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LEGAL MAXIMS,

WITH SPECIAL REFERENCE TO THE LAWS IN FORCE

IN

BRITISH INDIA,

BY

P. SREENEVASROW,

A MAGISTRATE OF POLICE AND JUSTICE OF THE PEACE,
(AND FORMERLY A PRINCIPAL SUDR AMEEN) MADRAS.

Ratio legis est anima legis.
The reason of the Law is the soul of the Law.—(JENK. CENT. 45).
The reasons and the principles of the Law can never change.—(CHITTY.)
He knoweth not the Law that knoweth not the reason of the Law.
(HOLLOWAY, J.—I, M. H. C. R., 365.)



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TO

THE HONORABLE WILLIAM HOLLOWAY,

ONE OF HER MAJESTY'S JUDGES

OF THE

HIGH COURT OF JUDICATURE,

VICE-CHANCELLOR OF THE UNIVERSITY,

AND

PRESIDENT OF THE FACULTY OF LAW, MADRAS.

This Work

IS MOST RESPECTFULLY DEDICATED

BY

HIS LORDSHIP'S MOST OBEDIENT HUMBLE SERVANT,

P. SREENEVASROW.

PREFACE.

At a time when the study of the Law has become so popular in this country as to be regarded by some as a desirable branch of general knowledge and education, while the many pursue it with the object of practising an honorable profession, any endeavor to assist the student, however slightly, in his most difficult task, cannot be regarded as a superfluous attempt; particularly so, when the necessity for such an attempt arises from the absence of an appropriate work, enunciating the very fundamental principles upon which the whole science of law is based. No doubt there are many valuable works on the subject of legal maxims in general; but certainly none of them is particularly designed to supply the desideratum felt *in India;* for there is no book that I am aware of, which illustrates our Legal Maxims with special reference to the Laws now in force in this country. This is a consideration which has induced me to take up a work, which, in its scope at all events, is calculated to impress upon the minds of Indian students of law, the grand principles of our system of jurisprudence, and thereby to facilitate their labors in understanding the law in all its various branches, together with the *reason,* which in fact is the *soul,* of the law.

But I beg it to be understood that in undertaking this task, I lay no claim to any originality, beyond perhaps that of designing to bring together the various principles to be deduced from the numerous approved works extant on Legal Maxims and the different branches of general Juris-

prudence, so far as they may fairly be made applicable to a similar state of things in India. The rules of Hindu and Mahomedan law, the Statutes of Parliament, the Regulations and Acts of the Indian Legislature, and the reported Judgments of the Judicial Committee of Her Majesty's Privy Council and of the several High Courts of Judicature in India, have all been brought to bear upon the maxims treated of. I am at the same time perfectly sensible that I can hardly have done full justice to my task; but should this humble effort of mine be of any little use to the Indian student, even if it be nothing more than to draw his particular attention to the importance of thoroughly mastering the great principles which govern all law, and should it thus pave the way to a higher standard of study, I shall feel myself perfectly satisfied that my object has in a great measure been attained, and that my labors have been amply compensated. With this explanation, I commit my book to the indulgence of the legal public and of my readers in general.

I would here remark that the topics embraced in my book have been treated at such length only, as appeared to me sufficient to make the maxims selected intelligible, with the qualifications and exceptions to which they are subject, as judicially recognised at the present day in this country. To have attempted anything beyond this, or to have pretended to exhaust all those subjects to their farthest limits, would not only have been quite incompatible with the object and scope of this work, but would also have been utterly impossible, in that subjects such as succession, contract, evidence, criminal law, &c., are so extensive as to require each a volume for itself much bulkier than this whole book. But at the same time, I have spared no pains

to collect together all the essential principles which govern the different topics discussed in the course of this work.

The maxims have been arranged and considered according to the order of the subjects to which they principally relate. Besides an ample table of contents, including *in extenso* all the maxims illustrated in this book, and an equally comprehensive Index, I have added a memorandum of the arrangement of the maxims, which shows at a glance the scope and extent of this book; and to facilitate reference, I have appended a list of the maxims in Latin in alphabetical order.

It is only necessary for me in conclusion to acknowledge my indebtedness to Broom's selection of Legal Maxims, Wharton's Legal Maxims, and many other of our standard works on different branches of law, for the invaluable assistance I have obtained from them.

MADRAS,
1*st October* 1873. P. SREENEVASROW.

	No. of the Maxims.
REVERSION	92
TESTAMENT	93
RENUNCIATION	94
ALIENATION	95,96
TREASURE TROVE	97—99
ESCHEAT...	100
ENJOYMENT OF PROPERTY	...101—106
COMMERCE	107
CONTRACTS—in general—capacity to contract; consideration; contracts against law, public policy, and decency; coercion and threat; conditions; appropriation of payments; ratification; and revocation...	...108—117
Partnership	118
Sale and Warranty	...119—126
Bailment and Mortgages	127
Agency	128,129
Guarantee	130
Assignments, Grants	...131—134
Agreement overcomes law in some cases ...	135,136
You ought to know with whom you bargain...	137
LITIGATION	138,139
WRONGS AND REMEDIES (CIVIL)—General principles; what are actionable wrongs and what are not; abatement of actions, &c	...140—147
CRIMES AND PUNISHMENTS—General principles: Offences against religion; against nature; against State; against justice; against the public; against private persons, property, and reputation; and against one's own self and property; abetments; attempts; excuses for the commission of offences; and punishments	...148—184
PROCEDURE—Acts of the Court; practice of the Court; jurisdiction; limitation; place of trial; the trial; *Lis pendens*; and *dies non.* ...	..185—201
EVIDENCE.—Truth; oath and cross-examination; faculty of proof; matters apparent to the Court; relevancy; best evidence; *res inter alios acta*; burden of proof; admissions and confessions; documentary evidence; opinion evidence; estoppels; presumptions; and appreciation of evidence	...202—243

	No. of the Maxims.
CONSTRUCTION—Of Documents and Statutes ...	...244—264
MISCELLANEOUS MATTERS, VIZ :—	
Ignorance of law	...265—267
Ignorance of fact	... 268
Fact	... 269
Consent	...270—273
Selection	... 274
Negligence	... 275
Fraud	...276—278
Necessity	... 279,280
Certainty	...281—283
Impossibility	... 284
Accidents (misfortune)	... 285
Drunkenness	... 286
Reasonable time	... 287,288
Delay	...289—291
Subtleties (trifling matters)	... 292,293
JUDGMENTS	...294—296
EXECUTION	...297—300

CONTENTS.

INTRODUCTION TO MAXIMS.

No. of the Maxims.		Page.
1.	A Maxim is so called because its dignity is the greatest—and its authority the most certain; and because it is universally approved by all	1

RELIGION.

2.	The highest rule of conduct is that which is inculcated by religion	5
3.	Human things never prosper where divine things are neglected	*ib.*

LAW.

4.	Law is a sacred sanction, commanding what is proper, and prohibiting what is not	11
5.	Law is the safest helmet; under the shelter of the law none is deceived	*ib.*
6.	The rules of law are—to live uprightly, not to injure another, to give every one his own	*ib.*
7.	The law of the place (*i. e.*, the place where any act is done) governs the act	18
8.	The law of the Tribunal (*i. e.*, the tribunal to whom application is made for remedy) governs the remedy ...	*ib.*
9.	The Plaintiff follows the law of the Defendant	27
10.	A new law ought to impose form on that which is to follow, and not on the past	*ib.*
11.	A new adjudication does not make a new law, but declares the old	29
12.	Reason is the soul of the law; the reason of law being changed, the law also is changed	30

EQUITY.

13.	Equity is a sort of perfect reason, which interprets and amends written law; comprehended in no code; but consistent with reason alone	31
14.	Equity follows law	*ib.*
15.	Equity is as it were equality	*ib.*

No. of the | Page.

CUSTOM.

16. The best interpreter of things is usage 34
17. A reasonable custom is to be obeyed like law ... ... *ib.*
18. A custom should be certain, for uncertain things are held as nothing ... ... *ib.*
19. An evil custom is to be abolished ... ... *ib.*
20. Law abrogates customs, (*i. e.*, at variance with law) ... *ib.*

PRECEDENT.

21. Where there is the same reason, there is the same law; and of things similar, the judgment is similar 39
22. Nothing in law is more intolerable than to rule a similar case by a diverse law ... ... *ib.*

THE SOVEREIGN.

23. The king is under no man; but he is in subjection to God and to the law; for the law makes the king... ... 40
24. The king never dies 45
25. The king is the head and guardian of the commonwealth... 46
26. All subjects are servants of the king ... ... *ib.*
27. The kingdom is not divisible 47
28. Where the rights of the king and of the subject concur, those of the king are to be preferred 50
29. The king can do no wrong 52
30. The king cannot confer a favor on one subject which occasions injury and loss to others 57
31. No time runs against the king ... ... *ib.*
32. The king is always presumed to attend to the business of the realm for the good of all ... ... *ib.*
33. The king is not bound by any Statute, if he be not expressly named therein to be so bound 59
34. No summons or citations are permitted to be served within the king's palace 61

JUDGES.

35. A Judge should have two salts: the salt of wisdom, lest he be insipid; and the salt of conscience, lest he be diabolical ... ..., ... 62
36. Justice ought to be unbought, because nothing is more hateful than venal justice; free, for justice ought not to be shut out; and quick, for delay is a certain denial. *ib.*
37. Justice knows neither father nor mother, but regards truth alone ... ... *ib.*

No. of the Maxims. Page.

JUDGES—*continued.*

38. A good Judge decides according to justice and right; and prefers equity to strict law 62
39. Let justice be done, though the heavens may fall ... *ib.*
40. To no one should we delay justice ... ... *ib.*
41. Hasty justice is the step-mother of misfortune ... ... *ib.*
42. It is the duty of a Judge to finish the work of each day within that day ... ... *ib.*
43. A Judge does not give more than what he that seeks does himself require 63
44. It is the duty of a Judge to decide according to facts alleged and proved 64
45. Of the good faith and intention of a Judge, a question cannot be entertained; but it is otherwise as to his knowledge or error, be it in law or in fact 65
46. Discretion is to know through law what is just 70
47. It matters not what is known to the Judge, if it be not known judicially... 72
48. A Judge cannot punish an injury done to himself ... 74
49. No one ought to be Judge in his own cause ... ... *ib.*

JUDGES' SUBORDINATES AND OTHERS ACTING UPON THEIR ORDERS.

50. He who does anything by command of a Judge will not be supposed to have acted from an improper motive, because it was necessary to obey 75
51. To a Judge exceeding his office, there is no obedience ... *ib.*

JURY AND ASSESSORS.

52. To questions of fact Judges do not answer. To questions of law the Jury do not answer 77

ADVOCATES.

53. A person may conduct an action either in his own name, or in that of another, as for instance, if he is a procurator, a tutor, or a curator, (*i. e.*, an advocate, a guardian, or an agent) 80

BIRTHRIGHT.

54. Liberty is that natural faculty which permits every one to do everything but that which is prohibited by law or by power 87
55. To every one his house is his surest refuge; or every man's house is his castle ... ... *ib.*

No. of the Maxims.		Page.
	BIRTHRIGHT RESTRAINED; PUBLIC GOOD.	
56.	The welfare of the people is the supreme law	92
57.	The law should more readily tolerate a private loss than a public evil	*ib.*
58.	A privilege avails not against public good	*ib.*
59.	A traitor is punished that one and not all may perish ...	*ib.*
	MARRIAGE.	
60.	Consent and not concubinage constitutes marriage ...	95
61.	A subsequent marriage removes the previous criminality ...	*ib.*
62.	It is not lawful to have two wives at a time	99
	HUSBAND AND WIFE.	
63.	Husband and wife are considered one person in law ...	102
64.	A married woman is not independent, but is under the subjection of her husband, whom, in his lifetime, she cannot contradict	*ib.*
65.	All things which belong to the wife belong to the husband; the wife has no power of her own; the husband has it all	*ib.*
	PARENT AND CHILD.	
66.	The authority of a parent should consist in affection, not in barbarity	108
	MINOR AND GUARDIAN.	
67.	A minor can make his own condition better, but by no means worse	110
68.	A guardian can make the estate of an existing heir under his guardianship better, but not worse	*ib.*
	OCCUPATION.	
69.	What belongs to nobody is given to the occupant by natural right	114
70.	He who is first in time has the strongest claim in law ...	*ib.*
71.	Wild beasts, birds, fishes and all animals either in the sea, the air, or on the earth, so soon as they are taken by any one, immediately become by the laws of nations the property of the captor...	*ib.*
72.	By the law of nature these things are common to mankind, the air, running water, the sea, and consequently the shores of the sea	*ib.*
73.	All rivers and ports are public	115

No. of the Maxims. Page.

ACCESSION.

74. Whose is the land, his also is that which is above and below it... 126
75. Water belongs to the soil ... ... *ib.*
76. That which is built upon the soil goes with the soil ... *ib.*
77. Whatever is planted on, or affixed to the soil, belongs to the soil... ... ... *ib.*
78. Whatever the river adds on to your land by process of alluvium, becomes yours by the law of nations ... *ib.*
79. The offspring follows the dam ... ... *ib.*

POSSESSION.

80. Possession is, as it were, the position of the foot... ... 131
81. Where the right is equal, the condition of the person in possession is better ... ... *ib.*
82. In equal wrong the condition of the possessor is the more favorable ... ... *ib.*
83. Long possession is like the right of possession, and takes away action from the true owner ... ... *ib.*

PRESCRIPTION.

84. Prescription is title from use and time, taking substance from the authority of the law 136

SUCCESSION.

85. Inheritance is the succession to every right which was possessed by the late possessor 139
86. An heir is by right of property or by right of representation. *ib.*
87. The lawful heir is he whom wedlock shows to be ... 149
88. God alone, and not man, can make an heir 151
89. He who is in the womb is now held as born, as often as it is questioned concerning his benefit 153
90. No one is heir of the living 154
91. The heir succeeds to the restitution, not to the penalty ... 155

REVERSION.

92. A reversion of land is, as it were, the return of the land to the possession of the donor or his heirs after the termination of the estate granted 156

TESTAMENT.

93. The last Will of a Testator is to be fulfilled according to his true intention... 157

No. of the Maxims. Page.

RENUNCIATION.

94. Every one is able to renounce a claim introduced for himself. 164

ALIENATION.

95. Alienation is favored by the law rather than accumulation. 167
96. Although alienation be prohibited, yet by consent of all, in whose favor it is prohibited, it may take place; for, it is in the power of any man to renounce a right existing in his favor ... ... *ib.*

TREASURE TROVE.

97. Treasure trove is an ancient hiding of money of which no recollection exists, so that it now has no owner ... 175
98. Treasure does not belong to the king unless no one knows who hid it ... ... *ib.*
99. The concealment of a discovered treasure is fraudulent ... *ib.*

ESCHEAT.

100. That which is the property of nobody belongs to our lord the king... 178

ENJOYMENT OF PROPERTY.

101. He who lawfully enjoys his own injures no one 179
102. So use your own as not to injure another ... ... *ib.*
103. It is not lawful to build upon your own land that which may be injurious to another ... ... *ib.*
104. Water runs and ought to run as it used to run ... ... *ib.*
105. One injury does not excuse another injury ... ... *ib.*
106. The law does not favor the wishes of the dainty ... ... *ib.*

COMMERCE.

107. Commerce, by the law of nations, ought to be common, and not be converted into a monopoly, or to the private gain of a few 203

CONTRACT.

108. An obligation is a tie of law, which binds us to render something according to the rules of our civil law ... 208

CAPACITY.

109. A minor before majority cannot act in a case of property, not even to agree... 213
110. A mad man, who knows not what he does, cannot make a bargain, nor transact any business ... ... *ib.*

No. of the Maxims. Page.

CONSIDERATION.

111. From a nude contract, *i. e.*, from a contract without consideration an action does not arise 216
112. It is a principle of law that contracts which are opposed to laws and constitution of the realm, or which are contrary to good morals, shall have no effect ... ... *ib.*

COERCION.

113. There is nothing so much opposed to a contract as coercion and threat 226

CONDITION.

114. A condition precedent must be fulfilled before the effect can follow ... ... *ib.*

APPROPRIATION OF PAYMENT.

115. Money paid is to be applied according to the intention of the party paying, and money received, is applied according to that of the recipient 227

RATIFICATION.

116. A subsequent confirmation has a retrospective effect and is equivalent to a prior command 228

REVOCATION.

117. Nothing is so consonant to natural equity as that every contract should be dissolved by the same means which rendered it binding 230

PARTNERSHIP.

118. Many partners are as one body, inasmuch as they have one right, and it is necessary that the body be perfect and that there be defect in no part 231

SALE.

119. Let the seller beware 233
120. Let the purchaser beware; no one in ignorance ought to buy that which is the right of another man ... ... *ib.*
121. The law assists the vigilant and not those asleep... ... *ib.*
122. Equal knowledge on both sides makes the contracting parties equal ... ... *ib.*
123. He gives nothing who has nothing ... ... *ib.*
124. The power derived cannot be greater than that from which it is derived ... ... *ib.*
125. Chattels taken or captured by pirates or robbers do not change their ownership ... ... *ib.*

No. of the Maxims.		Page,
	WARRANTY.	
126.	A simple commendation does not oblige, *i. e.*, does not imply a warranty	246
	BAILMENT AND MORTGAGES.	
127.	A mandatory cannot exceed the bounds placed upon himself.	248
	AGENCY.	
128.	He who does anything by another does it by himself ...	253
129.	Let the principal answer	*ib.*
	GUARANTEE.	
130.	The principal should always be exhausted before coming upon the sureties...	257
	ASSIGNMENTS.	
131.	That which is assigned takes with it for its use the rights of the assignor.	259
132.	The granter of anything to another grants that also without which the thing granted would be useless	*ib.*
	MISCELLANEOUS.	
133.	He who enjoys the benefit ought also to bear the burden, and the contrary	261
134.	Land passes with its encumbrances	*ib.*
135.	An agreement overcomes law	262
136.	A private agreement cannot affect public rights	*ib.*
137.	You ought to know with whom you bargain	263
	LITIGATION.	
138.	No person should appeal to the king in any suit, unless he cannot obtain his right at home	270
139.	Let not strife be immortal, while those that strive are mortal	*ib.*
	CIVIL WRONGS AND REMEDIES.	
140.	Where there is a right, there is a remedy	272
141.	An action is not given to him who is not injured... ...	278
142.	In law the proximate, and not the remote, cause is to be recognized	*ib.*
143.	The consequence of a consequence does not exist... ...	*ib.*
144.	It belongs not to the secular Judge to take cognizance of things which are merely spiritual	284
145.	A person alleging his own infamy is not to be heard ...	287
146.	An action does not arise from a base cause	*ib.*
147.	A personal right of action dies with the person	288

No. of the Maxims. Page.

OFFENCES AND PUNISHMENTS.

148. Felony, by force of the term, signifies some capital crime perpetrated with a malignant mind 289
149. Crimes are extinguished by death ... ... *ib.*
150. Money being restored does not set free the party offering... *ib.*
151. Where the divinity is insulted the case is unpardonable ... 295
152. Crimes against nature are the most heinous 296
153. A man cannot abjure his native country, nor the allegiance which he owes to his Sovereign 297
154. The crime of treason exceeds all other crimes as to its punishment ... ... *ib.*
155. An injury offered to a Judge, or person representing the King, is considered as offered to the King himself, especially if it be done in the exercise of his office ... 298
156. The law should more readily tolerate a private loss than a public evil 299
157. A theft is the fraudulent handling of another's property with the intention of stealing, without the consent of the owner 300
158. No one can be turned out of his own dwelling house ... *ib.*
159. Mayhem is the least amongst great crimes; and the greatest among small ones ... ... *ib.*
160. Homicide or slaughter of a man, is the killing of man by man. *ib.*
161. An injury is done to him to whom a reproachful thing is said or concerning whom an infamous song is made ... *ib.*
162. It is to the advantage of the State that every one uses his property properly 301
163. It is a greater crime to kill oneself than another... ... 302
164. That one who advises, another who aids, a third who harbours and conceals; each of them is subject to a like punishment 303
165. No man deserves punishment for a thought 305
166. To write is to act ... ... *ib.*
167. The act itself does not constitute guilt, unless done with a guilty intention 306
168. No one is deemed to be guilty of an offence who exerts his legal rights ... ... *ib.*
169. External actions indicate internal secrets ... ... *ib.*
170. In criminal proceedings regard is to be shown to immature years and mental imbecility 311
171. Malice supplies age ... ... *ib.*

No. of the Maxims.		Page.
	OFFENCES AND PUNISHMENTS—*continued.*	
172.	Whatever any one does in defence of his person, that he is considered to have done legally	315
173.	Justice truly preventing is better than severely punishing...	316
174.	The punishment should be proportioned to the crime ...	*ib.*
175.	Offences should be most severely punished which are most difficult to be provided against	*ib.*
176.	The infliction of punishment increases with multiplied crimes	*ib.*
177.	The smallest bodily punishment is greater than any pecuniary one	317
178.	What a man cannot pay with his purse, he must suffer in person, lest any one should sin with impunity ...	*ib.*
179.	A person who is wrongfully deprived of his property, is entitled to the restitution of that property before all others	*ib.*
180.	A delinquent provoked by anger ought to be punished mildly.	*ib.*
181.	No one ought to be twice punished if it be proved to the Court that it be for one and the same cause... ...	*ib.*
182.	It is a matter of import to one adjudicating that nothing either more severe, nor more lenient than the cause itself warrants should be done; and that the glory neither of severity nor clemency should be affected ...	*ib.*
183.	It is always safer to err in acquitting than in punishing—on the side of mercy than of strict justice	*ib.*
184.	He threatens the innocent who spares the guilty... ...	*ib.*
	PROCEDURE.	
185.	An act of Court injures no one	325
186.	The practice of the Court is the law of the Court ...	326
187.	The customary way is the safe way	*ib.*
	JURISDICTION.	
188.	A good Judge will, when necessary, extend the limits of his jurisdiction	327
189.	When anything is commanded, everything by which it can be accomplished is also commanded	*ib.*
190.	When anything is prohibited everything relating to it is prohibited	*ib.*
191.	He who has authority to do the more important act shall not be debarred from doing the less important ...	328
192.	The greater contains in itself the less	*ib.*
193.	A judicial act done in excess of authority is not binding; otherwise as to a ministerial act	329

No. of the Maxims. Page,

PROCEDURE—*continued.*

LIMITATION.

