.—Postponement of application by order—Application for continuation of suspended proceedings—Limitation—17 O. C. 169—See, 7 I. C. 614—13 O. C. 265.—Appropriation of debt due to two persons towards a debt due against one of them alone—11 O. C. 225.—Order in execution proceedings *res judicata* 11 O. C. 220.—Application against one of several judgment-debtors, effect of, against others —13 O. C. 48.—See "Decree."—Effect of want of proper attachment —absence of sanction—Validity of sale—16 O. C. 51.—Sale in, of inferior Court by order of Court of higher grade—Second appeal—11 O. C. 41.—Application for, on the last day of 12 years—11 O. C. 57.—Power of Court to which decree transferred to grant permission to continue execution proceedings began upon the application of decree holder since deceased—11 O. C. 112. —Previous for, limitation—13 O. C. 90.—Subsequent for, 16 O. C. 70.—Against person of Ward, 25 I. C. 668.—See application.

Exparte.

Decree, 31 I. C. 479—12 O. C. 25. —Application by representatives for review of—9 O. C. 35.—Decree, suit for cancellation of, 23 I. C. 976.—Grounds for setting aside of—14 O. C. 111—15 O. C. 282.—Decree, *res judicata*, 12 I. C. 329.—Decree, against debtor and his surety—24 I. C 115.—Decree under S. 90 T. P. Act, application to set aside, 9 O. C. 288.—Hearing of, 16 I. C. 600.

Expert.

Evidence of similarities in handwriting, 13 O. C. 1—14 I. C. 753—17 O. C. 276.

Ex-proprietary Rights.

Declaration of—*Dakhldihani* of proprietary rights does not amount to ex-proprietor's dispossession—Col-

lection of rent from sub-tenant's of ex-proprietors, whether amounts to dispossession—Mutation of names—1 O. L. J. 759.—Claim for—Actual possession of *sir* not retained by vendor—Waiver—Purchase at public sale, 2 O. L. J. 71—S. D. 11 of 1904.—Deed of relinquishment of, executed at the same time as sale deed—Possession retained by vendor—2 O. L. J. 42.—See SS. 7 A. O. R. Act.

Extension of Time.

By Court for amendment of plaint—See O. VII, R. 11 C. P. C. 4 O. C. 108—Of *lis pendens* to third persons—16 O. C. 225.—Of period of 6 months—15 O. C. 177.—Of time of deposit of one-fourth purchase money—2 O. L. J. 216.—Fixed for compliance of condition in decree, 8 O. C. 241.—For making and filing of award—9 I. C. 241.—Fixed in pre-emption decree—16 O. C. 5.—By Court of appeal—7 O. C. 359—17 O. C. 377—11 O. C. 144.—For paying Court fees, 4 O. C. 108.—Mortgage money—Payment after time fixed—5 O. C 82—14 O. C. 10, 100, 147—25 I. C. 752.—Of limitation, 14 O. C. 238—2 O. L. J. 562—13 O. C. 103—16 O. C. 5—10 O. C. 38.—Of period, 25 I. C. 26.—Of period of sanction to prosecute, 15 O. C. 177.—When allowed, 18 O. C. 58.—Of time fixed in decree, 16 O. C. 5.—Of limitation, by making written acknowledgment, 16 O. C 272.—See SS. 148, 151 C. P. C. and "Decree."

Family.

Settlement—10 All. L. J. 101, 105, 103—9 All. L. J. 778—14 O. C. 356. 41 I. C. 126.—Joint, see Hindu Law.—Arrangement—13 O. C. 332—17 O. C. 108—18 O. C. 51, 282—19 O. C. 75.—Business, 18 O. C 84—1 O. L. J. 456—2 O. L. J. 55.—Custom—See Custom.—Debt—15 O. C. 397—Idol—1 O. L. J. 204.—Records, ancient, 11 O. C. 362.—Usage and local custom—16 O. C. 290.

Fraud.

Insanity, weakness, helplessness—Commutation of insufficient case of insanity into a case of weakness, 7 O. C. 287—Knowledge of—S. C. 248.—Decree set aside on proof of, 4 O C. 31.—Transfer by vendee's husband—1 O. C. 188.—In dealing with third person's property—12 I. C. 39—16 I. C. 182.—Undue influence—20 I. C. 47.—Frandulent transfer—Transfer in lieu of dower—20 O. C. 295—Evidence of—21 I. C. 69.—General allegations of—1 O. C. 262.—Refusal of mortgagee to advance mortgage money—S. C. 280.—Plaintiff pleading his own, 8 O. C. 278—18 O. C. 131.—Principle to be observed where case is based on, 9 I. C. 429.—Suit to set aside decree obtained by false statement made in plaint—Plea of *res judicata*—4 O. L. J. 522—13 O. C. 429.—Parties to, position of—2 O. L. J. 399—18 O. C. 131.—Plea as to, 2 O. L. J. 399.—Of judgment-debtor—14 O. C. 238.—By the decree-holder alone—12 O. C. 175.—Of mortgagor, 13 O. C. 148.—Or other acts of bad faith by debtor, 13 O. C. 94.—Setting aside of a decree on ground of—Decree against 2 defendants.—Suit by one defendants—13 O. C. 388—Suit for cancellation of exparte decree—Effect of Plaintiff's knowledge as to falsity of claim—1 O. L. J. 92.—Of party to case—2 O. L. J. 14.—Proceeding—16 O. C. 225.—Limitation suit to set aside deed—15 Cal. 58—3 O. C. 105, (107) 1 O. C. 178 (180)—1 O. C. 229—13 C. W. N. 815 (821) 1 O. L. J. 225.—Pre-emption suit for recovery of a portion of consideration—8 O. C. 283—9 O. C. 308.—Transfer of Property Act, S. 55—Warranty—Misrepresentation—8 O.

C. 345—See Trover—12 M. I. A. 507.—See "Compromise," "Estoppel," and S. 53 T. P. Act.

Gambling.

Illegal Contract See S. 23 Contract Act.—In litigation—Champerty—Plea of failure of consideration, 8 O. C. 155—10 O. C. 173 (178)—14 O. C. 139—16 O. C. 136—21 I. C. 8.

Gambling Act.

Gambling not an offence *per se*—S. C. 203.—Presumption as to common gambling house—Warrant signed with pencil—5 O. C. 37.—Necessary elements of offence—Acquittal of approver—20 O. C. 4.—Public place—S. C. 91, 63.—Money found with gamblers—Confiscation of instruments of gaming—S. C. 63.

General Agent.

See "Agent."

General Clauses Act

(X of 1897.)

Tree immoveable—5 O. C. 228, 16 O. C. 346.—Immoveable property 18 O. C. 380, 16 O. C. 346.—Benefit of usufructuary mortgage whether immoveable property S. C. 300, 301.—Proceedings in execution of decree are part of a suit—1 O. C. 160.—Application of S. 6 of Act I of 1868, (General Clauses Act) to the provisions of Act XX of 1890, S. C. 193—211, 293.—See O. XXI, R 89 C. P. C.—9 O. C. 214.—Plea of previous acquittal in a criminal trial upon the same fact—6 O. C. 153.—Application of S. 10 of General Clauses Act to S. 31 Limitation Act—15 O. C. 373.—Application of General Clauses Act to Oudh Rent Act, 16 O. C. 346—S. D. 5 of 1913—S. D. 2 of 1913.

Gharwara.

Suit for recovery of—Limitation—3 O. C. 203.

Ghair Biradri.

Wife, exclusion of—12 O. C. 110.

Ghair Kuf.

Meaning of—12 O. C. 110.

Gift.

See Hindu Law and Mohammedan Law.—Construction of, S. C. 291.—Registration of deed of, 3 O. C. 231. For maintenance, custom of entail on heirs male of donee's body, S. C. 237—Of an absolute interest by Talukdar to vest at a future time, 2 O. C. 244—9 O. C. 113.—Of land on zamindari tenure—Limitation, 3 O. C. 55.—Meaning of Birt—Registration, 14 O. C. 41—17 O. C. 299.—Oral, by taluqdar in favour of daughter, 5 O. C. 345—9 O. C. 113.—Registered deed of—Delivery of possession, 5 O. C. 89.—Transfer by—Failure to prove alleged inequitable advantage taken by donee over donor—23 Cal. 15.—Unregistered deed executed before Registration Act, 7 O. C 342—20 I. C. 47—Oral, Will or Gift—13 O. C. 172—Gift of usufruct of maintenance—Restraint on alienation by done—15 O. C. 345.—Construction of—Evidence of intention—10 Cal. 238.—Construction of document—Deeds of will and gift executed simultaneously—Statement in Will as to revocability of gift—3 O. L. J. 525.—Does not include trust, 18 O. C. 356.—By owner while ousted by trespasser, 13 O. C. 347.—See SS. 13, 16, 17 Oudh Estates Act.

Grant.

See Oudh Land Revenue Act, S. 52—55.—As a Zamindari village, 25 All. 1.—Presumption as to nature

of, 4 O. C. 31—10 O. C. 318.—Jagit granted by King of Oudh, Sanad granted by British Government—Grant in perpetuity—18 O. C. 168.—By Government for maintenance of family, 11 Cal. 1.—In favour of temple—4 O. C. 61.—For maintenance—7 O. C. 90—12 I. C. 324—1 O. L. J. 589—18 I. C. 127—S. C. 209, 291, 237, 198, 281—4 O. C. 163.—Grant to one of three brothers—Brothers living jointly—Conduct of brothers—13 O. C. 332.—Power of manager—Burden of proof—Necessity—13 O. C. 79—11 I. C. 166.—Rent free service grant—Non-transferable—Title of purchaser as against grantor—3 O. L. J. 235 (Contra 1 O. L. J. 325).—See S. 107 A. Oudh Rent Act, 29 I. C. 510.—Construction of document—18 I. C. 127—13 O. C. 332—18 O. C. 168.—Operation of—2 O. L. J. 758.—Rent free—29 I. C. 552—12 I. C. 324.—From Government free of revenue, sale of—17 O. C. 369.—In perpetuity—7 O. C. 90—12 I. C. 324—18 O. C. 168.—For 100 years—17 O. C. 291.—Of lease—8 I. C. 410—14 O. C. 204.—Of muafi land, S. D. 1 of 1910.—Of Nankar—14 O. C. 196.—Of perpetual leases—20 I. C. 147, 57—18 I. C. 281.—Of villages, revenue free not a pension—18 O. C. 168.

Grave yard.

Jurisdiction—1 O. L. J. 557.—A field partly under cultivation and partly a —4 O. and A. L. R. 636.—Evidence to prove to be of a public nature—16 O. C. 76.

Grove.

Cultivators right to—1 O. C. 231—2 O. C. 280—15 O. C. 33—1 O. L. J. 63.—Occupancy tenant may plant trees without zamindar's permission, 16 O. C. 341—Grove belonging to absconding tenant—1 O. C. 42—12 O. C. 197, 201—1 O. L. J. 86.—Suit for removal of trees—Limitation, 11 O. C. 379.—Resumption of, piecemeal, 9 O. C. 109—11 O. C. 379.—Position of grove holder—15 O. C. 91—24 I. C. 780—15 O. C. 33—22 I. C. 125—2 O. L. J. 589—1 O. L. J. 273.—Right of proprietorship over trees and right of under-proprietorship over land—16 O. C. 173—Planting of trees, S. D. 7 of 1912.—Character of—2 O. L. J. 88.—Effect of abandonment—20 I. C. 40.—See Grant—17 O. C. 291.—Owner of land, covered by—10 O. C. 86.—Planting of, with mortgagee's permission—9 O. C. 18.—Portion of becoming devoid of trees—2 O. L. J. 589.—Proprietor of, not necessarily owner of land, 2 O. L. J. 88.—Suit for rent of land originally a —9 O. C. 227.—Tenure of—9 O. C. 109.—When losing its character as such—2 O. L. J. 589, 27 I. C. 94—Cultivation of land—29 I. C. 34.—Trees, whether moveable, 18 O. C. 122.—Grove holder—see Pre-emption, 10 O. C. 85—13 O. C. 202.—*Reza milkiat*—11 O. C. 164.—Mortgage by grove holder—12 O. C. 201, 197—1 O. L. J. 519—15 I. C. 277.—Of long standing—15 O. C. 33.—Subsequently cut—2 O. L. J. 772.—Custom in respect of—1 O. L. J. 63.—Brought under cultivation, 1 O. L. J. 751—2 O. L. J. 757.

Guardian.

Adverse possession from mere mutation of name in favour of—8 I. C. 728.—*Ad litem*, application for leave to appeal by next friend of minor in presence of—4 O. C. 98.—Minor represented by, decree nullity—5 O. C. 97.—Not appointed—Objection by minor to validity of decree in execution department, 7 O. C. 199.—Authority to contract, S. C. 264.—Court's power to revoke appointment of, 4 O. C. 241.—Promise to pay money on behalf of minor,

personal liability of minor, limitation, 7 O. C. 46.—Negligence of, 33 I. C. 481—2 O. C. 233—19 O. C. 119, 10 O. C. 321.—Mortgage executed by legal necessity, 10 O. C. 321—9 I. C. 56.—Certificated, effect on attainment of majority, 11 O. C. 159.—Lunatic's property—sale by certificated guardian—Court's permission not obtained—sale to extinguish previous mortgage—34 I. C. 422.—Enquiry as to the fitness of—affidavit that Guardian has no interest adverse—10 O. C. 321.—*Defacto* transferring minor's property, 7 O. C. 181—9 O. C. 97—11 O. C. 1—15 O. C. 49—16 O. C. 119—17 O. C. 52.—Registration of bond executed by, 10 O. C. 38.—Transfering by mother, 10 O. C. 367—9 O. C. 97—13 O. C. 158—1 O. L. J. 747.—Appointment of—9 O. C. 97—16 O. C. 119—4 O. C. 269—4 O. C. 241—S. C. 217—15 O. C. 49—15 I. C. 265.—Purchase by, of property at auction—6 O. C. 252.—Custody of minor girl—Disqualification for guardianship by marriage with man not related to minor within prohibited degrees—14 O. C. 103.—No order appointing, 16 O. C. 247, - 15 O. C. 153.—Interest adverse—16 O. C. 247.—Mortgage of property of minor son by mother—5 O. C. 197.—Widow as guardian—Notice of transfer to male relations, 12 O. C. 83, 78.—Lawful—S. 361 I. P. C.—1 O. L. J. 416.—Validity of transfers made by, 14 I. C. 14.—*Ad litem* (*a*) appointment of—10 O. C. 321—16 O. C. 261; (*b*) fitness of person whose act called in question, 11 O. C. 319—13 O. C. 140; (*c*) Notice not served upon minor prior to appointment of, 2 O. L. J. 562; (*d*) presumption about correctness of order of Court appointing, 13 O. C. 23; (*e*) effect of existence of, on minor's action, 16 O. C. 206; (*f*) propriety of appointment of, 13 O. C. 58; (*g*) not informed, 1 O. L. J. 708.—Of person and property of minor—18r O. C. 66.—See, O. XXXII C. P. C. and "Minor."

Guardian and Wards Act.

SS. 7, 17.

See "Guardian, appointment of."

SS. 11, 13, 17.

Application for guardianship of person and property—Interested person not made party—1 O. L. J. 761—18 O. C. 66.

S. 16.

Certificate of administration granted to a relative of the minor—Filing of accounts by such relative—S. C. 145.

S. 17

Qualifications for appointment of Guardian—13 O. C. 140—Appeal, right of—Revision *qua* persons not entitled to appeal—18 O. C. 66.—See Mohammedan Law, 14 O. C. 103.

S. 18.

Lease executed by guardian on behalf of minor, 2 O. C. 33.—Joint family see Hindu Law—1 O. C. 43.

SS. 28, 29 and 47.

Order granting permission to transfer—Appeal—11 O. C. 29.

S. 31.

Revision at the instance of persons not party to the proceedings, 12 O. C. 78.

Guzara.

Distinction between *Muafi* and, 20 O. C. 37.

Haq.

Lambardari, quite independent of right as to costs of collection, 24 I.

C. 673.—See "Lamberdar" and "Jurisdiction."—Sale of grove by tenant, S. C. 147.

Haq Chaharum.

Zamindar's right to in execution sales—1 O. C. 2—13 O. C. 366.—Purchaser's liability for—S. C. 147—11 O. C. 64.—Settlement Court's decree for—R. A. R 62.—Liability of vendee to the landlord for—11 O. C. 64.

Haq Jithwanse.

Custom—Oral evidence, 1 O. C. 301.

Haqiat Mutafarriqa.

See O. R. Act S. 108 (10)—1 O. L. J. 25, 364.

Hand-writing.

Evidence of expert in, 13 O. C. 1.—Witnesses for identification of—12 I. C. 513.

Hindu.

Status of a, by a Mohammedan mistress, 17 O. C. 68.—Formalities necessary for the conversion of a, into Mohammedanism—2 O. L. R. 21.—Legitimacy, 17 O. C. 68.—Meaning of "Malik"—12 O. C. 157.—Mother succeeding to her son—14 O. C. 170.

Hindu Law.

Adoption.—Alienation.—Divorce.—Inheritance and succession.—Gift.—Grant—Guardian—Jain—Joint family—Manager—Marriage—Maintenance—Partition—Reversioner—Stridhan—Survivorship—Shebait—Widow—Will.

Adoption.

Adoption by widow—3 O. C. 81, (83)—3 O. C. 336, (338)—5 O. C. 360—15 I. C. 247.—With consent of Sapindas—Limitation, 1 O. C. 30.—*Bania Class*—Religious ceremonies, S. C. 26.—Construction of deed—4 O. C. 6.—Adoption alleged and set up more than 12 years ago—9 O. C. 377.—Limitation, 7 I. C. 427 (430).—Evidence and proof of—S. C. 116—10 O. C. 343.—Of Brahman boy by person of lower caste, 17 O. C. 186.—Position of adopted son—34 I. C. 496—By husband without consent of wife—Right of adopted son to succeed to his adoptive father's wife—18 O. C. 341.—Adoption by Agarwala Banias without performance of *Datta Homam*—20 O. C. 356.

Alienation.

Validity of, of share by one member in favour of remaining member, 20 O. C. 277.—By some members, consent of all, antecedent debt, 13 I. C. 547.—Restraint on, by son, widow, father and mother, 14 O. C. 299—3 O. L. J. 289.—Members born after, competent to attack, 34 I. C. 447—4 O. L. J. 287.—Inadequacy of consideration whether ground for setting aside, 34 I. C. 89.—Sale by great great father, contested by grand son but suit dismissed, suit by alienee against great grand son, *resjudicata*, great grand son's right to challenge with respect to whole property, 1 O. C. 289—11 O. C. 15—11 I. C. 291.—Right of after born son to question—18 O. C. 162.—Mortgage by father, son not made party, 1 O. C. 53—4 O. C. 93—178, 6 O. C. 101—7 O. C. 137—14 O. C. 257.—Son's power to set aside voluntary sales by father, antecedent debt, 12 O. C. 248—14 O. C. 299—34 I. C. 89.—When not to be set aside, 19 O. C. 122.

25. Alienation by Widow.

Mortgage taken from, unpaid interest claimed on husband's mortgages—26 Cal. 707.—Transfers by, allowed to pass unchallenged, transfers in favour of next reversioner, 1

O. L. J. 470.—Power as to alienation of husband's property, 1 O. C. 80—3 O. C. 181—8 O. C. 94—13 O. C. 163—24 I. C. 640.—Legal necessity (*a*) absence of pressure, not binding on reversioner after widow's death, 2 O. C. 258; (*b*) decree being consideration for sale deed having been set aside, 10 O. C. 117—6 I. C. 207—7 I. C. 225—25 I. C. 806—19 O. C. 122; (*c*) Proof of income and expenses to determine, 12 I. C. 336; (*d*) Debts incurred to pay up prior debt, prior debt not proved to exist or for, 3 O. L. J. 454; (*e*) Marriage of deceased member's daughter, 33 I. C. 601 (*f*) Enquiry about existence of, 1 O. C. 30—5 O. C 18—30 I. C. 382; (*g*) See "Widow."—Consent (*a*) By some reversioners, 8 O. C. 21.—Value of, 9 O. C. 104; (*b*) No power to transfer with, 14 O. C. 170 – 32 All. 176; (*c*) subsequent to alienation, 11 O. C. 78—32 All. 176 -18 I. C. 289.

Divorce.

Effect of change of religion, 28 I C. 201.

Inheritance and Succession.

Hindu mother—Re-marriage—Right of inheritance to son's estate —S. C. 253—14 O. C. 170.—To property of Hindu religious mendicant, 3 O. C. 281—8 O. C. 297—12 O. C. 152—10 I. C. 11.—Daughter's son in preference to the collateral heirs, S. C. 41.—*Per ea ita*, 10 O. C. 159. —Illegitimate issue of a Kayesth—S. C. 235.—Order of, amongst *gotraja* Sapindas—16 O. C. 122.—Right of step brother—succession with whole brother—Special custom—13 O. C. 163.—Sonless Jain widow—succession to moveables—S. C. 43.—Illegitimate person's right to the property of another illegitimate collateral—9 O. C. 352—14 O. C. 227—*Samanodakas*—Agnates removed more than 14 degrees—Cognates—Bandus—Sister's son—9 O. C. 239. —Right of son's born after separation—5 O. C. 6.—See Custom.—Legitimacy—Force of evidence as to treatment—2 O. L. J. 101.—Co-heirs —Nature of property inherited from collaterals, 20 O. C. 271.—Contest as to right of—16 O. C. 122.

Gift.

By one of two family members in favour of other—3 O. L. J. 289—See alienation.—By widow—32 I. C. 734.—18 Cal. 545.—Position of son born alive after, whether invalidity can be cured by son's death, 3 O. L. J. 741.—Delivery of possession not essential—4 O. and A. L. R. 572.—By a coparcener—20 I. C. 861.—In favour of idol—1 O. L. J. 204.—Application of Hindu Law in construing Hindu gift—3 O. C. 55—8 O. C. 61.—See "Mohammedan Law" and "Gift."

Grant.

Presumably heritable, S. C. 291.—To widow—Nature of estate—13 I. C. 544.—See "Gift" and "Presumption."

Guardian.

Mother not, 10 O. C. 367.—Want of diligence on part of—1 O. L. J 503.—Widow may act as, 1 O. L. J 503.—Of a member belonging to joint Hindu family, 10 O. C. 367.—Girl, custody of—1 O. L. J. 416.—See "Guardian."

Jain.

Custom—Sonless Jain widow—Succession to moveable property—S. C. 43.

Joint Family.

Shares of each member recorded in the Settlement papers—S. C. 59—Validity of deed executed by adult member and ladies—Karta—34 I. C. 3.—Declaration of trust in favour of, 1 O. C. Sup. 24.—Nucleus, meagre—Members living and earning separately—22 I. C. 887—9 I. C. 948.—Liability of sons for father's debt—Immoral—S. C. 151—34 I. C. 89.—Son's liability to pay barred debt promised by father—16 O. C. 185.—Nature of evidence—Self-acquired property when becomes joint property—accusation of nucleus—30 I C 216.—Mortgagee, what to prove—whether in appeal prayer for simple money decree can be allowed—3 O. L. J. 214—14 O. C. 299.—Decree against father—Immoral purpose—17 O. C. 318—33 I. C 785—40 I. C. 369—30 I. C. 216.—Separation—Burden of proof—Allowance out of joint family given by sons to mother, lease executed by all members—32 I. C. 291.—Liability of sons for surety debt incurred by father, 20 O C 1.—Debt incurred by father personally—Execution of personal decree against father—Liability of son's share—20 O. C. 311.—Sale by father having no co-parcener at the time of sale—Right of after born son—18 O. C. 162.—Partition of son's share before decree on mortgage against father, 4 O. C. 93.—Meaning of "antecedent debt," 14 O. C. 299—16 O. C 136.—Blending of self-acquired property with ancestral property—20 O. C. 211.—Cause of action against son to pay father's debt, 9 O. C. 350—Decree against father—suit against son on death of father—11 O. C. 334.—Right of member of, to sue for his share of profits—15 O. C. 244.—Father's debt incurred for wrestling purpose, 10 O. C. 360—9 I. C. 406.—Mortgage by co-parcener of his undivided interest—Mortgagee's equitable rights—14 O. C. 295.—Separation of Hindu father from sons remaining joint unusual—22 I C. 129 see 14 O. C. 170—Effect of separation in mess—39 I. C. 498.—Separate transactions—Separate possession in village papers—11 O. C. 264—24 I. C. 633.—Entries in revenue papers of specified shares—11 O. C. 381—17 I. C. 96—Family business carried on—Debts contracted for family business—Creditor not bound to inquire as to purpose of loan—18 O. C. 84.—Suit against son more than six years after decree, 9 O. C. 350.—Burden of proof as to separation—17 I. C. 296—2 O. L. J. 502.—Right of a member to represent other members of the family—11 O. C. 15 see 1 O. C. 289—11 I. C. 291.—Self-acquired property—Gains of Astrology—Elementary education received at the hands of father, 5 I. C. 400.—After born son not to question validity of sale—18 O. C. 162.—Son's power to set aside voluntary sales by father—Antecedent debt—12 O. C 248—14 O. C. 299, 257—10 O. C. 360—1 O. L. J. 503—12 I. C. 347—4 O. C 178—6 O. C. 101—7 O. C. 137—1 O. C. 53, 169—9 I. C. 406.—Son's interest in tenant's holding—Relinquishment by father—11 O. C. 292.—Son's right to challenge a ready money debt contracted by father—10 O. C. 360.—Suit for recovery of the whole property by one member, 11 O. C. 15.—Partition—Separation—Test—Mesne Profits, 16 O. C 129—20 I. C. 861.—Admission of hearsay evidence upon the question whether a particular person was joint with or separate from other members—8 O. C. 94 (103).—Lunatic Estates Act—Interference of Civil Court limited to cases of neglect or illusage and to waste or mismanagement of joint property—12 O. C. 209.—Money for marriage expenses, Thakurs—19 O. C. 113.—Effect of one joint owner suing for his share

—Daughter's estate—15 I. C. 833 — Applicability of succession—Certificate Act to debts advanced from joint family funds—14 O. C. 244—18 I. C. 228.—Property, disposal by will —Decree against father—son's liability to satisfy—17 O. C. 318.—Separation between members—Effect of separation of one member, 13 I. C. 717—17 O. C. 235—16 O. C. 129—15 O. C. 397.—Transfer by *Karta* not describing himself as such—Minors joining *Karta* 3 O. L. J. 390.—Mortgage by father—Deed of further charge—Burden of proof—19 O. C. 159.—Property inherited by collateral succession, when co-parcenary property—4 O. L. J. 565—2 O. L. J. 502.—Separation in mess and residence—Burden of proof—20 O. C. 398.—Mortgage of joint family property by one member—Legal necessity—2 O. L. J. 378.—See Guardian—10 O. C. 367.—*Karta* consent of adult members—10 O. C. 121.—Property purchased by one member of—2 O. L. J. 283—Purchase with joint funds, 18 O. C. 160.—Property, adverse possession of, 9 O. C. 55.—Property mortgage by one member, 21 I. C. 581.—Mortgage of an undivided interest of a co-parcener in —10 O. C. 289, 367—14 O. C. 295. —Self-acquired property when becomes property, 30 I. C. 216.

Manager.

Liability of members on mortgage executed by *Karta*, 25 All. 407.—Right of descendants of, to carry on a suit, 10 O. C. 121—Implied authority of—18 O. C. 84.—Suit to recover debt belonging to joint family—Necessary parties—14 O. C. 127.—Binding effect of Manager's Act—16 O. C. 185—1 O. L. J. 450.—Power to recover money lent after the decree is passed, 16 O. C. 146.—Father as manager—Acts of father how far binding on sons—20 I. C. 861.—Father's power greater than those of, 34 I. C. 89.—Adult co-parcener when bound by alienations made by, 27 I. C. 517.—Property acquired at the expense of ancestral estate—minor members, whether bound—34 I. C. 738.—Debts contracted by, when binding on whole family, 32 I. C. 380.—Certifying payment of decree, 11 O. C. 246—Power of discharge—30 I. C. 75—Power to contract debts for family business, 18 O. C. 84.—Incompetent to dispose of family property by will—17 O. C. 318.—Can sue or be sued on behalf of family 1. O. L. J. 456.—Money lending business carried on by, suit by person succeeding as, 14 O. C. 127 Mortgage of ancestral property by, to acquire by pre-emption property belonging to distant branch—19 O. C. 100.

Marriage.

Between persons of different castes —Rights and privileges of their children—13 O. C. 375.—Right to give girl in,—Uncle—Mother—17 I. C. 95.—Hindu sons by Mohammedan women—Marriage of issue with women of *Chattri* caste—17 O.C. 68. —See "Divorce."

Maintenance.

To widow in joint family—32 I. C. 291.

Partition.

See "Joint family"—Widow entitled to claim in the Revenue Court, 9 O. C. 53.—Right or wrong decision of Revenue Courts bars civil suit 5 All. L. J. 725.—Necessary parties —misjoinder—10 O. C. 33—Shares—Custom—S. C. 152.—Between Co-widows—Reversioner's interest to be guarded, 15 O. C. 223.—Separate property of father—suit between sons for possession—7 O. C. 96.—Mortgage by a member of joint fam.

ily with respect to his share does not necessarily imply, 10 O. C. 289, 367. —What constitutes, 3 O. L. J. 508. —Mother's share on, 19 O. C. 240. —Indication of separation—Presumption—4 O. L. J. 124.

Reversioner.

Suit by next, when nearer refuses to sue, 3 O. C. 336.—Claim through father, amendment—19 O. C. 221—Validity of transfer of expectancy —15 O. C. 122.—Bound though a portion of mortgage money was for legal necessity 16 O. C. 283.—Nearer reversioner alive—Death of nearest after the suit—8 O. C. 81.—Nature of evidence—Descent and legitimacy essential, element for establishment of claim, 1 O. L. J. 447; 2 O. L. J. 246; 21 I. C. 274 —Bound by decree against widow, 10 O. C. 159, 163—25 I. C. 921.—Suit for recoverey of property transferred by widow—Legal necessity—9 O. C. 104—Suit for possession, limitation—10 O. C. 163 Nearest presumptive heir not bound to prove daughter's collusion, birth of daughter's son after institution of son, 5 O. C. 360—15 I. C. 347.—Proof requisite in a claim by—15 O. C. 364.—21 I. C. 274—30 I. C. 220.—Validity of transfer of expectancy, 15 O. C. 122—3 O. C. 215 —10 O. C. 277.—Estoppel—Widow allowed to represent as owner—30 I. C. 388—Right to redeem—8 O. C. 349—30 I. C. 234.—See Art 141 Limitation Act " Widow," " Alienation."

Stridhan.

Property inherited by daughter from mother—3 O. C. 129—1. O. L. J. 544.—Property acquired by unchaste widow, 14 O. C. 234.—Acquisition by female by adverse possession—5 I. C. 207.—Right of occupancy in *sir*—18 O. C. 377.—Succession to, unchaste widow—14 O. C. 234.—Possession of separate property as, by mother, reduction of share in partition—19 O. C. 240.

Survivorship.

Whether applicable to collateral succession, 32 I. C. 291.

Shebait.

Idol capable of being endowed with property—Distinction between gifts in favour of family idol and idol installed in temple for public worship—Rule of perpetuity—Rule succession—24 I. C. 72.—*Mahant* dying without nominating his successor, 1 O. L. J. 440.—Amounts spent in protecting and performing obligations, right to reimburse from funds, limitation 5 I. C. 404.—Whether member of donor's family can be appointed manager, remuneration—20 O. C. 200.—

Widow.

Widow's estate—3 O. C. 250, 258 —House of husband rebuilt, alienation, 32 I. C. 356.—Right of, when husband died in separation or left self-acquired property—4 O. C. 224. —Adverse possession, S. C. 196—11 I. C. 93.—Validity of alienation by, Only small amount of consideration not accounted for, 19 O. C. 122—Reversioner's right in property decreed in favour of, at Settlement.—Adverse possession against widow—19 O. C. 1.—Lease granted by, whether void or voidable, 20 O. C. 332.—Acquisitions out of the income of widow's estate—Purchase for value—*Legal necessity*, 11 O. C. 310—16 O. C. 359 —22 I. C. 702.—Power to extend limitation by making a written acknowledgment and to pay a barred debt—16 O. C. 272.—Mortgage by reversioner—Widow' in possession—Suit for declaration by widow—Period fixed by mortgage, expiration, during widow's life-time—30 I. C.

198.—Sale by, of mortgage deed forming husband's estate—Suit by transferee of mortgagee's rights against transferer and mortgagor —Widow's competence to transfer—Right of mortgagor to question payment of sale consideration—21 I. C. 8. Unchastity after husband's death, no ground for exclusion from inheritance—11 I. C. 279.—Power as to alienation—Custom—24 I. C. 646. —Grant to, nature of estate—13 I, C. 544.—Proof to determine legal necessity—12 I. C. 336.—Absolute power as to alienation—14 O. C. 170—1 O. L. J. 319.—Adverse claim set up by—10 O. C. 159.—Release executed by in favour of reversioner—2 O. L. J. 338.—Allowed to represent herself as owner—2 O. L. J. 368.—Legal necessity—See S. 15 Contract Act and "Alienation."

Will.

Taluqdar's replies to Government inquiries regarding devolution of their estates amounts to, 11 O. C. 102, 271—20 I. C. 429.—Presumption of law—Attestation—Status of witnesses, 1 O. L. J. 57.—Construction of—sons by Mohammedan women—"*Aulad*"—"*Khandan*"—Marriage of issue with Hindu women of *Chattri* caste—17 O. C. 68.—Joint family property, disposal by—17 O. C. 318. —Of life interest to woman—9 O. C. 119—11 O. C. 271—12 O. C. 157.—Power of appointment—Qualification of person—11 O. C. 271.—Of self-acquired property—Presumption of each son's interest in such property passing to his heirs at death—14 O. C. 244—18 I. C. 228—33 I. C. 785.—Revocation of, 4 O. C. 145—2 O. C. 26—9 O. C. 159—12 O. C. 157.—Meaning of "Malik" in relation to females, 12 O. C. 157—9 O. C. 119—11 O. C. 271.—What amounts to undue influence in case of—10 O. C. 76.—Family arrangement—Immediate operation—14 O. C. 133.—Construction of—Absolute or life interest—Power to appoint an heir—15 O. C. 270.—By father to son—Self-acquired property, 3 O. L. J. 29.—By Hindu widow void—32 I. C. 209.—In favour of persons who would not have succeeded under Act I of 1869—4 O. L. J. 193.—Whether document containing declaration as to who was to be his successor in pursuance of an advertisement, be treated as a testamentary declaration, 20 O. C. 360.

Honorary Munsif's Act (V of 1908).

S. 8 (2).

Small Cause Court suit transferred to other Court—appeal—4 O. L. J. 71.

House.

Suit for enhanced rent of—jurisdiction—6 O. C. 190.—Land necessary for convenient use of, acquisition by Government—9 O. C. 311.—Right of occupancy—custom—S. C. 245.—Sale of materials of—Pre-emption—4 O. C. 26—25 I. C. 718—Dwelling, of tenants, their right to transfer, 10 O. C. 31.—Possession of, by demolition of—11 O. C. 45.—Sites of, in inhabited area of village —Waiver—30 I. C. 295—10 O. C. 31 —2 O. L. J. 305.—Meaning of *Viran* —Taluqdar's right to possession of house left by tenant—14 O. C. 231. —Suit for possession of—17 O. C. 152.—See "absence" "Custom."

Hundi.

Drawn and accepted at one place and accepted and dishonoured at another—arrangement between drawer and acceptor—Position of holder—suit against acceptor and drawer—Cause of action, 3 O. L. J. 132.

Husband and Wife.

Assignment by husband in favour of wife in discharge of dower debt—Registration—3 O. C. 277.—Deed by widow in consideration of husband's debt—4 O. C. 347.—Liability of husband to pay for goods purchased by wife—authority of wife—10 I. C. 9.—Complaint by a brother of—11 O. C. 148.—Debts due to form part of unalienable corpus—15 O. C. 223.—Succession to the holding of collateral relatives of the occupancy tenant—S. D. 1 of 1907.—Effect of declaration by Court as to parties not being, 9 O. C. 49.

Identification.

Of accused, mode of recording—3 O. C. 72.

Immoveable Property.

Compromise relating to, registration of, 6 O. C. 362.—Superstructure of house, 3 O. C. 236.—Contract with respect to Mahabrahmani offerings, 11 O. C. 212.—Contract to transfer, 10 O. C. 218.—When registration not compulsory, 14 O. C. 161.—Undivided share in—14 O. C. 161.—Vendor's charge upon for unpaid balance of the price—9 O. C. 284.—Given in lieu of dower—Registration, 14 O. C. 214.—See "Grove," "Tree," "Compromise," "General Clauses Act."

Injunction.

To compel a person to pay money—3 O. C. 351.—Building erected on land by one co-owner without consent—Acquiescence—S. C. 270—7 O. C. 336, 362—11 O. C. 355.—Water right—Right of riparian owner—Restraining reparian owner erecting a dam across the river—10 I. C. 181.—Effect of—Alienation during pendency of suit, 6 O. C. 294.—Restraining defendant from cultivating land—2 O. C. 35.—Right to ask for—8 O C. 339.—Temporary—S. C. 295—5. O. C. 65—25 I. C. 9.—Mundatory, to fill up a well, 15 O. C. 170.—Suit for compensation for loss resulting from, 13 O. C. 357.—What constitutes dispossession disentitling one to, 12 O. C. 33.—To restrain infringement of patent—7 O. C. 103.—Forbidding defendant to complete well and to demolish work done—S. C. 69.—Order granting, without notice to opposite party, 11 O. C. 151—Interruption of light and air—8 O. C. 356.—See O. XXXIX, C. P. C. and SS. 54, 56 S. R. Act.

Insolvency.

See S. 55, O. XXI, R. 38 C. P. C.—Order passed by Chartered High Court—10 O. C 305.—Minor, position of—16 O. C. 68.—Creditor setting up debtor's, debtor denying, order, 3 O. L. J. 507.—Sale in execution of decree before adjudication—18 O. C. 268.—Suit against insolvent, necessity of leave of Court, 20 I. C. 304.—See Provincial Insolvency Act.

Insanity.

Not proved—18 Cal. 111.—Evidence of—S. C. 58.—Weakness, helplessness—Commutation of insufficient case of insanity into a case of weakness—Fraud—7 O. C. 287.

Interest.

Arrears of rent—1 O. C. 267—26 I. C. 41—1 O. C. 270—7 O. C. 116—R. A. R. No. 16—5 O. C. 187—3 O. C. 108, 22—1 O. C. 94—6 O. C. 94 (96)—7 O. C. 265 (272)—2 O. C. 288.—Penalty—22 I. C. 129—3 O. C. 168—5 O. C. 406—9 I. C. 406—11 O. C. 307—1 O. L. J. 544—13 I. C. 624, 473—20 I. C. 667—30 I. C. 323.—After due date—General covenant for payment of interest, 13 O. C. 125.—Discretion of Court in award-

ing—3 O. C. 22, (29)—R. and J's No. 35.—Awarded as damages, when to be charged on land—14 O. C. 106—7 O. C. 11.—Post diem interest (1) allowable when not provided by deed—3 O. L. J. 290 (2) see 12 I. C. 352—14 O. C. 106—18 O. C. 10—Banker and customer, 9 C. W. N. 745.—Limitation—10 Cal. 785.—In suit for amount of rent paid by under-proprietor on behalf of other under-proprietor, 6 O. C. 346.—At contract rate—11 M. I. A. 120—4 O. L. J. 547—1 O. L. J. 544.—On costs—2 O C. 37—1 O. L. J. 544—4 O. C. 93—20 O. C. 327.—On mesne profits, S. C. 258.—Reasonable rate of, 20 O. C. 319.—Decree holder purchasing property not entitled to, when sale set aside—13 O. C. 180.—General covenant for payment of—13 O. C. 125.—Stipulation for possession on default of payment of—11 O. C. 323.—After the date when the decree was made absolute up to the date of the notice—10 O. C. 179.—Payment of as such—9 O. C. 221.—In the shape of *deorha* provision as to payment of, 10 O. C. 214.—Recoverable from defaulting co-sharer—14 O. C. 164.—To be presumed equal to the profits of property, 10 I. C. 7.—Covenant to pay by instalment—S. C. 296—5 O. C. 406—9 I. C. 406—23 Cal. 483.—For period between date fixed by decree for payment and date of realization, 2 O. C. 37—3 O. C. 129 (154)—26 I. C. 177 (1 O. L. J. 544).—In case when exact amount not tendered—6 O. C. 135.—In inheritance, transfer of—3 O. C. 215.—Of usufructuary mortgage—5 O. C. 155.—Provided by unregistered *rukkas*—2 O. C. 209.—Question of—5 O. C. 168.—Stipulated in a compromise in execution—1 O. C. 71.—To be awarded in decree for mortgage money—3 O. C. 129—2 O. C. 37—26 I. C. 177.—Upon mortgage money subsequent to its deposit in Court, 4 O. C. 387.—When mortgagee entitled to—2 O. C. 103, 24.—See SS. 15, 73, 74 Contract Act and Mortgage "Interest."

Interest Act (XXXIII of 1839).

See 9 I. C. 221—12 O. C. 140.

Interpretation.

Rule of—12 I. C. 413.—Of compromise, 9 O. C. 365.—Of decree, S. D. 11 of 1912.—Of decree or instrument, 12 O. C. 164.—Of *Futwas*, 1 O. L. J. 133.—Of the provisions of Oudh Rent Act, 16 O. C. 346.—Of wills by Hindus—9 O. C. 159.

Issue.

Amendment of—24 I. C. 72.—Same involved in two suits, 14 I. C. 321.—Improperly raised after remand, 9 O. C. 377.—Necessity for framing of—14 O. C. 53.—Other than preliminary findings on—16 O. C. 78.

Jain.

Widow, custom as to succession, S. 43.

Jethwansi.

Custom of, 1 O. C. 301.—See *Haq.*

Jeth.

Tender of mortgage money in any month other than—1 O. L. J. 263—16 O. C. 206—34 I. C. 184.

Jijmani Dues.

Monopoly to collect dues in certain localities, 2 O. C. 1—5 O. C. 225—8 O. C. 339—11 O. C. 212.

Judgment.

Court's power to pronounce, when written statement not filed—15 O. C. 78.—Meaning of executing process for enforcing—15 O. C. 289.—Same, appeal filed on one of several copies,

of—10 O. C. 201.—Variation in, 9 I. C. 1040.—What it should contain, 9 O. C. 32.—Giving mere reasons for admitting additional evidence not sufficient—15 O. C. 253.—Not based upon the pleadings, 14 I. C. 130.

Judicial.

Decision—29 I. C. 552—S. D. 6 of 1909—2 O. L. J. 728—1 O. L. J. 693, 278—S. D. 7 of 1914.