194. Every plaint and every action for injuries are limited within certain time 331
195. The vigilant and not the sleepy are assisted by the laws ... *ib.*
196. Limitation will not begin to run whilst a party is incapacitated from acting ... ... *ib.*

TRIAL.

197. A trial should always be had where the jury can get the best information 333
198. Hear the other party 334

LIS PENDENS.

199. During litigation nothing new should be done 335
200. That he commit not waste or destruction pending the said suit ... ... *ib.*

DIES NON.

201. Lord's day (Sunday) is not juridical, (*i. e.*, not a day for legal proceedings) 337

EVIDENCE.

TRUTH.

202. Truth, by whomsoever pronounced, is from God... ... 339
203. To lie is to go against the mind ... ... *ib.*

OATH AND CROSS-EXAMINATION.

204. In law none are believed except those who are sworn ... 350

FACULTY OF PROOF.

205. The faculty of proof is not to be narrowed 354

JUDICIAL NOTICE.

206. The law does not require that which is apparent to the Court to be verified 359

RELEVANCY.

207. It is not allowed to prove that which being proved would not be relevant 361
208. The law rejects superfluities ... ... *ib.*

BEST EVIDENCE.

209. It is better to seek the fountains than to follow the rivulets. 366

RES INTER ALIOS ACTA.

210. A matter that has taken place between others, ought not to injure one who was no party to it 367

No. of the Maxims. Page.

EVIDENCE—*continued.*

BURDEN OF PROOF.

211. The burden of proof lies on the plaintiff... 373
212. The plaintiff failing to prove, the accused is absolved ... *ib.*
213. A defendant relying on an exception is in the position of a plaintiff ... ... *ib.*
214. The burden of proof lies on him who affirms, and not on him who denies ... ... *ib.*
215. In general the party averring a particular fact must prove it, whether he is plaintiff or defendant ... ... *ib.*
216. The law will not force a man to show a thing which by intendment of law lies not within his knowledge ... *ib.*

ADMISSIONS AND CONFESSIONS.

217. A confession made in a judicial proceeding is of greater force than all proof 378
218. The admission of an accused person is the best evidence ... *ib.*
219. He who does not deny, admits ... ... *ib.*
220. No one is bound to criminate himself 386

DOCUMENTARY EVIDENCE.

221. The written letter remains; words spoken pass away; words heard perish 387

OPINION EVIDENCE.

222. Whoever is skilled in his profession is to be believed ... 392

ESTOPPELS.

223. Contradictory allegations are not to be heard 394
224. No one is at liberty to change his mind so as to work an injury to others ... ... *ib.*

PRESUMPTIONS.

225. Violent presumption is sometimes full proof 397
226. An act shall stand on presumption until it be proved to the contrary... ... ... *ib.*
227. All things are presumed to be legitimately done until the contrary be proved 407
228. All things are presumed to be rightly and solemnly done ... *ib.*
229. Where a thing may be done in a legal or in an illegal way, the law will presume the former ... ... *ib.*
230. From lapse of time all things are presumed to have been done properly 408

No. of the Maxims. Page.

EVIDENCE—*continued.*

PRESUMPTIONS—*continued.*

231. Injury is not to be presumed 409
232. That which is odious and dishonest is not to be presumed... *ib.*
233. Fraud is hateful and not to be presumed ... ... *ib.*
234. All things are presumed against a wrong doer ... ... *ib.*
235. No person shall take advantage of his own wrong ... *ib.*
236. The law regards the order of nature 411
237. No one is presumed to be forgetful of his own eternal welfare; and more particularly at the moment of death. 415
238. It is always to be presumed that children are legitimate ... *ib.*
239. False in one particular, false in all 416

APPRECIATION OF EVIDENCE.

240. Evidence is to be weighed; not enumerated 418
241. Where the number of witnesses is equal on both sides, the more worthy is to be believed ... ... *ib.*
242. In criminal cases the proofs must be clearer than light ... *ib.*
243. When the facts are doubtful, presumptions will be in favor of dower, liberty, innocence, possession, the debtor, and the criminal at the bar ... ... *ib.*

CONSTRUCTION.

244. Liberal constructions (of written documents) are to be made, because of the simplicity of the laity (non-professional,) in order that the thing should prevail rather than perish; and words should be made subservient, not contrary, to the intention 425
245. He who sticks to the letter, sticks to the bark; or, he who considers the letter merely, (of an instrument,) cannot comprehend its meaning ... ... *ib.*
246. Examples illustrate, not restrain the law 428
247. From that which goes before, and from that which follows, is derived the best interpretation 431
248. The best mode of interpretation is so to interpret laws that the laws may accord with the laws ... ... *ib.*
249. The meaning of a word may be ascertained by reference to those associated with it ... ... *ib.*
250. The antecedent has relation to that which next follows, unless thereby the meaning of the sentence is destroyed 432
251. Where two clauses in a Will are repugnant one to the other, the last in order shall prevail ... ... *ib*

No. of the Maxims.		Page.
	CONSTRUCTION—*continued.*	
252.	The coupling of words shows that they are to be taken in the same sense	433
253.	In disjunctives it suffices if either part be true	*ib.*
254.	Bad grammar does not vitiate a contract. But in exposition of instruments, bad grammar, so far as it can be done, is to be avoided	434
255.	A false description does not vitiate a document	*ib.*
256.	The presence of the body cures error in the name; the truth of the name cures error of description	*ib.*
257.	A general clause does not extend to those things which are before specially provided for	436
258.	Later laws abrogate prior contrary laws	437
259.	General words are restrained according to the nature of things or of the person	438
260.	The express mention of one person or thing is the exclusion of another	440
261.	Words referred to are to be considered as incorporated ...	441
262.	The words of deeds are to be taken most strongly against him who uses them	*ib.*
263.	A contemporaneous exposition is the best and strongest in law	443
264.	Blessed is the exposition by which anything is saved from destruction	*ib.*
	MISCELLANEOUS.	
265.	Ignorance of law does not excuse	444
266.	Ignorance of the law which every one is bound to know does not excuse	*ib.*
267.	The law assists the ignorant	*ib.*
268.	Ignorance of fact excuses	449
269.	What ought not to be done, yet being done, shall be valid...	451
270.	That to which a man consents cannot be considered an injury	452
271.	Consent takes away error	452
272.	Where a person has made any change from the terms of the party threatening him, he is not considered as having retained his consent	*ib.*
273.	They who mistake are not supposed to consent	*ib.*
274.	Where a selection is once made, it cannot be disapproved any longer	457
275.	Gross negligence is tantamount to fraud	458

No. of the Maxims.		Page.
	MISCELLANEOUS—*continued.*	
276.	Fraud vitiates and corrupts everything	463
277.	Fraud is not purged by circuity	*ib.*
278.	He is not deceived who knows himself to be deceived ...	*ib.*
279.	What necessity forces, it justifies	467
280.	With respect to private rights necessity privileges a person acting under its influence	*ib.*
281.	Things uncertain are reckoned as nothing	469
282.	That is certain which can be rendered certain	*ib.*
283.	Latent ambiguity of words may be supplied by proof; for any ambiguity arising in respect of a fact is removed by proof of the fact	*ib.*
284.	The law does not enforce impossibilities...	472
285.	The act of God does no one injury (no actionable wrong arises out of an act of God)	473
286.	Let him who sins when drunk be punished when sober ...	474
287.	Drunkenness incites and brings to light all crimes ...	*ib.*
288.	How long a reasonable time ought to be, is not defined by law, but depends upon the discretion of the Judge ...	475
289.	Delay is reprobated in law	476
290.	By too much altercation truth is lost	*ib.*
291.	Hasty justice is the step-mother of misfortune	*ib.*
292.	The law pays no regard to trifling matters	478
293.	The law does not notice the fractions of day	*ib.*
	JUDGMENTS.	
294.	A thing adjudicated is accepted as truth	480
295.	Credit is to be given to the latest decisions	*ib.*
296.	Matters decided between third parties do not affect any but themselves	*ib.*
	EXECUTION.	
297.	The execution of the process of the law does no injury ...	482
298.	The punishment of a condemned woman when pregnant must be deferred until she be delivered	*ib.*
299.	It is not enough that sentence be given unless it be carried out into execution	483
300.	Execution is the end and fruit of the law	*ib.*

ALPHABETICAL
LIST OF MAXIMS EXPLAINED IN THIS BOOK.

LATIN.

	No. of the Maxims.
Acta exteriora indicant interiora secceta	169
Actio non datur non damnificato	141
Actio personalis moritur cum persona	147
Actor sequitur forum rei	9
Actori incumbit onus probandi	211
Actori non probante absolvitur reus.	212
Actus curiae neminem gravabit	185
Actus Dei nemini facit injuriam	285
Actus judiciarius coram non judice irritus habetur de ministeriali autem a quocunque provenit ratum esto	193
Actus non facit reum, nisi mens sit rea	167
Ad proximum antecedens fiat relatio, nisi impediatur sententia	250
Ad quaestionem facti non respondent judices; ad quaestionem juris non respondent juratores	52
Aedificare in tuo proprio solo non licet quod alteri noceat	103
Aedificatum solo, solo cedit	76
Æquitas est perfecta quaedam ratio quae jus scriptum interpretatur et emendat; nulla scriptura comprehensa sed sola ratione consistens	13
Æquitas est quasi æqualitas	15
Æquitas sequitur legem	14
Affirmanti, non neganti, incumbit probatio	214
Alienatio licet prohibeatur, consensu tamen omnium in quorum favorem prohibita est, potest fieri; et quilibet potest renunciare juri pro se introducto	96
Alienatio rei prefertur juri accrescendi	95
Allegans contraria non est audiendus.	223
Allegans suam turpetudinem non est audiendus	145
Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur	283
A piratis et latronibus capta dominium non mutant	125
Aqua cedit solo	75
Aqua currit et debet currere, ut currere solebat	104
A spoliatus debet ante omnia restitui.	179
Assignatus utitur jure autocris	131
Audi alteram partem	198
Benedicta est expositio quando res redimitur a destructione	264
Benignae faciendae sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat quam pereat; et verba intentioni, non e contra, debent inservire	244
Boni judicis est ampliare jurisdictionem	188
Bonus judex secundum aequum et bonum judicat; et aequitatem stricto juri praefert	38
Caveat emptor; qui ignorare non debuit quod jus alienum emit	120
Caveat venditur	119
Certum est quod certum reddi potest.	282
Cogitationis poenam nemo meretur	165
Commercium jure gentium commune esse debet, et non in monopolium et privatum paucorum quaestum convertendum	107
Conditio praecedens adimpleri debet prius quam sequatur effectus	114
Confessio facta in judicio, omni probatione major est	271
Consensus non concubitus facit matrimonium	60
Consensum tollit errorem	271
Consequentiae non est consequentia.	143
Consuetudo debet esse certa, nam incerta pro nulla habentur	18
Contemporanea expositio est optima et fortissima in lege	263
Contra non valentem agere nulla currit praescriptio	196

	No. of the Maxims.
Conventio privatorum non potest publico juri derogare	136
Conventio vincet legem	135
Copulatio verborum indicat acceptationem in eodem sensu	252
Crimen laesae majestatis omnia alia crimina excedit quoad poenam	154
Crimina morte extinguantur	149
Cui licet quod majus non debet quod minus est licere	191
Cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit	132
Cuilibet in sua arte perito est credendum	222
Cujus est solum ejus est usque ad caelum; et ad inferos	74
Culpae poena par esto	174
Cum duo inter se pugnantia reperiuntur in testamento ultimum ratum est	251
Cursus curiae, est lex curiae	186
Custos statum haeredis in custodia existentis meliorem, non deteriorem, facere potest	68
De fide et officio judicis non recipitur quaestio; sed de scientiâ, sive error sit juris aut facit	45
Delinquens per iram provocatus puniri debet mitius	180
De minimis non curat lex	292
Derivativa potestas non potest esse major primitiva	124
Deus solus haeredem facere potest, non homo	88
Dies dominicus non est juridicus	201
Discretio est discernere per legem quid sit justum	46
Dolus circuitu non purgatur	277
Domus sua cuique est tutissimum refugium	55
Duas uxores eodem tempore habere non licet	62
Eo sunt animadvertenda peccata maxime, quae difficilime pro	175
Et quidem naturali jure communia sunt omnium haec, aer, aqua profluens, et mare, et per hoc litora maris	72
Ex antecedentibus et consequentibus fit optima interpretatio	247
Ex diuturnitate temporis omnia praesumuntur esse solennitur acta	230
Executio est finis et fructus legis	300
Executio juris non habet injuriam	297
Exempla illustrant, non restringunt, legem	246
Ex nudo pacto non oritur actio	111
Expressio unius personae vel rei, est exclusio alterius	260
Exturpi causa non oritur actio	146
Facultas probationum non est angustanda	205
Falsa demonstratio non nocet	255
Falsus in uno, falsus in omnibus	239
Felonia, ex vi termini, significat quodlibet capitale crimen felleo animo perpetratum	148
Ferae igitur bestiae et volucres et pisces, id est, omnia animalia quae mari, coelo et terra nascuntur, simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt	71
Festinatio justitiae est noverca infortunii	41 & 291
Fiat justitia ruat caelum	39
Flumina autem omnia et portus publica sunt	73
Fractionem diei non recipit lex	293
Fraus est odiosa et non praesumenda	233
Fraus omnia vitiat et corrumpit	276
Furiosus stipulare non potest, nec aliquid negotium agere, qui non intelligit quid agit	110
Furtum est contrectatio rei alienae fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerat	157
Generalis clausula non porrigitur ad ea quae antea specialiter sunt comprehensa	257
Habemus optimum testem confitentem reum	218
Haereditas est successio universum jus quod defunctus habuerat	85
Haeres est aut jure proprietatis, aut jure representationis	86
Haeres legitimus est quem nuptiae demonstrant	87
Homicidium vel hominis caedium, est hominis occisio ab homine facta	160
Ibi semper debet fieri triatio, ubi juratores meliorem possunt habere notitiam	197
Ignorantia facti excusat	268
Ignorantia juris non excusat	265
Ignorantia juris, quod quisque scire tenetur, neminem excusat	266
In aequali jure melior est conditio possidentis	81
Incerta pro nullis habentur	281
In criminalibus, probationes debent esse luce, clariores	242
In disjunctivis sufficit alteram partem esse veram	253
In dubio prodote, libertate, innocentia, possessore, debitore, reo, respondendum est	243

	No. of the Maxims.
In facto quod se habet ad bonum et malum, magis de bono quam de malo lex intendit	229
In genere quicunque aliquid dicit, sive actor, sive reus, necesse est ut probet	215
In judicio non creditur nisi juratis	204
In jure non remota causa, sed proxima, spectatur	142
Injuria fit ciscuis convicium dictum est, vel de eo factum carmen famosum	161
Injuria illata judici, seu locum tenenti regis, videtur ipsi regi illata, maxime si fiat in exercentem officii	155
Injuria non excusat injuriam	105
Injuria non praesumitur	231
In omnibus poenalibus judiciis et aetati et imprudentiae succurritur	170
In pari delicto, potior est conditio possidentis	82
In restitutionem, non in pœnam haeres succedit	91
Interest reipublicae ut quilibet re sua bene utatur	162
Judex habere debet duos sales: salem sapientiae, ne sit insipidus, et salem conscientiae, ne sit diabolus.	35
Judex non potest injuriam sibi datam punire	48
Judex non reddit plus quam quod petens ipse requirit	43
Judici officium suum excedenti non paretur	51
Judicis est judicare secundum allegata et probata	44
Judicis officium est opus dici in dio suo perficere	42
Judiciis posterioribus fides est adhibenda	295
Juris praecepta sunt haec; honeste vivere, alterum non laedere, suum cuique tribuere	6
Justitia debet esse libera, quia nihil iniquius venali justitia; plena, quia justitia non debet claudicare; et celeris, quia dilatio est quaedam negatio	36
Justitia non novit patrem nec matrem, solam veritatem spectat justitia	37
Lata culpa dolo aequiparatur	275
Leges posteriores priores contrarias abrogant	258
Lex citius tolerare vult privatum damnum quam publicum malum	57 & 156
Lex est Sanctio Sancta, jubens honesta, et prohibens contraria	4
Lex est tutissima cassis, sub clypeo ligis nemo decipitur	5
Lex fori regit remedium	8
Lex loci regit actum	7
Lex neminem cogit ostendere quod nescire praesumitur	216
Lex non cogit ad impossibilia	284
Lex non favet delicatorum votis	106
Lex non requirit verificari quod apparet curiae	206
Lex rejicit superflua	208
Lex spectat naturae ordinem	236
Lex succurrit ignoranti	267
Lex vincit consuetudinem	20
Liberta pecunia non liberat offerentum	150
Libertas est naturalis facultas ejus quid cuique facere libet, nisi quod de jure aut vi prohibetur	54
Litera scripta manet; vox emissa volat; vox audita perit	221
Longa possessio parit jus possidenti est tollit actionem vero domino	83
Majus est delictum seipsum occidere quam alium	163
Mala grammatica non vitiat chartum. Sed in expositione instrumentorum mala grammatica quoad fieri possit evitanda est	254
Malitia supplet aetatem	171
Malus usus est abolendus	19
Mandatarius terminos sibi positos transgredi non potest	127
Mayhemium est inter crimina majora minimum; et inter minora maximum	159
Maxima ita dicta quia maxima est ejus dignitas et certissima auctoritas, atqui quod maxime omnibus probetur	1
Melior est justitia vere praeveniens, quam severe puniens	173
Meliorem conditionem suam facere potest minor, deteriorem nequaquam	67
Melius est petere fontes quam sectari rivulos	209
Mentiri est contra mentem ire	203
Minatur innocentibus, qui parcit nocentibus	184
Minima poena corporalis est major qualibet pecuniaria	177
Minor ante tempus agere, non potest in casu proprietatis, nec etiam convenire	109
Mora reprobatur in lege	289
Multiplicata transgressione crescat poenae inflictio	176
Necessitas inducit privilegium quoad jura privata	280
Nec veniam, laeso numine, casus habet	151