Jurisdiction.

General.—Of Civil and Revenue Court.

1. General.

What *prima facie* determines the jurisdiction of a Court is the claim as estimated by plaintiff—2 O. C. 103.—6 O. C. 255—9 I. C. 414—4 O. C. 397—12 O. C. 31—9 I. C. 414.—Suit for recovery of amount realised from sale of property attached—5 O. C. 190.—Suit on a bond which provided that in case of default the creditor would be entitled to recover his money from the boats pledged and also from moveable and immoveable property—1 O. C. 191.—Where a question not raised, Court bound to consider, 3 O. C. 32—Plea raised at late stage—2 O. L. J. 321.—No objection as to, in appeal—1 O. C. 51.—S. 476 Cr. P. C. 2 O. L. J. 546.—Objection as to not taken, 2 O. L. J. 51—18 O. C. 80.—Return of plaint as being beyond its, 9 O. C. 1, —Valuation of suit for purposes of, 11 O. C. 45—S. C. 237, 279.—Determined by the amount of mortgage money only, 13 O. C. 32.—Of Civil Court—12 O. C. 225—14 O. C. 153, 335—15 O. C. 159—24 I. C. 381.—Suit contesting validity of Municipal election, 16 O. C. 36—12 O. C. 191. —Of Court admitting review—14 O. C. 108.—See Suits Valuation Act —16 O. C. 256—19 I. C. 414.—Of sale officer to sell in contravention of the order of Court, 9 O. C. 289.—Of Settlement Court—9 O. C. 301.—Suit for recovery of the value of Jack fruit—2 O. C. 256.—Suit for share of profit of bazar—4 O. C. 89. —Appellate Court's power to order fresh trial in a suit cognizable by a Court of Small Causes—3 O. C. 20. —Appeal to Judicial Commissioner when valuation exceeds Rs. 5,000—4 O. C. 255.—Of a Subordinate Judge empowered to try appeals, as regards appeals preferred to his predecessor —7 O. C. 321.—Suit for removal of trustee—5 O. C. 110.—Suit against Military Officer—S. C. 113.—Munsif officiating as Subordinate Judge, reverting as Munsif, and again officiating as Subordinate Judge, 3 O. L. J. 256.—Suit for arrears of maintenance—1 O. C. 93.—Power of Judge raised—Delay in publication of notification—Execution of decree, 2 O. L. J. 212—Court's power to sell land in contravention of the terms of S. 20 Oudh Laws Act—8 O. C. 409.—Suit in the nature of a Small Cause Court suit decided as regular suit—1 O. C. 121.—Officer not invested with the jurisdiction of a Court of Small Causes disposing of a pending Small Cause Court case as if he were so invested—2 O. C. 143 —Diss. 6 O. C. 81.—Suit for share of profits—5 O. C. 130.—Suit for enhanced rent of house—6 O. C. 190. —Claim arising out of a partnership account—S. C. 103.—Estimated value of suit admitted by defendant, 18 O. C. 364.—Suit for redemption —appeal—9 O. C. 96.—Suit for recovery of property subject to a charge for unknown amount—10 O. C. 42, 291.—Parties' consent confers no jurisdiction—2 O. L. J. 321—18 O. C. 364—20 O. C. 37.—Suit for possession after death of grantee—12 I. C. 324—3 O. C. 48.—See S. 25 Oudh

Laws Act.—Partnership business—Suit for rendition of Account—1 O L. J. 561.—Suit for redemption, for account, and for award of any surplus that may be found due, 13 O. C. 32.

Of Civil and Revenue Courts.

See S. 233 K. Land Revenue Act (III of 1901).--Determination of genuineness and validity of leases—R. A. R. 10—3 O. C. 365, (368).—Civil Court decree for possession—Decree holder not in possession—Judgment debtor realised rent from tenant—26 I. C. 709, 904.—Denial of relation of landlord and tenant, 5 O. C 118 (122), 104—(106)—94 I. C. 381—28 I. C. 307—7 O. C. 372—18 I. C. 281—12 O C. 15—10 I. C. 11—14 O. C. 196—16 O. C. 163—22 I. C. 125—30 I. C. 218.—Suit for declaration that defendant is not proprietor or is not agricultural tenant—2 O. L. J. 131—3 O. C. 365—12 O. C. 293—1 O. L. J. 344.—Plea that defendant is occupancy tenant—8 O C. 353.—Ejectment—Possession—Graveyard—1 O. L. J. 557.—Objection to settlement —5 O. C. 30.—Decision as to tenancy by Revenue Court—16 I. C. 993.—Suit for ejectment of defendant after determination of lease—S. C. 219.—Suit for rent by landlord's assignee—6 O. C. 104.—Suit for arrears of a percentage granted—7 O. C. 108.—Ejectment of tenant—6 O. C. 289—14 O. C. 225—24 I. C 281. —The validity of re-union of *mahals* into a single *mahal* can not be questioned in a Civil Court—3 O. L. J. 405.—Interpretation of Revenue Court's decree—7 O. C. 372.—Right of one co-sharer to grant perpetual lease—Right of co-sharer to challenge acts done by others—Effects of partition—18 I. C. 281.—*Suits not cognizable by Civil Courts.*—(*a*) Suit for declaration that defendant is a mere tenant at will, 2 O. C. 96—3 O C. 365—12 O. C. 164—24 I. C. 381 —5 O. C. 104—12 O. C. 293—28 I. C. 307—1 O. C. 210; (*a*) Exclusive jurisdiction of Rent Court to determine the effect of the terms of the lease—8 O. C. 84—12 O. C. 84. (*b*); Claims relating to right of occupancy, S. C. 53, 135; (*c*) Suit to determine whether or not a right of occupancy exists in certain lands —1 O C. 210—2 O. C. 96—3 O. C. 87—12 O. C 164—24 I. C. 381—3 O. C. 365—18 I. C. 281—S. C. 53, 135; (*d*) Suit for a declaration that defendant's right is that of a lessee and is liable to be ejected by an ordinary notice of ejectment—3 O C. 55—1 O. L. J. 344; (*e*) Suit for ejectment of lessee and alienee for forfeiture of lease by reason of breaches of conditions—6 O C. 289 —14 O. C. 225—24 I. C. 281; (*f*) Suit for possession or damages against persons holding land either under a decree of a Settlement Court or under leases granted by the superior proprietor—3 O. L. J. 408—1 O. L. J. 344, 512; (*g*) Suit for arrears of rent by mortgagee—Proper parties, 3 O. L. J. 515; (*h*) Lessee holding under defective lease to be ejected in Revenue Court—3 O. L. J. 729; (*i*) Lease granted by Hindu widow—Lessee's position after avoidance by reversioner of perpetual lease—Civil Court's power to decree possession—20 O. C. 232; (*j*) Suit for declaration by a co-sharer that another co sharer is liable for the payment of arrears of revenue to the extent of his share—9 O. C. 232 —S. C 82—15 O. C. 117; (*k*) Divisions of revenue paying land—2 O. L. J. 321; (*l*) Suit against co-sharers by lambardar for recovery of costs of litigation for enchancement of rent—5 O. C. 298; (*m*) Suit for negligence of lambardar to collect rent, S. C. 158—1 O. C 183—4 O. C.

1—30 I. C. 203; (*n*) Suit by tenant against sub-tenant for recovery of land—R. A. R. 74; (*o*) Suit by under-proprietor tenant for possession of land from which he has been illegally ejected, 2 O. C. 83—8 O. C. 174—Diss. 9 O. C. 37—12 O. C. 90—35 F.—2 O. L. J. 145—3 O. L. J. 67—13 O. C. 35, 188—16 O. C. 105; (*p*) Suit to eject tenant illegally continuing in possession, S. C. 180; (*q*) Suit for mutation of names, S. C. 46; (*r*) Suit for possession of trees as well as of land against tenant—10 O. C. 188—Suit by tenant against landlord for recovery of possession of land—14 O. C. 60; (*s*) Suit for distribution of land in partition, 5 O. C. 140; (*t*) Suit for declaration that lessees had no proprietary or under-proprietary right—25 I. C. 914 (1 O. L. J. 512)—25 I. C. 603 (1 O. L. J. 344)—6 O. C. 289; (*Aa*) Appeals in suits for ejectment of tenant, 4 O. C. 314—9 O. C. 292—12 O. C. 164—24 I. C. 381; (*Ab*) Suit by tenant against landlord and his agent, 8 O. C. 257; (*Ac*) Suit for declaration that a person is a mere *thekadar*—14 O. C. 335; (*Ad*) Decisions under S. 74 Oudh Land Revenue Act and decisions under S. 75, or appeals therefrom, S. C. 252; (*Ae*) Suit for mandatory injunction against a tenant—15 O. C. 170—13 I. C. 554; (*Af*) Suit by Taluqdar to recover possession of land from wife of deceased *Thekadar* is neither cognisable by a Civil Court nor by a Revenue Court—5 O. C. 367; (*Ag*) Declaratory suit that person not ejected by Revenue Court is not proprietor or under-proprietor—42 I. C. 194; (*Ah*) Neither Civil Courts nor Rent Courts have jurisdiction to alter amount of rent fixed by the Settlement Officer—1 O. C. 124; (*Ai*) To go behind ultimate allotments of land at partition or question final allotments—14 O. C. 153—20 I. C. 145—23 I. C. 866—1 O. L. J. 81—(see 9 O. C. 76)—20 O. C. 115; (*Aj*) Suit for possession of land held rent free under grant, 6 O. C. 383; (*Ak*) Suit for declaration of under-proprietary right—12 O. C. 225—S. C. 282—12 O. C. 124—14 O. C. 335—23 I. C. 231; (*Al*) Suit for recovery of Patwari rate—11 O. C. 326; (*Am*) A Civil Court can not determine whether or not a lease has expired—12 O. C. 164—18 I. C. 281; (*An*) Suit for declaration of class of tenancy—3 O. L. J. 267—12 O. C. 124—14 O. C. 196, 335—2 O. L. J. 131, 241; (*Ao*) Civil Court passing decree for partition has no power to order the Collector to effect the partition, 8 O. C. 59; (*Ap*) Suit by lambardar to recover possession of land transferred by tenant against the terms of Settlement Court decree—14 O. C. 225; (*Aq*) Suit by licensee—shops for sale of drugs closed by order of Collector—15 O. C. 117; (*Ar*) Declaration that defendants neither proprietor nor under-proprietor—1 O. L. J. 344; (*As*) Division of revenue paying land—Consent of parties, 2 O. L. J. 321; (*At*) Suit for cancellation or declaration of invalidity of lease, 20 O. C. 182.—*Suits cognizable by Civil Court*; (*a*) Suit for declaration that defendant is not under-proprietor—3 O. L. J. 191—14 O. C. 196—23 I. C. 231; (*b*) Suit for possession as under proprietor by one who has been ejected as ordinary tenant—9 O. C 37 Over—12 O. C 90—See 10 O. C. 23 and 13 O. C. 188; (*c*) Partition of income of market and fair—20 O. C. 92; (*d*) Suit for possession of land allotted in partition—9 O. C. 76;—20 I. C. 46, 145—1 O. L. J. 81; (*e*) Suit to recover possession of land from a person who had successfully contested a notice of ejectment, on the ground that he had right superior to that of tenant—S. C. 51, 135, 167, 254—3 O. C.

365—1 O. C. 214—S. C. 261—1 O. C. 172—2 O. C. 79—4 O. C. 314—5 O. C 173 - 12 O. C. 164 (167)—24 I. C. 381—S. C. 293—5 O. C. 97; (*f*) Suit for ejectment of a person on failure to pay the rent demanded by the owner—6 O. C. 341; (*g*) To adjudicate upon the validity of *patta*—19 O. C. 58; (*h*) Suit relating to weighing dues—1 O. C. 103; (*i*) Suit for declaration that defendant was not a permanent lessee—3 O. L. J 267; (*j*) Suit against son or heir of deceased lambardar for profits collected by his predecessor—R A. R. 47—8 O. C. 206, 257; (*k*) Suit by person not party to partition proceedings—20 O. C. 241; (*l*) Suit for recovery of dues realised by lambardar from under-proprietor, S. C. 134; (*m*) Suit for declaration that plaintiff was owner of the land allotted to his father at partition—10 O. C. 204; (*n*) Declaratory suit against order passed under chapter VII Oudh Rent Act—40 I C. 200, (*o*) Suit regarding lease comprising of agricultural and non-agricultural lands, 1 O. C. Sup. 1—24 I. C. 788.—Declaration about title of land—3 O. C. 87—4 O. C. 180—5 O. C. 104; (*p*) Suit to enforce private award directing tenant to pay certain sum as rent of certain agricultural land—S. C. 218; (*q*) Suit to determine right to maintenance allowance, 9 O. C 179; (*r*) Suit for declaration that the defendants has no proprietary or under-proprietary rights in lands in suit—4 O. C. 175—12 O. C. 164—24 I. C. 381—18 I. C. 281; (*s*) Suit for recovery of occupancy of holding by the heirs of deceased tenant—10 O. C. 23—12 O. C. 90—16 O. C. 105—13 O. C. 35, 188—2 O. L. J. 145; (*t*) Suit by landlord against *Mukhtar* for money collected as rent of shops and for bazaar dues—19 O. C. 314; (*u*) Suit for declaration to receive offerings at the temple and for an injunction restraining the defendant from interfering with the receipt of such offering, 8 O. C. 339; (*v*) Suit by co-sharer for share of rent paid on behalf of others—5 O. C. 392; (*w*) Suit for arrears of rent based on a lease—1 O. C. Sup. 1—24 I. C. 788; (*x*) Suit by under-proprietor in possession ejected by landlord—12 O. C. 90—13 O. C. 35, 188—16 O. C. 105—12 O. C. 97,; (*y*) Suit for declaration that defendant has no ex-proprietary right and for invalidity of lease—18 I. C. 281—24 I. C. 381; (*Aa*) Suit for recovery of rent by a assignee of the rent in arrears—12 O. C. 388; (*Ab*) Where the alleged tenant does not admit the tenancy—5 O. C. 118; (*Ac*) Assertion of adverse title by tenant—7 O. C. 372—12 O. C. 164—14 O. C. 196—16 O. C. 163; (*Ad*) A person, though not in possession, claiming to be entitled to succeed to an under-proprietary right—16 O. C. 105; (*Ae*) Mistakes of Revenue Courts to be corrected by Civil Courts, 1 O. C. 225 9 O. C. 76—20 I. C 46, 145; (*Af*) A Civil Court giving decree for possession against trespasser can not refuse that for mesne profits, 2 O. L. J. 393; (*Ag*) Suit for declaration that A has no superior or inferior or proprietary right—2 O. L. J. 335; (*Ah*) Objection relating to title raised in course of partition in Revenue Courts—Civil Courts to satisfy if conditions and qualifications annexed to grant of jurisdiction complied with—17 O. C. 224; (*Ai*) Suit for possession of land after the death of grantee against the transferee of a non-transferable grant—12 I. C. 324; (*Aj*) Suit for declaration that certain land is exclusive property of the plaintiff by partition—10 O. C. 205; (*Ak*) Suit for possession of land transferred by one of co-sharer to a third person —15 O. C. 301; (*Al*) Suit between

under-proprietors—Mesne profits in respect of *Khudkasht*—2 O. L. J. 625; (*Am*) Suit for ejectment of lessee as trespasser—3 O. L. J. 703; (*An*) Government grant, free of revenue, sale of—17 O. C. 369.

Jury.

Choosing of Jurors—Practice—1 O. C. 418—12 I. C. 513.—Verdict with respect to offence of which the accused was not charged—High Court's power to interfere with the verdict of Jury—13 O. C. 295.

Justertic.

Third party entitled disclaiming interest—Conveyance of property not affected by statement unless evidenced by some act within law—30 I. C. 503.

Kabuliat.

Lease includes—8 O. C. 197—S. D. 27 of 1891—9 O. C. 296—12 O. C. 140—S. D. 6 of 1905—9 O. C. 362.—Executed on stamp payable for lease and registered, 7 O. C. 169.—Copy of—Inadmissibility—S. D. 27 of 1891.—Non-forfeiture of tenancy by terms of—Right of occupancy—S. D. 8 of 1885.—Never acted on, 1 O. L. J. 766.—Of mortgaged property executed by mortgagors in favour of mortgagee—6 O. C. 18.—Signed only by the tenant—Without lease—12 O. C. 140.—Undertaking contained in, enforceable against person in possession—12 O. C. 140.

Kanungo and Patwaris Act (IX of 1889).

Decree of Settlement Court—Patwari rate—3 O. C. 94—9 O. C. 63—12 O. C. 205.—Meaning of "Date," "Landholder," and "Tenant"—Patwari Cess—R. A. R. 72.—Liability of under-proprietor to pay Cess to superior proprietor, R. A. R. 73—12 O. C. 205.—Suit for recovery of—11 O. C. 326.

Khasras.

Copies—Public documents—3 O C. 204.—Entries in the remark column—11 O. C. 195.—Interpretation of—2 O. L. J. 305.

Khewat.

Entry made by Settlement Officer—5 O. C. 70.—Sufficient proof of *prima facie* title to profits, 1 O. C. 143.—Extract from produced in proof of legitimacy, 1 O L. J. 89—Rejection by Revenue Court of application for correction of, how far affects adverse possession—16 O. C. 163.—Entries—17 O. C. 332.

Lambardar.

Authority to sue for profits—R. A. R. 67.—Competency to grant perpetual lease of whole mohal—20 I. C. 57, 147—38 I. C. 399.—Suit by, against co-sharer for share of costs of litigation, 5 O. C. 298.—Entitled to recover interest from defaulting co-sharer—14 O. C. 164.—Liability of, for interest—6 O. C. 89—24 I. C. 15.—Liability of, for land held by co-sharers—1 O. C. 152—11 O. C. 75.—Misconduct or gross negligence of—Burden of proof—4 O. C. 1—S. C. 158—1 O. C. 83—30 I. C. 203—2 O. L. J. 206—One, only suing—1 O. C. 103.—Sums recovered when plaintiff was lambardar—S C. 134.—Definition of—Duty and liability of, 18 O. C 5.—Nature of possession of—A. W. N. (1905) 36.—Right of, to eject—29 I. C. 297.—Suit by, for share of revenue paid—14 O. C. 164.—Title of, to claim expenses of collection in addition to his fee, 1 O. L. J. 184.—Whether entitled to remuneration paid to *Ziladar* and *Shahna*—1 O. L. J. 184.—*Haq* quite independent of right as to costs of collection—1 O. L. J. 156.—Failure

to produce account books, 1 O. L. J. 184—Adverse possession—S. D. 20 of 1912.—Paying revenue for other, limitation, 7 O. C. 14—Resumption by—S. D. 6 of 1903.—Two—No subdivision—any one entitled to eject—35 I. C. 760.—Suit for recovery of dues realised by—S. C. 134.—Suit for lambardari dues, 4 O C. 143—5 O. C. 183—6 O. C. 89—R. A R. 27.—See Jurisdiction of Civil and Revenue Courts and S. 220 Land Revenue Act (Oudh).

Land Acquisition Act (I of 1894).

Sale of mortgaged property under Act I of 1894—Remedy of mortgagee—Charge on purchase money—20 O. C. 256—Award made by Collector without being communicated to applicant—16 O. C 374.—S. 9 4—Meaning of "house"—Land necessary for convenient use of house, acquisition by Government of portion of—9 O C. 311.—S 18—Assessment of pleader's fee—17 O. C. 284.

Landlord.

Declaratory suit by, against tenant setting up under-proprietary title—7 O. C. 372—12 O. C. 15, 164—14 O. C. 196—16 O. C 163.—Right of escheat—2 O. C. 195—14 O. C. 231—Acceptance of rent—20 I. C. 57—S. D. 15 of 1910.—Consent of, required by purchaser for occupying purchased house of tenant, 10 O. C. 4—Effect of minority at the time of building—10 I. C. 186—Estoppel if building not objected to in time—10 I. C. 186.—Liability of vendee to, for *haq chharum*—11 O. C. 64—Suit by tenants against, for recovery of possession—14 O C. 60—Rights of, and groveholder, 9 O C 109.—And tenant, relationship of—10 O. C. 23—29 I C. 415—27 I. C. 102—20 I. C. 57—S. C. 176.—Tenant's right to build on his *Sahan*, 10 I. C. 186.—Permission to transfer materials—10. O C. 4—14 O. C. 231.—Suing mortgagee of occupancy tenant—7 O. C. 265—18 I. C. 383.—Interpretation of Settlement decree—Claim for under-proprietary sub settlement refused—Decree for *Dasundh*—Possession of position of rightful holder, 42 I. C. 57.—Detention of crop until payment of rent—S. C. 4—Land held by a tenant with a right of occupancy right to subsoil products—S C. 9—Suit to eject trespassers—S C 219.—Suit on private award directing tenant to pay to, a certain sum as rent—S. C. 218.—Relation of, between mortgagee and mortgagor—6 O. C. 26.—Tenants leaving village—Right to possession of groves, S. C. 130—Diss. 1 O. C. 231—2 O C. 281—15 O. C. 33—23 I. C. 957—16 O. C. 341—12 I. C. 409.—Sinking of well by tenant on portion of *abadi* land occupied as appurtenance to dwelling house—Suit for possession or injunction. 4 O. L. J. 454.—Sale in execution of decree—Purchaser's right to occupy against consent of, 10 O C. 4—14 O. C. 231.—Transfer of house by tenant—Right of re-entry by landlord—S. C. 202—9 I C 427—10 O. C 31.—Entry on Patwari's papers—Shikmi—Non-payment of rent—25 I. C. 177—Extremely low rent no proof of favourable rent—Ejectment by notice—Plots held as *shankalap* included in notice—Validity of notice—1 O. L. J 236—Accepting mortgage of non-transferable holding—Estoppel—8 I. C. 691.—Transfer by tenant at will—Relation between sub-tenant and transferee—25 I. C. 6—Relationship of—Rent assessed—Failure in collection of—1 O. L. J 764.—Suit for possession of plots of land with trees, 1 O. L. J. 63—1 O. C. 231—2 O. C. 281.—Whether occupancy tenant can relinquish rights without relinquishing land, 4

O. L. J. 158—See "Jurisdiction" and, S. 3 (11) O. R. Act.

Land Revenue Act.

(Act XVII of 1876)

Resumption—Grove land—2 O. C. 73—9 O. C. 109.—Limitation for removal of trees newly planted by grove holder—11 O. C. 379.

S. 2

Agricultural year—R. A. R. 70.

SS. 15 and 220.

See Pre emption -4 O. C. 365.

S. 17.

Meaning of "rental" in settlement proceedings, 1 O. C.—124 1 O. C. 124—14 O. C. 41 (43).

S. 33.

Decision of question of under-proprietary title—jurisdiction—12 O. C. 97—13 O. C. 35.

S. 40.

Duty of Settlement Officer to determine rent only—2 O. C. 35 —Perpetual hereditary farming lease—Tenants holding under decree of Court—6 O. C. 94—7 O. C. 265 (272) —18 I. C. 583 —Interest on arrears of rent—Decree of Settlement Court —5 O C. 187.—Meaning of "Kabzadari"—S. D. 23 of 1892 —Vendor's covenant to pay rent—Effect of—2 O. C 273—3 O. C. 310—5 O C. 70.

SS. 52—55.

Right of tenant or mortgagee of *muafidar* to resume land after resumption—6 O C. 110—28 I. C 440. —Grant evidenced by a written instrument—Condition against resumption, S. C. 84 —Grant for an indefinite period—*Muafi*, grant not ripening into absolute proprietary right by lapse of time—S. C. 195, 209, 291—Grant at a favourable rate of rent—Nature of evidence required to prove favourable character of rate of rent—S. C. 263—3 O. C. 268 —Applicability of O. XXIII, R 3 to SS. 52 and 53—2 O. C. 67.—Claim to resume grant—25 Cal. 479.—Resumption in part payment of rent—S. C. 47, 117, 207—2 O. C 295—Not F. 6 O. C. 233.—Resumption of rent free grant—Limitation—Appeal—S C. 170, 174, 259, 276, 263, 288—2 O C. 67—3 O C. 365—5 O. C. 97—4 O. C. 228 —Possession of heirs of grantee for life—3 O. C 48, 5 O. C. 119—12 I. C. 324 —Grant by way of endowment to religious institution liable to resumption—Personal law—Assessment of rent on rent free grant —Long possession of grantee—2 O. C. 295 —Not F. 6 O. C. 232.—Resumption of *shankalap* grant for loyalty.—Valuable consideration—S C. 161—244. 288.—Grant held rent free under Judicial decision—4 O. C 252.—Marwat Grant—S. C. 61 —8 O. C. 59.—Grant for dancing and singing—S.C. 100, 170.—Grant for *janbazi*—S. C 244, 288.—Grant for spiritual services—S. C. 37, 163, 207, 244, 288,—2 O. C 295—3 O. C 375. Grant to a *Guru*—S. C. 36, 37, 163, 174, 244, 288 —Adverse possession—5 O. C. 97.—Suit for possession of land alleging defendant to be trespasser —Dismissal of suit—Application for resumption of the same land—S. C. 80.—Land held free at pleasure of grantor -30 I. C. 392.

SS. 70, 71, 74, 75.

Partition—Adjudication of title—Appeal—Court Fees—Jurisdiction—4 O. C. 289—6 O C. 372 —2 O. C. 359 —S C. 252—2 O. C. 351—1 O. L J. 81—7 O. C. 161—4 O. C 298.—Suit in Civil Court on title after partition —Effect of mutation of names—12 O. C. 288—23 I. C. 860.

SS. 73 and 74.

See 12 O. C. 97.

S. 100.

The date from which rent fixed should be payable—9 O. C. 227—11 O. C. 187—12 O. C. 35—15 O. C. 45.

SS. 108, 112, 121.

Liability of mortgagee without possession for payment of land revenue—4 O. C. 369—See Pre-emption—7 O. C. 284—10 O. C. 86, 225. —Transfer of share of under-proprietor in arrears of rent—Right of interest on rent from transferee—26 Cal. 523.

SS. 124, 125, 131.

Jurisdiction of Civil Court with regard to villages, settlement of which has been annulled for non-payment of land revenue—Contract made by proprietor during term of annulment of settlement—5 O. C. 30.

S. 135.

Sale in default of excise revenue. —Prior incumbrance, —3 O. C. 79.

SS. 150-151.

See General Clauses Act—5 O. C. 228.

S. 158.

See SS. 41 and 83 (4)—Oudh Rent Act, 15 Cal. 515.—Rural Police rate—Effect of neglecting to enforce right for sometime—Want of inclusion in Settlement amount, 12 I. C. 331.

Chapter VIII.

Court of Wards—Disqualified proprietor—Nature of disqualification, 25 All. 195.

S. 172.

Power of Court of Wards—Award in excess of question referred to arbitration—Right of suit by minor on attaining majority—23 All. 394.

SS. 173 and 174.

Competency of disqualified proprietor to borrow money without sanction of Court of Wards, 9 O. C. 188—6 I. C. 203, 439, 572—7 All. L. J. 655—10 I. C. 14.

S 181—219.

See Under-proprietor, R. A. R. Diss. —1 O C. 124, See also S. 124, 125 and 131 above.—See Jurisdiction S. C. 156-5 O. C. 140-392 S. C. 82—4 O. C. 379.—Effect of partition—Jurisdiction, 9 O. C. 76.

S. 220.

Lambari dues, right of lambardar to receive from co-sharer—4 O. C. 143.

Land Revenue Act (III of 1901).

S. 4 (12).

See S. 57.

S. 4 and 46.

Proceedings by Revenue Officer as distinguished from a Revenue Court —13 O. C. 198—17 O. C. 25.

SS. 22 and 34.

Succession to the holding of collateral relatives of husband—S. D. 1 of 1907.

S. 32, 33.

Co-sharer in an under-proprietary holding of specific plots is not a co sharer in an under-proprietary mohal—S. D. 2 of 1915.—See S. 176 Penal Code—10 O. C. 238.

SS. 33, 34.

Possession must be by succession or transfer—1 O. L. J. 452, 440—Possession in representative character as lambardar is not adverse—S D. 20 of 1912.

SS. 34, 35, 40.

Mutation—Possession to be shown in disputed cases—Vendor in possession and disputing Vendee's claim—1 O. L. J. 684.—Civil Court decree ground for mutation—S. D. 16 of 1912.—Error in record amended whenever noticed—S. D. 4 of 1909.

S. 34.

Transfer of possession before the Act came into force—9 O. C. 204.—Report of transfer by mortgagee—Possession—S. D. 2 of 1911—Report of transfer or succession whether necessary in case of holder of non-proprietary interest—S. D. 1 of 1906.

S. 36.

Persons entitled to receive rent payable by ex-proprietary tenant, 13 O. C. 70.—Retrospective effect of determination of rent, 12 O. C. 35.—Claim as to ex-proprietary right—Limitation, S. D. 12 of 1914—2 O. L. J. 11—4 O L. J. 170.—Agreement not to claim ex-proprietary right not enforceable, S D. 7 of 1913.—Creates no right, S D. 12 of 1914.

S. 39.

Mortgage of a *sir*—Ex-proprietary right, S. D. 3 of 1901—Diss. S. D. 13 of 1913—Decision of Civil Court as to adverse possession, S. D. 18 of 1912.

SS. 42 and 44.

Res judicata—Issues not framed—case as to correction of *Jamabandi*—1 O. L. J. 745.—Determination of class or tenure of tenant—jurisdiction mutation, 33 I. C. 205.—Does not apply to land free tenures, S. D. 5of 1914.—The settlement officer can only deal with heritable and non-transferable leases, S. D. 7 of 1914.—Provisions for mutation—19 O. C. 192.

SS. 46 and 55.

Facts to be proved to justify conviction, 8 O. C. 128

S. 57.

Correctness of entry of land as *sir* is open to disproof, S. D. 17 of 1912

S. 79.

Not applicable to lessees holding under heritable but non-transferable leases—1 O. L J. 357—40 I. C. 63—See 40 I. C 63, 200.—Liability of tansferee from under-proprietor to pay rent jointly—10 O. C. 36.

SS. 106, 111, 118.

Division of entire village—Partition of house—Objection as to jurisdiction not taken—18 O. C. 180.

SS. 107, 110, 111, 112, 113, 114, 118.

Partition proceedings—Time fixed for objection can be extended—Fresh notice—Mortgagee in possession—Proprietary title—Appeal—5 I. C. 107—39 I. C 715—Oojection by guardian as to proprietary title dismissed as time barred—Appeal—Third appeal treated as revision—3 O. L. J. 201.—Effect of consent to entry of one's name in Revenue papers, 1 O. L. J. 81—12 O. C. 288.—Objection to partition filed beyond time—Effect of complete partition—1 O. L. J. 81—9 O. C. 76—14 O. C. 153.—Appeal from order of Revenue Court disallowing objection on the ground of opposite party being recorded co-sharer—1 O. L. J. 81—4 O. C. 289—See Jurisdiction—17 O. C. 224.—Direction by Revenue Court to file suit in Civil Court final

—18 O. C. 343—4 O. L. J. 553.—See Partition, 6 O. C. 372—7 O. C. 161. —See Partition Act.—Hindu widow entitled to claim partition, 19 O. C. 53.—Date of issue of proclamation Time of filing of objection—Fram ing of decree, 4 O. L. J. 113.—Right or wrong decision of Revenue Court, 5 All. L. J. 725.—Civil Court can give a decree on the basis of partition irrespective of delivery of possession, 9 O. C. 76—20 I. C. 46, 145.—Suit after expiry of period fixed for establishment of right—11 O. C. 114.—Objection by Taluqdar in partition proceeding between under-proprietors—11 O C. 252.—Meaning of "Civil Court"—suit filed after 3 months—4 O. L. J. 553. —Partition of building—18 O. C. 80.

S. 119.

Power of Revenue Court to partition trees along with land, 19 O. C. 151—23 A. W. N. 291.

S. 126.

Succession to ex-proprietary tenancy—Death of Hindu widow, S. D. 1 of 1911.

SS. 132, 133, 211 and 212.

Interpretation of appeals in partition cases, S. D. 5 of 1905—S. D. 10 of 1912.

S. 138.

Plots held in under-proprietary tenure not forming an under-proprietary mohal can not be partitioned, S. D. 2 of 1915.

SS. 139—233 (*k*).

Reunion of mohals—Jurisdiction of Civil Court, 3 O. L. J. 405.

S. 142.

Purchaser's liability for arrears of Government revenue, 11 O. C. 279.

S. 147.

A citation under, is an order under, S. 174 Penal Code, 13 O. C. 55.

S. 172.

Mango trees—standing timber—Sale whether can be set aside by deposit—Standing timber—Immoveable property—29 I. C. 16.

S. 191—192.

Transfer of partition case—Jurisdiction, 7 O. C. 142.

S. 173 and 174.

See disqualified proprietor, 9 O. C. 188.

S. 185.

Power of revision—Suit for profits—Claim admitted—Suit dismissed in default—Legality of order—29 I. C. 33.

S. 233.

Does not apply to suits in which the plaintiff had no opportunity of having his objections considered—10 O. C. 363—20 I. C. 145.—Parties can not by their consent confer jurisdiction upon Court—30 I. C. 209, 207.—Civil Courts to question exclusive jurisdiction of Revenue Courts—20 I. C. 56.—Question of title—Effect of partition proceedings —4 O. L. J. 363.—Jurisdiction of Civil Court to grant possession of land partitioned by Revenue Courts —Possession for a long time, basis of suit—20 I. C. 46—9 O. C. 76.—Maintainability in Civil Court of objection which could not be raised in Revenue Court—20 I. C. 145.—Civil Court's power to rectify errors in partition by Revenue Court, 1 O. L. J. 38—See 14 O. C. 153—12 O. C. 288. —Decision of proprietary title by Revenue Court, 9 I. C. 59.—Partition of grove trees and land—Claim for

possession of Bazar—Jurisdiction—20 O. C. 92.—Reopening of partition by Revenue Court—Property treated as held in proprietary rights, subsequently found to be held under mortgage, 20 O. C. 79, 241.—Suit by person not party to partition proceeding—20 O. C. 241.

S. 234.

Determination of amount payable to a proprietor, 40 I. C. 200.

Lease.

Suit for ejectment of the lessees and alienees—Jurisdiction, 6 O. C. 289—14 O C 225—24 I. C. 281—38 I. C. 399.—Construction of—8 O C 61—12 O. C 164—24 I C. 381—25 All. 1—4 O. C. 139.—Determinable by notice—Liability of lessee or his representative—5 O. C. 113.—Determination of the terms of—Jurisdiction—8 O. C. 84.—Executed by guardian on behalf of minor—2 O. C. 233.—Executed in favour of Zamindar in consideration of surrendering proprietary right, presumption of perpetuity—4 O. C. 139.—Occupation of village without, 9 O. C. 362.—Permanent, of mortgaged land in favour of mortgagee, 11 O. C. 89.—Executed by mortgagor, cancellation of—1 O. C. 18.—Includes *Kabuliat*—8 O. C. 197—7 O. C. 169.—For a term not inconsistent with right in perpetuity, 4 O. C. 31—R. A. R. 10.—For life—Construction of—8 O. C. 61—12 O. C. 164—24 I. C. 381.—Whether sub-lease can outlive term of original, 3 O. L. J. 729.—For quarrying limestone—Registration—7 O. C. 231.—Heritable and non-transferable, whether creates under-proprietary right—6 O. C. 94—Lessee's right of transfer—Sub-lease—Mortgage—2 O. C. 12.—Holders of heritable and non-transferable, R. A. R. 36.—Mortgagee's suit for mortgage debt against mortgagor holding mortgaged property under—Jurisdiction—6 O. C. 26, 18.—For the farm and sale of drugs—17 O. C. 193.—Land in possession of successors of lessee for life—8 O. C. 13—12 O. C. 164—24 I. C. 381.—Not a sale—10 O. C. 348.—Modified by subsequent arrangement—Jurisdiction, 1 O C. 103.—Transfer of non transferable—2 O. C. 252.—Occupation of land after determination of—S. C. 219.—Fixing rent on land—S. D. 4 of 1912.—Of immoveable property—S. D. 6 of 1904—Subsequent, does not affect mortgagee's right to possession—15 O. C. 239.—Of right to receive collections of a village not agricultural, 5 O. C. 222—7 O. C. 169.—Oral evidence to prove an agreement to execute, 9 O. C. 296.—Agreement that the jungle and wild trees might be removed and land brought under cultivation—Registration 7 I. C. 864 (866).—Suit on account of compensation for use and occupation without registered, 9 O C. 362—10 I. C. 2 (3).—Of the right of taking toll—Proof—2 O. C. 59.—*Zari peshgi*—amounts to usufructuary mortgage—4 O. C. 257.—Permanent and hereditary farming—3 O. C 108—5 O. C. 187 (188)—6 O. C 94 (96)—14 I. C. 717—Perpetual—4 O. C. 264—S. C. 263—R. A. R. 31—2 O. C. 292—3 O. C. 105—12 O. C. 267, 87—Adverse possession—30 I. C. 276.—Perpetual, granted by some co-sharers jointly how far binding on other co-sharers—20 I. C. 57, 147.—Suit to cancel for breach of conditions, S. D. 5 of 1891.—To a *Thekadar*—Registration, 7 O. C. 169.—Unregistered, inadmissibility of S. D. 5 of 1898—30 I C. 258.—Unregistered—*Kabuliat* for toll on weighment—S. C. 144.—For certain purposes—Lessee's act in pursuance of purpose of lease—Landlord bound by lessee's act—1 O.L. J. 739.—License—Rent—Fee—25 I. C. 666—15 O. C. 91.—Lessee under Settlement Court decree vacat-

ing holding for 5 years and getting it back on new lease different from terms of decree—23 I. C. 231.—Granted in execution of decree—satisfaction of decree—8 I. C. 410.—Whether lessee entitled to suspension of rent on account of scarcity—13 O. C. 146. —Forfeiture for breach of condition—15 O. C. 91—24 I. C. 780—15 O. C. 295—S. C. 240.—Applicability of rule of license to lease—15 O C. 295.—Suit by lessee against tenant for arrears of rent—15 O. C. 295—30 I. C. 292.—Force of lease by mortgagee after redemption—33 I C. 270.—Conferring heritable and non-transferable rights, giving power to sub-let and imposing liability to ejectment—2 O. L. J. 634 Dist—4 O. L. J. 104—4 O. L. J. 191.—Lessee holding over, whether bound by conditions of lease—Ejectment without landlord's consent—S. D. 9 of 1892 Dist—4 O. L. J. 146—4 O L. J. 191. —Granted by Hindu widow whether void or voidable—20 O. C. 232 —Condition against alienation without right of re-entry in case of breach does not involve forfeiture—S. D. 2 of 1914—15 O. C. 91.—Lease fixing rent on land held by tenant does not affect occupancy rights which the tenant may have enjoyed before the rent was fixed—S. D. 4 of 1912.—See "Agricultural."

Legal Practitioner.

Duties and responsibilities of—SS. 22.—Unprofessional conduct of pleader—Agreement between pleader and client for payment of fee, 4 O. C. 229.—Pleader advancing money to client on mortgage—19 O. C. 60. —Right to appear for prosecution in Sessions Court, S. C. 31.—Counsel's indiscretion—S. C. 166.—Agreement to accept less than the legal fee —S. C. 136.—Agreement to pay indefinite reward—Public Policy—S. C. 15.—Suit for damages against, for wrong advice—Limitation—10 O. C. 95—Holding brief for another—Limitation—4 O. C. 303—2 O. C. 65. —Refusal to accept notice of date of hearing—7 O. C. 303. Wrong advice of not sufficient cause—5 O. C. 384.—Fee in a redemption suit, 6 O. C. 130—In declaratory suits, S. C. 24.—In pre-emption suit, 7 O. C. 43. —In the absence of agreement, reasonable remuneration—4 O. C. 345. Pleader fee—See Para. 272—Chapter VII.—The Oudh Civil Digest Vol. I.—Certificate filed after argument—13 I. C. 500.—Counsel engaged for one party, whether should be allowed to appear for opposite party—19 O. C. 237.

Legal Practitioner's Act

(XVIII of 1879.)

Pleader refusing to disclose professional communication on being questioned by Court—20 I. C. 598.

Legal Representative.

Application for leave to sue in *farma pauperis*, 18 O. C. 64.

Lien.

Effect of decree-holder putting property to sale without disclosing his—11 O. C. 206.—For dower—17 O. C. 157—1 O. L. J. 225.—For revenue paid in respect of a village, 10 O. C. 291.—Over the mortgaged share —10 O. C. 289. Possession of lien holder not adverse—1 O. L. J. 225.

Limitation.

(A) General (B) Sections and Articles.

(A)

Marginal notes to the sections of Act can not be referred to for construing the Act—7 O. C. 248.—To be determined as case set up in plaint

—4 O. L. J. 648—In the absence of a definition of a ward in an Act, its popular and ordinary meaning must be followed—7 O. C. 74.—Pre-existing state of the law, how far guide in construction—3 O. C. 325.—Retrospective effect of Statutes—7 O. C. 254—8 O. C. 45.—The Act does not apply to all kinds of application —11 O. C. 208.—Application of—Appeal unders S. 119 A Oudh Rent Act—17 O. C. 254.—Application of, when suit not cognisable by Rent Court—19 O C. 314

(B)

S. 2.

Acquisition of title, 9 O. C. 377.

S. 3.

Plaint returned for presentation to proper Court, 9 O. C. 1.—Last day gazetted holiday, 11 O. C. 144.

S. 4.

Applies to all the Acts of the Governor-General in Council, 9 O. C. 214 (215).—Does not apply to suits, under Oudh Rent Act, 4 O. C. 182—13 O. C. 103—Contra. S. D. 2 of 1913.—See S. 3.—Meaning of "Prescribed"—15 O. C. 373.

S. 5.

"Sufficient cause" liberally construed—4 O. C. 372.—Dist.—5 O. C. 384—15 O. C. 22.—Two suits decided in one judgment—One appealable to District Judge and the other appealable to Judicial Commissioner.—Delay in obtaining Copy —32 I. C. 380.—*Bonafide* error as to remedy—5 O. C. 183—3 O. C. 265—34 Cal. 216—*Bonafide* mistake of law as to jurisdiction—2 O. C. 133—4 O. C. 372—5 O. C. 384—15 O. C. 22—10 O. C. 31.—Mistaken advice of Counsel, 10 O. C. 291 (294).—Ignorance of law—3 O. C 13.—Presentation of appeal to wrong Court—Delay in filing when excusable—30 I. C. 211—2 O. L. J. 325.—Uniform practice of Court—10 O. C. 201.—Negligence of Pleader—4 O. C. 303.—Appeal filed in the Court of the District Judge by mistake—12 O. C. 31.—Error of a Subordinate official, 1 O. C. 47.—Time for legal advice and raising of funds—5 O. C. 183.—Exercise of discretion without legal material—3 O. C. 37.—Applicability to Oudh Rent Act.—4 O. C. 182—6 O. C. 68—13 O. C. 103— S. D. 2 of 1913.—Extension of period—Sufficient cause —Copying Office issuing wrong copies of judgment and decrees—Contributory delay—25 I. C. 26.

SS. 6, 7 and 9.

Applies when some and not all are affected by disability, 3 O. C. 316—9 O. C. 269.—Suit for arrears of rent —minority of plaintiff.—11 O. C. 118.—Effect of existence of guardian *ad litem* or next friend on minor's actions after attaining majority, 16 O. C. 206.—Privilege personal and not transferable—Position of assignee from minor—5 O. C. 197 (208) —18 O. C. 34.—Execution of decree—Joint Hindu family—Managers power of discharge—Minor member of family—30 I. C. 75.—Stoppay of period of limitation—Disability or inability to see after accrual of cause of action—Voluntary or involuntary disabilities—Application of S. 6 to S. 31—18 I. C. 306.

S. 12.

Time requisite for obtaining copy —Decree unsigned.—1. O. C. 184—28 I. C. 366.—Application for copy to be sent by post—8. O. C. 150.—Application for copy by whom to be made—23 I. C. 209.—Exclusion of time in obtaining copies of both judgment and decree—18 O. C. 74.

S. 14.

Claim to set off—4 O. C. 281.—Different causes of action—4 O. C. 293. —Mistake of law as to proper forum —1 O. C. 272—5 O. C. 304.—Ignorance of law—Decision not uniform —3 O. C. 265.—Effect of presentation to proper Court—Meaning of *bonafide* prosecution—14 I. C. 86. —Date of institution—Date of filing in Court having jurisdiction—18 I. C. 121.—See Art. 18—10 I. C. 21.—Under valuation, if not deliberate, reckless or *mala fide* whether ground for exclusion of time—17 O. C. 210—Prosecution of appeal in good faith in wrong Court—Undervaluation of plant—18 I. C. 92—Exclusion of time spent in Revenue Courts—3 O. L. J. 445.—When exclusion of time to be allowed—Presentation of plaint to wrong Court on last day—Absence, of fraud 17 O. C. 210—19 O. C. 367.

S. 18.

Effect of Fraud—Pre-emption—Omission to give notice, S. C. 248—1 O. C. 262—See Fraud—See S. 47 C. P C.—20 I. C. 538.

S. 19.

Acknowledgment of existence of decree—14 I. C. 1.—Acknowledgment by one of joint mortgagees, 14 I. C. 132.—Can not affect the absolute prohibition against the granting of an application after 12 years—11 O. C. 220.—Admission of liability entered in the *Wajibularz*—5 I. C. 77.—Effect of seal upon document without signature—Document bearing no date—20 I. C. 62.—Acknowledgment by guardian of minor—26 Cal. 51 —29 C. 647—See also 26 B. 221 (229)—35 C. 320—30 All. 422—37 Cal. 461.—Agreement to sell property during pendency of pre-emption suit—20 O. C. 13.

S. 20.

Payment in the shape of new bond passed for interest—9 O. C. 221.—Limitation as against surety—9 I. C. 8.—Payment of interest by one of joint debtors—14 I. C. 128.—Payment by guardian though not legally appointed, 19 I. C. 362.—Application of, to suits for recovery of debt or legacy, 13 O. C. 179.—Payment of interest as such—Intention to be indicated—Mere appropriation not sufficient, 19 I. C. 825.—Extension of period of—Payment—4 O. L. J. 494.

S. 28.

Suit by minor 3 years after attaining majority, 17 O. C. 52.

S. 31.

See S. 4—15 O. C. 373.—Right to sue for foreclosure—16 O. C. 157—9 I. C. 1,038—9 O. C. 147.—Foreclosure of mortgage of, 1869—13 I. C. 504. —Suit for foreclosure brought after 12 years but within period of grace —16 I. C. 20.—See S. 6—18 I. C. 306. —Institution of first suit after the withdrawal of former suit—12 I. C. 323.

Art. 2.

Applicable to cases where public official or private person does an act under powers conferred—16 O. C. 211.

Art. 10.

Mortgagee becoming owner by foreclosure—3 O. C. 184—25 I. C. 869.—Meaning of "Physical possession"—1 O. C. 262—2 O. C. 9—3 O. C. 184—See S. C. 126—7 O. C. 8—S. C. 248.—Transfer by husband to wife in lieu of dower—21 I. C. 60. —Sale of reversionary interest—7 O. C. 98—8 O. C. 349.—S. 11 Oudh Laws Act not applicable—S. C. 248. —Applicability where mohal was

divided—S. C. 126—3 O. C. 184.—Second purchaser sought to be pre-empted, limitation as against—Cause of action—1 O. L. J. 196.—See Art. 120 and "Pre-emption."

Art. 11.

Suit against auction purchaser—1 O. C. 83.

Art. 12.

Suit for possession of property mortgaged and sold during minority—11 O. C. 346—17 O. C. 52—Mortgage by Mohammedan mother—suit by son—5 O. C. 197.—Suit for setting aside an execution sale—13 O. C. 297—12 O. C. 45—S. C. 194, 215, 295—8 O. C. 152, 409.

Art. 13.

Suit to set aside order in execution—on the basis of *Sulehnama*—3 O. C. 84.

Art. 18.

Time taken in defending another suit, exclusion of—*bonafide* prosecution of a case in another Court—10 I. C. 21.

Art. 29.

Suit for compensation for seizure and sale of timber—3 O. C. 340.—A debt not moveable—16 I. C. 914.

Art. 32.

Suit for removal of trees newly planted by a grove-holder—11 O. C. 379.—Suit for removal of trees by landlord against tenant—S. C. 266.—Suit for recovery of possession of immoveable property joined with a prayer for permission to root up trees—S. C. 213—17 O. C. 282.—Suit for possession of land by removal of trees—Commission for local investigation—S. C. 213—17 O. C. 282.

Art. 36.

Damages for doing an act out of malice—16 O. C. 211.

Art. 44.

Alienation by *de facto* guardian, 5 O. C. 197—7 O. C. 181—9 O. C. 97—11 O. C. 1—15 O. C. 49.—Sale by mother—9 O. C. 97—10 O. C. 367—17 O. C. 52.—Alienation by brother—10 O. C. 321—16 O. C. 119.—Voluntary alienation by some heirs, 12 O. C. 146.—Sale by a wholly unauthorized person, 15 O. C. 49.—Suit by minor after attaining majority for possession of land sold by guardian during his minority, 11 O. C. 346—Not F. 17 O. C. 52.—Redemption suit by minor 12 years after sale—Ratification—11 O. C. 1.—See Guardian and Minor.

Art. 48, 49, 120, 131, 132.

See Art 131—S. C. 306—2 O. L. J. 113.

Art. 57.

Suit for money advanced to minor—Registration of bond executed by guardian—10 O. C. 38.

Art. 60.

See Art. 68.

Art. 61.

See Art. 57.—Suit against reversionary heir for recovery of money paid to redeem mortgage of his predecessor in title—6 O. C. 212—Suit for contribution by joint debtor—13 O. C. 23.

Art. 62.

See S. 68 T. P. Act—21 I. C. 581.—Suit to recover money realized after partition of family property—15 O. C. 397—S. C. 246—Suit for recovery of price of property to which the judgment debtor has no title—Suit for recovery of price paid for non-

existent property—14 O. C. 74—See Art. 116—Suit for property to which the judgment-debtor has no title—14 O. C. 74.

Art. 64.

Meaning of "Account stated"—7 O. C. 166.

Art. 65.

Simple money bond—Right to sue in default of any of the conditions of the bond—16 O. C. 45—R. 32 I. C. 551—Whether applicable to suits for money charged on land, 7 O. C. 108.

Art. 65.

Cause of action—Deed of further charge—3 O. L. J. 714.

Art. 66, 67, 68.

Meaning of "single bond" and "bond subject to a condition"—8 O. C. 77—14 O. C. 129—16 O. C. 45—18 O. C. 86—32 I. C. 551—20 O. C. 132.

Art. 75.

Suit brought more than 3 years from the date of default in payment of two instalments—10 O. C. 6—14 O. C. 129—18 O. C. 86.—See Bond —41 I. C. 423.

Art. 80.

See Art. 60 and 68.

Art. 83.

Suit by vendee to recover rent assessed on the land and decreed against him—15 O. C. 25.

Art. 89.

Suit against receiver—3 O. C. 171.

Art. 90.

Suit by Bank against pleader for negligence—10 O. C. 95.

Art. 91.

See S. 39 Specific Relief Act—1 O. C. 178—39 I. C. 456.—Inapplicability to cases where substantial relief claimed is not a declaratory decree, 3 O. C. 105—9 O. C. 292—10 O. C. 163—12 O. C. 164—24 I. C. 381.—Suit by one member of joint Hindu family that mortgage is invalid—13 I. C. 547. Suit for possession by avoidance of a fictitious deed—7 O. C. 319—If the plaintiff has had knowledge of the deed and could not succeed except by displacing the deed—1 O C. 229—Limitation for suits for declaration of right, 20 I. C. 147.—Decree, if instrument—8 O. C. 191.—See Art. 142.—Suit to set aside will—4 O. C 6—S. C. 222.—Suit to set aside sale deed —1 O C. 178, 229.—Knowledge of Board of Revenue is not knowledge of plaintiff—6 O. C. 142.—Suit for possession of property mortgaged and sold during minority of plaintiff, 11 O. C. 346—17 O. C. 52.

Art. 95 and 97.

Failure to get actual physical possession on account of mortgagor's fraud—Suit by mortgagee—13 O. C. 148—Suit for recovery of money secured by a mortgage deed found to be invalid—13 O. C. 155.—Possession—Title—Right of possessor to sue in ejectment—11 I. C. 537.—See Art. 115.

Art. 95.

Suit by usufructuary mortgagee for simple money decree—Fraud of mortgagor—3 O. L. J. 593.

Art 99.

See Art. 61—13 O. C. 23.

Art. 105.

Suit by mortgagor to recover surplus collections made by mortgagee

and for value of certain trees—4 O. C. 355—18 O. C. 30—20 O. C. 25.—Mortgage—Redemption—Mesne profits with interest thereon—Creditor having debtor's fund for payment to himself, 32 I. C. 729.

Art 109.

Possession disturbed on appeal—4 O. C. 355—Claim for mesne profit during a period preceding the three years next before the filing of the plaint—10 Cal. 785.

Art. 111.

Suit by vendor to recover the unpaid balance of the price of immoveable property by sale—9 O. C. 284.

Art. 113.

Suit by way of compensation for land to enforce partition arrangement—5 O. C. 140.—Suit for recovery of property based on an agreement to provide funds for litigation—10 O. C. 173.—A suit to enforce an award is not a suit for specific performance of contract—7 O. C. 369—42 I. C. 116.

Art. 115.

Suit for compensation for breach of an implied contract between mortgagor and mortgagee—8 O. C. 166.

Art. 116.

Suit to recover money secured by mortgage deed found to be invalid—13 O. C. 155.—Applicability of article—6 O. C. 30—S. C. 128.—Suit for interest on anamolus mortgage—7 O. C. 11—14 O. C. 106.—Running of limitation—Damages for breach of contract, 33 I. C. 746—See Bond—41 I. C. 423.—See Art. 113, 95, 97, 115.

Art. 118.

Suit brought to set aside adoption—9 O. C. 377.

Art. 119.

Suit by reversioner for recovery of possession brought more than 6 years from adoption—1 O. C. 30.

Art. 120.

Pre-emption suit in respect of mortgage by conditional sale—3 O. C. 184—1 O. L. J. 470—7 O. C. 8—2 O. L. J. 109—10 O. C. 374—12 O. C. 314.—In respect of sale of undivided share—7 O. C. 1, 206, 275.—Limitation for suits for declaration of right, 20 I. C. 147.—Declaration—Cause of action—Entry in Revenue Record—Order passed by Partition Officer for seeking declaration in Civil Courts—10 I. C. 11—8 O. C. 30, 303—7 O. C. 372, 187.—Suit for declaration of under-proprietary right—8 O. C. 30.—Declaration as to right of redemption—8 O. C. 303. Suit for arrears of rent—Declaration of title—Previous decree barred—14 O. C. 332.—Suit for possession and mesne profits or to declare that the defendant was a mere lessee and was liable to be ejected—3 O. C. 55.—Notice of ejectment cancelled—Suit for declaration that the defendant had no right as proprietor or under-proprietor—2 O. C. 79—6 O. C. 142—9 O. C. 292.—Suit to have it declared that defendant was an ordinary tenant—7 O. C. 187—7 O. C. 372—12 O. C. 15—14 O. C. 196—10 I C. 11 (13)—2 O. C. 79.—Suit for declaration of proprietary right—12 O. C. 320.—Suit to enforce pious obligation of Hindu son to pay his father's debt—9 O. C. 350.—Suit for possession joined with prayer for removal of trees—S. C. 213.—Suit against receiver—3 O. C. 171.—Suit for recovery of *gharwara* dues—3 O. C. 203.—Suit for removal of trees—S. C. 266.—Suit by mortgagor for excess of rents and profits, 4 O. C. 355.—Suit

to recover arrears under settlement decree, 7 O. C. 108.—Declaratory suit —Commencement of limitation, 20 O. C. 126.—Suit to recover money deposited with a lessee as security to ensure payment of rent payable under a contract of lease—13 O. C. 286. —Suit for possession of property mortgaged and sold during minority of plaintiff—11 O. C. 346—Not F. 17 O. C. 52.—Resumption of rent free grants—S. C. 276.—Pre-emption—Foreclosure decree—3 O. C. 184 7 O. C. 8—2 O. L. J. 109—1 O. L. J. 470—Suit for possession and mesne profits and in the alternative for declaration—3 O. C. 55—12 O. C. 164.—See Arts. 32, 95, 97.

Art. 123, 144.

Suit for share of estate which defendant legally bound to distribute—17 O. C. 157.

Art. 127.

Non-applicability of, where joint family property has passed to a stranger—15 O. C. 111.—Meaning of "share," 15 O. C. 111—397.

Art. 131.

Suit to establish right to annuity —S. C. 306—2 O. L. J. 113.—Right to receive offerings of shrine, 3 O. C. 351.

Art. 132.

Suit by vendor for the unpaid balance of the price of immoveable property by sale—9 O. C. 284.—Money charged on immoveable property—7 O. C. 108.—Money charged on rents and profits—*Naukar*—18 O. C. 380.—Suit for contribution by a person having a mortgagor's interest in certain property and paying off a decree for sale as against the property—4 O. C. 273. —Charge not created by simple loans—8 O. C. 132, 227.—Suit on simple mortgage—3 O. C. 156.—Not applicable to suits for *gharwara* dues, 3 O. C. 203.—A right to receive *nankar*—33 I. C. 461. —Suit to recover money left with vendee to pay off the mortgage, 33 I. C. 527.—Deed of further charge—Suit for recovery of money due on —18 O. C. 86—Contra. 14 O. C. 129.

Art. 134.

Suit for redemption—*Bonafide* purchase of absolute interest from mortgagee—9 O. C. 373—12 O. C. 84 —29 All. 471—31 All. 300—29 I. C. 403.—The word "purchase" in Act XV of 1877 does not include a mortgage—8 O. C. 233—6 O. C. 305.—Applicability of, 6 O. C. 305—2 O. L. J. 483—39 I. C. 582.—Suit to recover possession of property purchased from mortgagee—12 O. C. 84 —29 I. C. 403.—Sale in Court auction against mortgagor—6 O. C. 305.

Art. 135.

Suit by mortgagee for possession of mortgaged property—9 O. C. 147 —9 I. C. 1,038—16 O. C 157—18 O. C. 280—10 O. C. 69—2 O. L. J. 488.

Art. 136.

See Art. 144—6 O. C. 305—10 O. C. 17.—Suit for possession on payment of a sum directed by a decree —2 O. L. J. 500—Charge on mortgage—2 O. L. J. 500.

Art. 137.

Application of—35 I. C. 753.

Art. 140.

Suit by assignee of devisee—6 O. C. 305, (321).—Applicability of—18 O. C. 289.

Art. 141.

Successive reversioners—One reversioner does not claim from an

other—8 O. C. 124.—Suit for recovery of possession and not merely for declaration that adoption is invalid—9 O. C. 377—7 I. C. 427 (430). —Applicability of—18 O. C. 289.

Art. 142.

"Possession" explained—Presumption of, when title established —8 O. C. 177—19 O. C. 374—18 O. C. 43.—Suit by son born since separation—5 O C. 6.—Suit for possession of land free of house and trees—Claim for removal of trees - 17 O. C 252.—See Art. 32—S. C. 213. —Suit for share against vendee—S. C. 173.—Suit for joint possession of a share in a joint family property—5 O. C. 6.

Art. 143.

See 17 O. C. 157—1 O. L. J. 204.

Art. 144.

Sale by unauthorized guardian—Suit to set aside—13 I. C. 976. Joint family property passing to a stranger by sale—15 O. C. 111.—Suit to recover property covered by compromise—decree—8 O C. 191—Succession to property of Armenian Christian residing in Oudh—6 O. C. 305. —Suit by minor to recover property alienated by his mother—10 O. C. 367.—Applicability to a suit in which there is a prayer for dispossession, 2 O. C. 79—9 O. C. 292.—Redemption from co-mortgagor, who has redeemed the entire property—8 O. C. 233—9 O. C. 91—18 O. C. 95—16 O. C. 163.—Applicability of—33 I. C. 371.—Suit to recover property awarded by arbitrator, 42 I. C. 116.—Mortgage suit—Preliminary decree for sale—Transfer of mortgaged property to stranger—Adverse possession—Commencement of limitation, 4 O. L. J. 481.—Amendment of issue after trial on issues orginally framed is completed, 1 O. L. J. 204.—Suit for possession by one heir against another heir—17 O. C. 157.—Adverse possession over a right of equity of redemption—17 O. C. 294.—Suit by minor for redemption, 11 O. C. 1—17 O. C. 294.—Redemption—Adverse possession—Redemption by one of co-mortgagors—16 O. C. 163.—Time fixed under a foreclosure decree expired—Mortgagee's possession as absolute owner—8 O. C. 33—9 I. C. 431—1 O. L. J. 440.—Suit to redeem converted into a suit to recover possession on payment of a charge—10 O. C. 17.—Acquisition of mortgagee rights by prescription—41 I. C. 852. —What the prayer ought to be—2 O. C. 79—9 O. C. 292.—Suit for share against vendee—S. C. 173.—Suit for possession of property mortgaged and sold during minority—11 O. C. 346—17 O. C. 52.—Suit by sister—Cause of action—13 O. C. 183.—See Art. 44.

Art. 147.

Application to suit on simple mortgage, 3 O. C. 156—30 Mad. 426.

Art. 148.

Mortgage, redemption, 38 I. C. 626—42 I. C. 119—When found that plaintiff has a share in equity of redemption, 15 O. C. 7.

Art. 156.

Applies to cross appeal on full stamp—S. C. 160.

Art. 158.

Effect of omission to apply under the article—2 O. C. 355.—See Arbitration, 17 I. C. 320.—See Award, 14 O. C. 308.—Sch. II, Para 8 C. P. C.—16 O. C. 94.

Art. 165.

Applies to the case of a dispossessed judgment debtor disputing the right of decree holder to be put in possession—6 O. C. 44—17 O. C. 94—See 34 I. C. 231.

Art. 170.

Suit by pauper, when instituted—4 O. C. 250.

Art. 176.

Application by deceased plaintiff's son for substitution of name—16 O. C. 194.

Art. 177.

Application for permission to appeal to Her Majesty—Amendment of decree—2 O. C. 235.

Art. 179.

The date of the decree appealed from—2 O. C. 236.

Art. 181.

Application under, O. 34 R. 6 (S. 90 T. P. Act)—6 O. C. 114—9 O. C. 288—10 I. C. 21—20 O. C. 205.—Foreclosure suit—1 O. L. J. 433.—Right of mortgager—17 O. C. 347.

Art. 182.

Steps in aid of execution.—(*a*) Application of legal representatives of, to be brought on record, 9 O. C. 281; (*b*) Application asking for transfer of decree to another court—16 O. C. 70; (*c*) Application under, O. XXI, R. 72 C. P. C.—8 O. C. 161; (*d*) Application to send notice to the mortgagee to withdraw the money—14 O. C. 10—14 O. C. 100—1 O. L. J. 440—34 I. C. 349; (*e*) To prosecute a suit to set aside an order releasing property from attachment—4 O. C. 333; (*f*) Application to realize money deposited in Court—18 O. C. 359.—*No step*; (*a*) Application by a *Benamidar*, 2 O. C. 388—10 O. C. 263; (*b*) Deposit of process fee—Request of the Agent for the issue of warrant—14 O. C. 124—20 O. C. 332.—Decree capable of execution even though no time fixed for payment—14 O C. 100.—Final decree or order—5 O. C. 143—3 O. C. 50—6 O. C. 48.—The decree (in appeal cases) is that of the Appellate Court—5 O. C. 301.—Time begins to run from the date of the last previous application—S. C. 56.—Meaning of "Appeal"—5 O. C. 217.—Period for application of execution of a registered decree—6 O. C. 9.—Application consigned to record by Government order—Renewal of proceedings—2 O. C. 110.—Sch. III, Para 11 (3)—C. P. C. 13 O. C. 303.—Execution of decree—13 O. C. 48—14 O. C. 124.—Mortgage, 14 O. C. 10.

Local Rate 1894.

Patwari rate, Chaukidari rate, liability of under-proprietor to pay—5 O C. 43—R. A. R. 22—9 O. C. 65.—Cases—Suit for recovery of—R. A. R. 19.—Principle of calculating such rates—S. C. 150.—Suit by superior proprietor against under-proprietor, 6 O. C. 299—7 O. C. 35.

Lunacy Act (XXXV of 1858).

Report or certificate by medical expert—7 O. C. 354—Power to lease lands of proprietor disqualified from lunacy—13 Cal. 81.—Appointment of manager—Failure of Court of Wards to assume superintendence—15 I. C. 265.—Adjudication order—Procedure for cancelling such order—16 I. C. 885.—Function of District Judge—Position of relatives of lunaties—3 O. L. J. 398.—Member of joint Hindu family governed by *Mitakshara*—12 O. C. 209.

Mahabrahmani.

Suit for share in offerings—5 O. C. 225—8 O. C. 339.—Suit for decla-

ration and for perpetual injunction —8 O. C. 339.—Representatives of parties to the agreement not bound, 11 O. C. 212.—Transfer of non-existent property—11 O. C. 212.—Jurisdiction—2 O. C. 276.—Suit to discharge function—Jurisdiction—2 O. C. 62—2 O. C. 276.—Agreement to divide offerings in future—Right to resile from—20 O. C. 265.—See 5 O. C. 225—8 O. C. 339—11 O. C. 212.

Mahal.

Definition of—1 O. C. 45.—What constitutes—4 O. C. 365—10 O. C. 257.—See Pre-emption and Oudh Laws Act.—Partition of—1 O. L. J. 38.—S. D. 1 of 1909.

Mahant.

Deed of endowment—Right of trustee to recover money lent out of the profits of dedicated property —8 O. C. 297.—Suit against dismissed, by his successor for possession —3 O. C. 299.—13 O. C. 177.—Power of—12 O. C. 236.—Of *Sangat*, property held by—2 O. C. 340.—12 O. C. 236—Removal of by Court—2 O. C. 340—6 O. C. 355 (358).—Suit by, for cancellation of sale deed—6 O. C. 355—12 O. C. 236—16 O. C. 109.—Right to acquire property by—Subsequent treatment of property—Sufficient evidence of endowment—17 O. C. 336.

Maintenance.

See Arbitration—23 Cal. 838—7 O. C. 218.—Construction of a grant for maintenance, 23 All. 194.—S. 200 Cr. P. C. applicable to maintenance cases.—Appearance of *pardanashin* lady—S. C. 142.—After divorce—S. C. 239.—Effect of a recital that the grant is made for—S. C. 291.—For relatives of *Talugdars*, S. C., 42.—13 O. C. 74.—Of *Chaukidar* implied contract for, 7 O. C. 35.—Of family, grant by Government for—11 Cal. 1.—Out of the property of deceased Hindu, persons entitled to—S. C. 281.—See SS 488 Cr. P. C. 2—O. L. J. 251—17 O. C. 260, 331—9 O. C. 49—See Champerty—8 I. C. 500.—Proof of custom, 12 I. C. 403—Jurisdiction of Rent Courts to determine whether it is payable or not, 13 O. C. 74.—Whether an interest in property—12 O. C. 37.—Enforcement of a declaratory decree—1 O. L. J. 403.—Order for, of illegitimate son, 17 O. C 331.—Of peaceful possession, 17 O. C. 21—Paid by mortgagee, 11 O. C. 126.—To widow in joint family—2 O. L. J. 502—Claims for arrears of rent against maintenance holder—9 O. C. 179.—See "Presumption," "Grant" and S 488 Cr. P. C. and S. 39 T. P. Act.

Magistrate.

Presence of at every hearing—17 O.C 142.

Mahomedan Law.

Acknowledgment Dower—Endowment—Gift—Guardian—Inheritance Joint family—Legitimacy—Maintenance—Marriage—Pre-emption—Restitution of conjugal rights—Trust *Wakf*—Widow and wife—Will.

Acknowledgment.

Child born of a slave—Paternity unknown.—Burden of proof—Old S. C. 33.—When sufficient, to confer status of legitimacy, 13 O. C. 255.—Value of acknowledgment and proof —19 O. C. 192.—Evidence of intention—3 O. L. J. 654.—See Legitimacy.—9 O. C. 246—13 O. C. 255.

Dower.

Deed of, construction of—10 M. I. A. 252.—Consummation not necessary for claim for—16 O. C. 325.—Prompt or deferred—Certificate of administration—19 W. R. 315.—Ef-

fect of liabilities of deceased on claim for—16 O. C. 325.—Restitution of conjugal rights—Non-payment of prompt dower—S. C. 57—10 O. C. 11—15 O. C. 127.—Law in Oudh —Discretionary power of the Court over the amount of—21 Cal. 135 Lien extinguished after decree for, —18 O. C. 263.—Heritable *Wasiqa* to be taken into account—7 O. C. 176—10 O. C. 241—33 I. C. 516.—Whether wife can refuse access till paid—S. C 57—10 O. C. 11 3 A. L. J. 432—15 O. C 127.—Minimum dower—14 O. C. 356. Whether consummation necessary—Amount of dower where consummation did not take place.—22 I. C. 529.—Decree against assets left by husband—33 I. C. 516.—Possession in lieu of dower —Right of husband's heirs to oust her—15 O. C. 257—Dist. 18 O. C. 263.—See S. 5 Oudh Laws Act—Cause of action for claim of, 19 O. C. 171.

Endowment.

Power of *Shea* to create valid *Waqf* by will, 25 All. 236.—See *Waqf*—Trust.

Gift.

Of Government promissory notes, 11 M. I. A. 517—Resumption of, 10 Cal. 238.—*Hiba-bil-ewaz*—See pre-emption—1 O. C. 75—32 I. C. 516 —9 O. C. 196.—By a person not in possession—13 O. C. 347—20 I. C. 286—1 O. L. J. 133—20 I. C. 286.—Delivery of possession—9 O. C. 196 —12 B. L. R. 169—13 O. C. 347—5 I. C. 946—20 I. C. 286—Invalid of right in abeyance—15 O. C. 7. —20 I. C. 286—Deed of, inadmissible—Admissibility of oral evidence —18 O. C. 122.—30 I. C. 281.—Effect of invalidity of a portion of, on other separable portion—32 I. C. 516—2 O. C. 244.—In consideration of useful services and natural love—Revocation—20 O. C. 40—Actual or constructive possession, 13 O. C. 347—20 I. C 286.—Deed in favour of the son of a paramour and *Mukhtar*—16 O. C. 378.—Effect of delivery of possession over one only of two properties—1 O. L. J. 133.—Possession subsequent to— 17 O. C. 60.—Portion of, 2 O. L. J. 758.—When it is complete, 17 O. C. 60.—In respect of property not capable of physical possession—1 O. L. J. 133.—Of an equity of redemption—3 O. L. R. 71.—With consideration, 9 O. C. 196—See "Hindu" Law" and "Gift"

Guardian.

Transfer of minor's property by mother—9 O. C. 97—10 O. C. 321—12 O. C 146—11 O. C. 1—Alienation by unauthorized guardian—18 O. C. 16 —Custody of a minor girl—14 O. C. 103.—Powers of to sell minor's property—15 O. C. 49.—Appointment of—15 O. C. 49.—Age of majority—10 O. C 1—247.—Transfer by one who is not—11 O. C. 1—17 O C. 294 —Brothers' power to deal with minor's property—10 O. C. 321—16 O. C 119.—Death of, before minor attains age of majority—10 O. C. 247. —Disqualification, by marriage with a man not related to the minor—14 O. C. 103.

Inheritance.

Childless *Shia* widow—Sup. 1 O. C. 6—19 O. C. 246.—Suit for share of inheritance against administrator—2 O. C. 17.—*Shia* dying without heirs—8 O. C. 184.—Custom excluding females—13 O C. 183.—Voluntary alienation heirs in possession for payment of debts of deceased—12 O. C. 146—Meaning of "landed property"—19 O C 246.

Joint family.

Joint interest—14 M. I. A. 401.—Distinction between joint possession and adverse possession—14 M. 153 (162)—Inference of joint possession—11 W. R. 45 22 W. R. 185—24 W. R. 1—22 Cal. 954—8 O. C. 177—19 O. C. 44—3 O. L. J. 447.

Legitimacy.

Status of children by *Muta* wife—What amounts to a declaration of—2 O. C. 115—Over 25 All. 236.—Presumption of—11 M. I. A. 94 Statement as to—19 O. C. 192.—Declaration by father—admission by one defendant—"*Barkhurdar*" does not necessarily import legitimacy—1 O. C. Sup. 49.—Long cohabitation—Presumption of marriage—Mother originally a prostitute—13 O. C. 170—14 O. C. 356—Mere recognition of sonship not sufficient—9 O. C. 246.—13 O. C. 255—14 O. C. 356.—See Marriage.—Acknowledgment—Proof of marriage—Essentials to be satisfied in case of fosterage relationship—1 O.L. J. 281.—See "Hindu Law, Inheritance and Succession."

Maintenance.

Grant—Duration of—3 O. L. J. 354—35 I. C. 764.—Not a charge on right to redeem S. C. 281.—See "Maintenance."

Marriage.

Presumption of—11 M. I. A. 194—3 M. I. A. 295—13 O. C. 170.—*Fazuli*, contracted by minor's mother. 2 O. C. 90.—Marriage contracted by sick man—16 O. C. 325.—*Muta* 2 O. C. 115—19 O. C. 192.—Impotency—2 W. R. 52.—Direct evidence of marriage unworthy of credit—Acknowledgment of wife and children—Children not coming in the witness box—20 W. R. 352—Mere keeping of woman within *parda* and treating her as wife—20 W. R. 352. Distinction between *Nikah* and *Shadi* marriage—10 C. L. R. 293.—Condition that wife will continue to live in her father's house, whether legal. —21 I. C. 87.—*Nikah*, before expiry of period of *Muta*—19 O. C. 246.

Pre-emption.

Personal law or usage—Mohamedan Law not applicable—1 O. C. 75—3 O. C. 110.—See "Pre-emption."

Restitution of Conjugal Rights.

Apprehension of cruelty and ill-treatment—25 I. C. 213—Legal cruelty—4 All. L. J. 60—W. N. All. 1892 p. 77—15 O. C. 159—18 B. 316—4 I. C. 974—Decree subject to payment of—10 O. C. 11.

Trust.

Non-applicability to—14 O. C. 356.

Wakf.

By will—25 All. 236—See 2 O. C. 115.—Illusory dedication—Small charge on profits of estate for religious and charitable purposes—27 All. 320—8 O. C. 379.—Nominally for pious purposes but substantially to provide maintenance for family—11 O. C 48.—Possession of *Mutawalli*—13 O. C. 369.—Expenses of *Fatiha*—9 I. C. 753.—Alienation of property—Elements necessary to prove—Money borrowed by unauthorized trustee, whether charge on property—18 I. C. 11.—Proof of—Appropriation of income, whether sufficient proof—Case to be made out by the plaintiff—Evidence to prove public grave-yard—16 O. C. 76—17 I. C. 303.—Can be created by will—Whether Government promissory notes can be subject of—19 O. C. 69.—Validity of *Wakfnama*—Word of *Mutawalli* not used—35 I.

C. 732.—Of profits only—32 I. C. 516.—Property, alienation of by *Mutawalli*—16 O. C. 109.—Members of disposer's family benefitted—4 O. L. J. 586.—Suit by vendor for cancellation of—Estoppel—6 O. C. 355—12 O. C. 236—16 O. C. 109.

Widow and Wife.

Custody of person of minor wife—S. C. 133.—Succession of a widow by local custom to a life interest—21 Cal. 157.—Could not dispose by will of more than one-third of the amount of dower fixed by Court—7 O. C. 176. Childless "Shia" widow—Possession in lien of dower—1 O. C Sup. 6—15 O. C. 257—Dist 18 O. C. 263—19 O. C. 246.—Possession of, in persuance of family custom—18 I. C. 367.—Possession to be actual and lawful—Meaning of lawful possession—17 O. C 157.—See "Dower"—Right to receive fixed annual sum—19 O. C. 246.

Will.

Construction of—8 Cal. 1.—What amount of dower, a wife can dispose of by will—7 O. C. 176—Construction of—19 O. C. 319.—Not required to be attested—4 O. C. 408.—In favour of heir—Consent given during last illness—Revival of original, on failure of subsequent—14 O. C. 49.—Witness ignorant of contents of—10 O. C. 209.—See "Will."

Majority.

Right of minor on attaining—5 O. C. 197.—Order appointing guardian cancelled—Age of—15 O. C. 153.—Admission of a mortgage debt by minor after attaining—9 I. C. 56.—Age of—10 O. C. 247.—Attainment of—15 O. C. 153.—Actions after attainment of—11 O. C. 159.—Ratification of compromise after attaining of—18 O. C. 95.—See Guardian and Minor.

Majority Act (IX of 1875).

Age of minority—10 O. C. 247.—Majority of defendant at entering into contract—Proof—1 O. L. J. 366

Malice.

Whether necessary in suits for damages, 13 O. C. 357.—Acts done out of—16 O. C. 211.

Malicious Prosecution.

Burden of proof—Want of reasonable and probable cause—S. C 294—5 I. C. 50—Damages with respect to—Meaning of "Prosecution"—False information to Magistrate—9 O. C. 357.—Notice of suit to Public Officer—9 O. C. 275.—Charge false to the knowledge of complainant—Malice—11 O. C. 371.—Meaning of "Prosecutor" and "Prosecution," 27 I. C. 449.—Malice—Inference from mere fact that prosecution has failed—Information from servant—5 I. C. 50.

Malikana.

Right to suit for, without proving previous receipts—7 O. C. 108.—See also 4 Cal. 839—2 O. C. 199.

Marginal Notes.

To Indian statutes—3 O. C. 120—7 O. C. 248.

Market.

Suit by Zamindar for declaration to hold market on his land—5 O. C. 380.—Prescriptive right—Establishment of rival market—Wrong when actionable—S. C. 20, 35.—As to Magistrate's power to proceed under, S. 144 Cr. P. C—See 14 W. R. Cr. 46 (50)—18 W. R. Cr. 22, 47—20 W. R. 53—16 Cal. 9—31 Cal. 990—15 I. C. 655.—Evidence of, value—See Pre-emption.

Marriage.

See Hindu Law, Mohamedan Law.—Suit for recovery of money paid in consideration of—3 O. C 241—4 O. L. J. 171.—Direct proof of—1 O. L. J 281.—Presumption in case of—13 O. C 170.—Relationship by—14 O. C. 193.—Throwing doubt upon validity of—1 O. L. J. 281.

Marwat.

Grant, nature of—S. D. 18 of 1910 —11 O. C. 240.—Not under-proprietary right, 11 O. C. 240.

Master and Servant.

Notice of termination of contract —S. C. 107—See also 9 I. C. 348—18 I. C. 699.

Merger.

Mortgagee—Purchaser—7 O. C 330—2 O. L. J. 73—12 O. C. 90—13 O. C. 35.—Court to consider the circumstances of the transaction, 12 O. C. 97.—Proprietary or under-proprietary rights—Mortgage of either rights before merger does not affect the other right after merger—13 O. C. 35—33 Cal. 1212.—Points to be considered in deciding question of —11 O. C. 183—12 O. C. 97—18 O. C. 35—Doctrine of, 13 O. C. 35.

Meaning Of.

"Ba mah Jeth ada kar den"—16 O. C. 206.—*Chaupal*, 10 I. C. 186.—Court rate of interest—1 O. L. J. 544.—Family arrangement—17 O. C. 108.—*Ghair kuf*—12 O. C. 110.—*Lagan Sarkari*—14 O. C. 41.—*Nankar*—22 I. C. 125.—Primogeniture, 13 O. C. 316—18 O. C. 188.—*Qabzadari*—S. D. 11 of 1912—29 I. C. 653.—*Reza milkiat*, 11 O. C. 164—Married women—17 O. C. 318.—*Malik*, 1 O. L. J. 470—12 O. C. 157—See also 3 O. C. 181, 258.—*Najib-ul-tarfain*—S. C. 171—Antecedent debt—10 O. C. 360—14 O. C 299.—*Nikasi*—1 O. C. 124.—*Vaslan bad naslan*—14 O C. 296.—Landed property—19 O. C. 246.—*Aulad pisari aur aulad dukhtari*—6 O. C. 132.—*Aulad*—3 O. L. J. 327—17 O. C. 68.—Brother —3 O. C. 120—7 O. C. 248.—*Ek Jaddi*—4 O. C. 71.—*Sarpanch*—16 O. C. 94.—Intestate—16 Cal. 556.—*Viran*—14 O. C. 23.—Landlord, 4 O. C. 24—*Lambardar*—5 O. C. 392.—*Mafrur*—2 O. C. 281.—*Mahal*—4 O. C. 365—13 O. C. 165.—*Mahrani Sahiba* as applied to wife or wives —15 C. 725.—Price—7 O. C. 31—18 O. C. 109—12 I. C. 413.—Heirs—8 O. C. 270—Town—7 O. C. 74.

Mesne Profits.

Open to the High Court to direct an enquiry as to—19 Cal. 159.—A person who had not himself received, not liable—Limitation—10 Cal. 785.—Assessment of—S. C. 253.—Separate suit for of the period for which mortgagor has failed to take account—8 O. C. 302—12 O. C. 152 —10 I. C. 11 (13) —Separate suit for—S. C. 21, 124—2 O. C. 939—13 O. C. 180—9 O. C. 224, 322—28 All. 161.—Decree awarding possession of immoveable property with, S. C. 283.—Order for additional court fee on—Fee already paid to be taken into account—1 O. C. 8.—Court fee on, accruing after institution of suit, 6 O. C. 351—Court fee on appeal—6 O. C. 86.—Decree for, and costs, separate application, 30 I. C. 213.—Agreement as to determination of, in execution—6 O. C. 275.—Claim by decree holder for, from the institution of suit until delivery of possession—S. C. 286—6 O. C. 159. —Decree silent as to, S. C. 286—22 Cal. 434—11 O. C. 235.—Interest on —Costs of funeral—S. C. 258.—Restitution of, to judgment-debtor—8 O. C. 254.—On specific and definite

shares—16 Cal. 397.—Second appeal in a suit for less than Rs. 500—Limitation—Jurisdiction—7 O. C. 202.—*Res judicata*—9 O. C. 254.—Meaning of—Decree awarding, without mentioning past or future—Actual realization no test—Liability for sums not realized—Rate at which collection charges may be allowed—16 I. C. 866.—Decree for, 2 O. L. J. 393.—Exclusion entitling a member to—16 O. C. 129.—Separate application for execution of decree as to, 2 O. L. J. 327.—Suit for possession subsequent to suit for, 9 O. C. 322.—Due at the date of suit for possession, 9 O. C. 224.

Minor

See Guardian and O. XXXII—Limitation for suit by assignee from—18 O. C. 34—1 O. L. J. 747.—When *exparte* decree against minor can be set aside, 19 O. C. 119.—Money advanced to, for litigation purposes—10 O. C. 38.—Grounds on which compromise can be set aside at the instance of—6 O. C. 175—9 O. C. 219—34 Cal. 83—10 O. C. 321—14 I. C. 6—16 O. C. 247—11 I. C. 105.—Major defendant described in plaint as minor—Representation if proper—32 I. C. 380.—Position of—16 O. C. 68.—Interest of—25 All. 407—16 O. C. 247.—Money advanced to a minor for his sister's marriage—Charge on family property—5 I. C. 413.—Invalid decree against, on an alleged consent—Proof of authority to bind, by consent—23 Cal. 934.—Personal liability of, for money borrowed for his use by guardian—Limitation, 7 O. C. 46.—Right of suit by, on attaining majority, 23 All. 394.—Suit by, to avoid Settlement Court decree—Admission by *Mukhtar*—Ratification, 4 O. C. 31.—Notice not served upon minor prior to appointment of guardian *ad litem*—32 I. C. 380.—Procedure when discovered that plaintiff was not, at the time of institution—5 O. C. 355.—Wife, suit for custody of—S. C. 133.—To be allowed benefit of doubt—16 O. C. 261.—Wrongful admission of title against—24 Cal. 853.—When bound by compromise entered into by his father, 18 O. C. 95.—Assent of—2 O. C. 19.—Application for review of judgment—5 O. C. 316.—Plea of minority—Burden of proof—S. C. 265.—Decree without appointment of guardian *ad litem*, 5 O. C. 9.—Proper representation—22 I. C. 923—11 O. C. 319—5 O. C. 197—13 O. C. 123, 158, 247—10 O. C. 321.—Contract respecting estate of, 7 O. C. 181—9 O. C. 97—10 O. C. 321—11 O. C. 1—12 O. C. 146—16 O. C. 119—17 O. C. 234—15 O. C. 49—17 O. C. 52.—Mortgage by—30 Cal. 639.—Registration did not extend the period of limitation against—10 O. C. 38.—Not debarred from taking property, 18 O. C. 115.—Dismissal of a suit upon a compromise entered into by the Court of Wards—S. C. 199, 200, 233—4 O. C. 31—8 O. C. 202.—Not entitled in the execution department to challenge the validity of decree, 7 O. C. 199.—Suit for possession of property mortgaged and sold during minority of plaintiff—Limitation—11 O. C. 346—17 O. C. 52—16 O. C. 119—15 O. C. 111, 397.—Age of—10 O. C. 247—11 O. C. 159—15 O. C. 153.—Not to be declared bankrupt or made party to a petition for insolvency—16 O. C. 68.—16 O. C. 206.—Suit brought by, for possession—Money borrowed for legal necessity—Charge—Form of decree to be passed in such cases—14 I. C. 14.—Suit instituted without next friend or guardian, 11 O. C. 159.—Admission of mortgage debt after becoming major, 9 I. C. 56.—Agreement on behalf of—14 I. C. 6.—Decree in favour of, subject to payment of debts, 11 O. C. 1.—Decree or order made against, 13 O. C. 158.