	No. of the Maxims.
Ne faciat vastum vel estrepementum pendente placito dicto indiscusso...	200
Ne lites immortales essent dum litigantes mortales sunt.....	139
Nemo ad regem appellet pro aliqua lite, nisi jus domi consequi non possit.....	138
Nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa.....	181
Nemo de domo sua extrahi potest....	158
Nemo debet esse judex in propria causa.....	49
Nemo est haeres viventis.....	90
Nemo patriam in qua natus est exuere nec legeantiae debitum ejurare possit	153
Nemo potest mutare consilium suum in alterius injuriam.....	224
Nemo praesumitur esse immemor suae aeternae salutis; et maxime in articulo mortis.....	237
Nemo tenetur seipsum accusare.....	220
Nihil dat qui non habet.....	123
Nihil in lege intolerabilius est, eandem rem diverso jure censeri.....	22
Nihil tam conveniens est naturali aequitati, quam unumquodque dissolvi eo ligamine quo ligatum est..	117
Nil consensui tam contrarium est quam vis atque metus.....	113
Non decipitur qui scit se decipi.....	278
Non pertinet ad judicem secularem cognoscere de iis quae sunt mere spiritualia annexa.....	144
Non potest probari quod probatum non relevat.....	207
Non potest Rex gratiam facere cum injuriâ et damno aliorum.....	30
Non refert quid notum sit judici, si notum non sit in forma judicii.....	47
Non videtur consensus retinuisse si quis ex praescripto minantis aliquid immutavit.....	272
Non videntur qui errant consentire...	273
Noscitus a sociis.....	249
Nova constitutio, futuris formam, imponere debet, non praeteris.....	10
Novum Judicium non dat novum jus, sed declarat antiquum.....	11
Nulli differrimus justitiam.....	40
Nullum tempus occurrit regi.....	31
Nullus commodum capere potest de injuria sua propria.....	235
Nullus videtur dolo facere qui suo jure utitur.....	168
Nunquam res humanae prospere succedunt ubi negliguntur divinae.....	3
Obligatio est juris vinculum, quo necessitate astringimur alicujus solvendae rei secundum nostrae civitatis jura.....	108
Obtemperandum est consuetudini rationabili tanquam legi.....	17
Occultatio thesauri inventi fraudulosa.....	99
Odiosa et inhonesta non sunt praesumenda.....	232
Omne crimen ebrietas et incendit et detegit.....	287
Omne majus continet in se minus....	192
Omnes subditi sunt regis servi.....	26
Omnia praesumuntur contra spoliatorem.....	234
Omnia praesumuntur legitime facta donec probetur in contrarium.....	227
Omnia praesumuntur rite et solemniter esse acta.....	228
Omnia quae sunt uxoris sunt ipsius viri; non habet uxor protestatem sui; sed vir.....	65
Omnis querela et omnis actio injuriarum limitata est infra certa tempora.....	194
Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.....	116
Optimus interpres rerum usus.....	16
Optimus interpretandi modus est sic leges interpretare ut leges legibus concordant.....	248
Pacta quae contra leges constitutiones quae vel contra bonos mores fiunt, nullam vim habere, indubitati juris est.....	112
Participes plures sunt quasi unum corpus, in eo quod unum jus habent, et oportet quod corpus sit integrum et quod in nulla parte sit defectus.....	118
Partus sequitur ventrem.....	79
Parum est latum esse sententiam nisi mandetur executioni.....	299
Patria potestas in pietate debet, non atrocitate, consistere.....	66
Peccata contra naturam sunt gravissima.....	152
Pendente lite nihil innovetur.....	199
Possessio est quasi pedis positio...	80
Praescriptio est titulus ex usus et tempore substantiam capiens ab auctoritate legis.....	84
Praesentia corporis tollit errorem nominis; et veritas nominis tollit errorem demonstrationis.....	256
Principalis debet semper excuti antequam perveniatur ad fidei jussores	130
Privilegium non valet contra rempublicam.....	58
Quam longum debet esse rationabile tempus, non definitur in lege; sed pendet ex discretione justiciariorum.....	288

	No. of the Maxims.
Quando aliquid mandatur, mandatur et omne per quod per venitur ad illud	189
Quando aliquid prohibetur, prohibetur omne per quod devenitur ad illud	190
Quando jus domini regis et subditi concurrunt, jus regis praeferri debet	28
Quicquid plantatur solo, solo cedit	77
Quicquid solvitur, solvitur secundum modum solventis; quicquid recipitur, recipitur secundum modum recipientis	115
Qui sentit commodum sentire debet et onus; et e contra	133
Qui facit per alium facit per se	128
Qui haeret litera haeret in cortice	245
Qui in utero est, pro jam nato habetur, quoties de ejus commodo quaeritur	89
Qui jure suo utitur neminem laedit	101
Qui jussu judicis aliquod fecerit non videtur dolo malo facisse quia parere necesse est	50
Quilibet potest renunciare juri pro se introducto	94
Qui non habet in aere, luat in corpore; ne quis peccetur impune	178
Qui non improbat, approbat	219
Qui peccat ebrius, luat sobrius	286
Qui prior est tempore, potior est jure	70
Quodcunque aliquis tutelam corporis sui fecerit, jure, id fecisse videtur	172
Quod fieri non debet factum valet	269
Quod necessitas cogit, defendit	279
Quod nullius est, est domini regis	100
Quod nullius est, id ratione naturali occupanti conceditur	69
Quod per alluvionem agro tuo flumen adjecit, jure gentium tibi adquiritur	78
Quod semel placuit in electione, amplius displicere non potest	274
Quo praegnantis mulieris damnatae poena differatur, quod ad pariat	298
Ratio est legis anima, mutata legis ratione, mutatur et lex	12
Regnum non est divisibile	27
Res inter alios acta alteri nocere non debet	210
Res inter alios judicata nullum inter alios prejudicium facet	296
Res judicata pro veritate accipitur	294
Respiciendum est judicanti, ne quid aut durius aut remissius constituator quam causa deposcit; nec enim aut severitatis aut elementiae gloria affectanda est	182
Respondant superior	129
Reus exceptio actor est	213
Reus laesae majestatis punitur, ut pereat unus ne pereant omnes	59
Reversio terrae est tanquam terra revertens in possessione donatori, sive haeridibus suis post donum finitum	92
Rex est caput et salus reipublicae	25
Rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem	23
Rex non potest peccare	29
Rex nunquam moritur	24
Rex semper praesumitur attendere ardua regni pro bono publico omnium	32
Roy n'est lie per ascum Statute, si il ne soit expressement nosme	33
Salus populi est suprema lex	56
Scientia utrinque par pares contrahentes facit	122
Scire debes cum quo contrahis	137
Scribere est agere	166
Semper praesumitur pro legitimatione puerorum	238
Sic utere tuo ut alienum non laedas	102
Simplex commendatio non obligat	126
Stabitur praesumptioni donec probetur in contrarium	226
Subsequens matrimonium tollit peccatum praecedens	61
Summa ratio est quae pro religione facit	2
Sommonitiones aut citationes nullae lice aut fieri infra palatium regis	34
Sumus agere posse quemlibet hominem aut suo nomine, aut alieno: alieno veluti procuratorio, tutorio, curatorio	53
Terra transit cum onere	134
Testibus deponentibus in pari numero dignioribus est credendum	241
Testimonia ponderanda sunt; non enumeranda	240
Thesaurus inventus est vetus dispositio pecuniae, &c., cujus non extat modo memoria, adeo ut jam dominum non habeat	97
Thesaurus non competit regi, nisi quando nemo scit qui abscondit thesaurum	98
Titius semper est errare acquitando quam in puniendo, ex parte misericordiae quam ex parte justitiae	183
Ubi eadem ratio ibi idem lex, et de similibus idem est Judicium	21
Ubi jus ibi remedium	140
Ultima voluntas testatoris est perimplenda secundum veram intentionem suam	93

	No. of the Maxims.
Unum qui consilium daret, alterum qui contractaret, tertium qui receptaret et occuleret pari paenoe singulos esse abnoxios	164
Uxor non est sui juris, sed sub potestate viri, cui in vita contradicere non potest	64
Verba chartarum fortius accipiuntur contra proferentem	262
Verba generalia restringuntur ad habilitatem rei vel aptitudinem personae	259
Verba illata in esse videntur	261
Veritas, a quocunque dicitur, a Deo est	202
Veritas nimium altercando amittitur.	290
Via trita via tuta	187
Vigilantibus et non dormientibus jura subveniunt	121 & 195
Violenta praesumptio aliquando est plena probatio	225
Vir et uxor censentur in lege una persona	
Volenti non fit injuria	

MAXIM 1.

INTRODUCTION.

Maxima ita dicta quia maxima est ejus dignitas et certissima auctoritas, atqui quod maxime omnibus probetur. (*Co. Litt.* 11.)

A MAXIM is so called because its dignity is the greatest and its authority the most certain; and because it is universally approved by all. A Sanscrit scholar defines a maxim to be that which is embodied in a few words, unambiguous, full of meaning, and of universal application; and containing nothing useless, nothing faulty. Legal Maxims are those which constitute the fundamental principles of Law, without a knowledge of which all other imformation is useless. Nothing should be so dear to a people as the Laws of their country, the substance and safeguard of rational liberty, and the means of rendering them good, wise, and happy. It is incumbent upon every man to be acquainted with those laws at least with which he is immediately concerned. Indeed, the law, or its general principles at all events, ought to form an essential part of a liberal education. But, says Mr. George Norton, formerly Advocate General at Madras, "it is very common to find, among the most enlightened and best governed nations, those who undervalue the rules of law according to which justice is administered; making continual appeals to reason and *common sense*, as though all forms and requisitions of such rules should be set aside when the Judge's natural, uninstructed sense could suggest a different view of the case, or different course of arriving at that view, and as though all such forms and requisitions were but so many whims and fancies

invented for the purpose of shackling the efforts of a free understanding. Such notions, however prevalent, are in truth too shallow to deserve refutation. We may confidently declare that the universal experience of mankind throughout all countries, independently of what our reflective reason would explain, has shown that a people's prosperity must entirely depend on the certainty and merit of the rules for the administration of justice between man and man. * * * * * * If judgments shall be given according to each individual's sense of what is just, for want of any plain and sure guide in the admitted law, how could any man distinguish between what was the Judge's real sense of what was just, and what was his mere caprice and feeling? If individual sense, or caprice, or personal feeling was the sole origin of a judgment, who could say that any judgment was right or that it was wrong? For there would be no guide." "The fallacy of common sense argument," observes Mr. J. Bruce Norton, "scarcely deserves exposure. Common sense is not thought a sufficient rule and instructor in other arts and sciences. Men do not make hats or shoes by dictates of common sense, but are put to a lengthened apprenticeship. How then could bare common sense be a sufficient light for the guidance of the judge?" This is not all. The most vague and strange notions are current among many in regard to the character and usefulness of the laws. How often have we not heard it said that the "uncertainty of law is glorious;" that "going to law is a kind of lottery;" and so on; thus attributing to law what ought fairly to be laid at the door of wilful ignorance, or deliberate infraction of the law. This incorrect notion of law arises chiefly from a want of knowledge of the principles upon which it is based. The principle of the law is the original and operative cause of the law. *Ratio legis est anima legis.* "Although a man may tell the law, yet," says Coke in his work on Littleton, "if he know not the

reason thereof, he shall soon forget his superficial knowledge. But when he findeth the right reason of the law, and so bringeth it to its natural reason that he comprehendeth it as his own, this will not only serve him for the understanding of any particular case, but of many others; and this knowledge will always remain with him." It is certain that a mere knowledge of the laws, *memoritur*, will not make a good Judge; and it has been repeatedly observed that those men who, by trick of memory, can quote chapter and verse of any law, are the very worst exponents of the principles upon which the law rests.

The importance of mastering the principles, which override and govern the whole science of law, being thus apparent, no apology is needed for the production of a work on Maxims which are the very foundation of sound law; particularly so, when the work professes to illustrate them with special reference to the existing state of the laws of the country in which it makes its appearance, and in which our lot in life is cast. "It must not be supposed," observes Mr. Wharton in his work on Maxims, that, "the Maxims thus xplained are mere obsolete Latin phrases referring to by-one days, having no applicability to the law as now admin-ered in this country; or that being so applicable, they are aly so to some general principles too theoretical to be of ervice to a modern practitioner; but it is assured that ney are of every day use and application, and of absolute ecessity in the consideration of each minor branch of the wo great divisions of law, Civil and Criminal, and of numerless subjects continually occurring in the transactions of life within the range of each such branch." "Experi-nce has taught me," says Mr. Norton in his work on Jurisrudence, "that it is through epigrammatic brevity, the ith, and point of Maxims, the general principles are most sily and surely imprinted on the memory; and they serve) us as *nuclei*, round which each man may gather for him-

self the results of his own research and practice." It must be added here that a Maxim being a principle and not a technical rule of law, granted or assented to by all men, without proof, argument, or demur, we ought not to expect to find the reason of the maxim; to do so would be to look for the reason of the reason itself. *Non omnium quae a majoribus nostris constituta sunt, ratio reddi potest. Et ideo rationes eorum, quae constituuntur, inquiri non oportet; alioquin multa ex his, quae certa sunt, subvertuntur.* A reason cannot be given for all those laws which have been established by our ancestors; and therefore the reasons of those laws which remain established ought not to be demanded: otherwise many of them, which are determined, would be overthrown.

In the following pages an endeavour is made to illustrate three hundred of the most important legal maxims; and before proceeding further, it must be impressed upon the reader's mind, that the whole sum and substance of those maxims is this:—**(1) That the Rules of Law are to live uprightly, not to injure another, and to give every one his own; (2) that according to these principles, justice must be done though the heavens fall; and (3) that there should be no delay in giving redress; as taught by the three following maxims.**

I. Juris praecepta sunt haec; honeste vivere, alterum non laedere, suum cuique tribure.

II. Fiat justitia ruat caelum.

III. Nulli differremus justitiam.

All other maxims are entirely subservient to these grand and fundamental axioms, and only serve to enable us to carry out the essential principles of these three maxims in the most complete and successful manner.

MAXIMS 2 and 3.

(2.) **Summa ratio est quae pro religione facit.** (*Co: Litt.* 341.)—*The highest rule of conduct is that which is inculcated by religion.*

(3.) **Nunquam res humanae prospere succedunt ubi negliguntur divinae.** (*Co: Litt.* 35.)—*Human things never prosper where divine things are neglected.*

The most solemn maxim, whose truth must be universally admitted, is, that it should be the end and object of every human being so to rule his walk in life as finally to attain beatitude at the hands of his Creator. To know Him, to adore Him, and to obey His commands, as well in matters purely divine as in affairs entirely of this world, ought therefore to be the earnest desire and the utmost endeavor of every sentient being. "For in the knowledge and adoration of one God, which the Véda teaches, all the rules of good conduct are fully comprised." (*Menu*, Chapter xii, Verse 87.)

A course of life thus ruled and regulated in conformity with belief in a superintending power and submission to laws divinely established, is called Religion.

Religion being thus the basis upon which all national institutions ought to rest, it is the paramount duty of rulers so to frame and enact laws for human conduct as will be as nearly as possible in rigid consistence with the laws established by divine authority. "The contemplation and study of Law," observes Mr. Warren in his Abridgment of Blackstone's Commentaries, "are solemnizing and ennobling to one actuated by a right spirit; but this can never be where Law is dissociated from Religion, which alone indicates the august original of law, revealing the Supreme Law-giver, the Omniscient Maker and Final Judge

of man." This principle, has been recognized by every writer and sound thinker. "The roots of law," says Menu, "are the whole Véda; the Ordinances and moral practices of such as perfectly understand it; the immemorial customs of good men; and (in cases quite indifferent) self satisfaction." So Sir William Blackstone, speaking of the laws of England, observes that it ought to be ever borne in mind by those who make, who expound, who administer, who study, and who obey the laws of England, that they are the laws of a Christian State; laws based upon Christianity, and throughout supported and enforced by its sublime sanctions. On the same principle do our Mahomedan fellow citizens regard their own law; for the foundation of the Mahomedan law is the Koran, believed by them to be of divine origin, revealed by God Himself through the medium of an angel to their prophet Mahomed.

But human law must necessarily fall short of divine law to a great extent, inasmuch as some duties inculcated by the latter are not ordained by the former; and this for the following reason. "The Law," says Archdeacon Paley in his work on Moral Philosophy, "never speaks but to command, nor commands but when it can compel; consequently those duties which by their nature must be *voluntary* are left out of the Statute Book, as lying beyond the reach of its operation and authority. So human laws omit many duties as not objects of compulsion, such as piety to God, bounty to the poor, forgiveness of injuries, education of children, and gratitude to benefactors. Again human laws permit, or which is the same thing, suffer to go unpunished, many crimes because they are incapable of being defined by any previous description, of which nature are luxury, prodigality, partiality, caprice, disrespect to parents," &c., &c. Mr. Warren in his edition of Blackstone's Commentaries, suggests that the line of demarcation between Law and Ethics must be strictly observed, and internal

actions not be made the objects of law. This doctrine was fully recognised by the Romans; whence the maxim *Interna non curat praetor*. Any departure from this fundamental principle opens instantly a wide door to the most arbitrary and injurious violation of the rights of individuals on the part of the ruling power. Whenever judicial power is allowed to encroach too far on the widely extended domain of moral duties, from that moment judicial power is in danger of becoming not only inconvenient and inconsistent with sound principles of jurisprudence, but also absolutely unjust in its operation and effect on mankind.

But whatever human law may *omit* on the cogent grounds mentioned above, it is certain that whatever it enacts ought never to *contradict* the law of God. All systems, says Menu, which are repugnant to the Scriptures must soon perish.

The maxims under consideration are therefore of universal application, subject to the qualifications above noticed. Some difficulty however arises whenever laws are to be enacted for the government of a conquered country, if the religion of the conqueror happens to differ from that of the conquered. The Mahomedans thought fit to enact that it was imperative, and not merely optional, with the ruler to establish the law of Islam within the dominions owned or acquired by them; and it was enjoined that even questions of inheritance between persons who were not of the Mahomedan persuasion were to be decided according to the principles of Mahomedan law. (*Elberling*, Sec. 2.) But the Hindoos adopted a liberal policy; for example, speaking of a sovereign who has conquered a country, Menu ordains that "having conquered a country, let him respect the deities adored in it and their virtuous priests; let him also distribute largesses to the people; and cause a full exemption from terror to be loudly proclaimed. And let him establish the

laws of the conquered nation as declared in their books." (Chapter vii, Verses 201 and 203). In the same way according to the constitutional law of England, when a new country is added to the dominion of the British Crown, the people of the country are to be governed according to *their* own laws, until they are changed by the supreme authority of the State. (*Blackstone's Commentaries*, i, p. 107.)

"It is a Maxim," says Sir William Jones, "in the science of Legislation and with the Government, that, laws are of no avail without manners; or to explain the sentence more fully, that the best intended legislative provisions would have no beneficial effect, even at first, and none at all in a short course of time, unless they were congenial to the disposition and habits, to the religious prejudices and approved immemorial usages of the people for whom they were enacted; especially if that people universally and sincerely believed that all their ancient usages and established rules of conduct had the sanction of an actual revelation from Heaven."

"In order that due regard may be had to the civil and religious usages of the Natives (of India), it has been enacted that the rights and authorities of fathers of families and masters of families, according as the same may be exercised by the Gentoo or Mahomedan law, shall be preserved to them within their families respectively; nor shall the same be violated or interrupted by any of the proceedings of the said Courts; nor shall any act done in consequence of the rule or law of caste, so far as respects the members of the same family only, be deemed a crime, although the same may not be justifiable by the laws of England. * * * * * * In all suits to be determined by the laws and usages of the natives, the Courts shall make such rules and orders for the conduct of the same, and frame such process for the execution of their judgments, sentences, or decrees as shall be most consonant

to the religions and manners of the natives, and to the said laws and usages respectively, and the easy attainments to the ends of justice." (21, Geo. III, Cap. 70, S. 17; and 37, Geo. III, Cap. 142, S. 12 and 13; Letters Patent of 1774, S. 17; of 1800, S. 22; of 1823, S. 29; of 1862,S. 18; and of 1865, S. 19.) Vide Maxim 4, &c., as to what cases are governed by the laws and usages of the Natives of India.

So we see that from the reign of George III to the present days under the rule of Victoria, Empress of Hindostan —from the first regulation that was enacted in Bengal in 1772 down to the latest Acts passed by the Indian Legislature, both Imperial and Local, the British Government have preserved to the Natives of India the benefit of their own laws in suits regarding their religious usages and institutions, and in respect to inheritance; and in that spirit all acts, such as defiling or injuring a place of worship, with intent to insult the religion of *any class*; disturbing a religious assembly; uttering words, &c., with intent to wound the religious feeling of *any person*, &c., are treated as criminal offences, and the offenders are punished accordingly under the provisions of the Indian Penal Code.

But it must be well borne in mind that the application of the Hindu or Mahomedan systems founded as they are upon their respective religions, is here confined to those cases only, in which their observance is expressly sanctioned by law, or in which they are not repugnant to the provisions and enactments of the Legislature. Upon this point the observations of Mr. Justice Holloway in *Ex parte Padmanati* is deserving of careful study. His Lordship thus expressed himself: "The argument that the treatment of such a transaction as criminal is impossible, because the Hindu religion sanctions the practice, and the Private law recognizes private rights as flowing from it, is manifestly of no weight. An offence is every transgression of a Penal law, and a rule of Penal law is a rule of Public law and

sarily overrides every precept of Private law, and cannot be affected by any argument derived from that law. The fact of a transaction being in violation of Public law may prevent the arising of rights which would otherwise have the sanction of Private law; although *Harvey* v. *Bridges* (14 M. and W. 442) is an example of the contrary; but the fact that rights would, according to Private law, spring from an act transgressing a precept of Penal law, can never prevent that act from being an offence. With respect to the argument from religion, it is only necessary to observe that if the precepts of a particular religion enjoin acts which transgress the rules of Penal law, these acts will clearly be offences. Where the Legislature intended that acts which would otherwise be offences should not be so because connected with religious observances, they have expressed that intention;—Penal Code, Sec. 292." (V, *M. H. C. Reports*, 415).

Act VI of 1871, directs that in deciding any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution, the Mahomedan law where the parties are Mahomedans, and the Hindu law where the parties are Hindus, shall form the rule of decision, *except in so far as such law has by Legislative Enactment been altered or abolished.* Vide also Act III of 1873, (Madras Civil Court's Act) and Act VII of 1872, (Burmah Civil Court's Acts.)