—Suit by, to set aside a decree, 10 O. C. 321.—Suit by, after attaining majority for possession of land sold by guardian, 17 O. C. 52.—Suit for redemption, 12 years after sale—11 O. C. 1.—Claimants to exproprietary rights, 2 O. L. J. 774.—To be allowed benefit of doubt in case of procedure —16 O. C. 261.—Burden of proof— 2 O. L. J. 228.—See "Compromise," "Majority," "Guardian."

Misjoinder.

See Causes of Action—See O. I. R R. 1, 4, 9, 13 and O. II, R. R. 3, 6 C. P. C.—Of Parties—See 3 O. C. 215— Sup. O. C. 18—1 O. C. 215—2 O. C. 149—10 O. C. 33.—See *Res judicata* —9 O. C. 339.

1. Form of Mortgage and Burden of Proof.

Proof of mortgage relied on by plaintiff—Admission of defendant, 3 O. C. 173.—Of moveable property —1 O. C. 191—6 O. C. 230.—Mortgage and sub-mortgage of property which subsequently became separate property of mortgagor—5 O. C. 335.—Stipulation as to taking of possession in *Khali Fasli Jeth*—4 O. C. 347—6 O. C. 223—9 O. C. 144— 16 O. C. 206—34 I. C. 184.—Mortgage of land part of which subsequently transferred by mortgagor to another—5 O. C. 176.—Signed by stranger with mortgagor's authority —6 O. C. 279.—Recital—Admission by mortgagor at registration when admissible in evidence against auction—Purchaser—21 I. C. 554.—A paramount title can not be drawn into controversy in an action brought upon a mortgage—1 O. L. J. 261—See 5 O. C. 94.—Persons not made party—Effect of decree—5 I. C. 151.—Deposit of consideration with mortgagee—Suit for recovery of money—8 O. C. 5—11 O. C. 217 —34 I. C. 387.—Proof of ancient mortgage—Entry in partition, record, how far evidence of—20 O. C. 336.—Extinguishment of, on execution of second mortgage, 12 O. C. 285.

2. Construction.

Of instruments of mortgage—11 Cal. 237—12 I. C. 352.—Anomalous mortgage—Interest, not a charge—7 O. C. 11 - 14 O. C. 106—6 O. C. 167 —10 O. C. 218—16 O. C. 90—18 O. C. 10—(2 O. L. J. 165).—Operative words in a deed—General language —26 Cal. 395.—Sale of benefit of mortgage—Immoveable property— S. C. 301.—Usufructuary mortgage —Personal covenant to pay—10 O. C. 14.—Simple mortgage—Personal covenant to pay implied, 16 O. C 90.—Compromise in Settlement Court not amounting to mortgage —10 O. C. 17.—Meaning of *Ba mah Jeth ada kar den*—16 O. C. 206.— Time whether essence of contract— 4 O. L J 334—See also 5 O. C. 127 —6 O. C. 223.—Mortgage by way of conditional sale—Test of personal liability—12 O. C. 275—16 O. C. 90, 30 I. C. 224.—Mortgage or sale—Intention of parties—1 O. L. J. 703— See Pre-emption.—Effect of covenant in 17 O. C. 313.—Of deed, compound, interest, 10 O. C. 92.—Possession in default of payment, 11 O. C. 323—18 O. C. 10.

Possession.

See Account—4 O. C. 171.—Suit for, by mortgagee—Declaration concerning mortgage money when premature—2 O. C. 145.—4 O. C. 171. —Mortgaged property sold twice in execution of decree on prior and subsequent mortgage—Purchasers —Suit for—7 O. C. 243—29 All. 339.—Decree for redemption on pay-

ment of a specific sum—Suit for possession on payment, S. C. 256—1 O C. 289—6 O. C. 239—8 O. C. 261—14 O. C. 257 (263, 264).—Suit by mortgagee for—Limitation—9 O. C. 147—9 I. C. 1,038 (1,039)—16 O. C. 157.—Suit by mortgagee for, entitled to foreclosure also—12 O C. 21.—Purchaser at sale in execution of decree for sale to which puisne mortgagee was not made party—Purchaser at sale in which prior mortgagee was not made party—12 O. C. 133—13 O. C. 50, 62.—Mortgagee's right to take possession—Possessory right unaffected by subsequent mortgage.—Right of usufructuary mortgagee to resist a suit for, by a puisne mortgagee, 14 I. C. 735.—Suit for possession not a suit for specific performance, 10 I. C. 190—10 O. C. 218.—Failure to get actual, on account of mortgagor's fraud—Limitation—13 O. C. 148.

Sale.

Mortgagee's right to put up for sale any portion of mortgaged property—6 O. C. 197.—Joint mortgage—3 O. C. 8.—Limitation of suit for sale not effected by subsequent transaction between mortgage and third person who pays off mortgage debt—17 O. C. 38.—Purchase of mortgagor's right by mortgagee in execution of sale of third party—7 O. C. 307, 8 O. C. 327, 409.—Second mortgagee must redeem before putting up for sale, 3 O. C. 254—27 I. C. 960.—Words "*rehn*," "*arh*," "*mustaghraq*," whether convey power of, 20 I. C. 870—See S. 67 T. P. Act.—Respective rights of auction purchasers at the two sales—14 O. C. 89.

Hindu Law.

Liability of members on mortgage executed by *Karta*—25 All. 407.—By Hindu widow—1 O. C. 30—23 Cal. 766—4 O. C. 341—26 Cal. 707—2 O. C. 209—Mortgage of joint family—Liability of son under decree obtained by mortgagee against father—4 O C 93.—Reversioner bound even though a portion of mortgage money was for legal necessity—16 O. C. 283.—See redemption.—Money advanced to a minor for his sister's marriage—Charge on land—5 I. C. 413.—Mortgage of joint Hindu family property by one of family members—21 I. C. 581.

Contribution.

Doctrine of—Plea that at the time of, right of original creditor had become time-barred, 16 O. C. 285.

Redemption.

Suit by son, mortgage on which has been redeemed, 6 O. C. 101, 14 O. C. 257.—Second suit for, S. C. 132, 238—2 O. C. 139—3 O. C. 371—6 O. C. 367—8 O. C. 361—9 O. C. 7—14 O. C. 257.—Decree of Settlement Court declaring rights of parties, subsequent suit for—1 O. C. 289—6 O. C. 239—8 O. C. 361—7 O. C. 259—38 I. C. 626.—Subsequent mortgagee's right of, 3 O. C. 254—4 O. C. 100.—Fresh suit for, 33 I. C. 771.—No right within time—5 O C. 148.—Mortgage of joint property which became separate property of mortgager, right of mortgagee to redeem sub-mortgage, 5 O. C. 335—9 O. C. 233.—Deed in which no time for, fixed, 8 O. C. 233—18 O. C. 95—Inconsist pleas taken, 4 O. C. 199.—Not allowed, 41 I. C. 171—20 I. C. 61.—Declaration as to right of, limitation, 8 O. C. 303—10 I. C. 11.—Time of, stipulation as to season, 6 O. C. 223—9 O. C. 144—16 O. C. 206,—34 I. C. 184.—Under-proprietor's right of, on mortgage of superior right—5 O. C. 335.—Mortgagor and mortgagee acquiring interest in property, 5 Cal. 898—10 O C. 81—21 I. C. 251.—Right of person interested in part, 4 O. C. 273—6 O. C. 223—279.—

9 O. C. 63—10 O C. 81—40 I. C. 381. —By one having no title to mortgaged property, 4 O. C. 320.—Plea that mortgage was 50 years old and irredeemable, S.C. 129.—Second mortgagee bringing property to sale without offering to redeem first mortgage, 7 O. C. 330—27 I. C. 960.—Decree, profits after decree till possession— 19 O. C. 161.—Courts power to allow, irrespective of unreasonable terms 17 O. C. 313—25 I. C. 912—16 O. C. 267.—Not allowed by assignee of mortgagor in a suit for possession by mortgagee, 10 I C. 190.—Without payment of deed of further charge, 17 O. C. 388. —Absence of stipulation restraining, before certain period, 17O. C. 218.—Deed of further charge, position of purchaser of one of mortgaged properties, 3 O. L. J. 402.—See: "Consolidation of morgages" and "clog' Interest not demandable in addition to usufruct O. P J. 211.—Mortgage money being paid up from surplus profits, 13 O. C. 128.—Mortgage by grove-holder, Zamindar's right of, 12 O. C. 201—Deficiency in the profits by virtue of decree passed in favour of third person 18 I. C. 407.—Of whole against the will of—10 O. C. 81, 193 —2 O. C. 344—4 O. C. 199.—Right of when mortgagee sues for possession —18 O. C. 105.—After time fixed without extension of time—14 O. C. 10—1 O. L. J. 433—19 O. C. 30.—Release by one of several heirs of mortgagee, 18 O. C. 154.—Personal covenant not to redeem before satisfaction of subsequent mortgage, 17 O. C. 303.—Account, maintenance paid by mortgagee, 11 O. C. 126.—Old mortgage, proof, admission, 11 O. C 285.—Amount payable, 12 O. C. 133—13 O. C. 62.—Terms of, 9 O. C. 377.—Out of Court account, 18 O. C. 30.—Assignment of mortgage, what amount mortgagor should pay, 4 O. C. 210.—Subsequent suit by puisne mortgagee for, adjustment of account—19 O. C. 39.—Right to be exercised at any time before order absolute—19 O. C. 30.—Improbability of—16 O. C. 9—15 O. C. 285. Effect of (*a*) on original mortgage, right of sub-mortgagee, 8 O. C. 140, 12 O. C. 260—18 I. C. 389.—(*b*) on leases granted by, 14 O. C. 204.—(*c*) as to improvements, 9 O. C. 18. —Suit for by vendee, amount returned by mortgagee to mortgagor —19 O. C. 12.—Duty of Court, rectification of error in judgment—12 I. C. 66.—Valuation of suit, S. C. 267 —6 O. C. 130.—Question as to correct amount when to arise, 4 O. 171. —Right of puisne mortgagee, 10 O. C. 193—Right of usufructuary mortgage—18 O. C. 280.—Right of vendee, 10 O. C. 145.—Original mortgage deed or copy not produced, existence of mortgage admitted, terms not proved, 1 O. L. J. 442—10 I. C. 7.—Discharge of portion of mortgaged property by proportionate mortgage money, arrangement to hand over property other than mortgaged for payment of mortgage money when unregistered, 10 I. C. 196.—Suit not bared on the ground that Settlement Officer had expunged mortgagor's name from *Khewat*—9 I. C. 431—8 O. C. 33—Payment of money not charged on property, 18 I. C. 461.—Proof in such suit, 18 I. C. 229.—Person inheriting part of mortgaged property can not redeem more than his share against will of mortgagee also acquiring part of the same, 21 I. C. 251—10 O. C. 251.—And foreclosure right whether co-extensive, 27 I. C. 581—17 O. C. 313.—Alternative reliefs, fresh suit for, 27 I. C. 575.—Zamindari right, mortgage by grove-holder—12 O. C. 197, 201;—16 O. C. 341—1 O. L. J. 86.—Whether can be allowed, 4 O. L. J. 365—17 O. C. 313.—See SS. 60, 95 T. P. Act.—Adverse possession over right of

equity of, 17 O. C. 294.—Of mortgage of 1835, time of 18, O. C. 95.

Foreclosure.

Regulation XVII of 1806—Service of copy of petition and of *Parwana* in the manner provided, essential, 11 Cal. 111.—Suit for—Foreclosure of father's interest having been absolute, 7 O. C. 137.—Pre-emption—Limitation—Costs of foreclosure suit—3 O. C. 184—7 O. C. 8—1 O. L J. 470—2 O. L. J. 109.—Commencement of proceedings before Act IV of 1882 came into force.—*Forum* of decree—S. C. 85.—Right to sue for—Limitation—16 O. C. 157—9 O. C. 147—9 I. C. 1038 (1039).—Decree for foreclosure against auction purchaser—whether Court gives warranty of title in execution sales—1 O. L. J. 50.—Decree preliminary and final—Mortgagor's right to deposit after 27 years before order absolute—Adverse possession—1 O. L. J. 433—1 O. C. 91—8 O. C. 33—14 O. C. 10.—Decree for, 11 O. C. 26.—Effect of, when puisne mortgagee no party—10 O. C. 356.

Interest.

In anamolous mortgage, 7 O. C. 11.—14 O. C. 106.—Onerous, duty of Court, 40 I. C. 369.—Not to cease on part payment, 6 O. C. 135.—Payment of, after date fixed by decree, 3 O. C. 129.—Obligation of mortgager to pay on mortgagee's taking possession, 5 O. C. 286.—Compound, 4 O. C. 347—10 O. C. 69, 92—38 I. C. 537—11 O. C 307—2 O. L. J. 402.—Court's power to vary rate of.—19 O. C. 159—16 O. C. 267.—Continues to run after period fixed—34 I. C. 745.—For period of ouster, 4 O. L. J. 348.—Paid out of profits, 17 O. C. 218.—When usufructuary mortgagee does not take possession of property—9 O. C. 144—10 O. C. 29—11 O. C. 323—16 O. C. 56—18 O. C. 105.—See 18 O. C. 10.—Arrears of unpaid when to be paid, 10 O. C. 29.—Equitable, sale of liable to pre-emption, 10 O. C. 273.

Certificate.

Effect of, as evidence—Endorsement by Registering officer on deed, of statement made by mortgagor—23 Cal. 483.

Mortgage of Occupancy Holding.

See O. R. Act S. 5.

Mortgagee.

Prior, to question validity of subsequent mortgage—2 O. L J. 480—Prior and puisne—10 O. C. 145.—Puisne—10 O. C. 356, 193, 145.—12. O. C. 133—2 O. L. J. 480, 488—18 O. C. 347—10 I. C. 174—21 I. C. 554.—Redemption from *bona fide* purchaser from—9 O. C. 373.—Relief about surplus amount in the hands of—13 O. C. 32.—Report by, of transfer S. D. 2 of 1911.—Usufructuary, suit for possession—Default of, in making redemption of prior—18 O. C. 280.—Failure to perform his part of contract—11 O. C. 89—19 O. C. 328.—Effect on mortgagor's dealings with property after date of mortgage—15 O. C. 239.—Suit for possession by, entitled to foreclosure also—12 O. C. 21.—Deed invalid—Suit for money—13 O. C. 155.—Right as to substituted security can not be defeated by plea of *bona fide* purchase without notice—1 O. L. J. 175.—Liabilities of second mortgage when no party to suit for redemption of prior mortgage by mortgagor—4 O. C. 100.—Claim for excess revenue paid by—40 I. C. 402.—Claim by, to retain possession of rest of security after expiry of term in order to realize deficiency of mortgage money—S. C. 304.—Rights of, to sue for possession against purchaser of part of mortgaged property—18 O. C.

369.—Reduction of, security by acts beyond mortgagor's control—Acquiescence of—24 All. 521.—Mortgage simple in its inception but convertible into usufructuary—Right of mortgagee to sue for mortgage money—Effect of breach of condition—Waiver—6 O. C. 167—18 I. C 286.—Power of to grant *pattas*—Power to grant perpetual lease—3 O. C. 105—Duty of—42 I. C. 66.—Suit for mortgage debt against mortgagor's holdings, mortgaged property under lease—6 O. C. 18.—Transfer of mortgagee's rights to a third party—Mortgagee's right to question validity of—6 O. C 362 -7 O. C. 181—14 I. C. 29.—Suit for possession—Limitation—9 O. C. 147—9 I. C. 1,038 (1,039)—16 O. C. 157—20 I. C. 465.—Effect of transfer of right—Compromise binding on mortgagee's heirs—20 I. C. 61.—Right to put up for sale any portion of mortgaged property—6 O. C. 197.—Suit for fore closure and suit for mortgage money are not suits founded on the samc cause of action—Limitation—40. C. 293.—Payment of prior mortgage by subsequent encumbrancers as against intermediate charge.—3 O. C. 254.—Failure to get actual physical possession on account of mortgagor's fraud—Suit by mortgagee—Limitation, S. C. 280—13 O. C. 148—9 O. C.144—16 O. C. 29, 56—11 O. C. 323—Adverse possession—12 O. C. 45.—Right to enforce his mortgage of an undivided share—Share or cash allotment in lieu of share, to be followed—16 O. C. 161.—Bound to pay money paid for redemption of prior mortgage—10 I. C. 90.—Suit to recover mortgage money not a suit for specific performance—10 O. C. 69.—Suit for possession in default of payment of interest—10 O. C. 218—10 I. C. 190 (192)—15 O. C. 239.—5 O. C. 148—30 I. C. 258, 289—Default in payment of instalment—8 O. C. 286.—Effect of payment to one of joint mortgagees—14 O. C. 45—18 O. C. 154.—Effect of accepting deed of further charge from some of the mortgagors—11 O. C. 73.—Mortgage by way of conditional sale—Mortgage consideration not capable of being enforced when deed executed—20 I. C. 47.—Puisne mortgagee not made party to previous suit on prior and subsequent mortgages—18 O. C. 347—21 I. C. 554.—Prior and subsequent—Prior mortgagee's suit decreed—Mortgaged property sold and purchased in part by prior mortgagee—Suit by subsequent mortgagee—Redemption piecemeal and partial—2 O. L. J. 73.—A suit for possession and account by lessee against mortgagee treated as suit for redemption—4 O. C. 257.—Holding a single decree on two mortgages—Right to appropriate—11 O. C. 377.—Prior mortgagee to question validity of subsequent mortgagee—2 O. L. J. 140, 73—Arrangement between mortgagee and purchaser of portion of equity of redemption—Extinguishment of mortgage—Limitation—32 I. C. 729.—Option—waiver—commencement of limitation—20 O. C. 132.—Payment of portion of consideration money—Suit for possession—Limitation—18 O. C. 280.—Enhanced land revenue paid by—4 O. L. J. 148.—Application to send notice to, to withdraw mortgage money—14 O. C. 10.—Permanent lease in favour of—11 O. C. 89.—Prior right of to compel puisne to redeem—10 O. C. 193, 356, 13 O. C. 50.

Mortgagor.

Mortgagee unable to obtain possession and consequently failing to recoup money advanced—Suit by mortgagor on expiry of term to recover possession—25 All. 115.—Under-

taking by, to pay on a later security along with money due on earlier security—16 O. C. 267.—Purchase by mortgagee of half share of mortgaged property subject to entire mortgage debt—Purchase of equity of redemption by mortgagee at a sale in execution of money decree—Mortgagor's suit for possession—4 O. C. 341—10 O. C. 280.—Suit by, to recover surplus collection—Limitation —4 O. C. 355—18 O. C. 30.—Commission agreed to be paid to mortgagee—Mortgagor's liability—30 I. C. 323.—Mortgagor in possession, power to grant perpetual lease—30 I. C. 258.—Personal liability of—Transfer by way of sale—Promise as to payment of money within fixed period—30 I. C. 224.—Hypothecation of some more property to safeguard mortgagee's interest—Possession taken by mortgagee—Mortgagor entitled to get back possession of hypothecated property on satisfying the contingency—20 I. C. 648.—Mortgagee, right of—Splitting up of the mortgaged property with the consent of all the parties—Loss of rights in execution of a decree based on a prior mortgage—10 I. C. 15.—Mortgagor in redemption suit to pay principal and interest and not the price paid for the assignment—4 O. C. 210.—Right to redeem before delivery of possession—18 O. C. 105. —Personal covenant not to redeem, Subsequent transferee not bound—17 O. C. 303.—Right of, to pay amount due under decree *nisi*, limitation—17 O. C. 347—19 O. C. 30—Dealings between mortgagor and mortgagee made after plaintiff's purchase—19 O. C. 12.

Sub-mortgage.

Sub-mortgagee's right to sale of his mortgagor's interest as well as that of his mortgagor—9 O. C. 233 —12 O. C. 260—18 I. C. 389.—Sub-mortgagee necessary party, 5 O. C. 335—9 O. C. 233—By unregistered deed with possession—Right of, 38 I. C. 465—See also 7 O. C. 330—2 O. L. J. 73.

Marshalling.

Question as to, not raised—32 I. C. 715.

Limitation.

See Art. 132 and 65, 80, 105.—Limitation of a suit for sale not affected by subsequent transaction between mortgagee and 3rd person—17 O. C. 60.—Right to sue, having become barred—16 O. C. 157.

Motor Vehicles Act (II of 1911).

S. 13.

Meaning of "employs"—17 O. C. 311.

Muafi.

See Resumption.—Distinction between *Guzara* and, 20 O. C. 37.

Municipal.

Election, contesting validity of—16 O. C. 36.—Limits, rules relating to villages included within, 18 O. C. 138.—See U. P. Municipalities. Act (I of 1900.)

Mutation Act (I of 1900).

Oudh *Taluqa*—Law of primogeniture—History of estate—Will of doubtful validity—Stranger—Male collateral, 29 I. C. 651.—Compromise in, proceedings—Registration —Statement—Evidence—Claim withdrawn—Estoppel—Declaratory suit, 25 I. C. 34—No suit in Civil Court for—S. C. 46.—Effect of mutation of names, S. C. 204, 226.—Of names or transfer of possession not sufficient where law requires regis-

tered deed—11 O. C. 301.—Possession with Receiver—Title to possession—Duty of Revenue Court—34 I. C. 496.—Application for, only persons obtaining possession, S. D. 4 of 1909.—Civil Court decree, a good ground for—S. D. 16 of 1912.—Heirs of deceased proprietor not in possession when entitled to—1 O. L. J. 452.—Vendor in possession and disputing vendee's claim to, 1 O. L. J. 684.—Real purchaser not entitled on *Benamidar's* death, 1 O. L. J. 452.—Petition of compromise relied on as family arrangement—18 O. C. 51—25 I. C. 34.—Unregistered compromise deed filed in—2 O. L. J. 67.—Of names—11 O. C. 301.—Effect of decision of Civil Court—S. D. 18 of 1912.—Statements in, not amounting to abandonment of legal rights, 12 O. C. 288.

Nankar.

A heritable estate—1 O. C. 157.—(Cash) an under-proprietary right—Charge on *Zamindari* rights—1 O. C. 163—33 I. C. 461—7 O. C. 108.—Cash does not necessarily give right to possession as under-proprietor—12 O. C. 123—2 O. L. J. 359.—Mortgage of, rights.—Mortgagee's right to enforce payment against *Talukdar*—15 O. C. 99.—Liability of estate to pay—13 I. C. 629.—Meaning of—22 I. C. 125.—Right to cash—*Prima facie* case of under-proprietary rights to be established—1 O. L. J. 723.—Money charged upon immovable property—19 O. C. 49.—Auction purchaser of *Nankar* rights—Title when complete—3 O. L. J. 436.—Effect of postscript signed by Settlement Officer making *nankar* payable from certain villages—33 I. C. 461—14 O. C. 196.—Charge upon village—18 O. C. 380.

Nazul.

Land in Oudh, suit for possession—7 O. C. 65.—Land decreed in favour of—9 O. C. 249.—Land, whether constitutes a *mohal*—10 O. C. 257.

Nazrana.

See 8 O. C. 200.

Negotiable Instrument Act (XXVI of 1881).

S. 4.

Admission of document insufficiently stamped—Promissory note—4 O. C. 318.

SS. 14, 46, 48.

Transfer of interest in Government Promissory Notes, 9 O. C. 174.

S. 27.

Partnership—Partner's power to bind co-partner—Authority to draw Hundi—S. C. 255.

SS. 32, 37.

Bill of exchange—Holder and acceptor—Contract to treat the acceptor as surety—13 O. C. 206.

SS. 46, 48.

Government Promissory Notes, transfer of interest in, 9 O. C. 174.

S. 79.

Suit on promissory note, 17 I. C. 309.

S. 118.

Presumption—Consideration—Burden of proof—5 O. C. 307.

Non-forfeiture of rights by loss of Caste Act (XXI of 1851).

In force in Oudh since 1856—S. C. 171.

Notice.

Attestation of deed whether notice of its contents, 15 O. C. 67.—1 O. L. J. 225.—Counsel given, of adjourned hearing—Notice sufficient though counsel had no instruction—4 O L. J. 561 —Bonafide transferee without, 1 O. L. J. 175—43—14 O. C. 295 —11 O. C. 206.—Requirements of valid, 10 O. C. 179.—Of a mortgage, purchaser of property only with —15 O. C. 211.—Of ejectment—S. D. 1 of 1909—S. D. 15 of 1910 —14 O. C. 196—S. D. 11 of 1914—12 O. C. 15 —S. D. 18 of 1910—S. D. 17 of 1910. —Of sub-mortgage—12 O. C. 260.—Legality for injunction without, 11 O. C. 151.—To parties of filing award, 15 O. C. 295.

N. W. P. and Oudh Municipalities Act (I of 1900).

SS. 86, 88

Jurisdiction of Civil Courts to interfere with actions of Municipal Board—12 O. C. 191.

SS. 88, 147, 152.

Removal of building—Right of accused to challenge validity of order—9 O. C. 29.

S. 118.

See S. 188 Penal Code—18 O. C. 70.

S. 147.

Building erected without sanction —second prosecution, 8 O. C 249.

S. 168.

Conviction on failure to comply with order, 11 O. C. 121.

S. 187 (2).

Meaning of "Competent Court"—Appeal—16 O. C. 36.

N. W. P. and Oudh Act (XX of 1890).

S. 40 and 54.

Appeal—S. C. 187, 193, 211, 293 —13 O. C. 152 (154)—1 O. C. 160—S. C. 249—S. C. 220 —Memorandum of appeal is not application for revision, R. A. R. 64, 66.

N. W. P. and Oudh Land Revenue Act.

See Land Revenue Act.

Oath.

Procedure in a suit where one party offers to abide by the oath of the other—8 O. C. 11.—Competency to testify but inability to understand, 10 O. C. 337.—Examination of child —S. C. 242.—Agreement—Form and place of—10 I. C. 260.—Resilement to abide by oath of opposite party—19 O C. 161.

Objection.

As to right to sue as sole plaintiff, not by interested, but by un-interested defendant—22 I. C. 129—14 O. C. 170.—Filing of—limitation, 16 O. C. 374.—Preliminary, 16 O. C. 245. —As to remand order, 9 O. C. 80. —As to want of notice, 10 O. C. 49.—By accused, want of, 13 O. C. 337.—By judgment debtor that the auction purchaser had taken possession of property to which he was not entitled—14 O. C. 70.—By *Talukdar* in a partition proceeding between under-proprietors, 11 O. C. 252.—In bar of jurisdiction, effect of failure to raise, 18 O. C. 80.—In Civil Court which could not be raised in Revenue Court, 20 I. C. 145—10 O. C. 363.—By respondent against a party not appellant in the appeal, 11 O. C. 93—16 O C 213.—Relating to title raised in partition proceeding, 17 O. C. 224.—See "appeal."

Obstructed.

And unobstructed heritage—2 O. L. J. 502.

Opium Act (I of 1878)

S. 9.

Unlawful possession of opium, by member of joint family—Burden of proof—2 O. C. 100—S. C. 161.—Possession of opium in contravention of Excise Law—Guilty possession—Presumption—S. C. 236.—Sale of opium by servant of licensee, S. C. 285.—Opium found in accused's house, during his absence, 1 O. L. J. 141.

Oral.

Agreement converting mortgage by conditional sale into usufructuary mortgage—14 O. C. 321.—Agreement to execute lease for 7 years—9 O. C. 296.—Award, effect of—17 O. C. 108.—Evidence, admissibility of—2 O. L. J. 97—16 O. C. 185, 213—18 O. C. 122.—Evidence conflicting, principle of decision in case of—14 I. C. 99.

Order.

Successor in office not to go behind order passed by his predecessor—1 O. L. J. 682.—Error in—16 I. C. 830.—Power of Court to set aside its own, 2 O. L. J. 216—Suspension of application by, 17 O. C. 169.—Withdrawal of application before passing of—10 O. C. 141.—See S. 87 T. P. Act—10 O. C. 354.—Absolute, time to begin from—11 O. C. 267.—Admitting review, appeal against—12 O. C. 151.—Affirming decision of Court below—13 O. C. 59.—Confirming partition, appeal—S. D. 10 of 1912.—Dismissing suit for failure of payment—1 O. L. J. 191—17 O. C. 14.—Enforcing private award, appeal—12 O. C. 40—For costs—13 O. C. 66.—For further enquiry, 11 O. C. 261.—Of reference, 16 O. C. 233—2 O. L. J. 495.

Oudh Civil Courts Act (of 1871).

Declaration of legitimacy—2 O. C. 57.—Fyzabad Settlement Courts—Suit for land—Jurisdiction, S. C. 39.

Oudh Civil Courts Act (XIII of 1879).

Maintenance—Grant—S. C. 237.—Appeal—1 O. C. 160—4 O. C. 255.—Mortgage—Suit for redemption—Value of—Jurisdiction—Appeal—S. C. 267—6 O. C. 130.—Jurisdiction of a Subordinate Judge empowered to try appeals—7 O. C. 321.—Transfer of appeals by District Judge to Subordinate Judge—6 O. C. 104.—See S. 52 to 53 Land Revenue Act (Oudh).—Mortgage of 1852 whether redeemable.—Mortgage executed without authority can not extinguish prior mortgage—Proof in redemption suit, 18 I. C. 229—11 O. C. 285.—Appeal—S. C. 211.—1 O. C. 160.—See "Costs."—Mistakes or irregularities of Court—Presumption, S. C. 54—2 O. C. 133—4 O. C. 372.—Second appeal—S. C. 265—Appeal heard by a Court not property constituted, 24 All. 13.

(1891).

S. (8).

Valuation of appeal—Cross appeal involving indirectly claim upwards of Rs. 10,000—appeal triable by two judges—3 O. C. 96.—Application for leave to appeal as pauper—Whether single Judge can hear application, 3 O. L. J. 694.

Oudh Civil Digest (1912).

R. 24—Plaint or application, admission of—Presentation of plaint or application, date of, not coinciding with that on which court fee labels are purchased—Duty of *Munsarim*—17 O. C. 148.—R. 573—Sig-

nature of general agent to be accepted as signature of person entitled to receive money—25 I. C. 608.—Para. 272—See Co-operative Societies Act (II of 1912)—4 O. L. J. 588—R. 9, para. 272—Assessment of pleader's fee, 17 O. C. 284.—Vol 1, chapter VII—Proof of custom, 2 O. L. J. 607,—Rule 8.—9 O. C. 65.

Oudh Estate Act (I. of 1869).

S. 2.

Transfer means alienation *inter vivos*—See U. P. Act III of 1910 Constructive trust, 8 Cal. 769.—Hindu law joint family, 14 Cal. 493—Legal construction of will, 10 Cal. 482 Mortgage before confirmation—Right to sub-settlement—O. P. J. 314.—*Res judicata*.—11 Cal. 186—Specific Relief Act S. 42—7 O. C. 239.—Documents executed by Indian ladies, interpretation of—Appointment of heir to Taluqdari estate by Hindu widow—2 O. C. 372.—Estate of a Sanad holding Taluqdar—Lineal primogeniture by custom—award of a body of Taluqdar within S. 33 of Act 1 of 1869—Withdrawal of a voluntary admission—26 Cal. 81.—Government letter of 10th October 1859—Trustee—14 M. I. A. 112.—List I and II—Presumption of Taluqdari estate being held in trust for joint family—Taluqdari *sanad* in favour of single member—4 O. C. 214.—Mortgagee—Under-proprietary rights—Sub-settlement—*Malikana*—4 Cal. 839.—Not construed as retrospective—O. P. J. 148—7 O. C. 254—8 O. C. 45—9 O. C. 83.—Settlement of estates—Second Summary Settlement 1858—Effect of the Confiscation—Right of the Government—26 Cal. 879.—Succession to a Taluqdari Effect of declartion as to who should be his heir—27 Cal. 344.—Taluqa descending to a single heir—ascertainment of that single heir distinguished from the rule of primogeniture—20 Cal. 649.—Will executed before—4 O. C. 408.—Will of a Taluqdar—Rule of succession in a family to impartible estate—Primogeniture—10 Cal 792.—Transfer includes mortgage—1 O. C. Sup. 36.—Rule as to construction of document—10 O. C. 792—18 Cal. 1.—"Registered"—Rules as to construction of document, See Act. VIII of 1871—10 Cal. 976—Legatee—26 A 393, 27 A 634 are no longer in force,—Replies received operate as Taluqdar's wills.—Instrument partly testamentary—11 O. C. 102.—Signature of executant affixed for him—6 O. C. 279.—List No. II.—Construction of deed—O. P. J. 441.—Grantee—No special grant to be proved—1 O. C. Sup. 36, 44.—Heir—Person succeeding before Act 1 of 1869—7 O.C. 248, 254.

S. 3.

Whether S. 3 of the Crown Grant Act has the effect of reviving the *Sanad*—8 O. C. 94—40 I. C. 555.—Meaning of Taluqdar—9 I. C. 83.—20 I. C. 73.—What is Taluqdari estate—1 O. C. Sup. 36—R. and J. 77.—New *Sanad*—8 O. C.—317—14 O. C. 327—30 I. C. 234.—Whether provision in the *Sanad* apply to other properties—11 O. C 256—Dist.—16 O. C. 291—9 I. C. 76.—Trusts not effected—14 M. I. A. 112—R. and J. 32.—1 O. C. Sup. 24.—Meaning of 'estate'—16 O. C. 216.—Estate ordinarily devolving upon a single heir—4 O. C. 214.—Land held by Taluqdar subject to the custom of *Dhardhura*—9 O C. 129.—Settlement as *Mustajir*—Sup. O. C. 24.—Right of members of joint Hindu family in taluqdari estates—3 Cal. 645—8 Cal. 769—14 Cal. 493—17 Cal. 311, 444.—Object and effect of summary settlement—14 M. I. A. 112.—Settlement as farmer and not as proprietor—1 O. C. Sup. 36.—Settlement made within time limit—*Ka-*

buliat executed afterwards, 35A. 391 —Date of the making of Summary Settlement—16 O. C. 216.—"Permanent heritable and transferable right."—19 O. C. 290.

S. 6.

Clause (*b*) applies only to such mortgages as were common before the annexation of Oudh—8 O. C. 233, 238—18 O. C. 95.—Redemption—Burden of proof—Admission—11 O. C. 285—18 O. C. 95.—Burden of proving that mortgage was redeemable—11 O. C. 285—18 O. C. 95.—Burden of proof—2 O. L. J. 228.

SS. 8 and 9.

Construction of S. 8—26A 119—Taluqdar or grantee holding as trustee—26 I. A. 879 or as manager of joint family—22 I. C. 122.—Meaning of—10 C. W. N 1010.—Applicability of rule of—20 Cal. 649.—List No. 6.—Construction of award and relinquishment—22 I. C. 129.—Succession to Taluqdar's estate not held under *Sanad*—Entry of taluqdar's name in lists prepared after his death—Mohamedan Law—7 O. C. 254—8 O. C. 45—9 I. C. 83 (93)—26 All. 393.—Joint family—Entry in the name of only one of two brothers—22 I. C. 129 See 14 O. C. 170.—Meaning of "primogeniture"—"*Gaddinashini*"—8 I. C. 422—18 O. C. 188.—Relevancy of custom appertaining to a Taluqdar with reference to no taluqdari property—Difference between local custom aud family usage—16 O. C. 290.—See S. 22.—13 O. C. 316.—Lists Nos. 2, 3.—The word "ordinarily" in list No. 2—explained—16 O. C. 210—19 O. C. 290.—Gift—delivery of possession—4A and A. L. R. 601—Construction of document—14 O. C. 133.—Presumption of primogeniture to alienee—32 I. C. 516—16 O. C. 277.

S. 10.

Application of presumption to non-taluqdari property—16 O. C. 290.—Acquisitions made by Taluqdar, incorporation in original estate—Custom of impartibility—Date of making of Summary Settlement—16 O. C. 216.—Not affecting rights vested before Act—26 All 119.—Construction of section—25 All. 476.—Applicability of primogeniture *Sanad*—Meaning of "successor"—40 I. C. 469.—See 19 O. C. 290.

S. 11.

Minor—No ratification of transaction which had no legal existence—11 O. C. 1.—17 O. C. 294.—Power of Hindu daughter to transfer or bequeath—25 All. 276.—Power of transfer not controlled by Mohamedan Law—2 O. C. 244.—Scope of—10 Cal. 792.—Rule of election not applicable to will of taluqdar—S. C. 222.—Significance of—25 All. 476.—Reply to Government enquiry regarding devolution of estate—20 I. C. 429.

S. 12.

Section applicable to gifts *inter vivos* as well as bequests—2 O. C. 244.

SS. 13 and 13A.

Object of—8 O. C. 45.—"Would have succeeded"—Explained—7 O. C. 248.—Suit to set aside will of a Taluqdar—Limitation—S. C. 222.—Persons named in classes 1 and 2 can or can not take an estate under an oral transfer—5 O. C. 345—9 O. C. 113—13 O. C. 172.—Interpretation of "intestate"—16 C. 556—O. P J. 576.—Meaning of "interest"—10 C. 482, 976—R. and J. 246, 260—15 C. 725.—Plaintiffs right to maintenance would not bring the will within the exemption—S. C. 198.—Construction

of—S. C. 222.—Not retrospective—O. P. J. 148—7 O. C. 254—8 O. C. 45—9 O. C. 83.—Gift—Registration—10 C. 482—R. and J. 246.—Registration of wills, 25 All. 121.—Place and mode of registration—16 Cal. 468.—Validity of oral gifts—13 O. C. 172.—Gift in favour of wife, 9 O. C. 113.—Will—O. P. J. 430, 449, 544—Will, codicil executed fortnight before death, consideration of surrounding circumstances—20 O. C. 260.

S. 14

In applicable where transfer made to remote heir—26 All. 393; 7 O. C. 248.—Transfer includes mortgage—1 O. C. Sup. 26.—Property, whether estate in transferree's hands—16 O. C. 277.—Meaning of primogeniture—18 O. C. 188.—Bequest made prior to the Act.—Brother—Interpretation of Statute—3 O. C. 120—5 O. C. 345—7 O. C. 248—8 O. C. 45, 317, 22 I C. 577, 267—16 O. C. 291—14 O. C. 327, 30 I. C. 234, 1 O. L. J. 204, 8 I. C. 422—24 I. C. 73.—Definition of " estate "—16 O. C. 277.

S. 15.

Successor includes legatee—8 O. C. 317—27 All. 634.—Taluqdar's power of gift and bequest—Will in favour of a maintenance holder, S. C. 198, 222.—Prospective and retrospective—Estate entered in List 11 and held under primogeniture *Sanad*—Bequest in favour of a person not a talukdar or grantee and outside the line of succession—Applicability of *Sanad*—Hindu Law—Will—20 O. C. 360.—Meaning of " successor "—Will—4 O. L. J. 589.

S. 16.

Meaning of " transfer "—Heritable right of possession—3 O. L. J. 752.—See 9 O. C. 113.

S. 17.

Repealed by S. 10 of the Amending Act of 1910.—Requisites for validity of gift—2 O. C. 244.—Dilivery of possession to the life tenant within month—9 O. C. 113.—Construction of gift to wife—2 O. C. 244.

S. 19.

Not retrospective—4 O. C. 408.—Application of the proviso—10 Cal. 792.—Previous admission of will, sufficient proof of will but not of codicil—4 O. C. 408—Authority to destory a will—3 C. 626.—S. 57 of Indian Succession Act does not apply to revocation of will—11 O. C. 102.—Will by Taluqdar—Threats and undue influence—Revocation of will—11 O. C. 102.

S. 20.

Subsequent unregistered will—18 C. 1—R. and J. 351.

S. 21.

Najib ul tarfain—S. C. 171.—Wife not *ghair kuf* whether a *bratheri* wife—12 O. C. 111.

S. 22.

Presumption of rule of succession in case of Taluqdar whose name is mentioned in List II—Single heir to be determined by custom of family—10 Cal. 792—Law applicable—S. C. 171.—Brother includes step brother—7 O. C. 248.—Descendants of a deceased elder brother are preferred to the younger surviving brother—18 C. 1.—Authority to adopt should be registered—16 C. 556.—Estate entered in List II, descendable as an impartible estate—18 C. 111, 23 All. 369—O. P. J. 436—" Ordinary law " includes family custom—20 Cal. 649, 31 All. 457.—Able son without reference to seniority—16 C. 792.—Impartible estates descending to a single heir were not

estates passing according to the rule of lineal primogeniture—10 C. 511. Collaterals equal in degree—20 C. 649.—Rule of succession applicable to non-taluqdari property—11 O. C. 256—16 O. C. 290—9 I. C. 76.—Elder son of a wife married at a later date succeeds in priority over the son later born of a senior wife—23 All. 369.—SS. 13 (1) and 22—5 O. C. 345—9 O. C. 113.—Succession to non-taluqdari property—10 C. 792. —Meaning of "would have succeeded" "succeessor" and "nearest male heir"—18 O. C. 188.—Succession to acquired property—9 I. C. 76, 83.—Conditions in *Sanad*—Succession— Primogeniture— Intestate succession—13 O. C. 317.—40 I. C. 555.— Property acquired from the profits of Taluqdari property—Meaning of "*Ilaqa*"—Succession.—11 O. C. 256—9 I. C. 76, 83—20 I. C. 73.—Only applicable to a taluqdar or grantee—3 O. C. 287.—How far conditions in *Sanad* contrary to this section operative—14 C. W. N. 1010.—Meaning of "lineal descendant"—18 Cal. 1.—Whether sub-section includes family custom—20 Cal. 649.—Rule of primogeniture—Meaning of *gaddi-nashin*—Succession—Impartible estate—18 I. C. 422.—Intestate succession—Change of religion—S. C. 171—Applicability of *Sanad* to cases governed by special provision—Application of rule of primogeniture to collateral succession—18 O. C. 289.—*Sanad* granted under the Act—Trust —Cosharer's right against *Sanad* holder—2 O. C. 199.—No *Sanad*—Entry in list III, succession by ordinary law—2 O. C. 213—7 O. C. 254.

S. 23.

Whether ordinary law includes custom—31 All. 457.—Property acquired from the profits of Taluqdari property—9 I. C. 76.

S. 28.

No retrospective effect—S C. 42.

S. 29.

Adoption—8 O. C. 317—27 All. 634.

S. 33.

Effect of rules against award made before passing of the Act—S. C. 42—7 O. C. 218.—Rules of British Association—9 O. C. 179.—Grant —7. O. C. 90.—Award did not confer under-proprietary right—12 I. C. 324.—Committee of Taluqdar, whether, a Court—10 O. C. 343.—See *Res judicata*—10 O. C. 343.

Oudh Laws.

Title to sites of houses—2 O. L. J. 305.

Oudh Laws Act (XVIII of 1876).

Regulation XI of 1825—S. 4.—Applicable—8 O. C. 293, 28 All. 647 —Interpretation of, 32 All. 351.—Effect of on previous settlement decrees, 12 O. C. 220.

S. 3.

Trust, non-applicability of Mohamedan Law—14 O. C. 356.—Application of sub-section, 3 O. C. 55. —9 O. C. 227.—Right of pre-emption without regard to personal law —1 O. C. 75—3 O. C. 110.

S. 5.

Marriage at Lucknow and suit for dower at Meerut, whether Act applicable—7 A. L. J. 388.—Means of husband—S. C. 96, 287—10 M. I. A. 252—19 O. C. 171, 246.—Where amount of dower was held to be excessive—19 O. C. 246—24 I. C. 643 —Principle of determining dower debt—10 O. C. 241, 15 O. C. 127—19

O. C. 246.—Reasonable and sufficient amount 1 O. L. J. 281.—Amount fixed by decree outside Oudh not to be reopened—15 O. C 127.—See "Mohamedan Law," Dower.

S. 6.

See S. 9.—Chapter II deals with property in possession of vendor—9 O. C. 331.—History of development of custom, 15 O. C. 389.—Right of per-emption explained—13 O. C. 219—14 O. C. 156 (158).—General principles prevailing in Agra province not applicable—19 O. C. 185

S. 7.

Case where right was held to be excluded by custom—23 I. C. 943.—Instances of—17 O. C. 105—8 O. C. 142—1 O. L. J. 78—13 O. C. 163.—Village community (*a*) Meaning of—7 O. C. 19—12 O. C. 1, 13 O. C. 202; (*b*) Revenue free land—10 O. C. 257; (*c*) Owner of plot of land in *abadi*, 10 O. C. 225; (*d*) Under-proprietors—5 O. C. 399—17 O. C. 339; (*e*) Groveholder—13 O. C. 202—25 I. C. 718; (*f*) Residence in village whether necessary—7 O. C. 19, 275, 206—12 O. C. 1, 25 I. C. 718; (*g*) Under-proprietor in mohal and proprietor of other mohal—3 O. L. J. 193; (*h*) See Co-sharer.—Party may rely on both law and custom—1 O. C. 80.—Proof as to non-existence of custom—33 I. C. 775.—"Village sites" 4 O. C. 26—25 I. C. 718.—Scattered trees or grove—1 O. C. 284, 4 O. C. 26—13 O. C. 202—25 I. C. 718.—Inhabited sites—12 O. C. 1.—Presumption, claim decreed in absence of any defence as to non-prevalence of such custom—17 O. C. 105.—"Transferable rights," birthright—8 O C. 121.

S. 8.

Meaning of "town"—7 O. C. 74—12 O. C. 1.

S. 9.

"Sub-division," meaning of—9 O C 211—13 I. C. 490—1 O. C. 45—7 O. C. 129—13 O. C. 165—16 O. C 203.—"Property" not in possession of vendor about which he has doubt ful right to recover—9 O. C. 86, 331—Birt is not "sub-division," 13 I. C. 631—20 I. C. 474.—Effect of *Shamilat patti* in *thok*, 3 O. L. J. 309.—Prohibition of transfer to any person other than vendee, 18 O. C. 104.—*Co-sharer.*—(*a*) See 32 All. 351; (*b*); Test of, 10 O. C. 257, 225; (*c*) Birtholder with under-proprietor, 13 I. C. 631, or with superior proprietors, 20 I. C. 474; (*d*) Under-proprietor with proprietor, 17 O. C. 339—9 O. C. 271; (*e*) Owner of plot on which grove stands, without assessment of revenue, 10 O. C. 86, 225, or revenue paid through *lambardar*, 2 A L. J. 769; (*f*) Rule of preference between—16 I. C. 800; (*g*) Owner of separate *chak*, 7 O. C. 284; (*h*) Plaintiff's whole share wrongly sold, 9 O. C. 289; (*i*) Owner of plot of land in *abadi*, 10 O. C. 225, 348—1 O. L. J. 463; (*j*) Woman in possession with limited conditions, 3 O. C. 306; (*k*) What constitutes in, 18 I. C. 386; (*l*) Holder of separate land and paying rent separately, 5 O. C. 399; (*m*) Owner of separate part of grove—7 O. C. 19; (*n*) Son not recorded as, 1 O. C. 252—19 O. C. 306 (Contra), 7 O. C. 61; (*o*) Holder of proprietary rights in resumed *muafi*, 5 O. C. 399—3 O. C. 110; (*p*) Right of, *inter se*, 15 O. C. 389.—"*Relation*"—(*a*) Consanguinity from common stock, 7 O. C. 6—14 O. C. 193—11 I. C. 919; (*b*) Legitimate relationship, 17 O. C. 250; (*c*) Wife's position, 4 O. C. 397; (*d*) Order of, 7 O. C. 129; (*e*) Preferential right—17 O. C. 339.—"*Mohal*" Meaning of, 1 O. C. 45—13 O. C. 165—4 O. C. 365.—Pre-emptor and vendee both occupy-

ing position of co-sharer—17 O. C. 242.—Determination of rival rights, 19 O. C. 185—15 O. C. 389—13 O. C. 260—3 O. C. 330—7 O. C. 129.—Proprietor in one mohal to pre-empt in another mohal, perfect partition, 7 O. C. 1, 206, 275—13 O. C. 202—12 O. C. 1, 229—25 I. C. 718—28 I. C. 34 (P. C.)—See 17 O. C. 339.

SS. 9 and 10.

Sale.—(*a*) S. 54 T. P. Act not applicable, 2 O. C. 7—4 O. C. 169; (*b*) Mere proposal not sufficient, 9 O. C. 169; (*c*) Conditional agreement, 13 O. C. 219; (*d*) Auction purchaser transfering to sons of judgment-debtor before confirmation of, 10 O. C. 273; (*e*) Court sale, 3 O. L. J. 739; (*f*) In lieu of dower, 21 I. C. 60—1 O. C. 75—4 O. C. 169—18 O. C. 109, 367; (*g*) *Hiba bil ewaz*, 1 O. C. 75—4 O. C. 169—18 O. C. 367—21 I. C. 60; (*h*) Deed, agreement to pay back purchase money, 8 O. C. 275; (*i*) Of material of house, 4 O. C. 26.—(*j*) Or mortgage, 8 I. C. 501—21 I. C. 69—16 O. C. 9—18 O. C. 109—3 O. C. 213—2 O. C. 7—15 O. C. 1; (*k*) Or gift, 12 O. C. 185—11 O. C. 176—20 O. C. 249—19 O. C. 394; (*l*) Or exchange, 1 O. C. 75—18 O. C. 109—19 I. C. 301; (*m*) Where by vendor carves out subordinate tenure, 8 O. C. 121—17 O. C. 299; (*n*) Meaning of, 1 O. C. 75—12 O. C. 185—21 I. C. 60; (*o*) Of a share in a law suit, 9 O. C. 86, 331; (*p*) Perpetual lease, 10 O. C. 348—14 I. C. 717—17 O. C. 299; (*q*) Of trees, 10 O. C. 86; (*r*) Lapse of successful pre-emptor's right by time, 4 O. L. J. 422; (*s*) Deed purporting to rectify mistakes, 8 O. C. 288; (*t*) Deed, relinquishing claim to property for benefits previously received, 7 O. C. 81; (*u*) By Hindu widow without legal necessity, 33 I. C. 225; (*v*) Of property not in actual possession of vendor, 9 O. C. 86, 331—1 O. C. 99—11 I. C. 279—13 I. C. 508; (*w*) Of doubtful right, 11 I. C. 279; (*x*) Barred debt, consideration, 21 I. C. 69; (*y*) Of subordinate or under-proprietary tenure, 8 O. C. 121—10 O. C 348; (*z*) Birt, 14 O. C. 41—17 O. C. 299; (*a*1) Effected partly in lieu of expenses incurred in redemption, 16 O. C. 9; (*b*1) Partly in lieu of something valued in money, 16 O. C. 99; (*c*1) Agreement conferring right of pre-emption, 13 O. C. 241, 219; (*d*) 1 *Pattas* or leases of Birt *Sanklap*, 17 O. C. 299; (*e*1) Of reversionary interest, 7 O. C. 98—8 O. C 349; (*f*1) Property resold to vendor or any other co-sharer, 3 O. C. 33—13 O. C. 260—15 O. C. 380—14 O. C. 156—1 O. L. J. 187; (*g*1) Vendee selling property to persons having superior right, *lis pendens*—17 O. C. 150; (*h*) To a co-sharer and stranger, 7 O. C. 22—10 O. C. 225; (*i*1) Foreclosure decree, limitation, 10 O. C. 374—12 O. C. 314—11 O. C. 26—7. O. C. 1; (*j*1) Transfer short of sale, to circumvent law of pre-emption 16 O. C. 9, 21 I. C 69; (*k*1) Deed fictitious, 3 O. C. 260; (*l*1) Foreclosure decree in respect of under-proprietary right, 17 O. C. 37; (*m*1) More than that entered in notice, 7. O. C. 237; (*n*1) Deed executed before expiry of period fixed for tender, 14 O. C. 1; (*o*) Contract to transfer —15 O. C 389—10 O. C 273—30 I. C. 285—18 O. C. 104; (*p*1) Settlement decree giving right of pre-emption, 12 O. C. 220.—*Notice;* (*a*) Time for issuing of, 12 O. C. 314; (*b*) Not vitiated by lapse of year, 14 O. C. 332; (*c*) Effect of failure to give, S. C. 121, 248—1 O. C. 254; (*d*) Mere service of, creates no right, 13 O. C. 219; (*e*) Mortgagee issuing, entitled to claim interest up to decree for foreclosure, 10 O. C. 179; (*f*) Oral evidence of, 1 O. C. 254; (*g*) Requirements of valid, 10 O.

C. 179—12 O. C. 314; (*h*) Presumption from omission to give, S. C. 208.

S. 11.

Tender.—(*a*) Unnecessary when no notice issued, S. C. 52—1 O. C. 254—3 O. C. 110.—When sale deed executed before expiry of 3 months, 14 O. C. 1; (*b*) Delay due to official oversight, period expiring on Gazetted holiday, 11 O. C. 144.

S. 13.

Price.—(*a*) Meaning of—1 O. C. 75—12 I. C. 413—12 O. C. 185—18 O. C. 367—21 I. C. 60; (*b*) Fancy price, S. C. 208; (*c*) Paid, evidence of market value, 1 O. C. 227—4 O. C. 247—10 O. C. 88—19 O C. 90; (*d*) Decision as to, 37 I. C. 173; (*e*) Whether fixed in good faith, 36 I. C. 739; (*f*) Fraud, S C. 40; (*g*) Fictitious, 4 O.C. 247, 158; (*h*) Barred debt, value of previous sales, 21 I. C. 69; (*i*) Paid in excess of market value—9 I. C. 58.—Good faith; (*a*) Meaning of—9 I. C. 58; (*b*) Market value of property may be treated as evidence, 1 O. C. 227—4 O. C. 247—Amount to be decreed in absence of proof of market value—6 O. C. 327—10 O C. 88.

S. 14.

Amount (*a*) May include arrears of rent paid by mortgagee—27 I. C. 420.

S. 15.

Payment of purchase money out of Court—8 O. C. 57—14 O. C. 85.—Non-payment of purchase money within time—11 O. C. 144.—Appeal—17 O. C. 14—24 I. C. 109—Extension of time—S. C. 157—7 O. C. 359—13 O. C. 28—14 O. C. 147—16 O. C. 5—7 O. C. 36—8 I. C. 812—11 O. C. 144—17 O. C. 377—18 O. C. 58—28 I. C. 458.

S. 19.

Record of deposition of witnesses—S. C. 59.

S. 20.

Sale of ancestral land in excess of that sanctioned by Government—8 O. C. 409.—Sale of mortgagee right—Whether previous sanction necessary—Meaning of "land"—14 I. C. 351.—Includes decree or order under SS. 88, 89 T. P. Act—3 O. C. 1.

S. 25 (Repealed).

Jurisdiction of Civil Courts—8 O. C. 353.—Condition for occupancy right—S. D. 7 of 1903—Occupancy right—S. C. 45.—Determination of rent without giving notice—3 O. C. 69.—Right of occupancy of land sold in execution of decree—7 O. C. 312.—Sale of full proprietary rights—Rights of occupancy in *Sir*—18 O C. 377—3 O. L. J. 135—33 I. C. 258.

Oudh Taluqdar.

Title obtained by *Talvqdar* under his *sanad*—Effect of confiscation upon previous gift—Attempts to establish trust for claimants as to part of *Taluqdari* estate—Claim to sub-proprietary right distinguished—17 O. C. 444.

Oudh Local Rates Act of 1894.

Superior proprietor to claim contribution from under-proprietor—Assessment—6 O. C. 299.—See 9 O. C. 63.

S. 2 (5)

See S. 124—17 O. C. 55.

Oudh Rent Act.

S. 3 (3).

Definition of "land" and meaning of "ungathered produce"—10 O. C. 189—See 2 O. L. J. 88.—Grove is land—38 I. C. 488.

S. 3.

The following are not rent.—(*a*) Personal service—S. D. 18 of 1893; (*b*) Weighing dues—1 O. C. 103; (*c*) Grazing dues—S. D. 6 of 1910; (*d*) Profits of *Sir* land, R. A. R. 67—1 O. C. 152—11 O. C. 75; (*e*) *Malikana* dues—7 O. C. 108.

S. 3 (6).

Claim as to proprietary right does not affect under-proprietary rights—17 I. C. 334.

S. 3 (8).

Birt—14 O. C. 41—10 O. C. 318.—Under-proprietor, definition, status and rights of—Right of proprietor as to re-entry—Effect of—Distinction between proprietor and under-proprietor—1 O. L. J. 389—*Nankar—Dahyaak—Daswant*—12 O. C. 124—14 O. C. 335.—Plot proprietor paying revenue to *Lambardar*—1 O. L. J. 364.—Long perpetual leases—S. C. 282—3 O. C. 108—S. D. 3 of 1892—6 O. C. 94—5 O. C. 187 (188)—14 O. C. 196—22 I. C. 125—30 I. C. 218—8 O. C. 31—12 O. C. 164—24 I. C. 381—1 O. L. J. 389.—Vendee of proprietary rights—5 O. C. 70—6 O. C. 184—15 O. C. 25—S. D. 4 of 1903.—Decree of Settlement Court for heritable and non-transferable lease—5 O. C. 187.—Under-proprietor's liability to rent when out of possession—2 O. C. 288.—No inference as to proprietary right from the mere fact that first summary settlement was made with him—34 I. C. 768.—Difference between proprietary and under-proprietary rights—S. D. 4 of 1903.—Under-proprietary right not created by adverse possession—7 O. C. 372—12 O. C. 15—10 I. C. 11—12 O. C. 164—14 O. C. 196—16 O. C. 163.—Interest on arrears of rent—1 O. C. 94—3 O. C. 108—5 O. C. 187—7 O. C. 116—1 O. C. 267—26 I. C. 41—3 O. C. 22—2 O. C. 288.—A long lease does not constitute the lessee an under-proprietor—21 I. C. 125—14 O. C. 196.—Former proprietor can claim under-proprietary rights in *Sir* or Nankar—22 I. C. 125—15 O. C. 33.—Under-proprietary rights by prescription—4 O. C. 207—8 O. C. 145—14 O. C. 196—15 O. C. 33—8 O. C. 30—8 I. C. 710.—*Patwari* and *Chaukidari* rates—5 O. C. 43.—Construction of sale deed as conferring under-proprietary right—5 O. C. 187.—Suit for declaration that defendants are not under proprietors—Previous decision holding defendants to be something more than ordinary tenants—Subsequent decision holding defendant's under-proprietors—Cause of action—23 I. C. 231.—How to establish his right—8 O. C. 145—9 O. C. 167—8 I. C. 407, 691—14 O. C. 196—15 O. C. 33—22 I. C. 125.—Suit by superior proprietor—Defendant's under-proprietary rights acknowledged by previous proprietor—19 O. C. 27.—Suit for proprietary possession where tenant sets up under proprietary right—9 O. C. 292—12 O. C. 164—24 I. C. 381—12 O. C. 15—16 O. C. 163.—Illegal ejectment by landlord—8 O. C. 174—9 O. C. 37—12 O. C. 90—10 O. C. 23—13 O. C. 188—16 O. C. 105—2 O. L. J. 145—(28 I. C. 303).—Settlement decree—Execution of lease by under-proprietor—Tenancy held by joint under-proprietor—Superior proprietor purchasing share in under-proprietary holding—Adverse possession—3 O. L. J. 279.—

Prima facie proof of—14 O. C. 335—30 I. C. 425.—Burden of proof—Jurisdiction—8 O. C. 145—9 O. C. 167—12 O. C. 164—14 O. C. 196—15 O. C. 33—8 I. C. 407—18 I. C. 281—24 I. C. 381—16 O. C. 105—32 I. C. 376.—Declaratory suit by landlord against tenant setting up under-proprietary title—Limitation—12 O. C. 15—16 O. C. 163.—Suit for declaration—8 O. C. 30—11 O. C. 240—12 O. C. 164—8 I. C. 710—10 I. C. 11 (13)—24 I. C. 381—12 O. C. 15—14 O. C. 196—22 I. C. 125—30 I. C. 218—32 I. C. 376—8 O. C. 145.—Marwat grant is not under-proprietary holding—11 O. C. 240.—A holder of *haqiat mutafarriqa* is not under-proprietor—S. D 8 of 1914.—Liability of transferee from—10 O. C. 36.—Effect of declaration of such right—Effect of assessment of rent—11 O. C. 187—12 O. C. 35.—Merger, see "Merger."—Settlement decree against Talukdar for perpetual hereditary farming lease—Taluqdar's power to have a non-transferable tenure sold—12 O. C. 267—13 O. C. 303.—See S. 108 (10)—8 O. C. 174—13 O. C. 188.—Position of groveholder of long standing—15 O. C. 33.—Right not effected by execution of fresh *Qabuliat* at enhanced rate—30 I. C. 387.—Revenue Court's decision as to under-proprietary right—No bar to declaratory suit in the Civil Court—34 I. C. 753.

S. 3 (10).

How tenancy established—S. D. 3 of 1910—S. D. 34 of 1891—R. A. R. 67—1 O. C. 152, 215.—Position of tenant admitted by mortgagee after redemption—S. D. 9 of 1892—14 O. C. 204—S. D. 8 of 1909.—Transferee from person having status of more than tenant—2 O. L. J. 727.—Persons occupying land without consent of landlord, S. D. 6 of 1892—S. D. 28 of 1891—S. D. 3 of 1910.—Cultivators under a rent free grantee—S. D. 10 of 1904.—Mortgagors holding land under a lease from the mortgagee—6 O. C. 18.—Groveholders—S. D. 4 of 1911.—Service Tenure holder—S. D. 18 of 1893.—Manufacturer—S. D. 4 of 1891.—Mortgagee of occupancy tenure, S. D 2 of 1897—S. D. 5 of 1901—S. D. 2 of 1903.—Co sharer of joint estate, R. A. R. 67.—Tenant taking a mortgage or purchasing a share in a mortgage—11 O. C. 75.—Son's interest in a tenant's holding of his father—11 O. C. 292.—Co-sharer cultivating more than his share, 4 A. L. J. 1.—Heirs of a *Sajjada nashin*—S. D 16 of 1891.—Lessee of right of pasture—S. D. 6 of 1910.—Surety of a tenant—R. A. R. 50—9 Cal. 383.—Lessee of weighing dues—1 O. C. 103.—*Thikadar*—S. D. 1 of 1893—R. A. R. 46, 74—S. D 9 of 1892—7 O. C. 169—8 O. C. 197—9 O. C. 296, 362—12 O. C. 140—10 I. C. 2 (3).—*Bhuinkat Thikadar*—S. D. 1 of 1893.—Rent never paid or agreed to be paid—No relation of landlord and tenant—6 O. C. 341.

S. 3 (11).

Assignee of rent—S. D. 2 of 1902—3 of 1897—6 O. C. 104—12 O. C. 388.—Between *Thekadar* and cultivating tenants the former is landlord—34 I. C. 861—33 I. C. 203—S. D. 9 of 1892.—Mortgagee of an occupancy tenure—S. D. 2 of 1897—S. D. 5 of 1901—2 O. C 204—6 O. C. 331—7 O. C. 265 (271)—11 O. C. 345—14 O. C. 144—14 O. C. 225—15 O. C. 67—18 I. C. 383.—Meaning of, 4 O. C. 24.—At liberty to demand reasonable rent—6 O. C. 341.—Bound by contents of printed form of leases, R. A. R. 7.—Distraining sub-tenants crops—7 O. C. 351.—See "Landlerd."

S. 4.

Enhancement of rent—1 O. C. 78—5 O. C. 193.—Sub-section (3) explained—S. D. 24 of 1892—R. A. R. 57—S. D. 1 of 1893—No change in rent or area by acquisition of *Nautor* land—R. A. R. 57.

S. 5.

See S. 25 Oudh Laws Act.—Meaning of "proprietor" and "proprietary"—R. A. R. 49—33 I. C. 170.—*Qabzadari* meaning of—Right of occupancy—29 I. C. 653—S. D. 23 of 1892—7 O. C. 265—S. D. 29 of 1891.—Conditions of occupancy—S. D. 29 of 1891—S. D. 7 of 1903.—Retrospective effect—S. D. 7 of 1903 5 O. C. 176—8 O. C 353—7 O. C. 312—29 I. C. 401.—Grove—*Reza milkiyat*—16 O. C. 173.—Mortgage of land part of which subsequently transferred by mortgagor to another—5 O. C. 176—7 O. C. 312—8 O. C. 353—29 I. C. 401.—Occupancy tenant—Determination of rent—33 I. C. 214.—Burden of proof—S. D. 12 of 1910—S. D. 7 of 1907—S. D. 17 of 1910.—Right of occupancy tenant—Loss of all proprietary right—R. A. R. 32—5 O. C. 176—R. A. R. 4.—Transfer by foreclosure is a voluntary transfer—Loss of occupancy right subsequently to annexation, S. D. 7 of 1903.—Inheritance to occupancy tenure—adopted son, illegitimate son, disciple of a *Mahant*—S. D. 5 of 1904—S. D. 7 of 1886—S. D. 8 of 1904.—Usufructuary mortgage by tenant having non-transferable right in land—Relinquishment to a third party—7 O. C. 265—18 I. C. 383.—Transfer of occupancy tenure by sale, 10 O. C. 235—11 O. C. 292, by usufructuary mortgage, 2 O. C. 204—6 O. C. 331—7 O. C. 265—11 O. C. 345; by sub lease, 2 O. C. 292—S. D. 1 of 1898 (270)—S. D. 1 of 1898—S. D 10 of 1892.—Transfer prior to 1st January 1902—8 O. C. 353—2 O. L. J. 11.—No estoppel to the tenant—6 O. C. 331.—Claim of proprietary rights—Inconsistent claims—Relinquishment of under-proprietary rights—Portion added to holding—29 I. C. 653—S. D. 2 of 1912.—Remedy of mortgagor in order to resume possession, S. D. 5 of 1901.—Occupancy tenants right to plant trees—Permission of landlord, 16 O. C. 341—1 O. L. J 33.—Suit to set aside transfer of a non-transferable holding—2 O. C. 252—6 O. C. 331—14 O. C. 144—15 O. C. 67.—Mortgage of occupancy holding—Landlord's remedy—41 I. C. 125.—Effect of *Kabuliat* entered into as ordinary tenant, relinquishment of right—42 I. C. 53.

S. 6.

Lease—Occupancy right—33 I. C. 729—Dist. 39 I. C. 152.

7 A.

Vendor's *Sir* does not become *Sir* of vendee—S. D. 2 of 1900.—Effect of mortgage before 1st January 1902 upon *Sir*—*Sir* when ceases to be so—Ex-proprietary rights, how surrendered and extinguished.—Actual abandonment—Limitation for claim of ex-proprietary rights.—27 I. C. 586.—Prevailing rate—S. D. 25 of 1891.—Suit for cancellation of sale and return of purchase money—10 O. C. 243.—Agreement to abandon ex-proprietary right—S. D. 11 of 1904—10 O. C. 243.—S. D. 2 of 1900—S. D. 3 of 1889.—Relinquishment of occupancy right by ex-proprietor—Validity of—Voluntary agreement—Ex-proprietary tenancy created by ex-proprietor into rent free holding for life—Trespasser—Jurisdiction—27 I. C. 376.—Ex-proprietary tenancy heritable—S. D. 1 of 1911.—Period for claiming ex-proprietary right—S. D. 12 of 1914—Date from which

rent payable—12 O. C. 35—15 O. C. 45.—Person's entitled to receive rent from ex-proprietary tenant—13 O. C. 70.—See "Ex-proprietary rights."

S. 8.

Printed forms of *Pattas*—R. A. R. 7.—Determination of leases or *Pattas* granted by mortgagee or *thekadar* after redemption or after the expiration of the term of *theka*—Tenant's right to occupy for seven years—14 O. C. 204—S. D. 9 of 1892.—*Pattas* granted by Hindu widow having life interest only—3 O. C. 105.—*Qabuliat* not equivalent to lease—9 O. C. 296.—*Qabuliat* with lease enforceable—12 O. C. 140.—For the purposes of Stamp Act a lease includes *Qabuliat*—9 O. C. 296.—Respective rights and liabilities of lessor and lessee to be determined by terms of contract—12 O. C. 140—13 O. C. 146.

S. 9.

Male occupancy tenant dying—Succession by widow—Widow dying after Tenancy Act came into force—Brother's right to succeed without proving, sharing in cultivation—29 I. C. 548.

S. 19.

Whether lessee entitled to suspension of rent on account of scarcity—13 O. C. 146.

S. 20.

Notice not sufficient, actual relinquishment required—S. D. 8 of 1885.—Effect of relinquishment by one of several tenants—S. D. 7 of 1884—On tenant's transferees—7 O. C. 265 (270)—S. D. 1 of 1898.—Relinquishment by Hindu father without sons' consent—11 O. C. 292.

S. 21.

Sub-tenant's rights not to be taken into consideration—S. D. 15 of 1892

S. 22.

Compensation for improvement not allowed—8 O. C. 13.—12 O. C. 164—24 I. C. 381.

S. 23.

Injunction to restrain a tenant from making improvement—8 I. C. 554.—Explained—15 O. C. 170.

S. 27.

Principles on which compensation to be determined—S. D. 3 of 1886—S. D. 12 of 1885—R. A. R. 20.

S. 32.

Crop should be standing at the time of application—S. D. 1 of 1886—Application for appraisement of produce—Notice not issued—Legality of award by Amin—29 I. C. 475

SS. 33, 34, 35.

Explained—S. D. 21 of 1892—Enhancement—Rent fixed by judicial decision—33 I. C. 786—Suit for enhancement of cash rented fields—S. D. 9 of 1893.—Principle of enhancement of rent of occupancy tenant—S. D. 25 of 1891—S. D. 3 of 1909—1 O. L. J. 724.—*Fixation of rent*—Of an occupancy tenant—R. A. R. 55—S. D. 3 of 1893—S. D. 7 of 1903.—Court's power to determine rent in a suit for arrears of rent—R. A. R. 9—2 O. C. 269—9 O. C. 362, 296—10 I. C. 2.—Tenant holding under heritable, non-transferable lease—Enhancement or alteration of rent—29 I. C. 571.—Agreement between landlord and tenant as to the amount of rent—S. D. 21 of 1892.—Enhance-

ment of rent—Tenant with heritable non-transferable right—Order by Settlement Court—Judicial decision —4 O. L. J. 166—S. 33 not applicable to under-proprietor, perpetual lessee, and persons holding on grain rent—S. D. 23 of 1892—S. D. 11 of 1912, R. A. R. 36—S. D. 9 of 1893.—33 I. C. 186—Operation of S. 33 extends to such persons as hold under settlement decree conferring *Kabzadari* rights—33 I. C. 266.—Enhancement of rent—Agreement fixing no period after which enhancement to be made—33 I. C. 157—See S. D. 11 of 1912.—Determination of rent of occupancy holding—33 I. C. 214.—"*Kabzadari*" connotes rights of the same character as those of permanent lessee—S. D. 11 of 1912

S. 36.

Applicable to co-sharer holding, as tenant, land other than *Sir*—R. A. R. 54—11 C. C. 75.—See also R. A. R. 67—1 O C. 152, 215.—Determination of agricultural leases granted by mortgagee—14 O. C. 204 —Admission of occupancy right—Estoppel—S. D. 14 of 1893.

S. 36, 39.

Rent could be enhanced only under S .39—Court's power as to commute—2 O. C. 254.

S. 37.

Tenants of waste land—S. D. 24 of 1892.—Co-sharer holding as tenant —R. A. R. 54 —Holder of a clearing cultivating lease not *thekadar*—S. D. 1 of 1893.—Statutory tenancy is purely personal right—S. D. 19 of 1891.—*Thekadar* is not tenant—S. D. 9 of 1910.—Effect of partition—S. D. 1 of 1895 over ruled—S. D. 1 of 1909—Consent of landlord as to change in rent or alteration in area necessary—S. D. 1 of 1909.—Change must be material—S. D. 26 of 1891. —Nautor land—R. A. R. 57.—*Thekadar's* power to make alteration—R. A. R. 52—Not F. S. D. 9 of 1892 —S. D. 8 of 1909.—Mortgagee's power—14 O. C. 204.——Admission, what amounts to—S. D. 34 of 1891. —S. D. 9 of 1892—Fresh lease—S. D. 25 of 1892—14 O. C. 204—S. D. 15 of 1892—S. D. 15 of 1910.—Division by landlord—S. D. 1 of 1909—Dist. S. D. 5 of 1911.—Possession of heirs of deceased tenant—S. D. 18 of 1891 —S D. 19 of 1891—S. D. 3 of 1904 —25 I. C. 624—S. D. 1 of 1900.—Lessees holding over—S. D. 17 of 1891—S. D. 34 of 1891.—See S. 54 and S 108(10) Rent Act.—Division between landlords—Tenant entitled to hold for seven years from date of alteration though total area and rent unchanged—S. D. 5 of 1911.

S. 40.

See 12 O. C. 124.

S. 43.

Entry as to wrong rent—Fresh statutory period—33 I. C. 234.

S. 47.

Enhancement of rent of tenant succeeding occupancy tenant—5 O. C. 193.—Compromise enhancing rent —Enhancement illegal—Suit for rent—Position of landlord—18 O. C. 361.—Agreement to pay rent void—5 O. C. 193—30 I. C. 261—1 O. C. 78. —Meaning of tenant—Cash rent converted into rent in kind—Enhancementi n case of grain rent—18 O. C. 134.—Tenant re-admitted after ejectment—18 O. C. 361—4 O. L. J. 230.—Enhancement in case of grain rent—18 O. C. 134.—Tenant re-admitted after ejectment—18 O. C. 361.

S. 48.

See S. 37.—Cases in which heirs

entitled to a renewal of tenancy—S. D. 19 of 1891—S. D. 18 of 1891—S. D. 3 of 1904—25 I. C. 624.—Heirs of a deceased tenant—Claim by member of joint Hindu family—Right of widow—2 O. L. J. 50.—Minor could not share in the cultivation—S. D. 8 of 1888.—Right of inheritance in a lease—See S. 108.

S. 52.

Ejectment of the heir of an occupancy tenant—S. D. 6 of 1898—S. D. 1 of 1901.—Persons holding under special agreement—S. D. 1 of 1893 Dist.—S. D. 3 of 1903—S. D. 5 of 1909—Suit for ejectment—Limitation—S. D. 5 of 1907.—Process of ejectment not application for execution of a decree for arrears of rent—S. D 6 of 1898—S. D. 2 of 1891—S. D. 5 of 1907—S. D. 17 of 1893.—Effect of part payment—S. D. 11 of 1892.—Claim for improvement—S. D. 5 of 1889.—Grace to pay up arrears of rent—R. A. R. 29.—Lessee holding under a decree of Court—S. C. 282—6 O. C. 94—7 O. C. 265—23 I. C. 231—12 O. C. 293—28 I. C. 307—S. D. 3 of 1892.—Tenant holding under Settlement Court decree, with heritable and non-transferable rights—Holding mortgaged—Limitation—Ejectment—1 O. L. J. 273.—Settlement decree—Terms of lease—Notice of ejectment—Tenant holding under decree of Court—28 I. C. 929.—Mortgage of tenancy held under decree of Court—Relinquishment of tenancy after mortgage—Acquiescence in transfer by tenant—Estoppel—18 I. C. 383.—Person holding decree for perpetual hereditary farming lease is tenant—6 O. C. 94—3 O. L. J. 408—Ejectment on ground of transfer—S. D. 2 of 1914.—Special agreement—S. D. 5 of 1909.—Acquiescence in transfer by tenant—18 I. C. 383.

S. 53.

Meaning of "May"—Explained—S. D 33 of 1891.—Holder of Civil Court decree—S. C. 164, 254, 261—2 O. C. 79—3 O. C. 365—12 O. C. 164—24 I. C. 381.

S. 54.

Proof of determination of tenancy on landlord—S. D. 13 of 1893.—Time for service of notice—S. D. 1 of 1889—S. D. 11 of 1891—Mode of ejecting tenant on expiration of tenancy—S. D. 7 of 1892—R. A. R. 51 (Diss.)—Favourable rent—33 I. C. 257, 232.—Admission of occupancy right—Estoppel—S. D. 14 of 1893. *Thekadar* liable to ejectment by notice—See S. 3 (10)—S. D. 33 of 1891—S. D. 8 of 1910—S. D. 31 of 1891—S. D. 32 of 1891—2 O. C. 336.—*Shikmi* tenants—S. D. 15 of 1892.—Tenants of waste land—S. D. 24 of 1892—Persons occupying under—S 127—S. D. 6 of 1892—Co-sharer holding as tenant—R. A. R. 54—11 O. C. 75—Tenants holding at a favourable rate of rent—S. D. 5 of 1909—29 I. C 510—3 R. L. J. 112—4 O. C. 264—Ejectment by notice where a dispute as to succession exists between parties—S. D. 21 of 1891.—Holder of Marwat grant.—S. D. 18 of 1910.—Holding of father succeeded by two sons—Notice against one son only whose name appeals in *Patwari's* papers—34 I. C. 711.—Suit by lessor for cancelment of lease, Possession, Declaration that lessee is liable to ejectment through Rent Court—6 O. C. 289—14 O. C. 225—24 I. C. 281.—Notice for part of holding—1 O. L. J. 722.—*Sankalap* land—S. D. 1 of 1906.—Holder on service tenure—S. D. 18 of 1893.—Under-proprietary rights set up—33 I. C. 246.—Holder of decrees for *Dasundh* and *Dahyak* executing *Kabuliat*—S. D. 30 of

1891—S. D. 32 of 1891.—Heir of tenant, occupation of—Landlord's conduct—Acquiescence—Unstamped notice—Statutory period—26 I. C. 719.—Status superior to that of statutory tenants claimed—27 I. C. 935. —Lease—Heritable—Ejectment by notice—34 I. C. 760.—33 I. C. 729—39 I. C. 152—See S. 108 (8) and SS. 55 and 60 of Oudh Rent Act.

S. 55.

Agent's power to sign—R. A. R 39—Position of co-heirs to holding —33 I. C. 264.—*Bhuinkat thekadar* —Stamped notice—S. D. 1 of 1893. —Heirs of deceased tenant—When Court fee payable on notice, S. D. 18 of 1891—S. D. 19 of 1891—S. D. 3 of 1904—S. D. 1 of 1900—3 R. L. J. 96.—See S. 127 and S. 67.—Court fees to be fixed before notice is presented for service—S. D. 18 of 1891—R. A. R. 60.

S. 56.

Inaccurate area stated, 14 O. C. 332.—Total area wrong, 2 O. L. J. 712.—Signed by landlord alone, 1 O. L. J. 579.—Against one co-sharer only—26 I. C. 95—2 O. L. J. 746.—Validity of notice of—1 O. L. J. 741, 236—2 O. L. J. 156, 298.—Actual tenant necessary party—S. D. 2 of 1890.—Notice insufficiently stamped, R. A. R. 60—S. D. 18 of 1891.—For part of holding, 27 I. C. 382—33 I. C. 263.—Tenant holding at favourable rent—1 O. L. J. 697—1 O. L. J. 236—2 O. L. J. 722.—Heirs of tenant, unstamped notice—1 O. L. J. 717—387 S. D. 3 of 1904.—Delay in issue of—1 O. L. J. 717.—Plots held as *shanklap* included in, 1 O. L. J. 236.—Notice to vacate in May 1913, statutory period to expire in June 1913—27 I. C. 68.—Lease can not save ejectment, 1 O. L. J. 585—2 O. L. J. 634.—Wrong entry of rent in notice, 2 O. L. J. 102, 717.—Ejectment of trespasser as sub-tenant 4 O. C. 24—2 O. L. J. 352.—Occupancy right—1 O. L. J. 719.—Vendee of ex-proprietary tenant, 26 I. C. 722.—Plea as to commencement of fresh statutory period, new lease at enhanced rent, 30 I. C. 86.—Stranger taking possession of deceased tenant's holding, fresh statutory period, 2 O. L. J. 730.—Due service of notice—S. D. 17 of 1892—13 O. C. 54.—Service on persons not heir—S. D. 11 of 1914.—Notice in *Kaithi* and Urdu—30 I. C. 68.—Acceptance of enhanced rent—2 O. L. J. 725, 255.—Cancellation of notice as person was more than a tenant, 14 O. C. 196.

S. 58.

Court to determine amount of compensation, S. D. 22 of 1891.

S. 60.

Application to contest notice struck off in default, S. D. 15 of 1891.—Right of only one co-sharer to eject, 34 I. C. 693.—Effect of dismissal of suit to contest—Ejectment in the ensuing year without fresh notice—R. A. R. 12—S. D. 15 of 1910.—Effect of tenant's ejectment on his transferee—S. D. 15 of 1892—S. D. 1 of 1898—6 O. C. 110.—Limitation, See S. 63 and R. A. R. 12.—Landlord's suit—Jurisdiction—S. C. 180.—Reinstalment of tenant when notice of ejectment is finally cancelled—R. A. R. 56.—Suit by under-proprietor for possession after ejectment—Jurisdiction—Ejectment illegal—2 O. C. 83—8 O. C. 174—9 O. C. 37—12 O. C. 90—13 O. C. 188—10 O. C. 23—16 O. C. 105—13 O. C. 35.—Ejectment of the grantee by notice—4 O. C. 264.

S. 61.

Mere existence of arrears not sufficient, S. D. 4 of 1889.—Who can

apply, S. D. 10 of 1910.—Assignee of arrears of rent, 12 O. C. 388.—Application for ejectment whether application for execution, S. D. 17 of 1893—S. D. 6 of 1898—15 O. C. 381.—Part payment by tenant, S. D. 11 of 1892.—Good cause, S. D. 11 of 1892.—Revision, S. D. 2 of 1891.—*Exparte* order for ejectment, S. D. 2 of 1899.

S. 62.

Grounds for ejectment of tenant during currency of tenancy—R. A. R. 61—51 S. C. 254, 261—S. D. 24 of 1891—S. D. 7 of 1892.—Denial of landlord's title—Forfeiture—10 O. C. 31—21 I. C. 256.—Erection of house on very small portion of holding—Ejectment from that portion only—24 I. C. 283.

S. 66.

Meaning of "Growing crops"—S. D. 22 of 1892.—Meaning of "Ungathered produce" and "Mafroor" —2 O. C. 280—10 O. C. 189.—Tenant's right in trees planted during continuance of tenancy—2 O. C. 281 —12 I. C. 409—23 I. C. 957.—Occupancy tenant may plant trees without permission of *Zamindar*—16 O. C 341.

S. 67.

Sir land transferred by sale—S. D. 10 of 1885—Diss S. D. 2 of 1900. —Meaning of "landlord"—Ejectment—Power of co-sharer collecting rent separately—40 I. C. 114.

S. 68.

Birt—Heritable and transferable right—Decree of Settlement Court when binding upon minor—4 O. C. 31—10 O. C. 318—14 O. C. 41—8 I. C. 407.—Effect of—Merger—*Theka* for portion of statutory period—Tenancy, whether in abeyance—38 I. C. 160.

S. 69.

Copy of registered *Kabuliat* is no proof that *patta* was granted—S. D. 27 of 1891.—See *Kabuliat*.—Perpetual lessee not liable to ejectment by notice—1 O. L. J. 731.

S. 71.

See S. 52.

S. 72.

Liability of *shikmi* tenant for rent due from tenant in chief—10 O. C. 41.—Suit for damages by sub-tenant —7 O. C. 351 —Second distress for the recovery of a portion of the same arrears of rent—R. A. R. 3.

S. 77.

No substituted service, 13 O. C. 54.

S. 79.

See S. 33.

S. 86.

Meaning of 'any person'—S. D. 14 of 1892.

S. 107A.

Meaning of "Proprietor"—S. D. 16 of 1910—3 O. C. 235.—Deliberate concession as to favourable rent—S. D. 3 of 1911—Dist. 2 O. L. J. 755—See S. D. 5 of 1909.—*Lambardar* alone can sue—Assent or dissent of co-sharers immaterial—S. D. 6 of 1903. —Decision by Civil Court that tenant acquired proprietary right, S. D. 16 of 1910.—Land free tenures not exempted from operations of, S. 107A.—S. D. 5 of 1914.—Suit as regards land recorded *bila tasfia*, 3 R. L. J. 83.—Lease of *Zamindari* rights in consideration of a sum of money *mehmani* paid to the grantor by the

grantee—3 R. L. J. 83.—Applicability of—Land held at favourable rate of rent—Grant—29 I. C. 510—See S. D. 5 of 1909 and S. D. 3 of 1911.—Revenue free land—Cess is not land revenue—3 O. C. 325.—"Grant in writing or otherwise" explained—S. D. of 1911. - Under-proprietary tenure paying no rent fall under this chapter; those paying rent must be dealt with under, S. 79 U. P. Land Revenue, 27 I. C. 532—See S. D. 5 of 1914.—What is favourable rate of rent—S. C. 963—3 O. C. 268—3 R. L. J. 112—See S. 54—3 R. L. J. 83.—Dispossession of grantee's mortgagee in execution of decree obtained by grantor against grantee—6 O. C. 110—28 I. C. 440.—Estoppel of landlord who formerly sued defendant as trespasser, S. C. 80.—Judicial decision—No decision as to *muafidar's* right to hold rent free in future—*Muafidar* recorded as under-proprietor—1 O. L. J. 278.—Adverse proprietary possession established—33 I. C. 250.—Grant conferring under-proprietary rent free rights—39 I. C. 451.—Applies to all lands held rent free—No proof of specific grant required, S. D. 3 of 1911.