MAXIMS 4 to 6.

(4.) Lex est Sanctio Sancta, jubens honesta, et prohibens contraria.—(2, *Inst.* 587.)—*Law is a Sacred Sanction, commanding what is proper, and prohibiting what is not.*

(5.) Lex est tutissima cassis, sub clypeo legis nemo decipitur.—(2, *Inst.* 56.)—*Law is the safest helmet; under the shelter of the Law none is deceived.*

(6.) Juris praecepta sunt haec; honeste vivere, alterum non laedere, suum cuique tribuere. (*Inst.*, lib. 1.)—*The rules of Law are—to live uprightly, not to injure another, to give every one his own.*

These Maxims declare the authority, object, and utility of the law. The law in its confined sense, that is in the sense in which it is our present business to consider it, is generally called the Municipal or Civil law. Although strictly speaking that expression denotes the particular customs of one single *Municipium*, or free town, yet it may with sufficient propriety be applied to any one State or Nation, which is governed by the same laws and customs. The Municipal law thus understood is defined (in *Blackstone's Commentaries*) to be a rule of civil conduct prescribed by the Supreme power in a State, commanding what is right and prohibiting what is wrong.

There are *three* universally recognized natural rights inherent in every loyal subject, namely, (1) the right of *Personal Security*, (2) the right of *Personal Liberty*, and (3) the right of *Private Property*. The right of *Personal Security* consists in one's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. The right of *Personal Liberty* consists in the power of locomotion, of changing one's situation, or removing

to whatsoever place one's own inclination may direct, without imprisonment, or restraint, unless by due course of law. And the right of *Private Property* consists in the free use, enjoyment and disposal of one's possessions and acquisitions, without any control or dimunition, save only by operation of the law of the land. (*Blackstone's Commentaries*). It has been the policy of the British Legislature, with regard to the exercise of the said rights, to leave the Natives of British India to the protection of the English law, qualified and modified by means of enactments passed or to be passed by the British Indian Legislature; except that the benefit of their own laws is confirmed to them so far as regards the exercise of their rights in matters of religion, caste, succession, and inheritance; and also as regards Contracts in cases coming before the Original side of the High Courts of Judicature, and the Presidency Small Causes Courts. (21, Geo. III, Cap. 70, Secs. 17 and 18; 39, Geo. III, Cap. 142, Sec. 12; Letters Patent of 1774, 1800, 1823, 1862 and 1865; Regulation IV of 1793 of the Bengal Code; Regulation III of 1802 of the Madras Code; Regulation IV of 1827 of the Bombay Code; Act IX of 1850, (Sec. 37); Act VI of 1871; Acts IV and VII of 1872; and Act III of 1873). So that it may once for all be stated that as a rule subject to the qualifications above noticed, the Territorial law of British India is practically a modified form of English law. (I, *Bengal Law Reports, Original Civil Jurisdiction*, 113).

The law of British India consists of the Regulation law and the national systems of law, such as the Hindu, Mahomedan, &c., laws.

The Regulation law consists of the Letters Patent issued by the Crown, the Statutes of the British Parliament with reference to India, and the Regulations and Acts of the Imperial and local Legislature under 24 and 25 Victoria, Cap. 67, Sec. 2, &c.

The Hindu law is taken from the writings of the sages,

which are now embodied in the several Text Books, Glosses or Commentaries, and Digests. In the Eastern parts of India, namely Bengal, Behar, &c., the dialectic philosophy called "*Nyaya*" is generally followed in the interpretation of questions of law; while in the Southern parts, namely, Benares, Madras, &c., the system of philosophy called "*Meemamsa*," a disquisition on proof and authority of precepts, is followed. Hence two principal Sects or Schools have arisen, which construe the same text in different ways. These two great Schools having been further subdivided, there now exist *five* different Schools of Jurisprudence or Law, which differ more or less from each other. The Original Texts are common to all, but each School gives a preference to particular commentators or authorities or scholiasts. (*Elberling*, Sec. 27 and *Colebrook* in I, *Strange* 315). Of these five Schools, (1) the School of BENGAL follows chiefly the works called *Dayabhaga* of Jimuta Vahana, the *Dayatatwa*, the *Vyvaharatutwa*, the *Subodhini*, the *Dayacrama Sangraha*, &c., &c., &c. (2.) In the School of BENARES, followed in the middle of India, preference is shewn to the *Mitakshara* of Vignyaneswara; the *Veera Metrodoya*, the *Parasara Madhaveya* the *Vyavaharamadhava*, &c. (3.) In the MITHILA School, which is specially followed in the District of Purnaya (from 24° 34′ to 26° 35′) respect is chiefly paid to the *Vivada Chintamany*, the *Vivada Ratnacara*, the *Madana Parejota*, the *Dwaitaparesestha*, the *Smritisara*, &c. (4.) In the DECCAN School which is followed in the MADRAS Presidency, the chief authorities are the *Mitakshara*, the *Smriti Chendrica*, the *Madhaveya*, the *Saraswati Velasa*, &c. And (5) in the MAHRATTA School which is followed in the BOMBAY Presidency, the *Mitakshara*, the *Vyavahara Mayookha*, the *Nirnayasindhu*, *Madhaveya*, &c., are the recognized authorities. (*Elberling*, Sec. 28, &c.)

The Mahomedans have two schools, the SOONNEES and the SHEEAHS. The Soonnees allow [illegible]

the companions of the Prophet, his four immediate followers and some of his contemporaries; while the Sheeahs give credit only to Ally and his Partisans, and to those sayings and actions, which they believe to have been verified by any of the twelve Imams. The *Hidaya*, the *Futwa Alumgere*, the *Sirajeeya*, *Shareefeya*, &c., are the works followed by the Mahomedans, with slight differences between the said two schools. (*Elberling*, Sec. 13, &c.)

In all cases in which no specific rule may exist the Regulation law (Acts of VI 1871; IV and VII of 1872, and III of 1873,) directs that the Courts should act according to justice, equity, and good conscience; but no guide has been provided to ascertain what justice, equity, and good conscience are. It has been therefore held that the Courts, in proceeding according to justice, equity and good conscience, ought to be governed by the principles of the English law, applicable to a similar state of circumstances. (Vide Judgment of the Lords of the Privy Council in *Vurden Seth Sam*, v. *Luckpathiroyjee Lalah and others*; and the Judgments of the Bombay High Court in *Dada Honaje*, *v. Bahajee Janjushett*—and *William Webbe*, *v. William Lister*—*Bom. H. C.*, II, 36 and 57.)

The laws are to be administered, not by the Sovereign in person, but by the learned Judges appointed by him. (*Blackstone's Commentaries.*) The case of *Prohibitions Del Roy* is in point. The Archbishop had informed the King of England that His Majesty had a personal jurisdiction in ecclesiastical matters; which Sir Edward Coke, answering for himself and the rest of the Judges, denied, saying that the King in his own person cannot adjudge any case; but that it ought to be determined and adjudged in some Court of Justice according to law and custom, &c., &c. Then the King said that he thought the law was founded upon reason; and that he and others had reason as well as the Judges;

that God had endowed His Majesty the King with excellent science and great endowments of nature; but his Majesty was not learned in the laws of his realm of England; and causes which concern the life, or the inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by artificial reason and judgment of law, which law is an art, which requires long study and experience before a man can attain to the cognizance of it. (VI, *Coke's Reports*, 280.) The principles upon which the administration of Justice is to be conducted in British India in this and other respects, are embodied in the Preamble to Regulation III of 1793 of the Bengal Code, which runs as follows:—

"The many valuable privileges and immunities which have been conferred upon the natives of these provinces, evince the solicitude of the British Government to promote their welfare, and must satisfy them that the Regulations which may be adopted for the internal government of the country, will be calculated to preserve to them, the laws of the Shaster and the Koran, in matters to which they have been invariably applied, to protect them in the free exercise of their religion, and to afford security to their persons and property. The benefit, however, which they would derive solely from regulations enacted for the above purposes, would be but partial, unless the judicial establishments for dispensing those regulations, are framed upon principles, which will render them the means of protecting private rights and property, under the changes and temporary derangements, to which all forms of Government must occasionally be liable. To ensure, therefore, to the people of this country, as far as is practicable, the uninterrupted enjoyment of the inestimable benefit of good laws duly administered, Government has determined to divest itself of the power of interfering in the administration of the laws and regulations in the first instance

court of appeal or reveiw, the decision of certain cases in the last resort*; and to lodge its judicial authority in courts of justice, the Judges of which shall not only be bound by the most solemn oaths, to dispense the laws and regulations impartially, but be so circumstanced, as to have no plea, for not discharging their high and important trusts with diligence and uprightness. They have resolved that the authority of the laws and regulations so lodged in the Courts, shall extend, not only to all suits between native individuals, but that the officers of Government employed in the collection of the revenue, the provision of the Companys' investment, and all other financial or commercial concerns of the public, shall be amenable to the courts, for acts done in their official capacity in opposition to the Regulations; and that Government itself, in superintending these various branches of resources of the State, may be precluded from injuring private property, they have determined to submit the claims and interests of the public in such matters, to be decided by the courts of justice according to the Regulations, in the same manner as suits between individuals. To deprive the Judges of the Courts of the power of delaying or denying justice, the Governor General in Council has determined to frame the constitution of the Courts, upon such principles as will enable every individual, by the mere observance of certain forms, to command at all times the exercise of the judicial power of the State, thus lodged in the Courts, for the redress of any injury which he may have sustained in his person or property. A system for the administration of the laws and regulations so constituted, will contain an active principle, which, allowing for the various characters and dispositions of those who may be employed in the immediate conduct of it, must continually operate to the

* The Government has since relinquished even this authority of receiving such appeals; which now lie to Her Majesty's Privy Council. (Madras Regulation VIII of 1818, founded upon Bengal Regulation XVI of 1797)

important ends of compelling men to be just in their dealings; bringing into action that spirit of industry, which is implanted in mankind, and which exerts itself in proportion as individuals are certain of enjoying the fruits of it; dispensing prosperity and happiness to the great body of the people; and increasing the power of the State, which must be proportionate to the collective wealth, that by good government it may enable its subjects to acquire. As the basis of this system for the administration of justice, the Governor General in Council has lodged the powers specified in this Regulation in the Courts of Dewany Adalut established in the several Zillahs."

But it must be remembered that the office of the Judges, as observed by Lord Bacon in his essay on Judicature, is *jus dicere* and not *jus dare*;—to interpret the law, and not to make the law. "There hardly exists," says Lord Ellenborough in *R. v. Inhabitants of Harmyworth*, "a general rule out of which does not grow, or may be stated to grow, some possible inconvenience from a strict observance of it. Nevertheless the convenience of having certain fixed rules, which is far above any other consideration, has induced courts of justice to adopt them, without canvassing every particular inconvenience which ingenuity may suggest as likely to be derived from their application." (*Best's Evidence*, Sec. 37). For, Judges are not responsible for the consequences of their just and conscientious decisions. In *Burges* v. *Gray*, the Counsel for the defendant argued thus:—This defendant is undone and impoverished for ever, if this action is maintained against him; for then twenty other suits will be brought against him upon the like matter." Thereupon Thirning, C. J. interposed,—"What is that to us? It is better that he should be quite undone than that the law should be changed for him. (*Ibid.*, Sec. 37.)

MAXIMS 7 and 8.

(7.) Lex loci regit actum (*Lin. Jur.* xxiv.) *The law of the place (i. e., the place where any act is done) governs the act.*

(8.) Lex fori regit remedium (*Lin. Jur.* xxv.) *The law of the Tribunal (i. e., the tribunal to whom application is made for remedy) governs the remedy.*

Having shown, while discussing the preceding Maxims, what law is in general administered in British India, we are next led to the consideration of the question by what law are particular contracts to be governed and offences tried. It may once for all be stated as a general rule, with reference to contracts, that in matters which relate to the decision of the cause, *ad litis decisionem*, the law of the place where they originated, i. e., *lex loci*, is to be applied; and in matter which relate to the bringing of a cause to hearing, *ad litis ordinationem*, the law of the place where the action is instituted, or in other words, the law of the place of the tribunal, i. e., *lex fori*, should be applied. (*Story's Conflict of Laws*, Section 356, &c.)

In order to fully illustrate these two rules of law, it will be convenient to consider the subject under six different branches into which it is divided in Tudor's Leading Cases on Mercantile and Maritime law. (*Don* v. *Lippman*, p. 213, &c.)

First.—By the law of what country is the validity of a contract to be determined? As a general rule, the validity of a contract depends upon the law of the country in which it was made. If therefore a contract is void or illegal by the law of the place of the contract, it is held void or illegal everywhere; if void in its origin, it seems difficult to find

to it in any other country. *(Story's Conflict of Laws,* Section 243.*)* If on the other hand a contract is valid or legal in the country in which it was made, it is held to be legal or valid everywhere; for otherwise it would be impracticable for the nations to carry on extensive intercourse and commerce with each other. Moreover parties are understoood to have contracted according to the law they live under, and they do not necessarily look to the remedy when they make the contract, nor foresee that they may have to seek for the enforcement of the contract in a foreign country. (*Ibid,* Section 242, &c.)

But it must be remembered that there is an exception to the rule as to the universal validity of contracts; and that is in cases in which the contract is immoral, or unjust, or in which the enforcing it in a State would be injurious to the rights, the interests, or the convenience of such State, or its citizens. In all such cases, although a contract may be valid by the law of the place where it was made, yet it will be considered as a nullity in every other country affected by such considerations; for it is now a rule of international law that the contract to which aid is requested should not, either in itself, or in the means used to give it effect, work injury to the inhabitants of the country, where it is attempted to be enforced. *(Ibid,* Section 244*)*. So in Bengal in the case of *Sultoo Kushbeen,* 13th February 1835, where a mother hired out her daughter in concubinage and sued to recover the wages, the Court dismissed the action as inadmissible in disregard of the Hindoo law on the subject. *(D'Latour's Note Book,* I, 194.*)*

In *Subroya Pilly* v. *Subroya Mudaly,* the plaintiff, a resident of Pondicherry, held a bond from one of the defendants, (2nd) for a certain sum of money. This bond the plaintiff charged the said defendant before the French legal authorities, with having fraudulently abstracted from his

dition from British territory of the 2nd defendant and also of his brother the 1st defendant. The latter on his way to Pondicherry met the plaintiff, and a settlement of accounts took place. The 5th, 6th, 7th and 8th defendants made themselves liable by executing the bond sued on for the sum found due to the plaintiff, and took indemnity bonds to themselves from the 1st defendant; the consideration being the agreement of the plaintiff to discontinue further proceedings on the criminal charge. The Court at Pondicherry sanctioned the agreement as a compromise by civil redress, and suspended further proceedings in accordance with the law in force in the settlement. It was held by the High Court of Madras that the contract was enforceable; the facts of the case not showing the compromise to be in its nature prejudicial as being in contravention of public policy under the Government of British India, or injurious to the good order and interests of society in regard to the administration of public justice. The English common law rule, that contracts for compounding or suppression of criminal charges for offences of a public nature are illegal and void, has no application to a contract for compounding the prosecution of criminal proceedings for an offence against the Municipal law of a foreign country and committed there, the law of that country permitting such a transaction; and this whether the contract is entered into there or in British territory. The rule of International law, that the law of the place of the contract governs its validity is subject to the qualification that every State may refuse to enforce a contract where it is for the fraudulent evasion of its laws, or is injurious to its public institutions, or interests. *(See Story on the Conflict of Laws*, Sections 244 to 259; *Wheaton's Inter. Law*, 179*)*. And the present suit would not be maintainable though the bond was executed in the French territory, if the facts in evidence brought the transaction of

rule—but that was not in any degree shown in the present case. The High Court then referred to an American decision in the case of *Kentucky* v. *Basford*, referred to at p. 180 of Mr. Wheaton's work. There a contract relating to lotteries which were authorized by the law of Kentucky but were illegal in New York, was enforced in New York, the Court laying down the qualification that an obligation to carry into effect a foreign law sanctioning what was plainly contrary to morality, would not be enforced. *(M. H. C. Reports*, IV, 14.*)*

Second.—By what law is the capacity of a person to a contract governed? Whatever may be the views of foreign jurists, it has been definitely settled in England that the *lex loci* is to govern in determining the capacity of a person to enter into a contract. Thus, in an action brought in England for money paid for the use of an infant, but not for necessaries, it appeared that the cause of action accrued in Scotland, and that the defendant was according to the law of England a minor. But it did not appear from the evidence what the law of Scotland was in regard to the defendant's liability, and Lord Eldon said:—"I hold myself not warranted in saying that such a contract is void by the law of Scotland, because it is void by the law of England. The law of the country where the contract arose must govern the contract, and what that law is should be given in evidence." (*Male* v. *Roberts*, 3 *Esp.* 163.) So the Indian Contract Act (IX of 1872, Section 11) provides that every person is competent to contract who is of age *according to the law to which he is subject.*

Third.—By what law is the form of a contract to be regulated? The general rule is that a contract made in a foreign country will not be enforced elsewhere, unless it is executed with the forms and solemnities required by such a country. So in *Bristow* v. *Sequeville*, 5. Exch. 275 Rolfe B observed

foreign country is void, it cannot be enforced here." (Vide *Story's Conflict of Laws*, Section 260.) It is to be observed here that stamp duty is payable for documents executed in British India, or out of British India but relating to any property within British India. (Section 4 of the General Stamp Act XVIII of 1869.) So that any unstamped document executed in a country where want of stamp does not invalidate a document, would be perfectly admissible in India.

Fourth.—According to what law is a contract to be construed? It appears clear that the *lex loci* must furnish the rule as to the nature, extent of obligation, and interpretation of the contract. (*Tudor's L. C. on Mer. Law*, 235, 237, &c.)

Fifth.—By what law is the discharge or dissolution of a contract, governed? As a general rule, a discharge good by the law of the country where a contract is entered into is good everywhere. (*Ibid*, 248.)

And Sixth.—What law regulates the enforcement of contracts? It has been laid down by Lord Brougham that whatever relates to the remedy to be enforced must be determined by the law of the country of the tribunals to which the appeal is made. In *Molan* v. *The Duke de Fitzjames*, it was held by Tenterdon, C. J., (1 B and P. 138) that "a person suing in this country must take the law as he finds it; he cannot by virtue of any regulation in his own country enjoy greater advantages than other suitors have, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer; he is to have the same right which all the subjects of this kingdom are entitled to." So, in a suit brought upon a foreign contract, the entire procedure; the admission of evidence, and the weight to be attributed to it; the limitation of actions, &c., would be governed by the law of the tribunal, *lex fori*. In *Raksna*

Council (V, *Moore's Indian Appeals*, 234) that although the Supreme Court Charter provided that in matters of contract the Hindoo law shall prevail, and although the Hindoo law prescribed certain periods of limitation, yet in questions of limitation the English law of limitation alone should prevail.

The Indian Limitation Act provides that suits in British India on contracts entered into in a foreign country are subject to the rules prescribed by this Act. No foreign rule of limitation shall be a defence to a suit in British India on a contract entered into in a foreign country, unless the rule has extinguished the contract; and the parties were domiciled in such country during the period prescribed by such rule. (Act IX of 1871, Sections 11 and 12.)

It must be borne in mind that the rules already considered suppose that the performance of the contract is to be in the place where the contract is made expressly or by tacit implication. But where the contract is either expressly or impliedly to be performed in any *other* place, then the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. (*Story's Confl. of L.*, Section 280. *Tudor's L. C. on Mer. Law*, 239.)

In *Abraham* v. *Abraham*, the Lords of the Privy Council held that upon the conversion of a Hindoo to Christianity, the Hindoo law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound as he has renounced the old religion; or, if he thinks fit, he may abide by the old law notwithstanding that he has renounced his old religion. The profession of Christianity releases the convert from the trammels of the Hindoo law, but it does not, of necessity, involve any change of the rights or relations of the converts in

rights and interests in, and his power over, his property. The convert, though not bound as to such matters either by Hindoo law or by any positive law, may, by his own course of conduct after his conversion, have shown by what law he intended to be governed as to these matters. The regulation which prescribes that the decision shall be according to equity and good conscience is complied with (in the case of converts) by referring the decision to the usage of the class to which the convert may have attached himself and of the family to which he may have belonged. (*Sutherland's Privy Council Judgments*, p. 501.)

A person settling in a foreign country shall not be deprived of the benefit of the laws of his native land provided he adhere to its customs and usages. (II, *Moore Ind. App.* 132.)

Now as to criminal cases, it has been held that the *Lex loci* must needs govern all criminal jurisdiction from the nature of the thing and the purpose of jurisdiction. (Per Lord Brougham in *Warrender* v. *Warrender*.) The common law considers crimes as altogether local, and cognizable and punishable exclusively in the country where they are committed. No other nation therefore has any right to punish them; nor is it under any obligation to take notice of, or to enforce, any judgment rendered in such cases by the tribunals having authority to hold jurisdiction within the territory where they are committed. (*St. Confl. Law*, S. 620.) The Indian Penal Code (Section 2) provides that "every person shall be liable to punishment under this Code and not otherwise, for every act or omission contrary to the provisions thereof, of which he shall be guilty *within the said territories* on or after the said 1st day of January 1862.