S. 107B.

Judicial decision; (*a*) Judgment of Settlement Officer, 4 O. C. 252—S. D. 6 of 1909—29 I. C. 552—1 O. L. J. 693—33 I. C. 145.—Rent free grant—Judicial decision—Assessment of revenue—S. D 6 of 1909—S. D. 4 of 1903—29 I. C. 552—Settlement Court decree—Admission of claim, 34 I. C. 755.—*Valuable consideration*; (*a*) *Janbazi*—S. C. 244, 163; (*b*) Spiritual services, S. C. 288—S. C. 36, 37—3 R. L. J. 103—3 O. C. 268; (*c*) Dancing and singing, S. C. 100—S. C. 170; (*d*) *Duagdi*—3. R. L. J. 103; (*e*) *Shanklap* land—3 O. C. 268; (*f*) Marwat grant, S C. 61—11 O. C. 240 (244)—S. D. 18 of 1910.—Interest in land reserved rent free in a deed of sale, S. D. 4 of 1903.—Resumption in part, S. C. 207—2 O. C. 295—6 O. C. 233.—Notice to grantee—compensation for improvement—6 O. C. 232.—See S. 52 to 55 Act XVII of 1876 Land Revenue.—Person paying revenue by mistake is not grantor—S. D. 16 of 1910.—Joint grant—S. C. 84; (*a*) Grove land, 2 O. C. 73; (*b*) Resumption of grove piece meal, 9 O. C. 10; (*c*) Limitation for removal of trees newly planted by grove-holder—11 O. C. 379; (*d*) Meaning of grove-holder, S. D. 2 of 1892—S. D. 1 of 1908—S. D. 4 of 1911.—Resumption of a portion of grant—S. D. 1 of 1910—27 I. C. 974—Grant for an indefinite period—S. C. 195, 209, 291.—Grant for maintenance—S. C. 209.

S. 107E.

Burden of proof—S. D. 12 of 1893.—Specific service not mentioned in notice—Notice defective, 29 I. C. 547—3 R. L. J. 103—2 O. L. J. 351.—Old grant—6 O. C. 232.—Possession of heirs of grantee, 3 O. C. 48—5 O. C. 119—12 I. C. 324.—Local custom—Land held rent free at grantor's pleasure—weight of entry in *Wajib ul arz*—*Muafidar's* attestation wanting—30 I. C. 208.

S. 107G.

Meaning of grantee—3 R. L. J. 100.—Sale of rent free grant—position of purchaser—1 O. L. J. 325—Diss. 4 O. L. J. 162.—Assessment of rate—Date from which it takes effect—14 O. C. 58.—Effect of declaration of under-proprietary right and assessment of rent—11 O. C. 187—12 O. C. 35.—Grove-holder, nature of, tenure of—Resumption—Groves not held as *muafi* at Settle-

ment—Assessment of rent—Mistakes in certified copies of extract from Settlement, 26 I. C. 536.—Rent free under-proprietary holding—20 O. C. 171.

S. 107H.

Mortgagee from *muafidar*—2 O. L. J. 739.—Mode of fixing rent—3 R. L. J. 83.—Trees subsequently cut and land cultivated—33 I. C. 147—Dist. 38 I. C. 488.—Sale of share excluding Sir *bila lagan*—Covenant by vendor to pay rent of subsequently assessed—Limitation—15 O. C. 25—Groves brought under cultivation—Land held as *bila tasfia*—Accrual of under-proprietary right—Presumption—1 O. L. J. 751.—Second Para not applicable, where no gift of full proprietary rights—1 O. L. J. 589.—Gr[illegible]osing its character as such and [illegible]ght- under cultivation—Trees still standing on land—27 I. C. 94—6 I. C. 307—7 I. C. 840—33 I. C. 137.—Grove entered as *maurusi* in column of tenants—Accrual of under-proprietary right—1 O L. J. 696.—Groves subsequently brought under cultivation—2 O. C. 73—9 O. C. 109—32 I. C. 368—33 I. C. 137.—Resumption—Civil Court's power to decide questions of proprietorship after decision of Revenue Court—17 O. C. 86.—*Muafi* held by two brothers jointly or one after the other—Successor—33 I. C. 260, 166.—Oral evidence described—Appeal—S. D. 9 of 1914.—No under-proprietary rights in tank land, 33 I. C. 254.—*Muafi* heritable but not transferable—Right of transfer from *muafidar*—Non-accrual of under-proprietary rights—27 I. C. 585.—Creation of rent free tenure—Law as to rent free grants, applicability of—Contracts valid and binding over ruled by law as to resumption of rent free tenure—Purchaser of *muafi land*—1 O. L. J. 325.—Decree for resumption by Revenue Court—Suit in Civil Court for declaration of under-proprietary right—12 O. C. 225—17 O. C. 86.—Rent free land—Plantation of grove, 32 I. C. 769.

S. 107K.

Order setting aside *exparte* decree in resumption suit—Appeal—34 I. C. 702.

S. [illegible]08.

See Jurisdiction.—Jurisdiction not excluded by mere pleading—8 O. C. 353—12 O. C. 90—10 O. C. 23.—Proprietary of under-proprietary title, S. C. 135, 254, 260—3 O C. 365—4 O. C. 175, 314—8 O. C. 30—9 O. C. 293—R. A. R. 2, 10—S. D 8 of 1893.—Suit for declaration of class of tenancy—1 O. C. 210—2 O. C. 97—3 O. C. 87, 365—4 O. C. 180.—Suit for possession on expiry of lease—5 O. C. 118—8 O. C. 13, 61—12 O. C. 164.—Decision of Civil Court on point exclusively cognizable by Revenue Courts—S. D. 6 of 1891—Exclusive jurisdiction in resumption proceeding—3 O. L. J. 717.—Conflicting decisions of Civil and Rent Court, 2 O. C. 28—7 O. C. 169.—Jurisdiction of Revenue Court as to every question raised—R. A. R. 59—1 O. C. 40 (41)—2 O. C. 28—7 O. C. 340.—Declaration of tenancy at will—4 O. C. 180—12 O. C. 164.

S. 108 (2).

See S. 127.

Court fees—R. A. R. 37.—Mutation—Application of S. 34 Land Revenue Act to cases of transfer by mortgage or lease—S. D. 2 of 1911—Rent payable in kind—Tenant omitting to cultivate—17 O. C. 55.—Interest from *Thekadar*—12 O. C. 140—Determination of rent—*Jamabandi*, rent entered in—2 O. C. 269—R. A. R. 9—2 O. C. 269.—Proof

as to fixation of rent—37 I. C. 27.—Tenant not liable for rent before it becomes due, 3 O. C. 238—12 O. C. 35—15 O. C. 45—14 O. C. 58—Subsequent suit for the same period—15 O. C. 45—6 All. L. J 259.—Rent must be determined before suit—S. D. 9 of 1885—10 I. C. 2.—Admissibility of rent roll—R. A. R. 13.—Compensation for use and occupation—7 O. C. 169—5 O. C. 222—9 O. C. 296—12 O. C. 140—7 I. C. 864 (866)—9 O. C. 362—10 I. C. 2.—Land held without payment of rent—Whether occupation rent can be charged—3 O. L. J. 5—37 I. C. 27.—Liability of joint tenants, 6 I. C. 387—7 I. C. 840.—Liability of lessee's surety—R. A. R. 24 over R. A. R. 50.—Suit by assignee of rent—12 O. C. 388—S. D. 2 of 1902—S. D. 3 of 1897.—Setting up claim to *Dahyak* allowance by way of part payment, 17 O. C. 6.—Inconsistent allegation, 1 O. C. 88.—Joinder of claims in respect of several holdings—14 O. C. 287.—Determination of rent payable by trespasser—S. D. 20 of 1892.—Suit by *Lambardar* against co-sharer for share of profits of part of joint estate, R. A. R. 67—1 O. C. 152—11 O. C. 75.—Suit for arrears of rent—Ex-proprietary tenant—*Sir*—Co-sharers—13 O. C. 70—S. D. 2 of 1900.—Suit against heirs of occupancy tenant for arrears due, R. A. R. 69.—Defendant cultivating land without payment of rent, landlord's right to have rent determined and claimits recovery—17 O. C. 343—4 O. L. J. 448.—Against a *Thekadar* by his lessor, 1 O. C. 88—7 O. C. 169.—For rent of land originally grove but subsequently brought under cultivation and assessed to revenue—9 O. C. 227—11 O. C. 187.—For rent which landlord failed to realize from distress—R. A. R. 3—S. D. 3 of 1900.—For recovery of local rates, 5 O. C. 43.—For rent due under a lease executed by mortgagee, 6 O. C. 18, 26—15 O. C. 291—By usufructuary mortgagee or lessee against tenant—S. D. 6 of 1888—8 O. C. 197—S. D. 4 of 1901—15 O. C. 295—30 I. C. 292.—By under-proprietor against birtholder—1 O. C. 124—14 O. C. 41 (43)—17 O. C. 299.—For land not let to an agricultural tenant—S. D. 4 of 1891.—Suit against trespasser for assessment and recovery of rent—19 O. C. 370.

S. 108 (3).

Suit for determination of rent of *Sir*—S. D. 7 of 1903.

S. 108 (4).

Limitation—S. D. 5 of 1907—S. D. 24 of 1891.—Object explained—R. A. R. 61—S. D. 7 of 1892.—Suit by owners of newly partitioned mahal—S. D. 10 of 1910.—Suit against tenants to whom S. 54 applies—R. A. R. 51—R. A. R. 61—S. D. 7 of 1892.—Effect of ejectment decree, S. D. 15 of 1892—6 O. C. 110—6 O. C. 289—28 I. C. 440—(2 O. L. J. 161).—Suit by lessor for cancelment of lease and possession—Declaration that lessee is liable to ejectment through Rent Court—6 O. C. 189—14 O. C. 225—24 I. C. 281.—Right in trees after ejectment—2 O. C. 280—1 O. C. 231.—Suit for possession of trees as well as of land—10 I. C. 28—10 O. C. 188.—Tenant acquiring *Zamindari*—11 O. C. 75.—Suit for possession by reversioner against lessee, 20 O. C. 232.—Suit by tenant against sub-tenant for recovery of land, R. A. R. 74.—Suit for possession of trees as well as of land—10 I. C. 28—10 O. C. 188.—Suit for land in possession of successors of lessee—Compensation for improvements—8 O. C. 13—12 O. C. 164—24 I. C. 381—18 I. C. 281.—Occupancy rights created by decree—Alienation against the terms of de-

cree—Suit by *Lambardar* to recover possession, 14 O. C. 225.—Lessees holding under Settlement decree—Refusal to pay enhanced rent—38 I. C. 409.—Applicability of S. 3 of Limitation Act, 1908, S. D. 2 of 1913.

S. 108 (5).

Settlement Officer can only deal with heritable and non-transferable leases—S. D. 7 of 1914.—Inconsistent allegation—Suit not dismissed, 1 O. C. 88.—Suit for account—Agent—Representative of deceased landlord, when can sue—Jurisdiction—29 I. C. 679.—Suit by landlord against *Ziladar* and *Mukhtar*—Limitation—Jurisdiction—19 O. C. 314—See 6 O. C. 104.

S. 108 (5A).

See S. 107H.

Resumption of rent free grant—Suit for ejectment against transferee—12 I. C. 324.—Rent free under-proprietary holding—40 I. C. 200.—Enhancement of favourable rent—Lessee holding under heritable but non-transferable lease and not holding under judicial decision—1 O. L. J. 357.

S. 108 (6).

Conditions that confer right of occupancy—S. D. 7 of 1903.—See S. 5 and Jurisdiction.—Determination of occupancy right—1 O. C. 210.

S. 108 (8).

As to mode of service, See S. 163.—Notice (unstamped) on sons—No rent accepted—S. D. 11 of 1914.—As to ejectment, See SS. 54, 55 and 56 Oudh Rent Act.—Persons to whom rent paid only competent to sue—S. D. 2 of 1910.—Suit by owner of newly partitioned mahal for ejectment—S. D. 10 of 1910—S. D. 1 of 1895—Diss S. D. 1 of 1909—S. D. 5 of 1911.—Burden of proof—Tenant to show sufficient cause for being kept in possession—R. A. R. 2, 10, 17—S. D. 8 of 1893—3 O. C. 365 (368).—Landlord to prove that tenancy has determined, S. D. 13 of 1893.—Suit for ejectment by *Lambardar*—Other co-sharers not parties—Co-sharers making separate collections—Right of *Lambardar* to eject—29 I. C. 297.—Nature of enquiry when plaintiff pleads that the land is *Sir*—R. A. R. 2.—Agreement conferring title in perpetuity—R. A. R. 10.—Tenants holding from a landlord having life interest—S. D. 5 of 1909.—Transactions between *Thekadar* and tenant—Effect on landlord, R. A. R. 52—Diss. S. D. 9 of 1892.—*Thekadar's* power to sublet after the expiry of lease—S. D. 8 of 1909.—Plea by tenant of his status being superior to statutory tenant—Finding of Court to be definite—S. D. 17 of 1910—3 R. L. J. 110, 111, 113.—As to change in rent or alteration in area, See S. 37.—Informality in notice—One plot held on a tenure from which tenant could not be ejected under S. 54—S. D. 10 of 1893.—Where plaintiff alleged right of occupancy in part of the land—S. D. 29 of 1891.—Tenant when alleging that he has a proprietary or under-proprietary right in his holding is to satisfy the Court that there is reasonable ground to presume that he is not an ordinary tenant, S. D. 8 of 1893—13 of 1893—9 of 1893.—Notice of ejectment for portion of holding—Where entire holding is assessed at a lump rental—R. A. R. 40.—Where separately assessed—S. D. 3 of 1887.—Land added on by tenant—Inclusion of in notice, S. D. 28 of 1891—S. D. 2 of 1912.—Ejectment of tenants admitted by *Theka-*

dar, S. D. 9 of 1892.—*Bhuinkat Thekadar*—S. D. 1 of 1893—Dis. S. D. 3 of 1903.—Mortgagee of occupancy holding—S. D. 5 of 1901—R. S. D. 2 of 1903.—Tenants to whom leases were granted by mortgagee—14 O. C. 204.—Groveland—Character of grove, R. A. R. 18—R. A. R. 48—R. A. R. 25—S. D. 2 of 1912.—Meaning of groveholder, S. D. 4 of 1911—3 R. L. J. 94—15 O. C. 91.—Purchaser of grove belonging to tenant, S. D. 2 of 1892—S. D. 7 of 1893.—Joint estate—Each co-sharer realising rent from each tenant—Ejectment—40 I. C. 848.—Right of tenant of *Muafidar* to retain land after resumption—6 O. C. 110.—*Res judicata*—Decision of question of law although erroneous—8 O. C. 37—10 O. C. 145—12 O. C. 347—10 I. C. 29 (31).—Plea of heritable occupancy—S. D. 2 of 1893—Denial of landlord's title—S. C. 260—See Jurisdiction.—Right in trees planted during continuance of tenancy—2 O. C. 280—1 O. C. 231—16 O. C. 341—12 I. C. 409—23 I. C. 957—1 O. L. J. 63)—10 I. C. 28.—Lease conferring heritable and non-transferable rights giving power to sublet and imposing liability to ejectment—2 O. L. J. 634—Dist. 4 O. L. J. 104.—See S. 108 (4).—*Muafidar* is not a tenant—A person holding land from *Muafidar* can only be ejected on a duly stamped notice, S. D. 8 of 1913.—Permission to plant implied where landlord sees a fruit orchard being planted and does not forbid, S. D. 7 of 1912.—Division of land by landlords—Tenants entitled to hold for 7 years from alteration—S. D. 5 of 1911.—Adverse possession of co-sharer cultivating land in a *Patti* in which he was not co-sharer, S. D. 1 of 1916.—Rate favourable by deliberate concession—Ejectment or resumption—S. D. 1 of 1917.

S. 108 (9).

What is illegal ejectment—S. D. 4 of 1892—S. D. 33 of 1891—2 O. C. 83—12 O. C. 90—13 O. C. 188—8 O. C. 174.—Suit by tenant against his landlord and the agent of the landlord—Jurisdiction—8 O C. 257.—Suit for compensation—Cause of action—S. D. 5 of 1913.

S. 108 (10).

See 108 (9).

Suit for recovery of occupancy of holding by the heirs of a deceased tenant—10 O. C. 23—12 O. C. 90—See also 1 O. C. 172—S. C. 252.—Elements necessary to be proved by under-proprietor suing for recovery of holding—16 O. C. 105—Meaning of "Illegally ejected"—*Resjudicata*—27 I. C. 525—12 O. C. 90.—Suit by a tenant for recovery of occupancy of land from which he has been illegally ejected—S. C. 243—No F. 14 O. C. 60 (61).—Suit by under-proprietor or perpetual lessee—Jurisdiction, S. C. 202—Dist. 10 O. C. 23 (27)—F. 12 O. C. 90—9 I. C. 427—16 O. C 105—8 O. C 174—9 O. C. 37—13 O. C. 188, 35—2 O. C. 83—2 O. L. J. 145.—*Thekadar*—See S. 55.—Trespasser ejected not entitled to recover possession—S. D. 8 of 1903.—Tenant ejected under S. 61—Amount reduced in appeal—Ejectment improper—Suit for recovery of possession—S. D. 10 of 1914.—Suit by sub-tenant—See S. 37.—Suit for recovery of occupancy of land.—Holder of *Hakiat mutafarrika*—Plot proprietor paying revenue to *Lambardar* not under-proprietor—Right as to engagement of Government revenue—1 O. L. J. 364—S. D. 4 of 1903—S. D. 8 of 1914.—Ejectment of tenant for non-payment of arrears—Amount of rent reduced in appeal—Decree of first Court not final—

Illegal ejectment—1 O. L. J. 385.—Contest between rival tenants—18 O. C. 48.—A tenant who sublets his land—16 O. C. 105—33 I. C. 270—Claim for under-proprietary—Proof—4 O. L. J. 577—4 O. C. 207—8 O. C. 30—9 O. C. 167—12 O. C. 90—13 O. C. 188—16 O. C. 105—20 O. C. 8—19 O. C. 67.

S. 108 (11).

For liability of *Shikmi* tenant, See S. 72 Oudh Rent Act.

S. 108 (13).

Suit for land in possession of successors of lessee—See S. 108 (4)—O. R. Act.

S. 108 (15).

Extension of period of limitation—4 O. C. 182—6 O. C. 68 (71)—13 O. C. 103.—*Pattis* separately recorded—*Shamilat* land—Profits—Parties—Non-Joinder of co-sharers—8 I. C. 742.—Distinction between a suit for share of profits and a suit for rendition of account—7 O. C. 84.—Maintainability of suit of other co-sharer to share in collections, 19 O. C. 326.—Is the plaintiff required to be a recorded co-sharer—12 O. C. 13.—Co-sharer includes mortgagee in possession—2 O. C. 64, 299—4 O. C. 369—S. D. 6 of 1888.—Method of division of profits—Enhancement of revenue—3 O. L. J 634.—Suit for profits between under-proprietors—13 O. C. 251.—Mortgagee in possession to be joined as defendant—9 O. C. 142.—Parties to such suit, 1. O. C. 215—8 I. C. 742.—Set off—S. D. 5 of 1883—S. D. 1 of 1887.—Interest—*Lambardari haq*, costs of collection—6 O. C. 89—346—24 I. C. 15—(1 O. L. J. 184).—*Lambardar's* liability—Gross negligence or misconduct, 1 O. C. 183—4 O. C. 1—30 I. C. 203—(2 O. L. J. 206)—S. C. 158.—The profits of *Sir* land held by a co-sharer in a joint estate—Suit by *Lambardar* for share of profits due to himself and other co-sharers, R. A. R. 67—F. 1 O. C. 152—215—11 O. C. 75.—Suit by co-sharer against *Lambardar* for share of money realized by the latter under bonds taken from tenants for arrears of rent—S. C. 246.—Suit against heir of deceased *Lambardar*—R. A. R. 47—8 O. C. 206.—Co-sharer in undivided *patti* responsible for share of profits to another co-sharer—4 O. C. 363.—Death of defendant *pendente lite*—R. A. R. 75.—Interest on profits allowed when account falsified, 4 O. L J. 708—See 6 O C. 89.—Suit for arrears of profits—Minority of plaintiff—11 O. C. 118.—Adverse possession—Entry in Khewat—1 O. C. 143.—*Res judicata*—R. A R. 70.—Conflicting decisions of Civil and Revenue Courts—2 O. C. 28—2 O. C. 112—7 O. C. 169.—*Lambardars* remuneration not dependent on collection and payment of revenue—Interest not allowed—7 I. C. 647.—Burden of proof—17 I. C. 914.—*Lambardar* entitled to the expenses of collection—*A Lambardar failing to produce his account books not* entitled to claim a reduction in the gross rental—24 I. C. 15.

S. 108 (16).

Right of *Lambardar* to sue several defendants jointly, S. D. 10 of 1884—14 O. C. 164.—Interest—14 O. C. 164—S. D. 7 of 1886—7 I. C. 647.—Meaning of *Lambardar*—5 O. C. 392.—Mortgagee in possession is a co-sharer—S. D. 6 of 1888—2 O. C. 299.—Land described in sale deed *bila lagan* but subsequently assessed—1 O. C. 222—Adop 2 O. C. 273—Dist. 3 O. C. 310—5 O. C. 70—6 O. C. 184—15 O. C. 25.—Suit for contribution of rent or revenue—3 O. C. 308—5 O. C. 392.—Suit for amount of revenue paid by plaintiff for defendant—S. C. 82—9 O. C. 232.

—Suit for arrears of revenue paid by mortgagee without possession—4 O. C. 369.—Suit for declaration that plaintiff is entitled to get from the defendant the amount of arrears of revenue to the extent of his share—Jurisdiction, 9 O. C. 232.—Meaning of "village expenses"—Suit by *Lambardar* against co-sharer for share of costs of litigation—5 O. C. 298.—Right of *Lambardar* to receive dues from co-sharer—4 O. C. 143—7 I. C. 647—S. D. 23 of 1884.—Suit for arrears of revenue paid by one co-sharer for another—4 O. C. 261.—Declaration that the land was not liable to pay the revenue—Jurisdiction—Suit for damages—4 O. C. L. J. 68—(39 I. C. 133).

S. 108 (18).

Suit by one sharer in a *Muafi* against another sharer, S. D. 4 of 1893—Exp. 25 I. C. 646—(1 O. L. J. 364).

S. 109.

The District Judge and Judicial Commissioner are not Revenue Courts—R. A. R. 68—14 O. C. 38.

S. 116.

See S. 100 C. P. C.—No third appeal in suits under the Oudh Rent Act—S. D. 5 of 1892—R. A. R. 68—14 O. C. 38.

S. 118.

See S. 4 and 12 of Indian Limitation Act.

S. 119 (A).

Time for appeal expired on a holiday—17 O. C. 254.

S. 119 (C).

Revisional powers of the Court of Judicial Commissioner—R. A. R. 68—See S. 109.

S. 120A.

Power of review by subordinate Revenue Courts in Oudh—Decree when considered as nullity—Fraud of party to case—2 O. L. J. 14—27 I. C. 587.

S. 124A.

The question of jurisdiction, how to be decided—10 O. C. 23—12 O. C. 90.

S. 124C.

Explained—1 O. C. Sup. 1—24 I. C. 788.—Meaning of "portion of produce of land"—Landlord's remedy against tenant failing to cultivate holding held on rent payable in kind, 17 O. C. 55.—Fixation of rent of ordinary tenants at will—Fair occupation rent when no rent previously paid—compensation for use and occupation—10 I. C. 2—9 O. C. 296—362.

S. 124D.

See S. 108 (16)—4 O. C. 261.—Applicable to suits in which appeal lies to the District Judge, 4 O. C. 314.—Appellate Courts order directing Civil Court to receive plaint—5 O. C. 332.

S. 125.

Issue of notice of ejectment by agent—R. A. R. 39.—Trial by Deputy Commissioner of suits instituted by him as Manager of an estate under the Court of Wards—R. A. R. 42.

S. 126.

See S. 7A—13 O. C. 70—See S. 138.—Interpretation of "Special Contract"—33 I. C. 215—2 O. L. J. 724.—Definition of *Lambardar*—Duty and liability of—18 O. C. 5—2 O. L. J. 123—28 I. C. 236.—S. 198

(8)—29 I. C. 297.—*Lambardar* collecting rent—Right to eject—29 I. C. 569—S. D. 1 of 1897—S. D. 6 of 1903.—See *Lambardar*—35 I. C. 760.

S. 127.

Explained—S. D. 17 of 1891—S. D. 20 of 1892 (201)—S. D. 34 of 1891.—Trespasser—S. D. 3 of 1910—1 O. C. 40—1 O. C. 28—S. D. 8 of 1903—3 R. L. J. 109—87—30 I. C. 257, (2 O. L. J. 275).—Tenant adding to his holding by encroachment—S. D. 2 of 1912.—Tenant in chief can not eject trespasser—30 I. C. 206—2 O. L. J. 352.—Groveland let for cultivation—5 O. C. 162.—Meaning of "landlord"—4 O. C. 25.—See S. 108 (2)—S. D. 20 of 1892.—Position of *Thekadar* in possession after ejectment—42 I. C. 41.—Limitation for recovery of rent—R. A. R. 71.—Person occupying land after losing right of its occupation, 2 O. L. J. 745—33 I. C. 252.—Consent of landlord—Unauthorized occupation—17 O. C. 343—1 O. L. J. 574—26 I. C. 242.—Lawful occupation subsequently becoming unlawful—Meaning of "Occupied"—1 O.L.J. 574—17 O. C. 343—26 I. C. 242—See 1 O. C. 28, 40—15 O. C. 311.—Suit for recovery of arrears of rent—Agreement to pay rent not proved—Occupation rent, if allowable—Grain rent—Nature of proof—*Mend rate*—30 I. C. 499.—Suit against trespasser—Decree for mesne profits—Jurisdiction—30 I. C. 364.—Tenants holding on after formal ejectment—15 O. C. 311—17 O. C. 343—(26 I. C. 242)—4 O. L. J. 448.—Trespasser as tenant for the purpose of payment of rent and not of ejectment—3 O. L. J. 445.—Suit against trespasser for assessment and recovery of rent—19 O. C. 370.—See S. 108 (8)—40 I. C. 848 and S. 108 (2).

S. 128.

Court held in camp—Notice to parties—S. C. 165—S. D. 9 of 1893—1 O. C. 166.

S. 129.

See 11 O. C. 118.—Ex-proprietary rights claimed by mother of minor—Claim disallowed—Subsequent suit for declaration of ex-proprietary rights—29 I. C. 675.—See S. 5 Limitation Act.

S. 132.

Meaning of "year"—3 O. C. 67—R. A. R. 65.—Suit for rent by assignee of landlord—Transfer of appeal—Jurisdiction of Civil Court—6 O. C 104—Dist. 19 O. C. 314.

S. 135.

See O. XLI, R. 1 C. P. C.

S. 136.

See O. V. R. 17 C. P. C.

S. 137.

See S 108 (2).

S. 138.

Third person alleging receipt of rent—Necessary party, 2 O. C. 135.—Burden of proof—Appeal by intervener—2 O. C. 137—Dist. 19 O. C. 32.—Landholder's right against the intervener can only be enforced by Civil Court—R. A. R. 53.—Good faith—Suit for recovery of co-sharers fractional share of rent—Tenant paying rent to one co-sharer alone, released from further liability—1 O. L. J. 570.—Lessor when to be impleaded in lessee's suit against tenant—15 O. C. 295.—Inquiry about receipt of rent, 15 O. C. 295—F. 19 O. C. 32.

S. 140.

To set off the *guzara* allowance against the amount decreed to the plaintiff—9 O. C. 179.—The plea of set off about what was collected by landlord from defendant's sub-tenant not allowed—R. A. R. 13.—Claim to deduct the *Dahyak*—12 O. C. 124—17 O. C. 6—22 I. C. 125—23 I. C. 231—30 I. C. 218—14 O. C. 335.—*Thekadar* precluded from claiming set off—1 O. C. 100.

S. 141.

Non-liability of under-proprietor to pay interest—1 O. C. 94, 270—3 O. C. 22, 108—7 O. C. 116 (P. C.)—1 O. C. 267—26 I. C. 41.—2 O. C. 288.—*Thekadar's* liability to pay interest—12 O. C. 140—9 I. C. 221.—Interest from a person not holding under a written lease, 9 I. C. 221.—Interest on arrears of rent reserved by lease—21 I. C. 82.

S. 144.

See O. XXVI, R. 9 C. P. C.—S. C. 247.

S. 145.

Costs must be included—1 O. C. 141.—Execution of decree—Fresh process—R. A. R. 23, 24—R. A. R. 50.—Fresh or supplementary—S. D. 1 of 1904—S. D. 14 of 1891.—Process of ejectment is not process of execution—S. D. 17 of 1893—S. D. 6 of 1898—S. D. 5 of 1907.—Extension of period of limitation where it expires on a Sunday—13 O. C. 103.—Payment out of Court—See O. XXI, R. 2 C. P. C.—Application after 3 years—Previous application pending, 6 O. C. 48—9 I. C. 240.

S. 151.

Immoveable property—Standing trees and growing crops, S. D. 3 of 1899.—O. XXI, R. R. 54, 64 applicable when the attached property is a *mahal*—S. D. 4 of 1897.

S. 152.

Sale of under-proprietary right in execution of decree for arrears of rent against transferee to whom the right was transferred subsequent to the decree but before attachment—9 O. C. 185.—Judicial Commissioner's jurisdiction to revise an order passed by Deputy Commissioner purporting to cancel the sale—R. A. R. 63—R. A. R. 68—14 O. C. 38.—Compromise—Decree in terms of—Registration—4 O. C. 78—6 O. C. 364—13 O. C. 241—14 I. C. 29.—Pre-emptor's liability to pay arrears of rent recovered from vendee—17 O. C. 379.

S. 154.

Liability to transferee from an under-proprietor to pay arrears of rent—10 O. C. 36—9 O. C. 185.—Decree against under-proprietor for arrears of rent—Position of encumbrancer—Suit on encumbrance—4 O. L. J. 305—40 I. C. 305.

S. 155.

Meaning of "stranger"—Pre-emption—4 O. L. J. 167—40 I. C. 64.

Oudh Sub-Settlement Act (XXVI of 1866).

See "Under-proprietor."—Mortgage, usufruct—R. and J's. No 29.—Rule 10 not exhaustive—19 O. C. 27.—Proclamation of 1858—R. and J's. 23.—*Taluqdar*—R. and J's. 44, 30.—Tenancy under *taluqdari* settlement—11 Cal. 318.—See Oudh Rent Act S. 3 (8) and 6 Cal. 218.—*Taluqdar*—Under-proprietor—Onus on person seeking sub-settlement—R. and J's. 34, 52.—*Birt* heritable and transferable right—Presumption to

retain in perpetuity *birt* tenure—How to establish right to sub-settlement—4 O. C. 31—10 O. C. 318—14 O. C. 41—8 I. C. 407.—Under-proprietary rights—*Birt* rights—10 O. C. 318.—Meaning of *Birt*—Registration of *Birt* deed—14 O. C. 41—17 O. C. 299 —Sub-proprietary right—Holding under contract with some degree of continuousness—S. C. 109. —How to establish under-proprietary right, 8 O. C. 145—9 O. C. 167—12 O. C. 164—14 O. C. 196—15 O. C. 33—8 I. C. 407—8 I. C. 407—691—22 I. C. 125—30 I. C. 218.—See Oudh Estates Act, 4 Cal. 839.—Note of Settlement Officer in Settlement Record contrary to mutual agreement between the parties—Parties held bound by agreement—R and J's. 60. —Promise by *Taluqdar* in a letter held binding on himself and heirs—R. and J's. 59.—Grant of cash *nankar* for mortgagor's maintenance, whether amounts to grant of under-proprietary right, 12 O. C. 124—F. 22 I. C. 125—23 I. C. 231—30 I. C. 218.—Under-proprietary right, burden of proof, 12 O. C. 164—14 O. C. 196—15 O. C. 33—8 I. C. 407—22 I. C. 125—30 I. C. 218—8 O. C. 145—9 O. C. 167.—Whether intention to grant can be inferred, *patta shanklap*, 20 O. C. 285—42 I. C. 937. —Meaning of *Qabiz darmiani*, 25 I. C. 743.—Under-proprietary right, tenants to make out *prima facie* case only, 26 I. C. 683.—Assertion of under-proprietary right against landlord, 8 I. C. 710.—Illegal ejectment by landlord, jurisdiction, 8 O. C. 17—9 O. C. 37—12 O. C. 90—10 O. C. 23—13 O. C. 188—16 O. C. 105.

Pardanashin.

Documents executed by—Interpretation of—2 O. C. 372.—Whether required to appear in open Court out of *pardah* when applying under, S. 488 Cr. P. C.—S. C. 142.—Deed executed by—Nature of proof—4 O. L. J. 425.—Denial of execution by—Burden of proof—7 O. C. 292—O. P. J. 1030.—Suit to set aside part of a deed executed by—Burden of proof—S. C. 272—27 Cal. 768—Deed executed by—Burden of proof—15 O. C. 271—1 O. L. J. 466—30 I. C. 239—3 O. L. J. 482.—Deed of gift in favour of the son of a paramour and *Mukhtar*—Necessity of independent advice—Undue influence—16 O. C. 378—25 I. C. 861—30 I. C. 269 —25 I. C. 917—1 O. L. J. 466, 503. —Law as to transaction by—Burden of proof—Validity of deed to be established by person relying upon it, 1 O. L. J. 466—See 15 O. C. 271 —16 O. C. 378.—Deed of gift—Burden of proof—Independent advice—Undue influence—1 O. L. J. 67—See 15 O. C. 271—30 I. C. 269—35 I. C. 395.—Admission in pleadings when binding—19 O. C. 192.—Plea of non-receipt of consideration—33 I. C. 746.—How far protected by law, O. P. J. 1063—18 O. C. 147.—Attesting witness not actually seeing the lady sign the deed—18 O. C. 147.—Execution of decree, fraudulent conduct—40 I. C. 399.

Partition.

Proof of, 12 I. C. 403.—See SS. 107 to 114 Land Revenue Act (III of 1901).—Mortgagee in possession, objections by—2 O. L. J. 381.—Disputes arising after confirmation—2 O. L. J. 742.—Effect of—18 I. C. 281—9 O. C. 76.—Joint family—22 I. C. 129.—See jurisdiction.—Right of under-proprietor, S. D. 10 of 1909—S. D. 2 of 1915.—Suit for, 10 O. C. 32—15 O. C. 81—24 I. C. 633. —Between co-sharers, 2 O. L. J. 381. —See 37 O. R. Act—S. D. 5 of 1911. Imperfect, date of its effect—12 O. C. 229.—Among superior proprietors—12 O. C. 97.—Made by Commissioner—25 I. C. 227.—Of build-

ings 18 O. C. 80.—Of houses, 2 O. L. J. 51.—Of *mahal* not confering fresh statutory period, S. D. 1 of 1909.—Without actual division of property—20 I. C. 861.—Between sons and step-sons, mother's share, 19 O. C. 240.—Objection to method of partition, when to be urged—Mortgagee subsequently becoming full proprietor—30 I. C. 316.—Compromise—O. P. J. 628.—Suit between two widows—Minor heir not made party—Minor's title to share in deceased's estate recognized—Decree absolute refused until security for person and property of minor given by one widow—25 I. C. 904—15 O. C. 223.—Position after partition—41 I. C. 171.—Revenue Register, weight of entries in—Power of Partition Officer of Revenue Court—30 I. C. 240.—Partition proceedings does not affect tenant's status, 2 O. L. J. 720.—See "appeal," S. 42 Specific Relief Act.

Partition Act (IV of 1893)

Meaning of "undivided family" and "dwelling house"—9 O. C 156—7 I. C. 436 (440).—Property sold free from mortgage—Sale proceeds divided among co-sharers—Mortgagors undertaking to satisfy mortgage debt—Remedy of mortgagee—16 O C. 161—4 O. L. J. 386.

Partnership.

Agreement for, in respect of a lease for the farm and sale of drugs, validity of—17 O. C. 193.—Breach of agreement of suit for share of loss in—4 O. and A. L. R. 229.—Prayer for winding up of—4 O. and A. L. R. 229.—Business—Jurisdiction, 1 O. L. J. 561.

Party.

Wall, treatment as such, 15 I. C. 270.—Attesting deed of transfer whether consenting, 17 O. C. 157.—Addition of, in appeal, limitation—18 O. C. 90—20 O. C. 67.

Patwari.

See *Kanungos* and *Patwaris* Act, R. A. R. 72 and 72.

Patwari's Papers.

Entry in—25 I. C. 177—1 O. L. J. 531.

Pauper.

See O. XXVIII R. R. 1-16—O. XXXIII—O. XLIV C. P C.

Pedigree.

23 All. 72.—See S. 32 Evidence Act—Statements of members of the family touching tradition on the subject of descent—Controversy—11 O. C. 362—15 O. C. 364—21 I. C. 274—30 I. C. 220—O. P. J. 967.—Filed in Settlement Court—10 I. C. 199—8 I. C. 728—15 O. C. 364—1 O. L J. 447—3 O. L. J. 327—19 O. C. 321—Extracted from Settlement record—Parentage as given in memorandum of appeal, whether proof of legitimacy—21 I C. 274.

Penal Code.

S. 14 (4).

Unlawful assembly—Maintenance of existing peaceful possession with or without title—Enforcement of right by person out of possession—17 O. C. 21.

SS. 34, 397.

Dacoity—No evidence whether accused actually caused grievous hurt—Amendment of conviction—Punishment, 3 O. C. 263.

SS. 34, 299, 300, 302.

Assault causing death—Joint and several responsibility—Common intention—16 O. C. 19.

SS. 65 and 75.

Imprisonment for non-payment of fine—S. C. 175.

SS. 65 and 188.

Minimum term of imprisonment in default of payment of fine—Order promulgated by public servant —S. C. 65.

S. 75.

Second conviction—Limit of punishment—S. C. 79.

S. 84.

Meaning of "knowing the nature of the act"—15 O. C. 321.

S. 97.

Plea of private defence, when maintainable—title to property clear—19 O. C. 18—3 O. L. J. 14—33 I. C. 820.

SS. 99 and 105.

Forcible seizure of bullocks by *Chaprasis—Bonafide* act of public servant—Private defence—24 I. C. 172.

SS. 99, 323, 493, and 498.

Cognizance of offence upon complaint of person other than one affected by it—20 I. C. 233.

S. 102.

Right of private defence, commencement of—10 O. C. 196.

SS. 109, 110.

High Court's power of revision of District Judge's order granting sanction to prosecute—6 O. C. 216—17 O. C. 25.

S. 108.

Abettor present at the commission —S. C. 143.—Presence, inaction, probability compatible with innocence, 1 O. L. J. 360.—Of the offence of kidnapping with lawful guardianship.—See 12 O. C. 418.

SS. 114 and 323.

SS. 423, 439—Revision—Offence compounded—13 O. C. 161.

S. 141.

Enforcement of right by person out of possession, 17 O. C. 21.

SS. 141, 146.

House occupied by one, taken by another during former's absence—1 O. L. J 527.

S. 147.

Rioting—Grievous hurt—Separate sentences on separate convictions S. C. 125—The attacking and the resisting party not to be tried together—S. C. 75.—Rioting and some other offence committed in its connection—Separate sentences for each offence—17 O. C. 184.

S. 148, 149, 304.

Member of unlawful assembly lying unconscious from the outset, not charged with offence committed by others during his unconscious state —15 O. C. 183.

S. 154.

Facts to be proved—8 O. C. 418.

S. 174.

Actual service must be proved—S. C. 99.—Citation issued under S. 147 U. P. Land Revenue Act (III of 1901)—Intentional disobedience—13 O. C. 55.

S. 176.

"Official Register"—Refusing to furnish information to the *Patwari*

regarding collections made by *Zamindar—Jamabandi*—10 O. C. 238—8 O. C. 128.—Facts to be proved in order to justify a conviction under—8 O. C. 128.

S. 177.

Policeman enlisting under false name—S. C. 11.—Judicial proceedings—Proceedings by a Revenue Officer as distinguished from a Revenue Court—13 O C. 19- 17 O. C. 25.

S. 182.

See S. 195 Cr. P. C.—6 O. C. 1.—False charge against presiding officer in order to get the case transferred—12 O. C. 308.

SS. 182, 456.

See SS. 192 195, and 537—5 O. C. 164.

S. 188.

General order—18 O. C. 70.—Disobedience of order promulgated by public servant.—S. C. 60.—See S. 65 Penal Code—S. C. 65.—Order issued by Police Sub-Inspector to a Station Master to detain certain logs lying on trucks suspected to be stolen property—16 O. C. 371

S. 193.

See SS. 195, 537 Cr. P. C.—S. C. 232.—See S. 435 Cr. P. C. 4 O. C. 96.—17 O. C. 25.—Contradictory statement in the same deposition—Right of witness to correct before finishing his statement—16 O. C. 81.

S. 197.

Plea of previous acquittal, in a criminal trial upon the same facts—6 O. C. 153.

SS. 201, 302, 314.

Alternative charges—Attempt to cause disappearance of evidence of offence—S. C. 138.

S. 206.

See SS. 195, 476 Cr. P. C.—5 O. C. 46.

SS. 209, 210.

High Court's power of revision—6 O. C. 216—17 O. C. 25.

S. 211.

Complainant should be allowed an opportunity of proving truth of complaint—S. C. 94—Prosecution for making false charge—Invalidity of proceedings—5 O. C. 240—Complaint struck off or complainant's absence, fresh complaint—17 O. C. 18.

SS. 216, 395, 400.

Meaning of "Gang of dacoits"—13 O. C. 235.—See S. 400 Penal Code.—Harbouring proclaimed offender—Publication in Criminal Intelligence Gazettee, whether sufficient notice—Offender adopting false name—1 O. L. J. 30.

S. 218.

Pay sheet drawn up in Railway office is a "record"—Accused sentenced by Magistrate under two offences, one of which exclusively triable by Court of Sessions—24 I. C. 590.

S. 228.

Intentional insult or interruption to a public servant—S. C. 186.

SS. 300 and 304.

Provocation grave and sudden—Wife found lying with other—30 I. C. 449.—2. O. L. J. 463.

S. 302.

Murder with ferocity—Sentence of death—S. C. 210, 216—3 O. L. J. 19.—Suspected participator in crime appearing as prosecution witness—weight of his statement—1 O. L. J. 95.

S. 304.

Intention to cause death—S. C. 123.—Congestion of lungs.—S. C. 242.—Death by negligence—Sinking of boat overcrowded—Lessees of ferry not responsible—Accident—26 I. C. 664.

S. 314.

See S. 201, S. C. 138.

SS. 320, 411.

Theft committed during the mutiny of 1857—Dishonest retention of stolen property—Amnesty proclaimed by the Government after the mutiny—S. C. 190.

S. 323.

Security to keep the peace after conviction on a summary trial—7 O. C. 338.—Power of High Court in revision—13 O. C. 161.

S. 325.

Power of High Court in revision —17 O. C. 92.

SS. 335 and 338.

Grievous hurt—compoundable offence—S. C. 74.

S. 342.

See S. 211—5. O. C. 240.

SS. 361, 362, 363.

Elements constituting offence—Kidnapping from lawful guardianship not a continuing offence—Distinction between "taking and retaining" and "taking and detaining" and "concealing"—Abetment—15. O. C. 351.—Kidnapping by paternal uncles—Guardian of Hindu girl —25 I. C. 840, 638—15 O. C. 351—27 I. C. 121.

S. 366.

Kidnapping of two girls—Separate sentences—1 O. C. 4.—Taking to be physical—25 I. C. 638—1 O. L. J. 330.

SS. 394, 395.

See SS. 34, 302, 30—3 O. C. 263.—Presumption of dacoity—Possession of stolen property—1 O. C. 1.—Dacoity committed in Lucknow District—Trial by jury and not by assessors—27 I. C. 553—Pointing place where stolen property found—23 I. C. 1004.—Identification of dacoits—Weight of evidence—39 I. C. 296.

S. 396.

See SS. 342 and 289 Cr. P. Code—1 O. C. 84.

S. 397.

See S. 34—3 O. C. 263.

S. 400.

Meaning of belonging to "gang of dacoits"—Evidence of approver —Evidence necessary for corroboration of an approver—13 O. C. 235—243.

S. 401.

Evidence necessary to prove offence of—7 O. C. 163—10 I. C. 23 (25).

S. 409.

Place of trial—4 O. C. 476—Foreign Jurisdiction and Extradition Act—5 O. C. 55.

S. 411

Second conviction in cases of dishonest retention of stolen property —S. C. 167.—Dishonestly receiving stolen property—Security—S. C. 70.

S. 442.

Thatched hut, whether a building —3 O. L. J. 493.

S. 447.

See SS. 423 and 522—Cr. P. Code —7 O. C 208.

S. 448.

House trespass—To enter into judgment-debtor's house for execution of warrant—2 O. C. 65.

S. 451.

House trespass with intent to commit adultery—Husband's possession of house essential—Consent of husband—23 I. C. 703.—1 O. L. J. 48.

SS. 465, 467.

See S. 195 (*c*) Cr. P. C.—8 O. C. 313—Forgery—Will—3 O. L. J. 477.

SS. 468, 471.

Production of forged certificate for obtaining employment—5 O. C. 232.

S. 476.

Proceedings in execution of decree are judicial proceedings—17 O. C. 309.

S. 490.

What amounts to breach of contract of service—S. C. 87.

S. 494.

Infant marriage—Bigamy—S. C. 16.

S. 495.

Brother of the husband of the woman is not as such a "person aggrieved"—11 O. C. 148.

S. 498.

Evidence of marriage—3 O. C. 342.

S. 500.

See S. 132 Evidence Act—3 O. C. 80.

S. 503.

Threat to injure property—S. C. 146.

S. 511.

Distinction between an attempt and preparation—S. C. 76.

Penal.

Rate of interest—2 O. L. J. 402.—See Interest.

Penalty.

See S. 74 Contract Act.

Pendentilite.

Transferee, whether bound by result of litigation—2 O. L. J. 291 —16 O. C. 148—13 O. C. 50.

Pension.

Grant of villages revenue free not a—18 O. C. 168

Personal.

Contract to pay the mortgage money—12 O. C. 275.—Contract with manager—14 O. C. 127.—Covenant not to redeem prior mortgage before satisfaction of subsequent mortgage —17 O. C. 303.—Covenant to pay— 10 O. C. 14.—Decree—14 O. C. 62— 18 O. C. 145—17 O. C. 153—16 O.C. 48.—Knowledge of the judge—O.

P. J. 221.—Knowledge—S. 110 Cr. P. C.—10 O. C. 168.—Liability—12 O. C. 275—17 O. C. 207.—Pre-emption a, right—18 O. C. 256.

Plaint.

Cause of action—4 O. C. 29—S. C. 255.—See O. XLIII. R. 1—2 O. C. 5. —See O. IV, R. 17—S. C. 120.—Converting suit of one character into suit of another and inconsistent character—S. C. 92—8 O. C. 266.—No amendment without notice under —S. 80 C. P. C.—4 O. C. 133.—Verification of—O. P. J. 635—Suit for declaration—Amendment—6 O C. 324.—Amendment so as to claim jointly for himself and the added defendant—11 O. C. 225.—Amendment of, in suit in which plaintiff is held not a minor at the time of its institution—5 O. C. 355.—Where plaintiff entered as minor by mistake—7 O. C. 234—Suit instituted by minor without next friend—11 O. C. 159.—Objection as to amendment taken in appeal—4 O. C. 314—S. C. 214.—Extention of time allowed for amendment—8 O. C. 241(244) —Amendment after period of limitation had expired—S. 22—Limitation Act—19 O. C. 221.—Order returning for presentation to proper Court —11 O. C. 98—And labels, entry of actual date of presentation in—17 O. C. 148.—Or written statement, documents filed with, party filing not permitted to resile therefrom—17 O. C. 327.—Court making new case not set up in—5 O. C. 222—7 O. C. 287.—Use of forms of—S. C. 93.—Informality in—Inconsistent allegations—1 O. C. 88.—Insufficiently stamped—Limitation—4 O. C. 108—S. C. 118.—See O. XLIII, R. 1 C. P. C.—Plaintiff how far bound by case set up in—6 O. C. 119, 247 —S. C. 261, 293.—Returning of,—See 88. 92, 93 C. P. C.—5 O. C. 110. 116, 367.—Treated as application under S. 47 C. P. C.—8 O. C. 327. —Verification of, by acting manager—21 Cal. 60.—Fraud alleged but not proved—9 I. C. 429.—New relief claimed for the first time in appeal—3 O. C. 254—27 I. C. 960.—Whether a question of procedure—13 O. C. 152.—Jurisdiction of Court on valuation given in—16 O. C. 257. —See O. I, R. 10.—O. VII, RR. 1—18 C. P. C.

Plaintiff.

Abstaining from giving evidence —O. P. J. 739.—In a previous suit ignorant of his right not precluded from suing for it in a subsequent suit—O. P. J. 553.—Though claiming superior may get inferior rights —O. P. J. 314.—To succeed on his own title—O. P. J. 452.—See *Res judicata*—9 O. C. 339.—Deed of charge—12 O. C. 130—16 O. C. 354. —Relinquishment by—32 I. C. 740 —13 O. C. 183.—Misconduct, declaration refused on ground of—9 O. C. 185.—Title, decree whether it can be passed on—12 O. C. 183.—Title, proof of—9 O. C. 273—11 O. C. 93, 290.—See S. 5 Limitation Act—10 O. C. 291.

Pleader.

See Legal Practitioner's Act.—Certificate of fee lodged in Court after argument—13 I. C. 500.—Authority of—Withdrawal of plea —Client's position in appeal—34 I. C. 390.—Repudiation of admission of facts made by pleader—20 O. C. 49.—Appearance by, without instruction—2 O. L. J. 198.—Liability of, for giving wrong advice—10 O. C. 95.—Holding brief for another in appeal—9 O. C. 65.—Informed of date of hearing—2 O. L. J. 198.—Refusing to disclose professional communication on being questioned by Court—20 I. C. 598.—Fee—13 I. C. 500—17 O. C. 284.—To appear

for opposite party—19 O. C. 237.—See Contract Act S. 23.—Conduct of, in cross-examination—19 O. C. 246.

Pleadings and Practice.

Order in review—Reasons not recorded—O. P. J. 736.—Plaintiff not entitled to succeed upon a case not disclosed by his pleadings—S. C. 293.—Effect of failure to prove facts alleged in—17 I. C. 296.—Vague relief based on allegations outside pleadings—32 I. C. 365.—Parties to abide by the position they have adopted—8 O. C. 353—3 O. C. 32—4 O. C. 199, 408—6 O. C. 119.—Point not raised in memorandum of appeal—15 I. C. 270.—Vague—1 O. L. J. 591.—Setting a new case not made out in the plaint—6 O. C. 247 8 O. C. 45, 116—1 O. L. J. 38.—Statements made in, interpretation of—Admission of claim—1 O. L. J. 447.—New plea at the time of argument—4 O. C. 347.—Suit to redeem converted into a case for possession—10 O. C. 17.—Now case made out by Court—5 O. C. 222.—Pleading of one party, whether can be availed of by other party—37 I. C. 23.—Regarding cases on deeds executed by *Pardanashin* women—7 O. C. 292.—Anciliary prayer failing—11 I. C. 537.—Altered in appeal—O. P. J. 882.—Vendor not necessary party in pre-emption suit—10 O. C. 49.—Plea not specifically raised—Power of Court—4 O. L. J. 456.—Execution of deed denied—Burden of proof—Plea of minority—Proof of majority—Endorsement as to age madeb y registering officer—25 I. C. 648.—And judgment referred to for explaining decree—O. P. J. 618.—Admission of document in second appeal—Discretion of two Courts not to be interfered with in second appeal—Document not produced at first appeal—11 I. C. 289.—Practice of Indian Courts not to allow interest exceeding the principal—O. P. J. 37.—Amendment setting up inconsistent case—30 I. C. 499.—Order passed by District Magistrate in absence of statutory authority—Power of Magistrate to do an act, where to be derived from—17 O. C. 263.—See O. VI, R. 16—Alternative claims on ground of ownership and prescriptive right—20 O. C. 192.—His own fraud, effect of party—18 O. C. 131.—Substitution of representatives for deceased party—O. P. J. 563.—Appeal confined to a portion below the pre scribed limit.—See Pre-emption—O. P. J. 634..

Possession.

See also adverse possession.

Suit for—Limitation—1 O. C. 229—Dispossession, suit based on—Right of groveholder to mortgage—No provision as to re-entry—Custom recorded in *Wajib-ul-arz*—Custom as to non-transferability—15 I. C. 277—2 O. C. 3.—Possession of part—Presumption.—Trespasser's possession—12 O. C. 58.—Plots in bazar used as sitting places for dealers—Superior rights with Taluqdar—Subordinate rights with plaintiff—Adverse possession—Position of Taluqdar—3 O. L. J. 417.—Over jungle scattered trees—32 I. C. 370.—Good title against trespasser—12 O. C. 129—25 I. C. 694—13 O. C. 260—11 O. C. 337—2 O. C. 3—9 O. C. 273.—Suit by one *riaya* against another for,—19 O. C. 169.—Heritability of trespasser—Taking of various periods of adverse possession—9 O. C. 161, 230—11 O. C. 337.—Actual or constructive—13 O. C. 369, 347—20 I. C. 286—Suit for—Custom—*Ikrar malikan deh*—Estoppel by acquiescence—21 I. C. 256—See also—10 O. C. 256.—Possession for a long time, sufficient for a decree—Disturbance of plaintiff's long con-

tinued possession by defendant—Title to hold possession not sufficiently established—11 I. C. 94.—Presumption as to—18 O. C. 43—19 O. C. 375.—Money deposited in Court and pre-emptor put in possession, money recovered by Magistrate in payment of fine due from vendee, decree reversed in appeal, vendee whether entitled to get back possession without payment of money—11 I. C. 227.—Mortgagee when not entitled to sue for—18 O. C. 280.—Suit for, by decree holder, auction purchaser—18 O. C. 345—Plaintiff must prove better title—19 O. C. 141.

Police Act V of 1861.

S. 17.

Order appointing special constables, whether order made in Criminal proceedings—20 O. C. 229.

Pre-emption.

Transfers giving rise to See Oudh Laws Act SS. 9, 10.—*Right and liabilities of pre-emptor.*—Pre-emptor liable like vendee—17 O. C. 377.—Suit not instituted *bona fide* with the object of excluding a stranger—13 I. C. 508.—Pre-emptor's denial of vendor's title—1 O. C. 174—2 O. C. 9—7 O. C. 61—O. P. J. 646—17 O. C. 150.—Right once accrued can not be defeated by any thing that happens afterward—19 O. C. 183—20 O. C. 160.—Plaintiff's title at institution of suit, title acquired by vendee subsequent to cause of action—11 O. C. 290, 12 O. C. 229, 14 O. C. 156—17 O. C. 242, 19 O. C. 110—Property re-sold to vendor prior to suit—14 O. C. 156, 37 I. C. 181, 170.—Pre-emptor and vendee both occupying position of Co-sharers, circumstances arising subsequent to decree—17 O. C. 242.—Amount of proof necessary to shift onus—4 O. C. 247—6 O. C. 327—14 O. C. 1.—Burden of proof, witnesses not expert—4 O. C. 247.—Person inheriting property, whether entitled to pre-empt—18 O. C. 256.—Pre-emption of part of property sold—13 O. C. 260—17 O. C. 242, 339—4 O. C. 397—3 O. L. J. 7.—Vendee acquiring property after institution of suit—20 O. C. 196.—Pre-empter joining with himself one having no right of pre-emption—1 O. C. 308—S. C. 122.—Vendee joining stranger—10 O. C. 225.—7 O. C. 22—15 Cal. 224.—No bar to a subsequent suit as reversioner—O. P. J. 936.—Per-emption as defence to redeem—S. C. 205—6 O. C. 279.—Entry in *Wajib-ul-arz* that every co-sharer had a right to sell—20 O. C. 226—See also 33 I. C. 775.—Pre-emptor with limited interest—3 O. C. 306—18 I. C. 386.—Re-purchasing the property before suit—19 O. C. 190 (19).—Where inconsistent reliefs are prayed for—1 O. C. 174.—Effect of inheriting property on right of pre-emption—18 O. C. 256.—Not defeated by decree in which plaintiff was no party—7 O. C. 1.—Widows right of—7 O. C. 158.—Rival pre-emptor's—4 O. C. 397.—Mortgage, Foreclosure, decree for pre-emption without impleading other co-sharers, transfer by decree-holder during pendency of appeal, suit carried on by money supplied by third person—19 O. C. 153—20 O. C. 196.—Transfer after institution of suit to persons having superior right—17 O. C. 150.—Rules in Agra province not applicable in Oudh—19 O. C. 185.—Omission to allege readiness to pay the price found to have been actually paid—Dismissal of suit—S. C. 214.—No right in exchange—18 O. C. 109.—Right and liabilities of pre-emptor—Relation of vendor and vendee—8 O. C. 283—9 O. C. 308.—Decree passed in favour of vendee—Right of pre-emptor to

execute—8 O. C. 186.—Right of ex-proprietary tenant to pre-empt—1 O. L. J. 405.—Pre-emptor not suing *bonafide* for herself—Maintainability—13 I. C. 508.—9 O. C. 331.—Where a *Wajib-ul-arz* stated that every sharer has a right to sell—No custom excluding pre-emption—4 O. L. J. 562—17 O. C. 105.—Application of law of *lis pendens*—17 O. C. 150.—Personal—18 O. C. 256.—Sale in favour of one of several persons equally entitled to pre-empt—13 O. C. 260—17 O. C. 242, 339.—Condition essential for enforcement of—13 O. C. 219.—Effect of single instance of claim for on—17 O. C. 105.—Heritability of—18 O. C. 256.—Permanent lease—14 I. C. 717.—Ownership of land basis of—18 O. C. 256—Auction purchasers, before confirmation of sale—10 O. C. 273—16 O. C. 99.—On mortgage deed—15 O. C. 1—16 O. C. 9.—Foreclosure decree, mortgage by ostensible owner—11 O. C. 26.—Sale of revenue free land—*Nuzul* land—10 O. C. 257.—In case of lease—14 I. C. 717—10 O. C. 348.—Money supplied by third person—10 O. C. 49.—See Oudh Laws Act.

(*c*) **Pleader's Fee.**

See 7 O. C. 43 and the Oudh Civil Digest 1912 para 272.

(*d*) **Valuation.**

Where property is alleged of greater value than sale consideration, 12 O. C. 51.—Value of subject matter of suit—Forum of appeal, 6 O. C. 255.—Jurisdiction to be decided by the valuation set forth in plaint—9 I. C. 414—12 O. C. 31—6 O. C. 255.

(*e*) **Limitation.**

Applicability of Art 10 Limitation Act—S. C. 248.—Equity of redemption incapable of physical possession, S. C. 248—1 O. C. 263.—Suit on the basis of foreclosure decree—7 O. C. 8—2 O. L. J. 109—10 O. C. 374—12 O. C. 314.—Sale deed—Agreement to pay back the purchase money, 8 O. C. 275.—Document called *hiba bil iwaz* but on the face of it a sale deed—12 O. C. 185—21 I. C. 60.—Plaint returned for presentation to the proper Court, 9 O. C. 1.—Deed purporting to rectify some mistakes, regarding numbers and plots of land, but stating no rectification for rectification—8 O. C. 288.—Sale subject to mortgage and incapable of physical possession—28 I. C. 209—See also 7 O. C. 8.

(*f*) **Pleadings.**

Vendor not necessary party—10 O. C. 49—13 O. C. 241.

(*g*) **Costs.**

Mortgagee entitled to costs properly incurred in obtaining decree for foreclosure—2 O. C. 103—3 O. C. 184.—Setting off costs by pre-emptor decree-holder—3 O. C. 323—6 O. C. 23.—Of stamp paper for sale deed—Costs of improvement, 10 O. C. 49.

(*h*) **Estoppel.**

Fraudulent transfer by vendee's husband—Vendor estopped from denying the truth of the transfer—1 O. C. 188.—Attestation of sale deed by father—Son's right to pre-empt, 1 O. C. 252—7 O. C. 61.—No estoppel against right of pre-emption in the absence of written notice—5 O. C. 395.—Waiver—1 O. C. 254.—Proof for establishing plea of, 1 O. C. 254—10 O. C. 257.—Sale openly made—Co-sharers assembled—S. C. 83.—By conduct—S. C. 305—1 O. C. 254—5 O. C. 395—7 O. C. 61.—Admission of vendor in sale deed and written statement as to part pay-

ment by vendor—Decision of question as to payment of price between vendor and vendee, 9 O. C. 308.—Estoppel by representation or conduct, 3 O. L. J. 7.

Presumption.

Arising from non-receipt of share of profits within 12 years—1 O. C. 143—As to authenticity of old documents—23 Cal. 838.—Hindu joint family—Debts incurred by members—Family necessity—Consent—33 I. C. 778.—As to common gambling house—5 O. C. 37.—Production of document with endorsement of payment—15 O. C. 278.—As to documents more than 30 years old—7 O. C. 290.—As to genuineness of very old deeds—6 O. C. 142.—As to guilty possession of opium—S. C. 161, 236.—As to issue of notice by duly constituted authority, 7 O. C. 51, 68.—As to nature of estate taken by female under oral gift—5 O. C. 345—9 O. C. 113.—As to *Zamindar's* title and possession—32 I. C. 370.—As to possession—8 O. C. 177.—As to possession of waste land—9 O. C. 33—8 I. C. 708—12 O. C. 58.—Proof as to non-existence of custom—33 I. C. 775.—As to power of one official to sign for another, 7 O. C. 65.—As to statement of a witness regarding facts which occurred in his life time and which occurred before he was born—8 O. C. 94.—In favour of entry in *Wajib ul arz*—4 O. C. 71—8 O. C. 94.—Of estate of inheritance without express words of inheritance in *birt patr*—4 O. C. 31—10 O. C. 318—14 O. C. 41—8 I. C. 407.—Of Hindu Law of gift—3 O. C. 55.—Property in possession of widow, 2 O. C. 286—3 O. L. J. 289.—Condition in lease, perpetuity—4 O. C. 139.—Of ownership—6 O. C. 119—As to perpetuity of grant in favour of temple, 4 O. C. 61.—Of *Taluqdari* estate being held in trust for joint family—4 O. C. 214.—As to family remaining joint up to particular time—19 O. C. 93.—Of trust in *Sangat* property—2 O. C. 340—6 O. C. 355 (358).—Rebuttal of—S. C. 291—4 O. C. 31, 61.—Regarding moveable property acquired by Hindu widow—3 O. C. 89.—Entries in Settlement papers, whether correct—2 O. L. J. 127.—In case of grant for maintenance, 18 I. C. 127.—When will is not forthcoming at the time of testator's death—14 O. C. 14.—See O. XXII, R. 9—24 I. C. 275.—Evidence Act—18 I. C. 250—21 I. C. 274—1 O. L. J. 426.—Hindu Law—22 I. C. 887—1 O. L. J. 587, 698—2 O. L. J. 101—As to adoption, 10 O. C. 343.—As to date of disruption, 17 O. C. 235.—As to joint property—14 O. C. 244—30 I. C. 216—18 I. C. 228.—As to separation—9 O. C. 216—1 O. L. J. 698.—As to unity of other members—17 O. C. 235.—In favour of Will, 16 O. C. 386.—In favour of acquisitions by Hindu widow out of income of husband's estate—16 O. C. 359.—In favour of jointness, 11 O. C. 381.—In favour of marriage—13 O. C. 170.—In favour of title, 12 O. C. 58.—Of possession in favour of trespasser 18 O. C. 43.—Of possession when the land was under water—18 O. C. 43.—See "Will," "Grant."

Primogeniture.

Meaning of—O. P. J. 1010—See Act I of 1869.

Principal and Agent.

Agent fully represents his principal in dealings with other persons and his knowledge is knowledge of principal—3 O. C. 55.—Misconduct of agent—O. P. J. 502.—Pronote executed by agent—Liability of principal, 4 O. L. J. 299.—Authority of agent to incur personal liability on behalf of principal—16 I. C.

999—3 O. L. J. 623.—*Benami* transaction, O. P. J. 716.—Agent employed to sell at given price—Purchaser found by agent—Refusal by purchaser to sell—Agent entitled to remuneration—14 I. C. 981.—Lease—O. P. J. 795.—And surety—13 O. C. 206.—See 11 O. C. 191.

Privacy.

Suit to enforce right of—Customary right of—7 O. C. 126.—Right of—15 I. C. 270.

Privy Council.

Power to decide point appearing in the written proof but not discussed in the lower Appellate Court, 16 O. C. 136.—Concurrent findings of Appellate Court and Court below—Substantial question of law—30 I. C. 239—O. P. J. 899—See C. P. C. SS. 109, 110, 111—And O. XLV, R. 2.—Hearing of appeal in the absence of respondent, O. P. J. 872.—Certificate granted to appeal to, 15 O. C. 55.—See SS. 109, 110, 111 C. P. C.

Probate and Administration Act (V of 1881).

SS. 4, 64, 71.

Application by widow for letters of administration to husband's estate—Joint family—Limitation—Self-acquired property—4 O. C. 224.—And letters of administration—11 O. C. 101.—The order that the Court fees must be fixed before any further proceedings on the application could be taken, not appealable—4 O. C. 84.—Probate unnecessary among Hindus—2 O. C. 33.—Application can be heard when Court fee not paid—14 O. C. 14.—Revocation by person cognizant of proceedings—14 O. C. 77.

Proclamation.

Of 15th March—Confiscate houses, regranted for life time—O. P. J. 327, 321.—*Sanad*—Summary Settlement—O. P. J. 221.—Of Lord Canning of 1858—9 O. C. 249.

Promissory Note.

Suit by a *benami* holder of—Real creditor—1 O. C. 10.—Execution not proved—Decree for amount proved to have been lent—6 O. C. 16—9 O. C. 315.—Transfer of interest in Government—9 O. C. 174.—Execution admitted—Undue influence of plaintiff and immorality of defendant pleaded Burden of proof—consideration—17 I. C. 309.—Given as security for previous debt—Meaning of *Rukka indul talab*—Construction—21 I. C. 199—See 3 O. C. 195—7 O. C. 166—11 O. C. 152.—Failure of consideration—Effect of endorsement by payee after maturity—18 O. C. 272.

Provincial Insolvency Act (III of 1907)—See Insolvency.

SS. 5, 6.

Meaning of "reside"—Jurisdiction—39 I. C. 453—25 I. C. 41.

SS. 6—15, 16.

When petition to be dismissed—Bad faith and fraud—13 O. C. 94—17 O. C. 138.—SS. 16 (2) and (2*a*)—Receiver—Money received as pension—12 O. C. 323.

S. 16.

See 13 O. C. 94—17 O. C. 138.—Prohibition—Applicability of the Act—Operation of order of discharge—17 O. C. 267.—*Wasika* allowance, whether a pension or not, 12 O. C. 323.

SS. 16, 31.

Right of secured creditors to proceed against the assets realized by sale—15 I. C. 860.

S. 27.

Duty of District Judge, 18 O. C. 125.

S. 36.

Transfer by insolvent made two years before adjudication—Order—Jurisdiction, 23 I. C. 924.

SS. 43, 46.

Insolvent refusing to produce books of account, whether can be punished before order of discharge —19 O. C. 89.—Criminal proceedings —Procedure—Admissibility of evidence recorded at time of adjudication, 20 O. C. 123.—Bad faith of debtor, Judges power as to, 17 O. C. 138.

Provincial Small Cause Court Act (IX of 1887).

Suit by successful objector as regards property attached and then released but not restored—Costs—19 O. C. 236.

S. 15.

See jurisdiction.

S. 17.

Application to set aside exparte decree—Deposit of decretal amount —3 O. C. 296.

SS. 23 and 25.

Question of title—Revision—14 I. C. 2.

S. 25.

Meaning of according to law—S. C. 255.—Procedure as to recording of judgment—8 O. C. 44, 290.—Revision of orders and decrees of Court of Small Causes—S. C. 292—14 O. C. 343.—Suit to recover purchase money from decree-holder—14 O. C. 343.—Whether question of limitation good ground for revision—15 O. C. 319—See also 14 O. C. 343.

S. 27.

Appeal from *Munsif's* decree, 7 O. C. 144.—Fresh trial—3 O. C. 20.

SS. 27 and 35.

See jurisdiction.

S. 35.

Suit on bond hypothecating boats —1 O. C. 191—See 6 O. C. 81.

Sch. II Art. 3.

Suit for damages for breach of contract against Secretary of State for India—5 O. C. 403.

Art. 7.

See jurisdiction.

Art. 8.

Theka as to right of fishery and collection produce, 15 I. C. 666.

Art. 11.

See 2 O. C. 256—4 O. C. 89.

Art. 12.

Suit to discharge *Mahabrahmani* functions, 2 O. C. 62, 276—4 O. C. 89.

Art. 20.

Suit for recovery of the amount realised from sale of the property attached—5 O. C. 190.

Art. 31.

See 5 O. C. 130.—Suit for profits of immoveable property belonging to plaintiff wrongfully received by defendant—Second appeal in a suit for less than Rs. 500—7 O. C. 202.

Art. 35.

Suit to recover money advanced as loan on condition of marriage—4 O. L. J. 171.

Art. 38.

Suit for arrears of maintenance—1 O. C. 93.

Art. 41.

Suit for contribution by one of several joint under-proprietors—24 I. C. 28.

Puisne.

Mortgagee See Mortgage.—Entitled to repudiate his liability, 19 O. C. 39.

Purchaser.

A necessary party to application under, O. XXI, R. 90—S. C. 289—25 I. C. 907.—Mortgagee purchaser of mortgagor's right in execution of decree of third party—7 O. C. 307—8 O. C. 327.—Auction, party in mortgage suit—5 O. C. 91—13 O. C. 109.—Sale in execution of simple money decree—Sale of hypothecated property—Right of—S. C. 13.—For value without notice—6 O. C. 305.—In execution of decree on prior mortgage when sale takes place after sale on subsequent mortgage—7 O. C. 243—29 All. 339.—Joined as co-plaintiff—2 O. C. 149.—Liability of to pay, *haq chaharum*—S. C. 147.—Of decree-holder's rights, *benamidar* of—7 O. C. 229.—Of property after attachment—8 O. C. 189.—Of the house in execution of decree against the tenant—Right to occupy—10 O. C. 4—14 O. C. 231.—Liability to pay off the encumbrance entered in the proclamation of sale—10 O. C. 252—19 O. C. 110.—Auction, subject to a mortgage—Right to challenge the mortgage—15 O. C. 211—16 O. C. 148—10 O. C. 314—2 O. L. J. 225—17 O. C. 60.—Of mere equity of redemption as distinguished from purchaser of property—15 O. C. 211—30 I. C. 238.—Plea of priority—Plea of want of consideration and undue influence—15 O. C. 211.—Suit to recover purchase money from the decree-holder, 14 O. C. 343.—Applicability of *caveat emptor*, 14 O. C. 343.—Warranty in case of execution sale—14 O. C. 343.—Subsequent variation in decree—16 O. C. 225.—Amount payable on redemption from—12 O. C. 133.—*Bonafide*, for value—11 O. C. 310.—Liability as between, and original co-sharers, 11 O. C. 279—Payments made to, but not ratified by debtor—16 O. C. 1.—Puisne mortgagee's right to redeem from, 12 O. C. 133.—Right of, to claim rent after confirmation of sale—17 O. C. 343.—Stipulation postponing redemption till payment of the additional advance not binding on him—11 O. C. 248.—At auction—18 I. C. 461—16 O. C. 148, 225—15 O. C. 211—14 O. C. 89—12 O. C. 175, 133.—Of a portion of property, 9 O. C. 259—18 O. C. 369.—Of property only with a notice of mortgage, 15 O. C. 211—17 O. C. 38.—*Pendente lite*—16 O. C. 148.—Without notice—11 O. C. 206.—*Benami*, at execution sale, 18 O. C. 160.—See S. 66 C. P. C. and "Auction."—Of property not required to give notice to mortgagee, 19 O. C. 12.

Railway Act (1890).

Suit for compensation against State Railway should be brought against the Secretary of State—Amendment of plaint—Notice—4 O. C. 133.—Suit for consignment lost in transit—5 O. C. 153.—Meaning of 'Railway Administration," 4 O. C. 133.

Razinama.

Naslan bad naslin—O. P. J. 512.

Receiver.

See O. XL, XLIII, XLVII, C. P. C.—Not entitled to rateable distribution—18 O. C. 268.

Registration Act.

S. 2 (6), 9.

Character of transaction to be looked to—30 I. C. 281.

S. 3.

Lease includes *kabuliat*, need not be executed by lessor—8 O. C. 197.

SS. 3, 47 and 75.

Deed of gift, 3 O. C. 231.

S. 17.

Petition of compromise relating to immoveable property, 6 O. C. 362—14 I. C. 29.—Decree in terms of compromise—4 O. C. 78.—Grove transaction, whether transfer of moveable or of immoveable, 28 I. C. 180.—Petition or pleading acted upon or given effect to—6 O. C. 364.—Agreement by vendee to reconvey not compulsorily registerable, 28 I. C. 132.—Agreement in a petition of compromise filed in Mutation proceedings, 13 O. C. 241—27 I. C. 938—17 O. C. 108—5 I. C. 234—18 O. C. 51—31 I. C. 449—19 O. C. 75.—Receipt—Not extinguishing mortgage—7 O. C. 321.—Agreement to refer to arbitration—13 I. C. 500.—Award whether compulsorily registerable—4 O. L. J. 487.—Lease for quarrying limestone—7 O. C. 231.—Lease, 1 O. L. J. 585.—*Nikahnama*—Assignment by husband in favour of his wife in discharge of dower debt—3 O. C. 277.—Receipt of payment of money due under mortgage—Admissibility in evidence—16 I. C. 179.—Letter reducing rent of tenant—2 O. C. 250.—Document declaring antecedent title by way of inheritance—Mutation proceedings—2 O. L. J. 67—17 O. C. 108.—Unregistered *Sulehnama*—Covenant for pre-emption—5 I. C. 234.—See also S. 54 T. P. Act.—Immoveable property over Rs. 100 in value given to wife in lieu of dower—14 O. C. 214.—Not compulsory in case of sale of undivided share—14 O. C. 161.—Of bond executed by guardian, 10 O. C. 38.—Construction of document—14 O. C. 133.

S. 28.

Registration at a place where the property found not to belong to the executant situate—13 O. C. 265—7 I. C. 614.

SS. 32, 33, 60, 87.

Registration by duly authorized agent—Defect of procedure—Period for application of execution of a registered decree—6 O. C. 9.—See S. 77 Registration Act.—See 11. O. C. 353.

SS. 34, 87.

Registration contrary to, not void—14 O. C. 207.

S. 34.

Registration after the expiration of four months—14 O. C. 207.

S. 35.

Endorsement as to age made by registering officer—1 O. L. J. 366.

S. 47.

Time from which document operates—3 O. C. 231.

S. 49.

Unregistered deed—Inadmissible—Evidence of contents not allowed—7 O. C. 231.—Purchaser not bound by stipulation postponing redemp-

tion till payment of the additional advance, 11 O. C. 248.

S. 50.

Registered deed of sale, priority of—"Tangible property" defined—2 O. C. 74—14 O. C. 161.—Priority of mortgage executed subsequent to, over deed of gift executed prior to, passing of Registration Act—7 O. C. 342.

SS. 52, 58 and 60.

Endorsement and certificate of Registrar—14 O. C. 80—S. C. 296—19 O. C. 23—20 O. C. 18.

S. 65.

Presumption that duties imposed on sub-Registrar were performed by him—S. C. 197.

S. 72.

No appeal to Registrar—2 O. C. 77.

S. 74.

Admissibility of certified copy—7 O. C. 327—7 O. C. 365.

SS. 74, 76 and 77.

Suit to enforce registration, 11 O. C. 353, 358.

S. 75.

See SS. 3, 47 and 75—3 O. C. 231.

S. 77.

Period of limitation—2 O. C. 77.—Suit to enforce registration points to be proved—11 O. C. 353—S. C. 62.

S. 81.

Failure or doubt—6 O. C. 153.

S. 82.

See 11 O. C. 358.

S. 87.

Registeration of document presented by person not authorized to present—6 O. C. 9.—Defect in procedure cured by, 14 O. C. 207.

Regulation XI of 1825.

S. 4 (1) and (5).

Alluvial lands—Meaning of gradual accession—S. C. 290—27 Cal. 768—8 O. C. 293—23 I. C. 224.

Regulation XVII of 1806.

Validity of foreclosure proceedings taken under—Objection to attachment—Dismissal for want of prosecution—Regular suit necessary to set aside the order—12 O. C. 345—11 O. C. 180—O. P. J. 461.

Riyaya.

Suit for possession of land appurtenant to dwelling house—19 O. C. 169.

Remand.

See O. XLI and O. XLIII, C. P. C.

Res Judicata.

Suit for arrears of rent—3 O. C. 22, 65—7 O. C. 169—15 O. C. 45.—Second suit to eject tenant, S. C. 254.—Second suit to redeem a mortgage—S. C. 256—10 O. C. 145—3 O. C. 371—8 O. C. 361—12 O. C. 347.—Cause of action—8 O. C. 389—10 O. C. 44—13 O. C. 19—12 O. C. 347.—See Hindu Law—Alienation—11 I. C. 291.—Case decided in favour of one party—Decision adverse on one point not effecting ultimate favourable decision of case—Appeal—30 I. C. 502.—Competent Court—9 Cal. 439—6 O. C. 299.—Identity of cause of action, 15 Cal. 808.—14 O. C. 117.—Omission to raise ground of defence in former suit, 27 All. 37—7 O-

C. 169.—Relief claimed in the subsequent suit which could have been claimed in the previous suit, 5 O. C. 173—10 O. C. 44—13 O. C. 19.—Decrees determining exactly the same matter, one of which not appealed against—5 O. C. 384—15 O. C. 22—14 I. C. 321—21 I. C. 264.—Inclusion of whole claim in suit—15 Cal. 800. —Requisites for execution of time-barred decree—18 O. C. 374.—Judgment not confirmed by last King of Oudh, R. and J's. 32.—Second suit for recovery of occupancy right, 34 I. C. 640.—Decision between parties one of whom had no right to sue, 20 I. C. 429.—Decision on question of law—5 O. C. 181—2 O. C. 261—3 O. C. 22—8 O. C. 37—10 O. C. 145.—In former litigation no decision as to genuiness of document, 4 O. C. 408.—Sale of mortgaged property in execution of decree—Objection taken after part of mortgaged property sold—5 O. C. 251.—Suit for maintenance—9 Cal. 945.—Decision of question of title by Revenue Court in partition proceedings—2 O. C. 351.—Plaintiff not party to previous suit—Decision obtained against widow not binding on adopted son —9 O. C. 339.—Conflicting decision of Civil and Revenue Courts, 2 O. C. 28.—Effect of decree on compromise, 2 O. C. 112—7 O. C. 169.—Question decided in proceedings under S. 53 Oudh Land Revenue Act, 5 O. C. 97. —Exparte decree—5 O. C. 181—9 O. C. 243—14 O. C. 332.—Between parties arrayed on the same side—4 O. C. 108—2 O. C. 303.—Not applicable to execution proceedings—S. C. 131 —32 I. C. 754.—Bare expression of opinion which is not given effect to by decree—7 O. C. 122.—Finding on preliminary issues—16 O. C 178.—Decree for redemption—Separate suit for mesne profits, 8 O. C. 302—12 O. C. 152—10 I. C. 11 (13).—Finding on one issue sufficient to dispose the case, finding on other issues whether, 19 O. C. 69.—Pre-emption—Suit for recovery of portion of consideration, 8 O. C. 283—9 O. C. 308.—Property released on objection of third party and no suit brought, 8 O. C. 306.—Loss of money deposited.—Second suit for redemption.—9 O. C. 7.—Decision as to point pleaded by one defendant and supported by another—9 O. C. 125.—Finding on issues improperly raised—9 O. C. 377.—Reversioner's suit for possession—Plaintiff's former suit for pre-emption dismissed —10 O. C. 117.—Mortgagor's suit for possession after dismissal of similar suit by mortgagee—9 O. C. 33.—See S. 106—O. XXIII, R. 1—20 I. C. 17. —Second appeal only against one of two decrees in cross appeals disposed of by one judgment, when maintainable—21 I. C. 264—See 5 O. C. 384, 146—15 O. C. 22—42 I. C. 424. —Expression of concurrence with an *obiter dictum* quoted from a ruling is not—2 O. L. J. 113.—U. P. Land Revenue Act (III of 1901)—Decision of Deputy Commissioner as to the amount of rent and cesses—12 I. C. 331.—Plaintiff in his previous suit ignorant of his right, O. P. J. 553.—Judgment in a declaratory suit, in a suit for possession of the entire estate—O. P. J. 555.—Sale by widow —Suit for pre-emption—Claim of reversioner after widow's death—O. P. J. 936.—Fraud—4 O. L. J. 522—3 O. L. J. 501.

Respondent.

Objections by, against a party not appellant in the appeal and having distinct interest—11 O. C. 93.

Restitution of Conjugal Right.

Dower not paid—S. C. 57—10 O. C. 11—15 O. C. 127—18 Bombay 316 —4 I. C. 974.—Cruelty as defence—

15 O. C. 159—18 I. C. 867—4 All. L. J. 60—12 W. N. All. 77.—Cruelty—Use of liquor—Occasionally beating wife—4 O. L. J. 112—40 I. C. 674. —See Mahommedan Law—Dower.

Resumption.

See Land Revenue Act (Oudh) SS. 53, 52 and Oudh Rent Act Chapter VII.—Suit between grantor and grantee—Whether mortgagee from grantee necessary party—Right of mortgagee—28 I. C. 440—6 O. C. 110.—Claim for under-proprietary right—Entry in *Khasra* proving only forty-seven year's possession—Presumption as to fifty years possession—1 O. L. J. 275.—Hearsay evidence of land having been held for fifty years and by two successors—1 O. L. J. 248.

Review.

See O. XLVII and O. XLIII, S. 114 C. P. C. and application.

Revision.

(Civil) See S. 115 and O. XLVIII C. P. C.—Criminal—See SS. 435, 439 Cr. P. C —Court of District Magistrate inferior to that of the Session's Judge—19 O. C. 108.—Of order of Small Cause Court by decree-holder —19 O. C. 91.

Reza Milkiat.

Meaning of—11 O. C. 164—16 O. C. 174.

Sale.

Of trees in execution of decree—*Wajib-ul-arz* forbidding sale of trees by tenant—13 O. C. 366.—Deed setting aside, suit of—Sale of claim under litigation—Validity or invalidity to be judged by circumstances—1 O. L. J. 518.—Proclamation notifying charge on property—Sale subject to mortgage—Prior mortgagee to question validity of subsequent mortgagee—2 O. L. J. 140.—Sale in execution of decree, whether voluntary transfer—15 O. C. 345.

Sale of Goods Act.

Stipulation as to time of delivery —13 O. C. 143.

Sanction to Prosecute.

See SS. 195 and 211 Cr. P. C.

Security.

Renewal of, suit for contribution —19 O. C. 44, 347.

Settlement.

Confiscation of property in Oudh —Release of Government right—Limitation—4 Cal. 727—9 O. C. 249 (252).—Proprietary right—*Ratio decidendi—Onus probandi*—14 M. I. A. 401.—Mainly for the benefit to descendants of settlers—27 All. 320 —Of account—See S. 108 (15) Oudh Rent Act.—Of estate—26 Cal. 879.—Summary with Taluqdar—Sup.—1 O. C. 36—14 O. C. 95.—Correctness of entry at the last—S. D. 17 of 1912.—Summary, date of making of—16 O. C. 216.

Settlement Court.

Decree for under proprietary right—Decree obtained by fraud and collusion—Admission of claim by Court of Wards—S. C. 199, 200, 233 —4 O. C. 31—10 O. C. 318—8 O. C. 202.—Effect of—Decree not fixing time when mortgage money was to be paid—8 O. C. 361—14 O. C. 100 —15 O. C. 99.—Compromise in, not a mortgage—10 O. C. 17.—Decree of —14 O. C. 144.—Decree granting right of pre-emption—12 O. C. 220.—Pedigree filed in, how far admissible—15 O. C. 364.—Procedure of,—9 O. C. 301.—Decree—*Nankar*—18 O. C.

380.—Transfer against decree of—14 O. C. 225.—Deduction of *Dahyak* allowance based on Settlement decree—17 O C. 6.—Effect of restrictions against transfer imposed by—15 O. C. 67.—Decree against Talukdar for lease—12 O. C. 267—13 O. C 303.—Decree, power of Civil Court to interpret—25 I. C. 743.

Small Cause Court Act.

See Provincial Small Cause Court Act.

Societies Registration Act

(XXI of 1860)

Whether suit lies to enforce the right to subscribe—19 O. C. 15.

Specific Relief Act.

S. 9.

Possessory suit—Constructive possession by receipt of rent—Suit by tenant for recovery of occupancy of land from which he has been illegally ejected by landlord—S. C. 243, 114—Not F. 14 O. C. 60 (61).—Suit in ejectment by licensee against trespasser—15 O. C. 316.—Dispossession of tenant if dispossession of landlord—Suit for possession—18 O. C. 353.—Effect of decision upon question of title—*Res judicata*—20 O. C. 237.