But there are exceptions to the said general rule, so that under the Indian

Majesty's territories;—and those exceptions are embodied in the two following Sections of the Indian Penal Code. Section 3 runs as follows:—Any person liable, by any law passed by the Governor General of India in Council, to be tried for an offence committed beyond the limits of the said territories, shall be dealt with according to the provisions of this Code for any act committed beyond the said territories, in the same manner as if such act had been committed within the said territories. And Section 4 provides that "Every servant of the Queen shall be subject to punishment under this Code for every act or omission contrary to the provisions thereof, of which he, whilst in such service, shall be guilty on or after the said 1st day of January, 1862, within the dominions of any Prince or State in alliance with the Queen by virtue of any treaty or engagement heretofore entered into with the East India Company, or which may have been or may hereafter be made in the name of the Queen by any Government of India."

In criminal cases, the question often arises whether a nation is bound to surrender up fugitives from justice, who escape into its territories, and seek there an asylum from punishment. The practice has, beyond question, prevailed as a matter of comity, and, sometimes, of treaty, between some neighbouring States, and sometimes also, between distant States, having much intercourse with each other. (*St. Confl. L.*, S. 626.) I would refer my readers to 33 and 34 Vic., Cap. 52, being an Act for amending the law relating to the extradition of criminals; and to Act XI of 1872, being an Act to provide for the trial of offences committed in places beyond British India, and for extradition of criminals.

In *Reg.* v. *James Watkins*, the defendant, a European British subject, was charged with having committed three offences at Bangalore, punishable under the Indian Penal Code; and the Madras High Court held that they had the same

Bangalore being within the territories of the Maharajah of Mysore, a native Prince in alliance with the Government of Madras, the defendant was subject to the jurisdiction of the High Court of Madras in respect of criminal offences committed in the territory of Mysore. (II, *M. H. C. R.*, 444, *4th November* 1865.) But the High Court of Madras in their Proceedings of 21st November 1870 held that the Joint Magistrate of Tellicherry in the Presidency of Madras had no jurisdiction to try one *Chatta Sing*, resident of Mysore, for criminal acts done in Mysore. (V, *M. H. C. R.*, *Appendix* III.) And in the case of the *Queen* v. *Venkameah and Narsa*, it was held by the Madras High Court that the Session Court of Bellary had no jurisdiction to try native subjects of the Jahgirdar or Rajah of Sundoor for offences committed on the plateau of Ramandroog upon native inhabitants of the village of Ramandroog. (III, *M. H. C. R.*, 354.)

In prosecuting a British subject for an offence committed on board a British Ship upon the High Seas, it was held by the Calcutta High Court, (1) that he must be charged with an offence under the English law; (2) that the punishment must be according to English law, and (3) that the trial must be according to the Procedure of the Local Court. (*The Queen* v. *Thompson*; *Beng. L. R. Orl. Crl. Juris*: p. 1.)

When the Court has to form an opinion upon a point of foreign law, the opinion, upon that point, of persons specially skilled in such foreign law, is admissible in evidence. Such persons are called Experts. (The Indian Evidence Act 1872, Sec. 45.) And until the foreign law is proved, there is a presumption that it is the same as that of England. (*Smith* v. *Gould*; IV, *Moore*, 21.)

MAXIM 9.

Actor sequitur forum rei.—*The Plaintiff follows the law of the Defendant.*

This maxim will generally be of use in Civil cases governed by the *Lex loci.* In 21, Geo. III, Cap. 70, Sec. 17, and 37, Geo. III, Cap. 142, Sec. 12, it is provided that where one of the parties is a Mahomedan or Gentu, the case should be determined by the laws and usages of the defendant. But the recent Acts of the Indian Legislature (Acts VI of 1871, IV and VII of 1872, and III of 1873) do not make any specific provision for the laws of the defendant being adopted in any such cases; but supply this omission by declaring that in cases not provided for by the said Acts or any other laws in force, the Courts shall act according to justice, equity, and good conscience. In thus acting according to justice, &c., the Courts would naturally be inclined to follow the rule laid down in the abovementioned Statutes, founded as it is upon the principle that the position of the defendant is always the better; and where there is a doubt, presumptions will be in favor of innocence, the debtor, &c.

MAXIM 10.

Nova constitutio, futuris formam, imponere debet, non praeteris (2, *Inst.* 292).—*A new Law ought to impose form on that which is to follow, and not on the past.*

Persons must ordinarily be presumed to have contracted, or acted, with reference to the existing state of the law, and not with reference to any law which may hereafter be

passed. The laws, therefore, must be made to apply from the time they are passed, so as to affect future and not past transactions. But a distinction must be noticed between new enactments which affect *vested rights*, and those which merely affect *procedure* in Courts of justice. When a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But when the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act. (*Broom's Maxims.*)

This subject has been discussed by his lordship Mr. Justice Holloway in *G. L. Morris* v. *Samba Murthi Rayer.* There his lordship observed:—"The general principle is that rights already acquired shall not be affected by the retro-action of a new law. Rules as to procedure are an exception. The law as to the acquisition of rights is that prevailing at the period of the arising of the matters of fact which generate them. Their enforcement must be according to the rules of process at the period of the suit. Care must, however, be taken to distinguish between laws which are merely processual and such as, under that fictitious appearance, are really material. To declare a certain right which would be validly created by certain matters of fact, not createable without the addition of some other, is material and not formal law. The non-distinguishing of this has led to very great injustice. (VI, *Mad. H. C. R.*, 122.)

Where the law is altered while a suit is pending, the law as it existed when the action was commenced, must decide the rights of the parties, unless the Legislature by the language used, shews a clear intention to vary the mutual relations of such parties. (*Guzeratti Trading Company* v. *Trickanige Veza & Co.* III, *Bengal H. C. R., O. C. J.* 45.)

In *Nagammah* v. *Kareebasapah* the late Madras Court of Sudder Adalat held that Acts of the Legislature cannot

have retrospective effect, unless clear provision towards that end is made in them. The Act (XXI of 1850) which declares that no person shall forfeit his rights or property by reason of his changing his religion, could not, therefore, avail the plaintiff, who, having changed his religion before the passing of the said Act, was liable, under the Hindu law, to the forfeiture of his inheritance. (*Madras Sudder Udalat Decision, No.* 99 *of* 1858, *dated* 11*th Dec.* 1858, *p.* 250.)

And with reference to the operation of a new criminal law, it is settled that the law does not allow a later circumstance, or matter subsequent, to extend or amplify an offence. It construes neither penal laws nor penal facts by intendment; but considers the offence in degree as it stood at the *time when it was committed.* (*Broome's Maxims.*) So, it is provided in the Indian Penal Code, Sec. 2, that a person is liable to punishment under the said Code, for every act or omission contrary to the provisions thereof, of which he shall be guilty, *on or after* the date on which the said Code came into force in British India.

The Statute 33, Geo. III, Cap. 13, prevents Acts of Parliament from taking effect from a time prior to the passing thereof.

MAXIM 11.

Novum Judicium non dat novum jus, sed declarat antiquum. (10 *Co.* 42.)—*A new adjudication does not make a new law, but declares the old.*

In illustration of this Maxim, it will be sufficient to quote a portion of the Judgment of the Madras High Court in *Muni Reddy* v. *Vencat Reddy.* (III, *H. C. R.*, 241.) There the High Court observed:—"The judgment of the Principal Sadr Amin proceeds upon the supposition that the High Court have held that when a person sues in a

Small Causes Court for the recovery of an amount due to him which is secured upon immovable property, he abandons his right to the security, and that this suit having been brought subsequent to the promulgation of this opinion, the plaintiff is bound by it, implying that otherwise he would not be bound. There are here two erroneous views. The proceedings of the High Court to which allusion is made did not arise out of any case coming before the Court for decision, and amounted merely to an expression of opinion for the guidance of the Courts. But supposing them to be a judicial decision, it would make no difference whether the decision were given prior or subsequent to the date of institution of plaintiff's suit. The High Court does not by its decisions make the law; it merely declares what the law has been and is. And, if the law were so prior to the institution of plaintiff's case, it would make no difference that the point was not decided until subsequently.

MAXIM 12.

Ratio est legis anima, mutata legis ratione, mutatur et lex. (7 *Co.* 7.)—*Reason is the soul of the law; the reason of law being changed, the law also is changed.*

When the law casts upon an individual or body of persons, the burthen of particular duties, it clothes them also with the means of performing those duties; but so long only as they are in the performance of those duties, they have the protection of the law; and the moment the reason of their being so ceases, the protection afforded to them by the law, also ceases. (*Wharton's Maxims*). So acts done by Judges or Magistrates, or by Guardians or Agents, after they cease to hold their respective posts, will all be illegal by the operation of these maxims. Certain lands are exempted from the jurisdiction of the Civil Courts because

they are of a rent free Inam tenure, (Act XXIII of 1871); but as soon as the land is enfranchised (as in the case of Madras Inam land of some description (Madras Act IV of 1862) and a rent fixed thereon, the land becomes the proper subject of a civil action, because the reason of the law which caused the exemption of the land from a Civil Court's jurisdiction having ceased to exist, the exemption itself ceases.

MAXIMS 13 to 15.

(13). Aequitas est perfecta quaedam ratio quaa jus scriptum interpretatur et emendat; nulla scriptura comprehensa sed sola ratione consistens. (*Co. Litt.* 24.)

Equity is a sort of perfect reason, which interprets and amends written law; comprehended in no code; but consistent with reason alone.

(14.) Aequitas sequitur legem. (*Gilb.* 136.)—*Equity follows law.*

(15.) Aequitas est quasi æqualitas. (*Co. Litt.*, 24.)—*Equity is as it were equality.*

A great master of equity, the late Lord Redesdale, has left the following comprehensive and luminous illustration of our English system of equity. The passage in question will be found in Mr. Samuel Warren's Abridgment of Blackstone's Commentaries, p. 68.

"Early in the history of our jurisprudence, the administration of justice by the ordinary courts, appears to have been incomplete. To supply the defect, the courts of equity have gained an establishment, assuming the power of enforcing the principles, upon which the ordinary courts also decide, when the powers of those courts, or their modes of

proceeding are insufficient for the purpose of preventing those principles, when enforced by the ordinary courts, from becoming, contrary to the purpose of their original establishment, instruments of injustice; and of deciding on principles of universal justice, where the interference of a court of judicature is necessary to prevent a wrong, *and the positive law is silent.* The courts of equity also minister to the ends of justice, by removing impediments to the fair decision of a question in other courts; by providing for the safety of property in dispute, pending litigation; by restraining the assertion of doubtful rights in a manner productive of irreparable damage; by preventing injury to a third person from the doubtful title of others; by putting a bound to vexatious and oppressive litigation, and preventing unnecessary multiplicity of suits; and, without pronouncing any judgment on the subject, by compelling a discovery, which may enable other courts to give their judgment; and by preserving testimony, when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation." In the year 1854, a bold step was taken by the legislature, in the Common Law Procedure Act 1854, tending seriously to affect the long established relations between the administration of law and equity, by arming the courts of law with powers till then wielded by courts of equity alone, and allowing equitable matter to be available in courts of law. On the other hand great and beneficial changes have been introduced into the administration of equity; rendering its proceedings, comparatively with their former conditions, simple and inexpensive; and introducing the *vivâ voce* examination of witnesses."

The systems of jurisprudence in our courts of law and equity are equally fixed and positive, though varied in the forms of their proceedings. *Equity follows the law,* as is said above; by which is to be understood, that the rules of property, the rules of evidence, and of interpretation, are

the same in each, or each would be perpetually confounding and defeating the other. No one can understand or appreciate the objects and action of equity, who is not equally well informed in respect of the law.

The true meaning of the maxim that equity follows the law seems to be, says Mr. Smith in his Manual of Equity, that equity is governed by legislative enactments and the rules of law in regard to legal estates, rights, and interests; and that it is regulated by the analogy of such legal estates, rights and interests, and the legislative enactments and rules of law affecting the same in regard to equitable estates, rights and interests, where any such analogy plainly subsists, if in such case there are no peculiar circumstances rendering it absolutely necessary to deviate from this rule, or creating an equitable obligation in one of the litigant parties, and an equitable correlative right in favor of another litigant party, and requiring a different course to be taken in the particular case, without overturning or destroying the general application of any legislative enactment or rule of law, that may in terms, or by any analogy, apply to the case.

Then as to the maxim that equity is equality, Pothier says:—Equity ought to preside in all agreements; hence it follows that in contracts of mutual interest, where one of the contracting parties gives or does something for the purpose of receiving something as a price and compensation for it, an injury suffered by one of the contracting parties, even where the other has not had recourse to any artifice to deceive him, is alone sufficient to render such contracts vicious. For as equity in matters of commerce consists in equality, when that equality is violated, when one of the parties gives more than he receives, the contract is vicious for want of the equity which ought to preside in it. For a further and more practical illustration of this maxim, the

reader is referred to the explanations which will be found hereafter in the maxims on contracts, enjoyment of property, &c.

MAXIMS 16 to 20.

(16.) Optimus interpres rerum usus. (2, Inst. 282).—*The best interpreter of things is usage.*

(17.) Obtemperandum est consuetudini rationabili tanquam legi. (4 *Co.* 38). *A reasonable custom is to be obeyed like law.*

(18.) Consuetudo debet esse certa, nam incerta pro nulla habentur. (*Dav.* 33.) *A custom should be certain, for uncertain things are held as nothing.*

(19.) Malus usus est abolendus. (*Co. Litt.* 141.) *An evil custom is to be abolished.*

(20.) Lex vincit consuetudinem. *Law abrogates customs* (*i. e., customs at variance with law*).

These are the principal rules with reference to custom. Customs are much respected in every nation. The custom of England is the law of England—*consuetudo regni Angliæ est lex Angliæ.* One of the four roots of law is the "immemorial custom of good men." (*Menu,* Ch. ii, v. 6—12.) A king, says Menu, who knows the revealed law must enquire into the particular laws of classes; the laws or usages of Districts; the customs of traders; and the rules of certain families; and establish their peculiar laws if they be not repugnant to the law of God. (Ch. viii, v. 41.)

The principle upon which the recognition of customs depends is thus explained by Mr. Elberling: "Civil society is not a mechanical machine, formed and regulated by certain unchangeable and written laws, but a moving and con-

tinually changing connection of individuals and families. Besides, it is impossible that the written law, however perfect and complete, could contain rules and directions for all human affairs; so far indeed is this from being necessary, that it would only be detrimental to the happiness of the people, and prevent all moral and social improvement. As long as there exists no necessity for an interference on account either of an uncertainty of the real customs, or of the existence of different and clashing usages, or of their immoral or detrimental nature, the Government need not, and generally does not, interfere by making any enactment. The usages form themselves, alter and amend themselves, as the state of things require. (Sec. 40.)

In *Tarachand* v. *Reeb Ram*, (III, *M. H. C. R.* 50,) the question of the origin and binding force of customary law was discussed, and the authorities upon the subject cited and commented upon by the Madras High Court. (Frere and Holloway J.J.) The following is taken from the Judgment in the said case (page 56): "The question of the origin and binding force of customary law is one which has divided the great jurists of the last generation. Mr. Mayne quoted Mr. Lindley's translation of Thibaut. Mr. Austen, as is well known, has, in perfect consistency with his definition of law, altogether denied that customary law has any inherent force as substantive law, and contended that it is in truth a species of judiciary law (Aust. I, 148 and II, 229); and that this judiciary law obtains its force by virtue of powers, really legislative, which with the tacit sanction of the supreme authority have been exercised by tribunals. Nearly every opinion contained in the short passage of Thibaut, has been the subject of a warm controversy, the more remarkable, as Mühlenbruch observes, inasmuch as by positive legislation its binding force has been almost abolished. The theory of Savigny is that the real basis of all positive law is to be found in the general consciousness of

a people. This basis being invisible, it is to be discovered by the external acts which manifest its usages, manners, and customs. The use of the phrase customary law is deluding, inasmuch as it would lead to the supposition that the first solution of a question of law was purely accidental, and that the same question was subsequently resolved in the same manner, because it was so resolved before. Thibaut, in the general language used by him, seems to concede to each class of persons, a power of establishing a law by their own will, but the restrictions which he afterwards imposes really narrow this power very materially, and in the practical result of his doctrines he will not be found very discordant from Savigny. After a very full discussion of the doctrines of the Roman law upon the subject, he then lays down the principles of modern jurists as to customary law, (Sec. 29). The acts of individuals are not the foundation of law but the signs of the existence of a common idea of law. The acts required for the establishment of customary law, ought to be plural, uniform, and constant. They may be judicial decisions, but these are not indispensable for its establishment, although some have thought otherwise. The authors of the acts must have performed them with the consciousness that they spring from a legal necessity. From the common law the continental jurists, as well as our own, have imported the qualification that the custom must not be unreasonable. These principles of course have reference to the doctrines of the Roman law and to their application in the country of which they form the common law, and there is nothing immaterial in their application to Rome, in which the decisions of the Roman people were in fact law whether upon Mr. Austin's theory or on that of his opponents. The important observation of Savigny is that usages and customs are only evidence of law. 'Custom is, for the people that has established it, a mirror in which that people may recog-

nize itself,' says Puchta. The authors who deal with this subject, are all discussing customary law as applicable to a whole community or a large section of it. They would never have conceived it possible for a customary law, antagonistic to the general law, to be established by evidence of the acts of a single family, confessedly subject to that general law. There are now three generations of this family, and we entertain as little doubt upon principle as upon authority, that no evidence of their acts or opinions could establish what would not be a law, but an anomaly.

"The Abraham case is almost the antithesis of this. The Hindu law being based upon the Hindu religion and inextricably interwoven with it, the throwing off of the religion prevented the law being obligatory, and left it to the parties themselves to determine whether they would be bound by it or by another law, prevailing by custom among the class to which their conversion and still more their altered habits had assimilated them.

"Even if we were disposed to follow the doctrine of Thibaut that the acts of the parties are capable of making law, and that, on proof of conduct amounting to a mutual agreement to adopt particular customs, a customary law will be established, from which the person or classes of persons, expressly, or tacitly, parties to such agreements will not be at liberty to dissent, we should consider the evidence in this wholly insufficient to establish such a custom. Assuming that each member of the family during the single generation after the acquirement of the property, has made a will, we should be wholly at a loss to see a case, which, on the principles of the jurists who follow the school of Thibaut, or indeed upon any principles of jurisprudence, would establish such a binding law. The Privy Council have observed incidentally that, in their opinion, there does not exist in any persons the power of making laws of inheritance for themselves."

In *Narsamiah* v. *Balaramacharlu*, (I, *Mad. H. C. R.*, 425,) Mr. Justice Holloway laid down the following dictum: "This is a case, then, in which it is sought to set up a supposed custom, which has never received the sanction of judicial authority, against the express language of the greatest authorities. We are strongly of opinion that such customs cannot, even if proved to exist, operate in a Court of Justice bound to administer the law. More peculiarly is it the duty of the Court to uphold a positive prohibition of the law, when that prohibition is itself a logical deduction from the very nature of the subject to which it applies."

In order to be respected and recognized, a custom must be (1) certain; and (2) reasonable; (3) it must have existed from time immemorial; (4) it must have continued without interruption; (5) it must have been peaceably enjoyed and acquiesced in; (6) it must have been obligatory and not optional; (7) customs must have been consistent with each other; (8) a custom cannot prevail against a public statute; (9) nor against an express contract *inter parties.*

But "proof of mercantile usage needs not either the antiquity, uniformity, or the notoriety of custom, which in respect of all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result, it is enough if it appear to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties in their contract." *(Judgment of the Lords of the Privy Council in Juggomohan Gose* v. *Manick Chund and another—Sutherland's Edition, p.* 357.)

"All local customs and mercantile usages shall be regarded as valid, unless they are contrary to justice, equity, or good conscience, or have, before the passing of this Act, been declared to be void by any competent authority." (Act IV of 1872, Sec. 5; also see Act III of 1873, Sec. 16.)

According to the Indian Evidence Act, (Sec. 13) where

the question is as to the existence of any right or custom, the following facts are relevant, *i. e.*, admissible in evidence; namely, any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence,—and also particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted or departed from.

MAXIMS 21 and 22.

(21.) Ubi eadem ratio ibi idem lex, et de similibus idem est Judicium. (*Co. Litt.* 191.)—*Where there is the same reason, there is the same law; and of things similar, the judgment is similar.*

(22.) Nihil in lege intolerabilius est, eandem rem diverso jure censeri. (4 *Co.* 93.)—*Nothing in law is more intolerable than to rule a similar case by a diverse law.*

These maxims inculcate the propriety of Judges abiding by former precedents—*Stare decisis*—where the same points come in litigation; but our Judges ought not to apply precedents blindly, nor be led away by precedents in cases seemingly alike, but not in reality so.

The reason why the decrees of the several Courts, and especially those of the High Courts, are considered to be of the same force as the written law is, says Mr. Elberling, Sec. 41, that they must be considered to contain a true exposition of the law of the land, having been laid down as such by the most learned and best informed persons; yet decrees are in themselves not laws, but merely the application of the law to particular cases; and as the Judges are by

their oath bound to decide each case upon its own merits in conformity with law and natural justice, they cannot be bound by precedent, which they consider either unfounded, or contrary to law and justice. Precedents are always to be applied with great consideration and circumspection, because human affairs are so diversified that whenever the decision of a case does not depend upon a single rule or principle, two cases will seldom be found perfectly equal.

With reference to Indian Judges applying English precedents in the adjudication of cases coming before them, Mr. Justice Holloway conveys a significant warning in *Peddamathalaty* v. *N. Timmareddy*, (II, *Mad. H. C. R.*, 272.) His Lordship held that, "the existence in England of two sets of Courts, administering justice upon different processes, renders a resort in this country to English cases and dicta, somewhat perilous, unless this distinction is constantly kept in mind. A principle for the guidance of our Courts can only be eliminated from a careful consideration of what would be the joint operation of Courts of law and of equity in the particular case."

MAXIM 23.

Rex non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem. (*Bract, Lib.*, I, *fo.* 5.)—*The King is under no man; but he is in subjection to God and to the law; for the law makes the King.*

"Since, if the world had no king, it would quake on all sides through fear, the ruler of this universe, therefore, created a king for the maintenance of this system, both religious and civil, forming him of the eternal particles drawn from the substance of *Indra*, *&c.* A king, even though a child, must not be treated lightly. Let the king prepare a just compensation for the good, and a just punishment

for the bad: the rule of strict justice let him never transgress. From those who know the three Vedas, let him learn the triple doctrine comprised in them, together with the primeval science of criminal justice and sound policy, the system of logic and metaphysics, and sublime theological truth: and from the people he must learn the theory of agriculture, commerce, and other particular arts. By a king wholly pure, faithful to his promise, observant of his scriptures, with good assistants, and sound understanding, may punishment be justly inflicted." Such are the views and directions of Menu in regard to a Hindoo king; and they show beyond a doubt that a king is held to be under the Divine law, which of course is the "root of human laws." (*Menu*, Chap. vii, verses, 3, 4, 8, 13, 31 and 43.) But in the view of a Mahomedan lawyer, the absolute sovereignty of the prince, carries with it the idea of the superiority of the prince to all law, the prince himself being a living law. (I, *Mad. H. C. R.*, 283). In 12 and 13. William III, Chap. 2, it is declared that "the laws of England are the birthright of the people thereof; and all the kings and queens, who shall ascend the throne of the realm, ought to administer the Government of the same according to the said laws;"—thus placing the king under the law beyond all doubt. The king of England does, as it were, enter into a contract with his people; the reciprocal duties of the king and the people, being *protection* and *subjection* respectively. The terms of such contract are supposed to be couched in the Coronation oath, which is administered to every king or queen, who succeeds to the Crown. The following was the oath administered to Queen Victoria on Her Majesty's Coronation on the 20th November 1837, as quoted in Warren's abridgment of Blackstone's Commentaries, p. 227. (Vide also *Stephens' Commentaries*, II, 369), thus:—

"The sermon being ended, and Her Majesty having, in the presence of the two Houses of Parliament, made and

signed the Declaration, the Archbishop goes to the Queen, and standing before her, saith to the Queen.

Madam, is your Majesty willing to take the oath ?

And the Queen answers,

I am willing.

Archbishop.—Will you solemnly promise and swear to govern the people of this United Kingdom of Great Britain and Ireland and the Dominions thereto belonging, according to the Statutes in Parliament agreed on, and the respective Laws and Customs of the same ?

Queen.—I solemnly promise so to do.

Archbishop.—Will you, to your power, cause law and justice, in mercy, to be executed in all your judgments ?

Queen.—I will.

Archbishop.—Will you, to the utmost of your power, maintain the laws of God, the true profession of the Gospel, and the Protestant Reformed Religion established by law ? And will you maintain and preserve inviolably the settlement of the United Church of England and Ireland, and the Doctrine, Worship, Discipline, and Government thereof, as by law established within England and Ireland, and the territories thereto belonging ? And will you preserve unto the Bishops and Clergy of England and Ireland and to the Churches there committed to their charge, all such rights and privileges, as by law do or shall appertain to them or of any of them ?

Queen.—All this I promise to do.

Then the Queen arising out of her Chair, attended by her supporters and assisted by the Lord Great Chamberlain, the Sword of the State being carried before her, goes to the Altar, and there makes her solemn Oath in the sight of all the people, to observe the Premises: Laying her right hand upon the Holy Gospel in the Great Bible, which was

before carried in the procession, and is now brought from the Altar by the Archbishop, and tendered to her, as she kneels upon the steps saying these words:

The things which I have here before promised, I will perform and keep. So help me God."

Then the Queen kissed the Book and signed the Oath.

A somewhat similar contract was made by the Queen with the people of British India in the Proclamation issued when the Queen assumed the Government of this country. The following are extracts (made from the Government Gazette of the 1st November 1858) from the Queens' Proclamation.

* * * * *

"We hereby call upon Our subjects within the said territories (in India) to be faithful and to bear true allegiance to Us, Our Heirs, and Successors; and to submit themselves to the authority of those whom We may hereafter, from time to time, see fit to appoint, to administer the Government of Our said territories, in Our name and on Our behalf.

* * * * *

"We hereby announce to the Native Princes of India that all treaties and engagements made with them by or under the authority of the Honorable East India Company, are by Us accepted and will be scrupulously maintained, and We look for the like observance on their part.

"We desire no extension of Our present territorial possessions; and while We will permit no aggression upon Our dominions or Our rights to be attempted with impunity, We shall sanction no encroachment on those of others. We shall respect the rights, dignity and honor of Native Princes as Our own; and We desire that they, as well as Our own subjects, should enjoy that prosperity and social advancement which can only be secured by internal peace and good government.

"We hold Ourselves bound to the Natives of Our Indian territories by the same obligations of duty, which bind Us to

all Our other subjects; and those obligations by the blessing of Almighty God, We shall faithfully and conscientiously fulfil.

"Firmly relying Ourselves on the truth of Christianity, and acknowledging with gratitude the solace of religion, We disclaim alike the right and desire to impose our convictions on any of Our subjects. We declare it to be Our Royal will and pleasure that none be in anywise favored, none molested or disquieted by reason of their religious faith or observances; but that all shall alike enjoy the equal and impartial protection of the law; and We distinctly charge and enjoin upon all those who may be in authority under Us that they abstain from all interference with the religious belief or worship of any of Our subjects on pain of Our highest displeasure.

"And it is Our further will that so far as may be, Our subjects of whatever race or creed, be freely and impartially admitted to offices in Our service, the duties of which they may be qualified, by their education, ability, and integrity duly to discharge.

"We know and respect the feelings of attachment with which Natives of India regard the lands inherited by them from their ancestors; and We desire to protect them in all rights connected therewith, subject to the equitable demands of the State; and We will that generally, in framing and administering the law, due regard be paid to the ancient rights, usages, and customs of India.

* * * * *

"When by the blessing of Providence, internal tranquillity shall be restored, it is Our earnest desire to stimulate the peaceful industry of India; to promote works of public utility and improvement, and to administer its government for the benefit of Our subjects resident therein.

"In their prosperity will be Our strength; in their con-

tentment Our security, and in their gratitude Our best reward.

"And may the God of all power grant to Us and to those in authority under Us, strength to carry out these Our wishes for the good of Our people."

The legal style and designation of the Queen of England is—

"*Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.*"

The law grants to the Sovereign certain prerogatives and attributes of a great and transcendant nature, such as sovereignty, perpetuity, perfection, &c.; and these are exemplified by the following maxims.

MAXIM 24.

Rex nunquam moritur. (*Branch, Max. 5th Ed.*, 197.)—*The king never dies.*

"The person of the king is by law made up of two bodies; a natural body, subject to infancy, infirmity, sickness, and death; and a political body, perfect, powerful and *perpetual.* These two bodies are inseparably united together, so that they may be distinguished but cannot be divided." (*Broom's Max.*) "The ruler of the Universe," (says Menu) "created a king for the maintenance of this system, both religious and civil; forming him of *eternal* particles drawn from substances of *Indra*, &c., &c. (Chap. vii, v. 3 & 4). It is hence said that the king never dies in his political capacity, as the royal dignity should ever remain perpetual. On this principle no king can be a minor; and any laws or grants made by a king, even if he be a minor in his natural capacity, are binding on himself and his successors.

MAXIMS 25 and 26.

25. Rex est caput et salus reipublicae. (4, *Co.* 124).—*The king is the head and guardian of the commonwealth.*

26. Omnes subditi sunt regis servi. (*Jenk. Cent.* 126). —*All subjects are servants of the king.*

As conservator of the public peace, the Crown, in any criminal proceeding, represents the community at large, prosecutes all offences committed against the public, and can alone exercise the prerogative of pardoning. As the fountain of justice no Court can have any compulsory jurisdiction over the Sovereign; and an action for a personal wrong will not lie against the king. (*Broom's Maxims*).

The last and surest resort for avoiding the execution of the judgment of a Judicial tribunal is the Sovereign's high gracious privilege of pardon; and the "granting of pardon is the most amiable prerogative of the Crown." Law, says an able writer, cannot be framed on principles of compassion to guilt. Yet justice, by the constitution of England, is bound to be administered in mercy: indeed, this is expressly pronounced by the Queen in her Coronation Oath; and when a case for mercy is made out, in order to remedy the harshness of justice, the Crown rarely fails to cast its protecting shield around the victim of the law. The Queen herself condemns no man; that rugged task she leaves to her Courts of justice. The great operation of the sceptre is MERCY. (*Blackstone's Com.* 4, 394, &c.)

In India, the Governor General in Council, or the local Government, as the representative of the Queen, may at any time without conditions, or upon any condition which the person sentenced accepts, remit the whole or any part of the punishment, to which any person had been sentenced for an offence. (Vide Sec. 322 of the *Code of Crim. Proc.*; Act X of 1872).

Any person may appeal to Her Majesty in Council in any Civil case from any final judgment, decree, or order of the High Courts of Judicature, provided that the amount or value of the suit is not less than 10,000 Rupees; or that, the Judges, where the suit is less than that value, certify that the case is a proper one for such appeal. (*Letters Patent of* 1865, Sec. 39). And any person may likewise appeal to Her Majesty in Council from any judgment, order or sentence of the High Courts of Judicature in any criminal case, provided the High Court shall declare that the case is a fit one for such appeal. (*Ibid*, Sec. 40.)

MAXIM 27.

Regnum non est divisibile. (*Co. Litt.*, 165).—*The kingdom is not divisible.*

The executive power of the English Nation is vested in a single person. It is in general hereditary and descendible to the next heir on the death of the last holder. It corresponds as a rule with the feudal path of descent chalked out by the common law in the right of succession to landed estates; yet with one or two material exceptions. The Crown will descend lineally to the issue of the reigning monarch; the preference of males to females and the right of primogeniture among the males being strictly adhered to. On failure of the male line, the Crown descends to the female issue. Among females too, the Crown descends by right of primogeniture. The doctrine of representation prevails in the descent of the Crown, *i. e.*, the lineal descendants of any person deceased stand in the same place in which he would do were he living, and thus represent him. On failure of lineal descendants, the Crown goes to the next collateral relations of the late occupant of the throne, provided they are lineally descended from a common ancestor, that is, from

that royal stock, which originally acquired the Crown. But the doctrine of hereditary right does by no means imply an indefeasible right to the throne. It is unquestionably in the breast of the Supreme legislative authority of the kingdom, viz., the Sovereign, and the people as represented by both houses of Parliament, to defeat this hereditary right and vest the inheritance in any one else. This is strictly consonant with the English laws and constitutions, as may be gathered from the expressions so frequently used in the Statute Book of the "King's Majesty, His heirs and successors;"—the word "heirs" implying an inheritance or hereditary right, and the word "successors," taken expressly, signifying that this inheritance may sometimes be broken through; or that there may be a succession without the successor being necessarily heir to the last king. And lastly, however the Crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it. (*Blackstone's Comm.*, I, 190, &c.)

To the descendibility of estates under the Hindu law to all the sons in common there appears to have been ever, in point of fact, an exception in the case of the Crown. The exception, arising from the nature of the thing, is noticed by Menu, who speaks of a dying king "having duly committed his kingdom to his son. (*Menu*, Chap. ix, 323.)

"Upon the same principle of usage, stands, with respect to many of the great zemindaries of Bengal and other parts of India at this day, the exclusive succession of the eldest son." (*Sir T. Strange*, I, 198). But it must be remembered that "there is no rule of Hindu law regulating the descent of all Hindu rajahs and their estates; but in every case in which a departure from the ordinary law of succession and inheritance is relied on, a particular custom or Koolachar must be proved. (*Raj Coomar Shooraj Nundun Singh* v. *Raj Koomar Deo Nundun Singh—Calcutta W. R. Civil R.* XVI, p. 142).

Partibility is the general rule of Hindoo Inheritance; and the succession of one heir, as in the case of a Raj, is the exception. (*The East India Company* v. *Kamachee Boye Sahiba*, the Tanjore Ranee. *Privy Council Judgments, Sutherland's Edition*, p. 373.)

Even then, the rule of impartibility applicable to zamindaries does not extend to the personal property of a zamindar left at his death; and such property is divisible amongst his sons. (*Sri Sri Sri Rajah Rajeswara Gazpati Narrain Deo Maharvzloongaroo's* case, *M. H. C. R.*, V, p. 31).

On the question of the extent to which property of the nature of an impartible Raj is excepted from the general law by a special rule of succession, entitling the eldest of the next of kin to take solely, the Madras High Court held as follows:—"Whenever such rule applies, it has existence by force of usage and custom as pointed out in the judgment of this Court in R. A., No. 86 of 1868; M. H. C. R., V, p. 39, and recognised in the recent decision of the Privy Council in *Baboo Beer Pertab Sahee* v. *Rajender Pertab Sahee*—XII, *Moore's Ind. App.* 18; and like every thing of the kind it must have effect rigidly according to the established usage. Now in the present case there is simply the admitted governing usage of succession to the possession and enjoyment of the estate as a Raj by a single heir by primogenitureship the ordinary and recognized usage of succession to zamindaries of this Presidency; and we apprehend it to be clearly the law that such an usage does not interfere with the general rules of succession farther than vest the *possession and enjoyment of the corpus* of the whole estate in a single member of the family, subject to the legal incidents attached to it, as the heritage of an undivided family,—that being all that the purpose of the usage, namely, the preservation of the estate as impartiable Raj, renders necessary. The unity of the family right to the heritage is not dissevered any more than by the succession

of coparceners to partible property; but the mode of its beneficial enjoyment is different. Instead of the several members of the family holding the property in common, one takes it in its entirety, and the common law rights of the others, who would be coparceners of partible property, are reduced to rights of survivorship to the possession of the whole, depending upon the same contingency as the rights of survivorship of coparceners *inter se* to the undivided share of each; and to a provision for maintenance in lieu of coparcenary shares." (*M. H. C. R.*, VI, p. 105).

MAXIM 28.

Quando jus domini regis et subditi concurrunt, jus regis praeferri debet. (9 *Co.* 129.)—*Where the rights of the king and of the subject concur, those of the king are to be preferred.*

"The king by his prerogatives regularly is to be preferred in payment of his duty or debt before any subject, although the king's duty or debt be the latter." (*Coke on Littleton*, 131). The law is just the same in India. *Yajnyavalkya* says, "A debtor shall be forced to pay his creditor in the order in which the debts were contracted, after first discharging those of the priest or the king." (*Vyvahara Mayukha*, Chap. v, Sec. iv, verse 9.)

In the case of the Secretary of State in Council for India, *v.* The Bombay Landing and Shipping Company, the point in question was discussed by the Bombay High Court at great length; and it was held that a judgment debt due to the Crown in this country is entitled to the same precedence in execution as a like judgment debt in England, if there be no special legislative provision affecting that right in the particular case; and that in similar circumstances a judgment debt due to the Secretary of State in Council for India

is in this country entitled to the like precedence, and the reason is, that such debt is vested in the Crown, and when realized falls into the State treasury. (*Bombay H. C. R.*, V, 23).

The following provisions are made in the Madras Revenue Recovery Act II of 1864;—"The lands, the buildings upon it, and its products, shall be regarded as the security of the Public Revenue." (Sec. 2). Claims to crops upon the ground, or to gathered products of the ground attached, in the possession of the defaulter, whether founded upon a *previous* sale, mortgage or otherwise, shall not bar the *prior* claim of revenue due from the ground upon which such crop or product may have been grown. (S. 17.) Similar process is followed in case of other species of revenue, advances, fees, and cesses. (S. 52). And a like provision will be found in the regulations of the other Presidencies (*Bengal*, I of 1845).

The Indian Insolvent Debtor's Act of 1848 (11 and 12, Vic. C. 21) provides in Sec. 62 that no debt, &c., due to our Sovereign Lord the king shall be deemed to be such a debt, &c., as to entitle any person to apply for the benefit of the said Act.

In *Gamush Loll* v. *Ameerkhan*, it was held by the Calcutta High Court on the 8th January 1872, that the property of a judgment debtor, convicted of an offence against the State under Act XI of 1857, which had been attached intermediately between the time of the commission of the offence and the time of conviction, is properly forfeited to the Crown under S. 3, Act XXV of 1857. The forfeiture relates back to the time of the commission of the offence. (*Calcutta W. R. Civil R.*, XVII, p. 80.)

MAXIM 29.

Rex non potest peccaer. (2, *Rolle, R.* 304).—*The king can do no wrong.*

On the principles already noticed, no wrong can be imputed to the Sovereign in his political capacity.

Are then, it may be asked, the subjects of England totally destitute of remedy, in case the Crown should invade their rights, by either private injuries or public oppressions? No. The law has made the following provisions in both these cases:—

As to *private injuries.* If any person have, in point of property, a just demand upon the Queen, he must petition Her Majesty in Her Court of Chancery, when the Chancellor will administer right, as a matter of grace, though not upon compulsion. The prayer of this petition, which is really in the nature of an action against the Sovereign for the recovery of debts, chattels, real or personal, and unliquidated damages, is grantable *ex debito justitiae.* It may be addressed to the Queen in Parliament, or in Chancery, or in any other Court. And this is entirely consonant to what is laid down by the writers on natural law. "A subject," says Puffendorf, "so long as he continues a subject, hath no way to oblige his prince to give him his due, when he refuses it, though no wise prince will ever refuse to stand to a lawful contract; and if the prince give the subject leave to enter an action against him, upon such contract in his own Courts, the action itself proceeds rather upon natural equity, than upon the Municipal laws; for the end of such action is not to compel the prince to observe the contract, but to persuade him." And, as to personal wrongs; it is well observed by Mr. Locke, "the harm which the Sovereign can do in his own person, not being likely to happen often, nor to extend itself far, nor being able, by his single strength to

subvert the laws, nor oppress the body of the people, should any prince have so much weakness and illnature as to endeavour to do it, the inconvenience, therefore, of some particular mischief that may happen sometimes, when a heady prince comes to the throne, are well recompensed by the peace of the public and security of the Government in the person of the chief Magistrate being thus set out of the reach of danger." (*Blackstone's Com:* I, 237, *&c.*)

And, "as to cases of ordinary *public oppressions*, where the vitals of the constitution are not attacked, the law has also assigned a remedy. For as a king cannot misuse his power, without the advise of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments and parliamentary impeachments, that no man shall dare to assist the Crown, in contradiction to the laws of the land. But it is at the same time a maxim in those laws that the Queen herself can do no wrong. * * * * * *—For which reason all oppressions which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any stated rule, or express legal provision." (*Black. Com:* I, 237, *&c.*) But "whenever the *unconstitutional oppressions*, even of the sovereign power, advance with gigantic strides, and threaten desolation to a State, mankind will not be reasoned out of the feelings of humanity, nor will sacrifice their liberty by a scrupulous adherence to those political maxims, which were originally established to preserve it. And therefore, though the positive laws are silent, experience will furnish us with a very remarkable case, which has been already under our notice, wherein nature and reason prevailed. When king James II invaded the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the Crown. (*Ibid.*)

But the civil irresponsibility of supreme power for tortious acts could not be maintained with any show of justice, if its agents were not personally liable for them. Hence, if the act is in itself wrongful as against the plaintiff and causes damage to him, he has the same remedy by action against the doer, whether the act were his own spontaneous and unauthorized, or whether it were done by order of the supreme power. (*Story on Agency*, 322. *Collett on Torts*, 118.) So in *Thomas Eales Rogers, Superintendent of Marine* v. *Rajindro Dutt and others*, it was held that in the case of damage occasioned by wrongful act (*i. e.*, an act which the law esteems an injury) the same remedy by action lies against the doer whether the act was his own, spontaneous and unauthorised, or whether it was done by the order of Government. (*Privy Council Judgments, Sutherland's Edition*, p. 413.).