S. 12.

Undertaking in mortgage deed to put mortgagee in possession—2 O. C. 24.—A suit for possession by mortgagee in default of payment of interest is not a suit to enforce a contract to transfer immoveable property—10 O. C. 218—10 I C. 190 (192).

SS. 21, 24.

Contract must be in existence at time of suit- 4 O. C. 17.—Suit for recovery of money left with mortgagee to pay off prior mortgage—8 O. C. 5—10 O. C. 69—Suit by mortgagee to recover mortgage money—10 O. C. 69.—Suit for recovery of money agreed to be paid on a mortgage—11 O. C. 217.

SS. 27 (*b*).

Contract of sale—Sale disguised as mortgage—*Bonafide* transfer—Notice—34 I. C. 396.

SS. 31.

Suit for rectification of mortgage deed—Mistake unilateral—8 O. C. 1—Fraud—Mistake—O. P. J. 515—14 Cal. 308.—Rectification of sale deed—11 O. C. 93—16 O. C. 213.

SS. 35, 39.

Suit by mortgagor for cancelment of mortgage deed—Refusal of mortgagee to advance money—Fraud—S. C. 280.

SS. 39, 42.

Commencement of period of limitation, effect of registration—1 O. C. 178—39 I. C. 456.—See "Declaration," "Declaratory."—Suit to set aside decree, maintainability of,—Fraud—30 I. C. 849.

S. 42.

Meaning of "entitled to a legal character"—Case of candidate defeated at election—16 O. C. 36.—Possession not delivered—Whether declaratory suit maintainable—35 I. C. 395. Mere question of law, whether justifies grant of declaration—1 O. L. J. 344.—Maintainability of suit against Secretary of State—Jurisdiction—Necessity of hearing case before granting declaration—17 O. C. 369.—Entry of plaintiff's name in Revenue papers as in joint possession—Suit for partition not barred—20 I. C. 429.—Application

of—17 O. C. 354.—Setting aside of compromise made to the detriment of minor's interest—Application of —16 O. C. 247.—Discretion of Civil Court in matters exclusively cognizable by Revenue Court—20 O. C. 182.—See " Declaration " " Declaratory."

S. 54.

Patent injunction to restrain infringement of—7 O. C. 103.

S. 56.

Suit for injunction to close the door and to remove the thatch, and to prevent the flowing of water from the defendant's roof on his land—12 O. C. 33.

Stamp.

Adhesive, cancellation of—15 O. C. 58.—Different date on, refusal to accept plaint or application—17 O. C. 148.—Necessary for appeals from decree under O. XXXIV, R. 3—18 O. C. 11.

Stamp Act (1869).

Unstamped *Kabuliat*—Admissibility in evidence—S. D. 22 of 1884.—Unstamped receipt—Maker—Acceptor—S. C. 33.

Stamp Act (1879).

Promissory note written on a Rs 3 impressed sheet bearing the word " Hundi"—S. C. 169, 201, 183.—Acknowledgment of debt—Execution of *Rukka*—Revocation of contract to pay—3 O. C. 195—11 O. C. 152—21 I. C. 199—6 O. C. 16—7 O. C. 166—9 O. C. 315.

Stamp Act (II of 1899).

S. 2.

Admission of document insufficiently stamped—Appeal—4 O. C. 318—*Kabuliat* executed on stamp payable for lease—7 O. C. 169.

S. 3.

Meaning of " final order "—1 O. L. J. 190.

S. 12.

Cancellation of adhesive stamp—Lines drawn on—15 O. C, 58.

S. 16.

See Acknowledgment—Stamp Act 1879.

S. 36.

Instrument not sufficiently stamped—11 O, C. 152.

S. 62.

Meaning of " Accepting "—4 O. C. 168.

Sch. I. Art 45.

Final decree operating to effect partition of moveable or immoveable property—Instrument of partition—1 O. L. J. 281.

Art 53.

Construction of document—Receipt—Memorandum—Whether stamp required—42 I. C. 328.

Statement.

Made by party or his Pleader—Admissibility in evidence—1 O. L. J. 532.—Witness to correct before completion of—16 O. C. 81.—By executant made to the registering officer —14 O. C. 80.—In first report made by complainant—1 O. L. J. 687.—Made *post litem motam*—11 O. C. 362 —Contradictory in the same deposition—16 O. C. 81.—Of the accused recorded in English—10 O. C. 211.—Of witness taken behind the back of the accused—17 O. C. 363,

Statute.

Interpretation of—Change in law of procedure—13 O. C. 152—See 2 O. L. J. 641.—

Sub-mortgage.

See mortgage—12 O. C. 260—9 O. C. 233—18 I. C. 389.

Sub-tenant.

See Oudh Rent Act S. 72.

Subscription.

Whether Committee bound to accept—19 O. C. 15.

Succession Act (X of 1865).

S. 31.

Right of transfer and bequest—Estate of ordinary Hindu widow—S. C. 10.

S. 49.

Power of attestation or revocation —2 O. C. 226—9 O. C. 159—12 O. C. 157—4 O. C. 145.

S. 50.

Will, validity of—Attestation clause—30 I. C. 263.—Execution of will includes signature of executant and attestation of witnesses—Execution when complete—Place for executant's signature—Revocation of previous will—1 O. L. J. 591—11 O. C. 102.

SS. 96 and 321.

Wills executed by Hindus—Interpretation of—9 O. C. 159—11 O. C. 337—9 O. C. 230.

SS. 111 and 187.

Will bequest to daughter—9 I. C. 123.

S. 217.

Powers of administrator appointed under—Creditors—Meaning of "for the use and benefit of the lunatic"—12 O. C. 390, 414.

S. 269.

See 12 O. C. 414.

Succession Certificate Act (VII of 1889).

Applicability of—1 O. C. 197—18 I. C. 228.—Suit for share of inheritance against administrator—Administrator's refusal to pay interest to plaintiff, no denial of plaintiff's title—2 O. C. 17.—Joint certificate to persons having antagonistic interests—S. C. 137.—Order requiring security before granting certificate not appealable—5 O. C. 13.—Joint decree-holders—Right of heirs —10 O. C. 378.—*Prima facie* title to be determined in case of intricacy—Meaning of "Summary inquiry"—14 O. C. 53.—Certificate for part only—A. W. N. 1901 p. 125—7 All. L. J. 255—(5 I. C. 424)—8 All. L. J. 79—(9 I. C. 127)—See also 12 I. C. 593—32 All. 335—33 All. 327—42 Cal. 10.

Suits Valuation Act (VII of 1887).

S. 9.

Suit for restitution of conjugal rights—S. C. 154.

S. 11.

Under-valuation—Appeal—S. C. 279.—See "Mortgage" and "Jurisdiction."—Value of subject matter of suit—Misrepresentation of true value —6 O. C. 255—12 O. C. 31—9 I. C. 414—2 O. C. 103—18 O. C. 364.—Application of—16 O. C. 257.

Surety.

Contract to treat the acceptor as —13 O. C. 206.—Debtor and his, *ex-parte* decree against, 24 I. C. 115.—Discharge of—9 O. C. 28.—For performance of decree, 11 O C. 342.—See S. 145 C. P. C., O. XLI, R. R. 5, 6, 10 C. P. C.

Taluqdar.

Right to possession of house left by tenant—Meaning of *Viran*—14 O. C. 231.—Provision for maintenance of relatives, 13 O. C. 74—30 I. C. 249.—*Dhara* dues—Contruction of Settlement decree—Liability of *Taluqdar*—4 O. L. J. 154.—Acquisition by—11 O. C. 256—16 O. C. 216.—Heir of—18 O. C. 188.—Objection by in partition between under-proprietors, 11 O. C. 252.—Will executed by, 11 O. C. 102.—Oral gift by, 13 O. C. 172.—Family custom appertaining to, 16 O. C. 290.—Mortgagee's right to enforce payment against, 15 O. C. 99.

Taluqdars' Relief Act (Oudh).

SS. 3 and 4.

Hypothecation of lands under management—10 Cal. 740.

Tenant.

Deliberately omitting to cultivate holding rent of which is payable in kind—Landlord's remedy, 17 O. C. 55.—Rights of ordinary, non-transferable—19 O. C. 117.

SS. 9, 10, 11 and 20.

Interest—Manager appointed under Act XXIV of 1870—Determination of amount of debt by Manager —Limitation—R. and J's. No. 51.

S. 17.

Fraudulent Contract—R. A. R. 1.

Tender.

See S. 83 T. P. Act.

Transfer.

Absolute right of—1 O. L. J. 421.—Arrears of rent due at the date of —10 O. C. 36.—Creating right of pre-emption, 18 O. C. 104.—Competency of minor to take property under, 18 O. C. 115.—Contract to, 10 O. C. 218.—Effect of restriction against, 15 O. C. 67.—Fraudulent, 12 I. C. 401—13 O. C. 265—15 I. C. 509.—*Qabzadari* without right of—14 O. C. 144 —Report of, by mortgagee, S. D. 2 of 1911.—Right of tenant to, in respect of materials of house—10 O. C. 4.—By tenant—18 I. C. 383—25 I. C. 7.—In favour of next reversioner, 1 O. L. J. 470—9 I. C. 243.—Not in good faith, 11 O. C. 197.—Of expectancy of succession, 15 O. C. 122.—Of dwelling house by tenant —10 O. C 31—9 I. C. 427.—Of occupancy tenure, 10 O. C. 235.—Of plot of land containing trees—18 O. C. 122.—See S. 6 T. P. Act.

Transfer of Property Act.

SS. 2, 67 and 90.

Decree subsequent to the Act coming in force—4 O. C. 231.

S. 3.

Lease—Grant as a "*Zamindari* village"—Form of suit—25 All. 1.

S. 6.

Hereditary farming lease whether transferable, 3 O. C. 108—S. C. 282—6 O. C. 94—7 O. C. 265—23 I. C. 231—5 O. C. 187—18 I. C. 583.—Transfer by *pardanashin* lady—4 O. L. J. 425.—Mortgage of occupancy holding by tenant—Relinquishment of holding after transfer to a third party—7 O. C. 265—18 I. C. 383—9 I. C. 243.—Mortgage of occupancy

holding—Transfer in breach of terms of decree of Settlement Court 14 O. C. 144—Objection by transferor that transfer is void—15 O.C. 67—18, I. C. 383—30 I.C. 388.—Abandonment of heritable interest—15 O. C. 67.—Transfer of expectancy—15 O. C. 122—25 I. C. 743—39 I. C. 540.—Transfer of chance of an heir apparent—11 O. C. 301—14 O. C. 139—15 O. C. 122.—Contract to make testamentary dispositions—Transfer by person in whose favour such contract exists—9 O. C. 55.—Transfer of reversionary interest—10 O. C. 277—9 I. C. 243.—Transfer of the chance of a relation obtaining property on the death of a kinsman —9 O. C. 55.

S. 10.

Restraint partial—S. C. 237.—Condition restraining alienation, 4 O. C. 163—10 O. C. 136—14 O. C. 189—25 I. C. 743—(1 O. L. J. 421).—No proviso for re-entry in case of breach, S. C. 240—7 O. C. 265—24 I. C. 780.—Condition in restraint of alienation contained in a Settlement decree—1 O. L. J. 421—4 O. C. 163—10 O. C. 136—15 O. C. 345.

S. 14.

Rule against perpetuity—Devolution of property in perpetuity not recognised by law—20 I. C. 429.

SS. 22, 23, 93 and 94.

Payment of mortgage money after time fixed by Court—5 O. C. 82—14 O. C. 10.

S. 35.

Doctrine of election—Person occupying different capacities in relation to burden and benefit, whether subject to rule of election—20 O. C. 243.

SS. 39, 91, 100.

Maintenance not charge on the right to redeem—S. C. 281.

S. 40.

Suit for recovery of sum due on account of land revenue by *Lambardar* against tenant—Transfer of proprietary right when vendor undertakes to pay land revenue—6 O. C. 184.

S. 41.

Pre-emption—Decree for foreclosure on a mortgage by ostensible owner—11 O. C. 26.—Transfer be ostensible owner—Reasonable care by transferee—3 O. L. J. 224.

S. 43.

Pre-emption—Sale of reversionary interest—No misrepresentation—7 O. C. 98—8 O. C. 349—30 I. C. 234.—Does not extend to cases of S. 6 (*a*)—39 I. C. 540.—Mortgage by coparcener of undivided interest—*Bonafide* transferee without notice—14 O. C. 295.—Mortgage of joint property which subsequently became separate property of mortgagor—Right of mortgagee to redeem submortgage—5 O. C. 335—9 O. C. 233.—Co-mortgagor redeeming usufructuary mortgage—Necessity of possession—Transferee's belief in erroneous representation immaterial—Time for exercise of option—20 O. C. 72.

SS. 45 and 67.

Joint mortgage—Right to sale of the whole mortgaged property—3 O. C. 8.

S. 51.

Compensation for improvement—8 O. C. 31.—Mortgage paid off by person claiming estate—Whether real owner bound to make compensation, 4 O. L. J. 514.

S. 52.

Contentious stage—S. C. 194—1 O. C. 280—6 O. C. 294 Diss.—13 O. C. 98—10 O. C. 314—13 O. C. 50.—Encumbered property sold subject to no encumbrance—Liability of purchaser —30 I. C. 238, (2 O. L. J. 225).—Application of suits for sale and redemption—13 O. C. 50—2 O. L. J. 73.—Mortgage effected during pendency of suit—Right of sub-mortgagee—10 I. C. 16.—Doctrine whether applicable to purchasers at auction sale—3 O. C. 170—16 O. C. 148. —4 O. L. J. 135—16 O. C. 225.—Transfer invalid only to the extent of plaintiff's interest—2 O. C. 330.—Transfer pending appeal—S. C. 204. —Collusive and fraudulent proceedings—Auction purchaser—Extension to third persons—16 O. C. 225—Agreement to sell property during pendency of pre-emption suit—20 O. C. 13.—Decree passed upon a compromise—13 O. C. 98.—Doctrine of—10 I. C. 16.

SS. 52 and 53.

See 2 O. L. J. 225.

SS. 52, 74 and 95.

See 16 O. C. 148.

S. 53.

Meaning of " good faith "—S. C. 204.—When there is some consideration—Single creditor's right to avoid fraudulent proceedings—11 O. C. 197 —Fraudulent transfer—Preference given to one creditor over another—Data for determining intention of parties and nature of interest sought to be created—17 O. C. 173.—Consideration not a necessary test of *bonafide*—Motive of transferee—13 O. C. 265.—Fraudulent transfer—Alienation for consideration—Alienee acting under good faith—Fraudulent intention of judgment-debtor alone not sufficient—12 I. C. 401.—Transfer with a view to defeat an anticipated attachment—15 I. C. 509.

S. 54.

Undivided property is tangible immoveable property —Registration —14 O. C. 161.—Meaning of "price" —18 O. C. 109 367.—Immoveable property over Rs. 100 in value given in lieu of dower—14 O. C. 214.—Unregistered sale deed—Position of vendee—Title by possession—3 O. L. J. 460—20 O. C. 33.

SS. 54, 118.

Exchange—Meaning of " thing " —Equity of redemption—Pre-emption—Transferee's intention—18 O. C. 109.

SS. 54, 74, 78.

Mortgage by conditional sale—Suit for foreclosure—Puisne mortgagor—Priority—Fraud—S. C. 197.

SS. 55 and 88.

Damages for breach of covenant for title—Suit for possession of certain other land—5 O. C. 78.—Covenant as to title—Warranty—Fraud—Misrepresentation—Caveat-emptor—8 O. C. 345.—Unpaid purchase money charge upon immoveable property—9 O. C. 284.

SS. 55, 82, 95.

Mortgage money paid by purchaser of portion to pay off prior mortgage —Contribution —Charge— Payment by one who actually supplies money —9 O. C. 259.

S. 58 (*c*).

See 1 O. L. J. 703.

SS. 58 (*d*), 67 (*a*).

Usufructuary mortgage, suit for sale of property under—Conversion of simple mortgage into usufructuary mortgage—Interest—5 O. C. 286.—See mortgage or sale—Intention of parties—1 O. L. J. 703.—Transfer by lessee—2 O. C. 12, 204, 252.—Usufructuary mortgage of occupancy holding—2 O. C. 204—See S. 5 Oudh Rent Act.—Meaning of "Usufructuary mortgage"—Mortgage in which possession is postponed—16 O. C. 56—30 I. C. 377—18 O. C 105—6 O. C. 167—7 O. C. 11—10 O. C. 218—16 O. C. 90—18 I. C 286.

S. 59.

Validity of mortgage signed by third party for mortgagor with his authority—6 O. C. 279—12 O. C. 257—Mortgage with possession—Second mortgage under unregistered deed—Delivery of possession—11 O. C. 248.—Deed not executed in the presence of attesting witness—34 I. C. 397.—Scribe whether a witness—Witness though signing but absent at the time of execution—4 O. L. J. 101.—Proof of attestation—One witness—4 O. L. J. 65.—Meaning of "delivery of possession"—4 O L. J. 446.

S. 60.

Absence of tender of amount due on mortgage—Dismissal of suit—5 O. C. 127—6 O. C. 223.—Mortgagee's obligation to deliver possession, when ceases—16 O. C. 199.—Power of mortgagee to recover mortgage money from any one of the mortgaged properties—Purchasers not to interfere—16 O. C. 199.—Mortgagee purchasing part of property not entitled to have redemption restricted to the interest of plaintiff—9 O. C. 63—Court's power to allow redemption—17 O. C. 313.—See "mortgage."

S. 62.

Zari peshgi lease—Suit for possession treated as one for redemption—4 O. C. 257.—Supplementary to S. 60—17 O. C. 388.

SS. 67 and 99.

Suit by mortgagee for sale of equity of redemption for amount due under simple money decree—7 O. C. 314.—Suit for possession barred—Decree for sale—6 O. C. 151, 167.—Question as to correct amount when to arise—4 O. C. 171.—Order absolute, objection to execution—4 O. C. 123—6 O. C. 114—9 O. C. 288—10 I. C. 21.—Anomalous mortgage—Interest, limitation—7 O. C. 11—14 O. C. 106.—Personal covenant implied—16 O. C. 90.—See "Mortgage."

S. 68.

Suit for recovery of money upon an existing consideration which afterwards fail—Compensation for breach of implied contract between mortgagor and mortgagee—Limitation—8 O. C. 166.—Suit to recover mortgage debt from mortgagor personally—Limitation—21 I. C. 581.—Suit by mortgagee dispossessed before expiry of term—6 O. C. 339—2 O.C. 145—4 O C. 171.—Does not debar mortgagee from bringing suit for possession—2 O. C. 24.—Anomalous mortgage—Personal covenant to pay—Decree for sale—10 O. C. 14—16 O. C. 90.—Prior mortgagee getting pre-emption decree against subsequent mortgagee on ground of subsequent mortgage being a sale—Suit by former against mortgagor personally for recovery of mortgage money—Maintainability of suit—3 O. L. J. 276—See 21 I. C. 69.—Sale of mortgaged property under Land Acquisition Act—Remedy of mortgagee—Charge on purchase money—

20 O. C. 256.—Mortgage deed not properly attested—Money decree in a suit on mortgage—20 O. C. 306.—Limitation—21 I. C. 581.

S. 72.

Improvements made by mortgagee—Damages for planting grove by tenant—9 O. C. 18.—Property ordered to be sold in execution of a simple money decree subject to mortgagee's lien—Sale to imperil mortgagor's security—Usufructuary mortgagee not entitled to mortgage money nor to personal decree—16 O C. 48.—Mortgagee how far entitled to make improvement—30 I. C. 234.—Right of mortgagee in possession to recover expenses incurred in suit to recover arrears of rent—No extension of period of limitation—17 O. C. 47, 38.

S. 74.

See SS. 60, 54, T. P. Act—Extinguishment of prior mortgage on execution of second mortgage—12 O. C. 285.—No priority—Registration and non-registration of prior and subsequent mortgage deed—30 I. C. 388.

SS. 74 and 95.

Subrogation—Auction purchaser redeeming prior mortgage entitled to—16 O. C. 148.

S. 76.

Applicability of—Possession of mortgagee not as such—19 O. C. 328—Duty of mortgagee to collect rent—Liability to account for rents not collected—Negligence—Compound interest—3 O. L. J. 689.—Portion of property retained by mortgagor on rent—Rent not paid—Liability of mortgagee to pay land revenue enhanced—Position of mortgagee with possession—4 O. L. J. 118.

S. 78.

See S. 54 T. P. Act.

S. 82.

Contribution between the representatives of mortgagor or between co-mortgagor's—16 O. C. 199.—See 16 O. C. 261—9 O. C. 259.

S. 83.

Deposit with reservation of right to dispute—4 O. C. 355.—Deposit not made at the place required by terms of deed—4 O. C. 387.—Appointment of guardian in proceedings under—16 O. C. 261.—Mortgage—Costs and subsequent suit for profits from the date of deposit to possession—12 O. C. 152.—Interest after deposit—What constitutes payment into Court—Costs—19 O. C. 145.—Effect of full and inadequate tender—Costs—3 O. L. J. 204.—Insufficient tender—O. P. J 564,—S. C. 48—3 O. C. 193—5 O. C. 127—6 O. C. 221.

S. 85.

O XXXIV R. 1 C. P. C.—Sale by second mortgagee—Sale of mortgaged property without redeeming prior mortgage—Right's of prior and subsequent mortgagees—1 O. C. 105—3 O. C. 254—5 O. C. 335—7 O. C. 330.—Redemption, deposit after time—25 I. C. 752—14 O. C. 10—Stranger to mortgage—4 O. L. J. 352.—24 I. C. 871.—Suit for sale, on mortgage by father, without joining sons—1 O. C. 53—4 O. C. 93, 178—6 O. C. 101—7 O. C. 137—14 O. C. 257.—Sons and grandsons of mortgagor's whether ought to be made defendants—19 O. C. 58—3 O. L. J. 322.

SS. 85, 87, 88 and 89.

Execution of decree—Decree for sale of moveable and immoveable

property—Order absolute—4 O. C. 301.

SS. 85, 87.

See 10 I. C. 174.

S. 86-O. 34 R. 2 C. P. C.

Adverse possession of mortgagee from the time fixed under foreclosure decree—8 O. C. 33—Dist. 9 I. C. 431 Exp.—25 I. C. 752.—Decree for foreclosure against all defendants—Order absolute against some—Payment by one against whom no order absolute passed—Decree joint and indivisible against all judgment-debtors—Redemption by puisne mortgagee, 10 I. C. 174—See 10 O. C. 356.—Costs of foreclosure suit—Pre-emption—2 O. C. 103—3 O. C. 184 (190).—Execution as to moveable property, before decree being made absolute—4 O. C. 301.—Deposit after expiry of time fixed by decree—Redemption—1 O. C. 91.

SS. 86, 87, 93.

See 10 O. C. 374.

S. 87-O. 34 R 3 C. P. C.

Applications under, SS. 87, 89, 93 are applications for execution—6 O. C. 114—3 O. C. 1—13 O. C. 137—15 O. C. 234.—Stamp necessary for appeal, 18 O. C. 114.—Money paid to discharge portion of decree can not be returned—10 O. C. 354.—Order for foreclosure passed *exparte*—4 O. C. 238, 301.—Application for absolute decree—Effect of appeal, 20 O. C. 205.—Order absolute for foreclosure—Suit by son, 7 O. C. 137.—Application for final decree—Notice—20 O. C. 268.

SS. 87, 89.

See 13 O. C. 137.

S. 88-O. XXXIV, R. 4 C. P. C.

Foreclosure decree not made absolute—8 O. C. 75.—Application to attach simple money decree, in execution of decree for sale of mortgaged property, 5 O. C. 108.—Sanction for sale of land necessary—3 O. C. 1.—Sale of ancestral land in excess of that sanctioned, 8 O. C. 409.—Part execution of decree not made absolute—No objection allowed on second application for execution—2 O. C. 338.—To replace the land from which plaintiff has been dispossessed—5 O. C. 78.—See O. XXXIV, R. 4. C. P. C.

S. 89-O. XXXIV, R. 5 C. P. C.

Propriety of decree could not be questioned in proceedings under, 1 O. C. 49—F. 4 O. C. 23—App. 7 O. C. 199—S. C. 297.—See 10 O. C. 145 and O. 34 R. 5 C. P. C.

SS. 90-O. XXXIV, R. 6 C. P. C.

Art 116 Limitation Act not applicable—6 O. C. 30.—No attachment and sale before any decree under—6 O. C. 59.—Application to set aside *exparte* decree—9 O. C. 288.—Mortgage by occupancy tenant—14 O. C. 62.—Costs recoverable under—11 O. C. 377.—See O. 34, R. 6 C. P. C.

S. 91.

Right of daughter-in-law of a Hindu—12 O. C. 37.—Right of Reversioner—S. C. 271—8 O. C. 349—4 O. C. 347—30 I. C. 234.—Right of *Zamindar*—Mortgage by grove holder—12 O. C. 201.—Heritable but not transferable estate, whether it gives a right to redeem—12 O. C. 271.—See "Mortgage, redemption."

S. 92-O. 34, R. 7.

Form of decree in redemption suit—2 O. C. 196.—Separate suit for mesne profits for the period for which mortgagor has failed to take such account—8 O. C. 302—12 O. C. 152—10 I. C. 11.

SS. 92 and 93.

See 14 O. C. 257.

SS. 92, 95.

See 9 O. C. 91.

S. 93-O. 34, R. R. 8, 9 C. P. C.

Payment after time fixed—Mortgagor's right to pay—5 O. C. 82—12 O. C. 10—14 O. C. 100—25 I. C. 752—34 I. C. 349.

S. 95.

Meaning of "obtains possession"—Redemption by one of the mortgagors—Charge—4 O. C. 273.—Redemption by one of original mortgagor's representatives—Charge on shares of other representatives of original mortgagor for proportionate expenses—22 I. C. 918.—See S. 43—20 O. C. 72.—See 9 O. C. 259, 91.

S. 96 and 97.

See 11 O. C. 377.

S. 97.

Applies to proceedings under, S. 96—11 O. C. 377.

S. 98.

Mortgage simple and usufructuary—Decree for sale—Personal covenant implied in simple mortgage—16 O. C. 90—18 O. C. 105.—Anomalous mortgage—Simple and usufructuary combination of—Right of redemption—Mortgagee's claim for redemption, 18 O. C. 10, 105.—Decree for foreclosure only when power to foreclose and to sell both given—18 I. C. 24.—See 10 O. C. 14.

S. 99-O. 34, R. 14 C. P. C.

Suit by mortgagee for sale of equity of redemption of mortgaged property for amount due under a simple money decree—7 O. C. 314.—Purchase of mortgagor's rights by mortgagee at sale in execution of sale of third party—7 O. C. 307.—Sale in contravention of S. 99 voidable—Sale to be impugned in execution proceedings and not by separate suit—Plaint treated as application—8 O. C. 327.—Application of, to transferee of money decree obtained by mortgagee—11 O. C. 231.—See mortgage and O. 34, R. 14 C. P. C.

S. 100.

Maintenance not charge on right to redeem, S. C. 281.—Compromise in Settlement Court not equivalent to a mortgage deed but a charge—10 O. C. 17.—Element necessary to create a charge—14 I. C. 29.—Will creating charge by way of annuity—Distinction between mortgage and charge—*Bonafide* transferee—Registration of charges not compulsory—Lien—1 O. L. J. 43.—Joint decree against several mortgagors, redemption by one, 4 O. C. 273.

S. 104.

Penal rate of interest—1 O. L. J. 544.

SS. 105, 107.

Kabuliat, Unregistered—9 O. C. 296, 362—12 O. C. 140.

S. 106.

Tenancy created by holding over—Provision as to notice not applicable in case of contract to the mode of termination of tenancy—12 O. C. 279.

SS. 107 and 117.

Oral evidence to prove lease for a term exceeding one year—5 O. C. 222—7 O. C. 169—9 O. C. 296—12 O. C. 140—7 I. C. 864—8 O. C. 197—9 O. C. 362—10 I. C. 2.

S. 108 (*c*).

Damages caused by reason of contract—7 O. C. 351.

S. 111.

See S. 10—S. C. 240.
Denial of landlord's title—Forfeiture—10 O. C. 31—21 I. C. 256.

SS. 111, 117.

Determination of Agricultural leases granted by mortgagee after redemption—14 O. C. 204.

S. 117.

See S. 107—5 O. C. 222.
See S. D. of 1905.

S. 118.

Equity of redemption is not "thing"—18 O. C. 109.

S. 122.

Subsequent election to take under settlement, whether renders mortgage void—19 O. C. 192.

S. 123.

Gift—Delivery of possession—5 O. C. 89.—Oral gift by Taluqdar in favour of his wife—9 O. C. 113.

S. 130.

Transfer by Hindu reversioner of a portion of his interest—Suit by vendor and vendee—Misjoinder of parties—3 O. C. 215.

SS. 131, 135.

Claim to a debt secured by mortgage of immoveable property—4 O. C. 210.

S. 135 (*d*).

Refers to the point of time at which actionable claim is sold—3 O. C. 18.—Lending money to a person after he has obtained decree for redemption on security of property—19 O. C. 60—20 O. C. 67.

S. 136.

Pleader advancing money to client on mortgage—19 O. C. 60.

Trees.

Grove tenure, cultivator's right to—*Wajib-ul-arz*—Custom—Incidents of grove tenure—1 O. C. 231—2 O. C. 281—15 O. C. 33—1 O. L. J. 63—Standing, and standing timber—18 O. C. 122.—Tenants right in, planted during continuance of tenancy—2 O. C. 281—16 O. C. 341—12 I. C. 409—23 I. C. 957.—Planting without permission of Zamindar—16 O. C. 341—S. D. 7 of 1912—1 O. L. J. 33.—Trees immoveable property—5 O. C. 228—16 O. C. 346—2 O. L. J. 285, 97.—Applicability of *Wajib-ul-arz* forbidding sale of, to sales in execution—13 O. C. 366.—Claim for removal of, limitation—17 O. C. 252—11 O. C. 379.—Planting of, on occupancy holding—1 O. L. J. 33.—Portion of grove becoming devoid of—2 O. L. J. 589—Partition, jurisdiction—19 O. C. 151.

Trespasser.

Possession good title against all persons except rightful owner—2 O. C. 3—11 O. C. 337—9 O. C. 273—12 O. C. 129.—Possession of heritable—9 O. C. 161—11 O. C. 337.—Suit against, by person dispossessed—Plaintiff entitled to recover on the basis of previous possession—11 I. C. 279.—Tacking of various periods of adverse possession—9 O. C. 230—18 O. C. 289.—Exemplary damages—13 I. C. 493.—Profits of land in possession of,—12 O. C. 154.—Possession of part—12 O. C. 58.—No presumption in favour of—Land under water—18 O. C. 43.—Acts of trespass amount

to dispossession—4 O. L. J. 532.—Ejection of tenants by—10 O. C. 353—Maintainability of suit against—14 O. C. 65—15 O. C. 316.—Suit against—2 O. L. J. 393—9 O. C. 273—Tenant if—31 I. C. 472.—Possession of, confined to land actually occupied—12 O. C. 58.

Trust.

Declaration of, in favour of joint family—Sup. O. C. 24.—Deed of, settlement in favour of wife—19 O. C. 192.—*Wakf* property—Suit by seller for cancellation of transfer—6 O. C. 331—12 O. C. 236—16 O. C. 109.—Money borrowed by trustee—18 I. C. 11.—Trustee has power as manager or guardian—Power to create a trust—12 O. C. 236—16 O. C. 109.—Limitation within which to recover property wrongfully alienated—16 O. C. 109.—Hindu Law—What constitutes trust—Succession to property of Hindu religious mendicant—Property left by *Guru*—3 O. C. 281—8 O. C. 297.—Right of trustee to recover money lent out of the profits of dedicated property—Succession—8 O. C. 297.—Suit for removal of trustee—Jurisdiction—5 O. C. 110.—Will as executory trust—Limitation—Purchaser for value without notice—6 O. C. 305.—Obligation to release property settled on payment of money, whether creates trust—Adverse possession—14 O. C. 95.—See also O. P. J. 58, 724, 69.—Whether public or private—Management of *Asthal* property—20 O. C. 49.—Position of *Mahant* of *A sthan*—Mortgage of trust property—Necessity—Burden of proof—4 O. L. J. 547—12 O. C. 296.—Conduct of trustees after execution of deed of—14 O. C. 356.—Gift does not include—14 O. C. 356.—Management of—18 O. C. 38.—Terms of, giving a sort of right or charge—15 O. C. 202.—When the plaintiff claimed to recover his share on payment of amount due to defendant—10 O. C. 291.—See Proclamation of sale—10 O. C. 252.—For *Sadabart*—14 O. C. 14.—Suit against trespasser for possession of—14 O. C. 65.—See S. 92 C. P. C.

Trust Act (II of 1882).

S. 3.

Notice—Good faith—Presumption—2 O. C. 319, 340—17 O. C. 336 (26 I. C. 621).—Removal of *Mahant*—2 O. C. 340.

SS. 4, 6.

Discharge of dower debt not unlawful—Delivery of possession in addition of registered instrument of transfer—14 O. C. 356.

S 47.

Trustee's power to appoint another trustee—12 O. C. 236.

S. 53.

Trustee purchasing trust property at auction sale without permission of Court—6 O. C. 252.

S. 81.

Suit by a *benami* holder of a promissory Note—1 O. C. 10.

SS. 88 and 90.

See S. 53 Trust Act.—Purchase of mortgagor's rights by mortgagee at a sale in execution of sale of third party—Leave of Court—7 O. C. 307—Gift by way of trust—19 O. C. 192

U. P. Court of Wards (IV of 1912).

Application for execution of decree against person of Ward—25 I. C. 668.

U. P. General Clauses Act (I of 1904).

See 29 I. C. 16.

U. P. Motor Cars Act (II of 1911).

Meaning of "Employs"—17 O. C. 311.

U. P. Act (III of 1910).

Meaning of primogeniture—18 O. C. 188.

U. P. Court of Wards Act (IV of 1912).

Interpretation of "Proprietor" and "Ward"—19 O. C. 306.—Application for execution against person of ward—25 I. C. 668.

U. P. Municipalities Act (I of 1900).

S. 118—General order—18 O. C. 74.

Under-proprietory.

Lands, decree for foreclosure pre-emption—17 O. C. 379.—Or proprietary title—12 O. C. 164.—Right—14 O. C. 41, 335—12 O. C. 123, 267, 225—11 O. C. 240, 187—9 O. C. 185, 292—10 O. C. 318—13 O. C. 35—12 O. C. 123, 267, 225—Right by prescription—8 I. C. 30, 710—2 O. L. J. 549, 556.—Title—12 O. C. 15, 79—14 O. C. 196.—Right claimed by lessee—30 I. C. 218.

Under-proprietor.

Contract by, to pay *Patwari* and *Chaukidari* rates—9 O. C. 63.—Definition, status and rights of—25 I. C. 675.—Liability of the transferee from—10 O. C. 36.—Occupancy of, alleged or acknowledged—16 O. C. 105.—Plot proprietor paying revenue to *Lambardar* not,—S. D. 8 of 1914.—Pre-emption suit against—9 O. C. 271.—Right of to claim partition against superior proprietor S. D. 10 of 1909.—Right of an, to claim for, on ground of being old proprietor without evidence of specific grant of right—9 O. C. 167.—Suit for possession by—12 O. C. 90.—Easement on land held by—12 O. C. 106.—Whether a co-sharer—S. D. 10 of 1909.—Acquiring superior proprietary right—11 O. C. 183.—Jurisdiction—9 O. C. 37.—Not residing in the village—9 O. C. 271.—With whom a sub-settlement of the whole village has been made—12 O. C. 205.—Right to graze cattle—20 I. C. 467.—Suit for profits between—13 O. C. 251.—See S. 3 Oudh Rent Act.

Vendee.

Bound to redeem—4 O. L. J. 321—33 I. C. 527.—Clause in sale deed prohibiting transfer to any person, 18 O. C. 104.—Arrears of rent recovered from, liability of pre-emptor to pay—17 O. C. 379.—Liability of, to *Haq chaharum*, 11 O. C. 64.—Redemption by, 10 O. C. 145.—And vendor, decision of question of payment, 9 O. C. 308.—Right of, to contest validity of encumbrances, 2 O. L. J. 140.—Or pre-emptor, circumstances arising subsequent to decree of first court, 17 O. C. 242.—See Art. 132 Limitation Act.

Vendor.

Admission of, as to part payment of price, 9 O. C. 308.—Covenant by, to pay rent if assessed—15 O. C. 25.—Dismissal of pre-emption suit for nonjoinder of—10 O. C. 49.—Suing vendee for unpaid purchase money, 17 I. C. 288.—Relinquishing the ex-proprietary rights at the time of sale—S. D. 7 of 1913.—Agreement by, to pay specific rent on ex-proprietary holding, S. D. 7 of 1913.—

Charge for unpaid balance of price, 9 O. C. 284.—Want of title, O P. J. 77.

Verbal.

Admission of defendant—O. P. J. 423.

Viran.

Meaning of—14 O. C. 231.

Vis Major.

See 9 O. C. 7.

Wager.

See 8 I. C. 500.

Wagering transaction—14 O. C 139.

Waiver—2 O. L. J. 71, 305—18 I. C. 286—18 O. C. 138

Wajib ul Arz.

Forbidding sale of trees, whether applicable to sales in execution—13 O. C. 366.—Construction of—12 O. C. 63, 111—15 O. C. 389—14 O. C. 232—1 O. C. 42—3 O. C. 181—22 I. C. 138—Provision of, to govern tenants of *abadi*, 10 O. C. 31.—Giving permission to transfer materials only—10 O. C. 4.—Relating to the clan, admissibility of—17 O. C. 1.—Value of—4 O. C. 71—8 O C. 94—30 I. C. 503, 392—32 I. C. 748—7 O. C. 134—42 I. C. 199—13 O. C. 163—17 O. C. 1—11 I. C. 536—15 I. C. 247—1 O L J. 532—19 O. C. 1, 290, 363—10 I. C. 448, 558—2 O. L J. 388—Not binding on *muafidar*, 28 I. C. 229.—Showing *muafi* to be resumable, 26 I. C. 869.—Admissibility in evidence, O P. J 359.—Entry not treated as will, O. P. J. 895.—Meaning of *Farar*, 2 O. L. J. 281 (285)—32 I. C. 337.—Meaning of *Malik Kamil*, 32 I C. 734.—Whether conclusive proof of custom—1 O. C. 80—4 O. C. 71.—Construction of—3 O. C. 181—32 I C 734—24 I. C. 640.

Wakf.

See Mohammedan Law.

Wall.

See Party wall.

Ward.

Effect of personal decree against—18 O. C. 145—Borrowing money—5 O. C. 256—9 O C. 188—8 O. C. 210—6 I. C. 203, 439, 572—7 A. L. J. 655—10 I. C. 14—See 19 O. C. 306

Wasika.

See 12 O. C. 323.

Water.

Flow of—12 O. C. 33.—Presumption of possession when land was under—18 O. C. 43.

Will.

Construction of—6 O. C. 305—14 O. C. 14.—Interpretation of—Charge on moveable property—28 I. C. 217—See S. C. 306.—Devise of *Taluqa* to certain persons in succession for life and remainder in fee—S. C. 224, 302—Interpretation of—Direction or wish contained—4 O. C. 86.—Adoption—Limitation—4 O. C. 6—Contract to make testamentary disposition—9 O. C. 55.—Made before Act I of 1869.—Admission in former suit—4 O. C. 408.—Proof of—Presumption in favour of natural will—16 O C. 386—(1 O. L. J. 57).—Construction of Mortgage by widow in lieu of interest due on previous mortgage—Unregistered *rukkas*—O. P. J. 722.—Of illiterate person—Proof—11 O. C. 20—See S. 19 Oudh Estates Act, (I of 1869)—See also "Hindu Law" "Will."—Meaning of "*Malik* like myself"—5 I. C. 73.—See Succession Act.—Answers to Government enquiries held as—O. P. J. 221.—Construction of—Meaning

of "interest therein"—Extrinsic evidence as regards testator's intention—Relief granted though prayer of plaint dismissed—Costs—O. P. J. 544.—Executed by a Hindu widow —O. P. J. 845.—Presumption as to genuineness - O. P. J. 1068.—Of *Talukdar*—Registration—Failure of life estate—Gift in remainder accelerated, O P. J. 430.—Registration —Title to maintenance—Deposit of will in a sealed cover—O. P. J 449. —Registration of—O. P. J 595.— Addendum executed and registered —O. P. J. 807.—Attestation clause wanting—2 O. L. J. 193—30 I. C 263—Grant in pursuance of—Undue influence—Unconscionable transaction—Burden of proof—38 I. C. 471.—Bequest in favour of the Collector—14 O. C. 14—Codicil—17 O. C 68—Revocation of—14 O. C. 14— 11 O C. 102.—Attestation of—1 O. L. J. 591.—Attesting witnesses ignorant of contents of, 10 O C. 209.—Disposal by, of joint family property —17 O. C. 318.—Presumption in favour of, 16 O C 386.—Revival of —14 O C 49—Power of appointment given under, 15 O. C. 270.— Proof of knowledge of contents of— 11 O. C 20.—Undue influence in case of—10 O C 76.—Construction of, 8 Cal. 1—6 O C. 305—4 O. C. 86— 2 O. C. 226—9 O. C. 196—O. P. J. 430, 625—12 O. C 157—5 I. C. 946— 11 A L J. 726—20 I C. 286.—Gifts of profits—gift of corpus—O. P. J. 701, 722.—See Hindu Law, Mahommedan Law and Construction.

Wild Animal.

When it can be property of pursuer—15 O. C. 183.

Witnesses.

Absence of, not due to any want of diligence—4 O. C. 379—Statement inconsistent with his statement —Witness to be cross-examined before proof of such statement—S. C 251—Right of party to examine his opponent as his witness—16 O C. 145—Not to be prosecuted for defamation, 3 O. C. 80—12 O. C. 308. —Attesting, notice of contents—17 O. C. 157.—Competent to testify but unable to understand—Evidence recorded without administering oath— 10 O. C. 337.—Statement of, regarding fact which occurred in his life time and those which occurred before he was born, 8 O. C 94.—Attesting, of a will—Admissibility of evidence, 16 O. C 386.—Not belonging to family—22 I. C. 138.—Testimony of witnesses interested in result of suit, 32 I. C. 380.—Right of party to examine his opponent as, 16 O. C. 145 —O P. J. 716.—Statement of—16 O. C. 81—17 O. C. 363.—Attesting not actually seeing the lady sign the deed, 18 O. C. 147.—Position of attesting—16 O. C. 386.—See S. C. 221, 242.—Test of competency of child—5 O. C. 246.—See SS. 132, 145 and 157 Evidence Act.

THE END

Printed by Myron O. Insko at the
Methodist Publishing House, Lucknow