The Secretary of State in Council for India shall and may be sued as well in India as in England by the name of the Secretary of State in Council as a Body corporate; and the property and effects vested in Her Majesty for the purposes of the Government of India or acquired for the said purposes shall be subject and liable to judgment and execution. (21 and 22 Vic. C. 106, Sec. 65, dated 2nd August 1858.) If the suit be brought against the Government, the summons shall be served on the Government Pleader; and if the suit be against an officer of Government for an act which the plaintiff alleges to have been done by such official in his official capacity, the summons shall be served upon such officer. (Secs. 67 and 68 of the *Code of Civil Procedure*.)

The Secretary of State in Council for India is liable for the damages occasioned by the negligence of servants in the service of Government, if the negligence is such as would render an ordinary employer liable. (*The P. and O. Steam Navigation Company* v. *The Secretary of State for India*—

Judgment of the Calcutta Supreme Court in 1861, reproduced in the Appendix to Bombay H. C. R., V., Appendix, p. 1.)

But the acts of a Government officer affect the Government, only when he is acting in the discharge of a certain duty within the limits of his authority, or if he exceed that authority, when the Government in fact or in law, directly or by implication, ratifies the excess. *(The Collector of Masulipatam* v. *Cavali Vencata Narrainappah.—Privy Council Judgments, Sutherland's Edition, p. 476.)*

The Civil Courts have no jurisdiction to try any matter concerning public revenue. (21, Geo. 3, Cap. 70, S. VIII). So that Civil Courts cannot take cognizance of a suit, in which the alleged cause of action is the impolicy or inexpediency or oppressive nature of revenue assessment, or its unjust inequality or unfair increase. But the Civil Courts have jurisdiction to entertain suits brought to try questions of *liability* to the public revenue assessed upon the land. Where a suit is brought for alleged wrongful acts done by an executive officer of Government, the circumstance that the acts complained of were done in enforcing payment of a revenue assessment sanctioned by Government does not, *per se*, preclude the jurisdiction of the Court to entertain the suit. But acts done by Government through its executive officers, not contrary to any existing rights according to the laws administered by the Municipal Courts, although they may amount to grievances, would afford no cause of action cognizable by the Civil Courts. (*M. H. C. R.*, II, p. 167.)

A Municipal Court has no jurisdiction over an act of State. In the case of the *East India Company*, v. *Kamachee Boye Sahiba, Ranee of Tanjore*, the Lords of the Privy Council held that "the result in their Lordships opinion is that the property now claimed by the Respondent has been seized by the British Government acting as a Sovereign

power through its delegate, the East India Company. And that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction." * * * * * "It is sufficient to say that even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy. *(Sutherland's Edition of Privy Council Judgments*, p. 373, &c.) On the same principle no action is maintainable for service Inam lands and other rent free Inam lands, and also for revenue pensions, yeomiahs, &c., for the State reserves to itself the right of settling the claims in regard thereto. (*Act XXIII of* 1871, *Madras Reg. VI of* 1831, *&c.*)

Whenever reasons of State policy render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper, &c., &c., a warrant under the authority of the Governor in Council and under the hand of the Secretary to Government, shall be issued, committing the individuals for detention in any fortress, gaol, or other place. And for the same reason, the estates and lands of zemindaries, talookdars and others, may be attached by Government, and placed under the temporary management of the revenue authorities without having recourse to any judicial proceeding. Such lands or estates shall not be liable to be sold in execution of decrees of the Civil Courts, or for the realization of fines, or otherwise, during the period in which they may be so held under attachment. But the Government will make fair and equitable arrangements for the satisfaction of the decrees of the Civil Courts. (*Madras Regulation*, II of 1819; and *Bengal Regulation*, III of 1818.)

MAXIM 30.

Non potest Rex gratiam facere cum injuria et damno aliorum. (3, *Inst.* 236).—*The king cannot confer a favor on one subject which occasions injury and loss to others.*

This is because the king's prerogatives are for the public good; and therefore the king can shew no favor to one of his subjects, if his doing so is likely to occasion loss and injury to others. But the loss and injury here contemplated are not such as any person may choose to imagine to be so, but real ones which the law esteems to be loss and injury. (Vide *Williams* v. *Wilcox*, 8, Ad. and E. 314, &c.)

MAXIMS 31 and 32.

31. **Nullum tempus occurrit regi.** (2, *Inst.* 273).—*No time runs against the king.*

32. **Rex semper praesumitur attendere ardua regni pro bono publico omnium.** (4, *Co.* 56).—*The king is always presumed to attend to the business of the realm for the good of all.*

The law determines that in the Crown there can be no negligence or laches, for the time and attention of the Sovereign must be supposed to be occupied by the cares of Government; and hence the above quoted maxims. From this doctrine it follows not only that the civil claims of the Crown sustain no prejudice by lapse of time, but that criminal prosecutions for felonies or misdemeanors may be commenced at any distance of time from the commission of the offence. And this is, to some extent, still the law, though it has been qualified by the legislature in modern times. (*Broom's Maxims*, 65). Indeed the application of this rule has been

very properly confined to the narrowest limits. The prerogatives of a Sovereign are for the public good; but an unlimited exercise of the privilege under consideration is capable of producing enormous evil, as for instance, where a Sovereign chooses to oust a citizen from a piece or spot of land, of which he and his ancestors have had the enjoyment for several centuries.

So, it may once for all be stated that this maxim has now no application whatsoever in civil cases; and under the Indian Limitation Act (IX of 1871) the Sovereign is bound to prosecute his claims within a certain limited time like all other private individuals; but for obvious reasons, in consideration of the great cares of Government which occupy the time and attention of the Crown and its representatives, the period of limitation laid down for the institution of any suit in the name of the Secretary of State for India in Council is somewhat longer than that allowed in ordinary cases, namely 60 years. (Vide Article, No. 150, of Schedule II of the aforesaid Indian Limitation Act.) But this extended period of 60 years refers only to *suits*, and not to the *enforcement* of rights already decreed, so that in respect of proceedings in execution of decrees, the rules of limitation to be applied in regard to Government are the same as those applied to private individuals. (*Government of Bengal*, v. *Thuruffutoomea and another. Privy Council Judgment, 25th June* 1860.)

In a certain case in Bengal, the Government having a claim to land situated in Chittagong, which was not capable of being enforced by suit, by reason of the cause of action having arisen previous to 1765 which was at that time the utmost period of limitation in Bengal, took forcible possession of the land in 1800. The persons dispossessed sued Government in 1804; and recovered the land by a decree. (*Bengal Sudder Dewany Udalut Select Rep.*, Vol. II, p. 156.)

In criminal cases where the Crown is bound to prosecute

the offenders for the good of the public, the maxim in question, *nullum tempus occurit regi*, has the fullest application. As a general rule prosecutions for crimes are not limited to any time. There are certainly some exceptions to this rule, but they are very few and unimportant. As for instance, prosecutions for offences of a civil nature, such as failing to maintain wives and children, and offences against the Conservancy Act (trading without a license, &c.,) must be commenced within three months from the date of the offence or cause of complaint; (Police Act IV of 1866, Bengal; VIII of 1867 of Madras and Conservancy Act VI of 1863 of Bengal; IX of 1867 of Madras and II of 1865 of Bombay); and prosecutions for offences against the Indian Christian Marriage Act should be commenced within *two* years of the commission of the offences, (Act XV of 1872, Sec. 76).

MAXIM 33.

Roy n'est lie per ascum Statute, si il ne soit expressement nosme. (*Jenk. Cent.* 307.)—*The king is not bound by any Statute, if he be not expressly named therein to be so bound.*

The law made by the Crown is for its subjects and not for the Crown itself; so that it has been held that where the king has any prerogative, estate, right, title, or interest, he shall not be barred of them by the general words of an Act, if he be not named therein expressly. (Vide Magdalen College case reported in Coke's Reports, vol. VI, p. 140). Hence any local Act imposing tolls and duties could not affect the Crown, or the property in the occupation of the Sovereign. (*Rex* v. *Matthews, Cald.* 1, *and Broom's Maxims*, p. 72; and *Notes to Chitty's Statutes*, III, 638, &c.) But this exemption does not apply to the property of the Sovereign occupied by others, (*Rex.* v. *Terrott*—3, *East*, 514), from which profit is derived. (*Bute* v. *Grindell*—I, *T. R.*, 338).

Therefore it has been decided that when the site of a Palace is demised to a subject for a certain permanent interest, the grantees who occupy are rateable. (*Duke of Portland's case*—I, *Const.*, 131, Pl. 166). Also those who beneficially occupy part of the royal parks, and (perhaps for the same reason) of the palaces, to their own use, are liable to assessment, although the premises are to be considered in all other respects as in the hands of the Crown. Indeed wherever occupation is for private benefit of the occupier, he may be rated, whether he is a civil or military officer of the Crown. (*Rex.* v. *Terrott*—3, *East*, 506). A storekeeper or porter employed by the Crown in the public service, occupying premises belonging to the Crown, for the purpose of performing such service, is not rateable in respect of such occupation, although it constitutes part of the emolument of his office. But if he have an occupation of more than is reasonably necessary for the performance of such service; he is rateable in respect of the excess, and of no more. (*Reg.* v. *Stewart.* Vide *Petersdorff's Abridgment*, VI, 185, &c.)

On the same principle, the Sovereign is not affected by the provisions of the Penal Code, nor can he be compelled to give evidence in any case under the Evidence Act.

In *A. G.* v *Radloff*, 10, Exch. 94, Pollock, C. B. observes, that the Crown is not bound with reference to matters affecting its property or person, but is bound with respect to the *practice* in the administration of justice.

In the case of *the Secretary of State* v. *the Bombay Landing and Shipping Company*, it was held that as the Crown is not expressly, or by implication, bound by Act X of 1866 (which is an Act for the incorporation, regulation and winding up of Trading Companies and other associations in India), and as an order made under that Act for the winding up of a Company does not work any alteration of property, such an order does not enable the Court to stay the

execution of a judgment debt due to the Crown, or to the Secretary of State in Council for India. (*Bombay H. C. R.*, V, page 23.)

But "in divers cases the king is bound by Act of Parliament, although he be not named in it, nor bound by express words. And therefore all Statutes which are made to suppress wrong, or to take away fraud, or to prevent the decay of religion, shall bind the king although he be not named; for religion, justice, and truth are the sure supporters of the Crowns and diadems of kings." (Case of Ecclesiastical persons reported in Coke's Reports, vol. III, page 26.)

It must be remembered that the king may take the *benefit* of any Act though he be not specially named therein. (*R.* v. *Wright*, 1 A. and E., 447.)

MAXIM 34.

Sommonitiones aut citationes nullae lice aut fieri infra palatium regis.—*No summons or citations are permitted to be served within the king's palace.*

The high privilege enforced by this maxim is due entirely to the great dignity and veneration which naturally attach to the person of the Sovereign as the *parens patriae*, the fountain of justice, and the representative of all power in the State. Parties are therefore protected from arrest whilst actually in the presence of the Sovereign or in one of his royal palaces. (*Elderton's case, &c.; Blackstone's Com.*, III, 289; *Coke's Reports*, II, 403; and *Petersdorff's Abridgment*, 1st Edition, II, 302, &c.)

MAXIMS 35 to 42.

35. **Judex habere debet duos sales: salem sapientiae, ne sit insipidus, et salem conscientiae, ne sit diabolus.** (3, *Inst.* 147).—*A Judge should have two salts: the salt of wisdom, lest he be insipid; and the salt of conscience, lest he be diabolical.*

36. **Justitia debet esse libera, quia nihil iniquius venali justitia; plena, quia justitia non debet claudicare; et celeris, quia dilatio est quaedam negatio.** (2, *Inst.* 56.) —*Justice ought to be unbought, because nothing is more hateful than venal justice; free, for justice ought not to be shut out; and quick, for delay is a certain denial.*

37. **Justitia non novit patrem nec matrem, solam veritatem spectat justitia.** (1 *Buls.* 199.)—*Justice knows neither father nor mother, but regards truth alone.*

38. **Bonus judex secundum aequum et bonum judicat; et aequitatem stricto juri praefert.** *(Co. Litt.* 24.)— *A good judge decides according to justice and right; and prefers equity to strict law.*

39. **Fiat justitia ruat caelum.** *(Dyer,* 385.)—*Let justice be done, though the heavens may fall.*

40. **Nulli differrimus justitiam.** *(2, Inst.,* 56.)—*To no one should we delay justice.*

41. **Festinatio justitiae est noverca infortunii.** (*Hob.* 97.) —*Hasty justice is the step mother of misfortune.*

42. **Judicis officium est opus diei in die suo perficere.** *(2 Inst.* 256.)—*It is the duty of a Judge to finish the work of each day within that day.*

The maxims require that a Judge should be *learned* and *honest;* they warn him against *precipitancy* as well as *procrastination;* and enjoin on him the principle that the utmost *regularity* in point of time should be observed in

personal attendance at Court and in the daily performance of the functions of the Bench. The words of Menu are peculiarly appropriate. He says, "either the Court must not be entered by Judges, parties and witnesses; or law and truth must be openly declared," (Chap. viii, v. 13.)

"Since the law is in England the supreme arbiter of every man's life, liberty, and property, Courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *Magna Charta* spoken in the person of the king, who, in the judgment of law, says Sir E. Coke, is ever present and repeating them in all his Courts, are these, *nulli vendemus, nulli negabimus aut differemus rectum vel justitiam ;* and therefore every subject, continues the same learned author, for every injury done to him in *bonis, in terris, vel personâ,* by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." (*Stephens' Commentaries,* II, 446.)

MAXIM 43.

Judex non reddit plus quam quod petens ipse requirit. *(2 Inst. 286).—A Judge does not give more than what he that seeks does himself require.*

No Judge should by his decree award to a plaintiff more than what he himself asks for. His business is to give or withhold, wholly or in part, that which is sought by the plaintiff. Thus where a suit is brought to recover money lent and not to enforce the security upon which it was lent, the decree ought to be simply for money and ought not to touch the property mortgaged. Where the plaintiff's claim

is a specific one for the value of a crop carried away from his land by the defendant, claiming to be landlord, the Court must simply award or refuse to award such value to the plaintiff; and must not, in rejecting the claim, proceed to fix the rate at which the plaintiff shall hereafter pay rent. (*Macp. Civil Prac.*) The determination in a cause should be founded upon a case, either to be found in the pleadings, or involved in, or consistent with, the case thereby made. (*Eschanchunder Sing* v. *Shamchurubhuttoo—Privy Council Judgment, Sutherland's Edition*, p. 649.)

MAXIM 44.

Judicis est judicare secundum allegata et probata. (*Dyer*, 12).—*It is the duty of a Judge to decide according to facts alleged and proved.*

A party cannot be allowed to prove facts inconsistent with his case as stated in the pleadings. It must be decided with reference to allegations upon which he has himself rested it. There must be a direct and real conformity, though not perhaps a minute literal conformity, between the pleadings and the proofs. Thus a party who sets up a general title in the pleadings cannot recover under a particular deed merely. For the Court will not allow a man to be taken by surprise by a case proved on the other side, which though plausible in itself is substantially different from that which was set up in the pleadings. (*Macp. Civil Prac.*)

MAXIM 45.

De fide et officio judicis non recipitur quaestio; sed de scientia, sive error sit juris aut facit. (*Bac. Max., Reg.* 17).—*Of the good faith and intention of a Judge, a question cannot be entertained; but it is otherwise as to his knowledge or error, be it in law or in fact.*

If every unsuccessful party to a litigation were at liberty to impeach the personal character of a Judge, and libel him as to the motives of his judgment, instead of impeaching the error of facts and the applicability of the law, no respectable person could possibly be found to hold a judicial office. Hence the rule is that no question can be entertained as to the *bonâ fides* or the good intention of a Judge or Magistrate.

Act XVIII of 1850 enacts that "no Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially, shall be liable to be sued in any Civil Court, for any act done or ordered to be done by him, in the discharge of his judicial duty, whether or not within the limits of his jurisdiction; provided that he at the time, in good faith, believed himself to have jurisdiction to do, or order, the act complained of. Under the Indian Penal Code nothing is an offence which is done by a Judge, when acting judicially in the exercise of any power, which is, or which in good faith he believes to be, given to him by law. (Sec. 77). No Magistrate shall be held to commit any offence by ordering the dispersion, by military force, of any assembly, the dispersion of which he regards, on reasonable grounds and in good faith, as necessary to the public security. (Sec. 483, *Criml. Pro. Code.*)

Such immunity from prosecutions and accountability at the suit of an individual is given by our law to Judges, not so much for their own sake as for the sake of the public

and for the advancement of justice, in order that Judges, being free from actions, may be free in thought, and independent in judgment as all who are to administer justice ought to be; and it is not to be supposed beforehand that those who are selected for the administration of justice will make an ill use of the authority vested in them. (*Broom's Maxims.*)

But nothing is said to be done or believed in good faith, which is done or believed without due care and attention, (S. 52, *I. P. Code*). So that the protection above noticed can only apply where persons *bonâ fide, and not absurdly,* believe that they are acting in pursuance of Statutes and according to law. (*Moore's Ind. App.*, iv, 379.)

Further, it must be observed that these words of exemption, wide as they are, can scarcely be taken to excuse culpable negligence, or gross ignorance, or incompetency. They ought to be limited to cases where a judicial officer exercising ordinary reason, care, and caution, has yet erred in judgment and acted without jurisdiction. It is not because a Magistrate chooses to think himself acting under a Statute that he can by such mere fancy of his own protect himself in an action. Thus, when a Magistrate acts without those circumstances which must concur to give him jurisdiction, as where he grants a warrant without information, upon a supposed charge of heinous offence, he ought to be liable, and so, when he remands a person for further examination for a protracted and unreasonable time. So, a Magistrate is not at liberty to detain a known person to answer a charge not yet made against him; though it might be otherwise as to a mere vagabond. So, a Magistrate will be guilty of an assault and false imprisonment, and be responsible in damages, if he tries to force a party who has appeared to answer a complaint, to agree to an arrangement by threatening that he will otherwise convict him, and by giving him into the custody of a constable. In India, a Magistrate in-

vestigating a charge on which he has power only to commit for trial is not a Judge; and an improper remand or refusal of bail would not seem to be a judicial act, but would be actionable on proof, at least, of malice.—*(Collett on Torts*, S. 57, *Ind. Penal Code.* S. 19, *Ill.(d).)* The refusing or accepting of bail is a judicial, not merely a ministerial duty; and a mistake in the performance of that duty without malice will not be sufficient to sustain an action. (*Parankusa Narsyahpuntulu*, v. *Captain Stuart*, Supt. of Police· *M. H. C. R.*, II, p. 396.)

In Civil Petition No. 124 of 1865, the Madras High Court held that wilful abuse of his authority by a Judge, *i. e.* wilfully acting beyond his jurisdiction is a good cause of action by the party who is thereby injured. (*M. H. C. R.*, II, 443.)

In the case of *Tarakanad Mookhopadhya* who sued a Magistrate for damage occasioned by him, by the cutting of his bund which was erected for the purpose of providing water for irrigating his land, the Magistrate raised the defence that he was protected by Act XVIII of 1850 for all acts done by him *bonâ fide* in his Magisterial capacity; and the Calcutta High Court held on the facts that the Magistrate was liable, and observed as follows:—Act XVIII of 1850 does not protect a Magistrate who has not acted with due care and attention. The mere absence of *mala fides* is no defence. A Magistrate cannot be said to have in good faith believed himself to have jurisdiction to do or order the act complained of, unless he, in arriving at that belief, acted reasonably, circumspectly, and carefully. A Magistrate would not be personally liable for an act done by him under a misconstruction or misinterpretation of the law, if his proceedings were in other respects regular, and the misconstruction or misinterpretation were one which might have been put upon the law by a reasonable man acting with ordinary care and attention. Neither Sec. 62, nor Chap. XX of the (old) Criminal Pro. Code authorises a Magistrate

to dispose of the property at his mere will and pleasure, without his having distinct and legal grounds for the course he takes. When a Magistrate violates the plain language of the law, and the very first principles of his judicial enquiry, his proceedings presumably are characterised by want of care. (*Bengal Law Reports, App. Jurisdiction Civil*, Vol. IV, p. 37.)

In Regular Appeal No. 7 of 1870 of the Madras High Court the 1st defendant acting as a Magistrate ordered the removal of the plaintiff's house under Sec. 308 of the (old) Criminal Procedure Code, upon the ground that it was a nuisance and obstruction to the public thoroughfare; and the High Court held that as the house was neither an obstruction nor nuisance, the 1st defendant had no jurisdiction to direct its removal; but that the 1st defendant having acted in his judicial capacity, and in good faith believed himself at the time to have jurisdiction, a suit for damages could not be sustained against him. (*M. H. C. R.*, V, p. 345; and a similar case is reported in *M. H. C. R.*, VI, p. 423.)

The Indian Penal Code contains ample provisions for punishing Judges and public servants if they are proved to be guilty of corruption, &c., &c. But a complaint of an offence alleged to have been committed by a Judge or public servant, in his capacity as such public servant not removable from his office without the sanction of the Government, shall not be entertained against him except with the sanction or under the direction of the Local Government or of some officer empowered by the Local Government, or of some Court, or other authority to which such Judge or public servant is subordinate, and whose power so to sanction or direct such prosecution the Local Government shall not think fit to limit or reserve. No such Judge or public servant shall be prosecuted for any act purporting to be done by him in the discharge of his duty unless with the sanction of Government. The sanction must be given before

the commencement of the proceeding. The Local Government may limit the person by whom, and the manner in which the prosecution is to be conducted and may specify the Court before which the trial is to be held. (*Crl. Proc. Co.*, S. 466).

On the question of a Judge as such not being liable to criminal prosecution except with the sanction of Government, the reader may with advantage refer to the observations of the Madras High Court in their Proceedings, dated 29th March 1871. There the Head Assistant Magistrate of ———— refused to entertain a charge against the District Munsiff of ———— of an offence punishable under Section 219 of the Penal Code, because the Local Government had not sanctioned the prosecution; and the Session Judge of ———— referred the case to the High Court, being of opinon that the Magistrate's interpretation of the law was erroneous, and that the Code of Criminal Procedure only required the sanction of Government for prosecutions against Judges *not removable from office without the sanction of Government.* On this reference, the High Court remark—"It appears to the High Court that the words in Section 167, *removable from his office without the sanction of Government* have reference only to *public servants,* and that the sanction of Government is required for the prosecution of any Judge, if a complaint is made against him as Judge. Had the meaning of the Section been otherwise, the words *public servant* would have sufficed. All Judges are public servants, but all public servants are not Judges. The Head Assistant Magistrate acted rightly in dismissing the complaint." (VI, *Madras H. C. R.*, Appendix XXII.)

It may not be amiss in this place to notice that the position of Tahsildars and Deputy Tahsildars, who are Magistrates as well as Revenue officers, was not infrequently a subject of doubt and difficulty with reference to the words

in the Code of Criminal Procedure "not removable from his office without the sanction of the Government," &c. The difficulty, however, may now be said to be set at rest by a recent order of the Madras Government in this Presidency. In their order of 19th February 1873, No. 197, the Government thus express themselves. "The Government concur with the Board that Tahsildars and Deputy Tahsildars should be protected against hasty and improper prosecution. It is observed that every Tahsildar and Deputy Tahsildar in this Presidency is a *Magistrate*, and by the new Code of Criminal Procedure (Sec. 9) all Magistrates must be appointed and are removable by the Government. Further, under the provisions of Sec. 466, an official not removable from his office without the sanction of Government cannot be prosecuted as such official, except with the sanction of Government, or of some authority to which he is subordinate, and whose power to sanction or direct such prosecution the Government shall not think fit to limit or reserve." "In regard finally to the limitation or reservation of the power of the several authorities to whom a Tahsildar and Magistrate, or a Deputy Tahsildar and Magistrate, may be subordinate, to sanction or direct the prosecution of an officer of either grade in either capacity, the Government resolve to reserve this power to the Board of Revenue, who shall *call* for and consider such preliminary enquiry as each case may demand before passing final orders in the matter." (VII, *Madras Revenue Register*, 80.)

MAXIM 46.

Discretio est discernere per legem quid sit justum. (10 *Co.* 140.)—*Discretion is to know through law what is just.*

When an Act directs the Magistrate to proceed in the exercise of his *discretion*, it does not mean that he is to act according to his own sweet will and pleasure, or

caprice. "According to his discretion" must be understood to mean, "according to the rules of reason, and law and justice, and not mere fancy or private opinion." (*Rooke's case*, 5, Rep., 100 a; and *Keighley's case*, 10 Rep., 140 a; see also 5 Ves., 734 n; 7 Ves., 35; and *Re Tempest*, L. R., 1 Chap., 487, per Turner, L. J.) A loose and unfettered discretion is likely to be the refuge of vagueness in decision, and the harbour of half formed thought, (per Lord Penzance in *Morgan* v. *Morgan*. L. R. 1 P. and D., 644). A discretionary power must, according to Lord Mansfield, be exercised with sound discretion, guided by law. It must be governed by law and not by humour. (*R.* v. *Wilkes*. 4 *Burr.*, 2539.) It was, for instance, long ago settled that the 43rd Eliz. C. 2, which empowers the overseers of every parish in England to rate the parishioners in such competent sum as they *think fit*, did not authorise an arbitrary rate on each parishioner, but that the rate must be equal and in proportion to the means of each contributor. (*Early's case*, 2 *Bulst.*, 354; *Marshal* v. *Pitman*, 9 *Bing.*, 601.) Where the exercise of the discretion has been settled by practice, this should not be departed from without adequate reason. (2 *Inst.*, 298; see ex. gr. per Lord Abinger in *R.* v. *Chapman*, 8 C. and P., 558). The exercise of the discretion, also, is to be confined to those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself, (per Lord Kenyon in *Wilson* v. *Rastall*, 4 *S. R.*) On an application to the Judges for a warrant upon the non-payment of a rate, it was held that they had no power to refuse to issue it, merely because they considered the payment imposed by the Act unjust. The justice or injustice of the enactment was not a question which concerned them, or which they were justified in taking into consideration, in exercising their discretion. (*Reg.* v. *Boteler*; 38, *L. J. M. C.*, 101. Vide *Max. Mag. Guide*, p. 154.)

MAXIM 47.

Non refert quid notum sit judici, si notum non sit in forma judicii. (3, *Buls.* 115.)—*It matters not what is known to the Judge, if it be not known judicially.*

One of the principal checks which the law of England imposes on its tribunals is the prohibiting Judges and jurymen from deciding *facts* on their own *personal* knowledge, and placing them as it were in a state of legal ignorance as to almost everything relating to the matter in question, except what is established before them by *evidence.*

In trying a question of fact no Judge is justified in acting principally on his own knowledge and belief or public rumour. (*Matheen Bebee* v. *Busheerkhan. Privy Council Judgments, Sutherland's Edition,* page 683. Also *Madras Sudder Udalut Decree,* No. 24, *Appeal Case* 847, Vol. II, p. 93.)

Although each juryman may apply to the subject before him that general knowledge which any man may be supposed to have, yet if he be personally acquainted with any material particular facts, he is not permitted to mention the circumstance privately to his fellows; but he must submit to be publicly sworn and examined, though there is no necessity for leaving the box or declining to interfere in the verdict. So a Judge before whom the cause is tried must conceal any fact within his own knowledge, unless he be first sworn; and, consequently, if he be the sole Judge, it seems that he cannot depose as a witness; though if he be sitting with others, he may then be sworn and give evidence. In this last case, the proper course appears to be that the Judge, who has become a witness, should leave the bench, and take no further judicial part in the trial, because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or weighing it

against that of another. It must however be noticed that on several occasions, when trials have been constituted before the High Court of Parliament, Peers, who have been examined as witnesses, have nevertheless taken part in the verdict subsequently pronounced. But perhaps these cases are not inconsistent with the law above stated, since in trials before the House of Lords, the Peers must be regarded at least as much in the light of Jurors as of Judges; and we have before seen that a juryman is not disqualified from acting simply because he has been examined as a witness. (*Taylor on Evidence*, Sec. 1011.)

In the case of the *Queen* v. *Mucta Sing* which came before the Calcutta High Court, (Norman and Mitter, J.J.) on the 20th April 1870, a question arose whether a Session Judge, sitting and trying cases without a jury, himself the sole judge of law and fact, could give evidence in a case which he is trying; and the Hon'ble the Judges, who commented at some length upon the aforementioned section of Taylor's Law of Evidence, observed that no exception was made in the Indian Evidence Act (*i. e.*, Act II of 1855 then in force) as to a Judge testifying in a case before himself; and held, "that the giving of evidence does not preclude him from dealing judicially with the evidence of which his own forms a part;" and in conclusion one of the Judges observed:—"No doubt it is extremely inconvenient that a Judge sitting without a jury should try a case in which he himself is the complainant and material witness. I should have no doubt that if he has any personal or pecuniary interest in the subject of the charge, he is disqualified from trying it. But if that is not the case, and if the Judge in making the complaint has merely acted in the discharge of his duty as a public officer (this being a case of perjury which arose out of a case tried before the same Judge), I think we must say that he is not incompetent to try the case." (*Bengal Law Reports*, Vol. IV, Part XXIII).

In the aforesaid ruling of the Calcutta High Court, allusion is made to the Evidence Act (II of 1855) then in force. The new Indian Evidence Act (I of 1872) provides that a Judge or Magistrate shall not, except upon the special order of some Court to which he is subordinate, be compelled to answer questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but that he may be examined as to *other* matters which occurred in his presence whilst he was so acting. (Sec. 121); but there is no provision as to whether or not a Judge or Magistrate can give evidence in a case tried by himself. But the Code of Criminal Procedure (Sec. 250) provides that if a juryman or assessor is personally acquainted with any relevant facts, it is his duty to inform the Judge that such is the case; whereupon he may be examined, cross-examined, and re-examined, in the same manner as any other witness.

MAXIMS 48 and 49.

48. Judex non potest injuriam sibi datam punire. (12 *Co.* 113.)—*A Judge cannot punish an injury done to himself.*

49. Nemo debet esse judex in propria causa. (12 *Co.* 113.)—*No one ought to be Judge in his own cause.*

No one should be a Judge in a cause to which he is a party, or in the result of which he has a pecuniary or proprietary interest. It matters not how small the amount of such interest of the Judge may be in the matter of enquiry, provided it be real and not nominal, as where he is a bare trustee merely. (*R. V. R.*, and *L. R.*, 1, *Q. B.*, 230.) The disqualifying interest must be direct and certain, not merely remote or contingent (*R. V., Manchester, L. R.* 2, *Q. B.* 336). Indeed, in all cases where there is a real likelihood, or even

any ground for suspicion, that his judgment would, from kindred or any other causes, have a bias in favor of one of the parties, it is very wrong in the Judge so circumstanced to act further in the matter. (*Ber Blackburn, 2, in R. V. Band—L. R. 1, Q. B. 230.*) It seems that in England, Judges invariably decline to take any part in the decision of a case in which they were counsel when at the bar. (*Max: Magistrates' Guide.*)

But there is an exception to the foregoing rules, that is, in cases of contempt of Court. The offences of intentionally omitting to produce a document to a public servant; refusing to take an oath when duly required to do so by a public servant; refusing to answer questions; refusing to sign a statement; intentionally insulting or interrupting a public servant sitting in a stage of judicial proceeding, under Secs. 175, 178, 179, 180, and 228 of the Indian Penal Code, are triable by the Court in which the offence is committed.

MAXIMS 50 and 51.

50. Qui jussu judicis aliquod fecerit non videtur dolo malo facisse quia parere necesse est. *(10 Co., 76.)—He who does any thing by command of a Judge will not be supposed to have acted from an improper motive, because it was necessary to obey.*

51. Judici officium suum excedenti non paretur. *(Jenk. Cent., 139.)—To a Judge exceeding his office, there is no obedience.*

No officer of any Court or other person bound to execute the lawful warrants or orders of any Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially, shall be liable to be sued in any Civil Court for the execution of any warrant or order, which he would be bound to execute if within the jurisdiction of the person issuing the same. (Act XVIII of 1850.)

Nothing which is done in pursuance of, or which is warranted by, the judgment or order of a Court of justice, if done whilst such judgment or order remain in force, is an offence, notwithstanding that the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believed that the Court had such jurisdiction. (*Indian Penal Code*, Sec. 78.)

The ministerial officers of Courts of justice and all other *persons* acting under the sanction of such Courts are protected by the said Sec. 78, I. P. C., against criminal liability for what they do in execution of the orders or decrees of the Judge. It is the duty of such persons ordinarily not to question or dispute judicial orders, but to obey them so long as they remain in force. Unless it is known that a judgment or order is a mere nullity for want of jurisdiction in the Court which makes it, those who act under it are protected. Any error or mistake whether of fact or of law in executing the judgment or order may also be deemed to be protected by the said Sec. 78, I. P. C.—(*Morgan and Macpherson's Commentary on the I. P. C.*)

It is clear that the aforesaid protection extends to private persons obeying the orders of a Magistrate under the law, which directs that any person should assist a Magistrate or Police officer demanding his aid in the prevention of a breach of the peace, or in suppression of a riot or an affray, or in the taking of any other person whom the Magistrate or Police officer is authorized to arrest. (*Criml. Pro. Code.*, Sec. 90 & 108.)

No officer, &c., obeying any requisition made by a Magistrate for the dispersion of any unlawful assembly shall be held to have committed any offence by any act done by him. in good faith, in order to comply with such requisition, (*Crim. Pro. Code*, Sec. 485 & 486.)

MAXIM 52.

Ad quaestionem facti non respondent judices; ad quaestionem juris non respondent juratores.—(*Co. Litt.* 295.) *To questions of fact Judges do not answer. To questions of law the Jury do not answer.*

Sir William Blackstone speaks in highly eulogical terms of the institution of trial by jury. "The trial by jury," he says, "ever has been, and I trust ever will be, looked upon as the glory of the English law. It is the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected in either his property, liberty, or his person, but by the unanimous consent of twelve of his neighbours or equals. This is a constitution which, I may venture to affirm, has under Providence secured the liberties of this nation for a long succession of ages." (*Blackstone's Commentaries*, III, 379.)

This system is not quite unknown in India, although it never has prevailed to the extent it does in England, except perhaps on the criminal side of the original jurisdiction of the High Court. "A king," says Menu, "must enter his Court of Justice together with councillors who know how to give him advice." (Chap. VIII, Ver. I). And "let the Chief Judge accompanied by three assessors fully consider all causes," &c. (*Ibid*, Ver. 10.)

In British India, trial by jury does not obtain in the *Civil* Courts, either in the Presidency towns or in the Mofussil; so that our Indian Judges are judges of law as well as of fact. But the system, as just observed, prevails in all *criminal cases* tried by the High Courts of Judicature at the Presidency towns at the periodical Sessions.—(Act XIII of 1865, &c.), and is adopted in all such *criminal cases* tried in the Courts of Session in the Mofussil as the Local Government may deem fit to order or direct. (*Criminal Procedure Code*, Sec. 233).

In cases tried by jury the general rule is that the Judge must determine the law and the jury the fact; and as regards the matter of fact "it is the duty of the Judge to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own conscience" (Sec. 20, *Taylor's Law of Evidence*); for the verdict of a jury is conclusive. But it must be observed that this is not the case in British India, in Courts governed by the Code of Criminal Procedure, which provides that if the Court disagrees with the verdict of the jurors, or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court; and the High Court shall deal with the case so submitted as with an appeal. (Sec. 263, *Criminal Procedure Code.*)

As above observed the functions of the Judge and jury are distinct; and the Code of Criminal Procedure lays down the following rules:—It is the duty of the Judge to decide all questions of law, and especially all questions as to the relevancy of facts which it is proposed to prove; the admissibility of evidence, or the propriety of questions asked by the parties or their agents; to decide upon the meaning and construction of all documents given in evidence; to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given; and to decide whether any question which arises is for himself or for the jury to decide. (Sec. 256, *Criminal Procedure Code.*)

And it is the duty of the jury to decide which view of facts is true; to determine the meaning of all technical terms and words used in an unusual sense, whether such words occur in documents or not; to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure, or unless their meaning is ascertained by law, in either of

which cases it is the duty of the Judge to decide their meaning; and lastly to decide all questions declared by the Indian Penal Code or any other law to be questions of fact. (Sec. 257, *Criminal Procedure Code.*)

With reference to the last clause of the preceding para., it will be well to adduce a few instances. What are reasonable means, or what is a reasonable time, in cases of criminal misappropriation, is a question of fact. (*Indian Penal Code*, Sec. 403). Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. (*Ibid*, Sec. 300.) Also see Sec. 352, I. P. C. as to criminal force. The question of probable cause is for the Judge, and the jury can find only the facts, and the inferences from facts, on which the theory of probability is founded. (*Powell's Evid.*, p. 11.) Reasonable skill, due diligence, and gross negligence are questions for a jury. (*Ibid*, p 12.) *Bonâ fides*, actual knowledge, express malice, and real intention are questions for a jury. (*Ibid*, p. 13.)

When the case is concluded, the Judge should charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided. He may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact relevant to the proceeding. (*Criminal Procedure Code*, Sec. 256.)

Upon a somewhat similar principle the system of assessors has been introduced into criminal trials held before the Courts of Session in the Mofussil. All trials not held by jury by special sanction of Government, under Sec. 233 of the Criminal Procedure Code, must be conducted with the aid of two or more assessors. But the assessors (unlike jurymen) can only give an opinion, which the Judge will take

into consideration in disposing of the case, but which will not be in any way binding upon him. (Sec. 261, *Criminal Procedure Code.*)

MAXIM 53.

Sumus agere posse quemlibet hominem aut suo nomine, aut alieno: alieno veluti procuratorio, tutorio, curatorio.—*(Just. Inst., Lib.* iv.*)—A person may conduct an action either in his own name, or in that of another, as for instance, if he is a procurator, a tutor, or a curator,* (i. e., *an advocate, a guardian, or an agent*).

That every one is duller in his own business than in the business of another, is a proverb which applies with much force to almost every suitor seeking to prosecute or defend a case in person. His interest in the issue of the case throws him into a state of utter confusion and excitement; makes him forgetful of all the weak points of his case; and tempts him, though perhaps unconscientiously in some cases, to have recourse to various means which under other circumstances he would not have condescended to adopt. Moreover it is often necessary that a party should possess a certain amount of knowledge of the practice of the Courts and other matters of routine, which a layman cannot at all be expected to understand. And above all, the preparation of pleadings, the production of evidence, and the most important work of bringing the law, governing the particular case, to bear upon the proved facts, require the help of persons skilled in law and in the practice of the Courts. It is therefore desirable, in all important cases, that parties should engage the services of a professional advocate. Moreover, it will often be very inconvenient for a suitor to conduct his case personally; for ill-health, old age, unavoidable journeys, and many other causes continually prevent people from being able to attend to their affairs in person.

So, the Code of Civil Procedure provides that a party may appear in person, or by his pleader, and, in certain cases, by legally recognized agents.—(Sec. 17). And the Code of Criminal Procedure likewise allows that in cases of whatever nature, in which the Magistrate thinks fit to issue a summons, he may, if he sees sufficient cause, dispense with the personal attendance of the accused person and permit him to appear by an agent duly authorized to act in his behalf—(Sec. 151); and every accused person has a right to be defended by any barrister, attorney, or pleader—(Sec. 186).

The advocate, when so engaged, observes Mr. Smith in his Work on the English Bar, "is to do for the person whom he represents all which that person could *rightly* do for himself, were he disencumbered of the excitement and confusion occasioned by his interest in the trial, and were he furnished with the ability, learning, and experience which his counsel should bring to the support of his cause. Therefore, the advocate may and ought to see to it, that, as far as his powers allow, the whole strength of his client's case is brought out; that it is arranged in such order, stated with so much clearness, enforced with so much earnestness, that it will leave upon the minds of the Judge and the jury the impress of its weight, well stamped, and proof against the defacing effects of antagonistic reasoning." * * * * * "But in the conduct of his own case, he should seek for it no advantages which would not belong to it in the judgment of an impartial by-stander, who thoroughly knew and appreciated its claims; and in resisting his opponents, he should not attempt to lessen its real merits, or to attach to it any blame or discredit which he does not believe that it deserves. So, in the treatment of witnesses, while unsparing in the pursuit and detection of fraud and malevolence to the utmost of his power, and severe in its exposure, he should be so far from attempting to confuse or intimidate a blun-

dering witness, who appears to be intending honestly, that he should rather assist him to recover his discorded faculties and to recollect more clearly what he had forgotten. And in bringing out the evidence on his own side, he should not conceal or withdraw from disclosure facts which would naturally and properly accompany those which he elicits. Throughout, he should hold it to be his duty to assist rather than retard the development of truth. * * * * The Judge is to see to it that the *whole truth* is brought out; the advocate, that *portion of truth* is brought out which is in favour of the cause he represents. But neither Judge nor advocate may rightly seek that truth should be suppressed, or a misleading view be presented or credited. But it may be said, in every instance, there must be one side in fault, and what are the counsel on that side to do? Our answer is that there are few causes in which either side is wholly wrong, although one party must be wrong on the whole; and there may be much to be done in seeing to it, that those facts or reasonings even on the worse side which are really material and weighty be brought forward, and receive fair and full attention. Again, although at the end of the trial, it may be clear that a client should fail, a long investigation may be required before this is clear, and, even after a long investigation, it may often be real matter of doubt on which side the right lies. If we take the case of a criminal charge which appears to be well made out on paper, this apparently strong fabric may melt away under a strict but fair cross-examination in open Court. It may be seen after all, the person charged is innocent; or if there be no substantial doubt in his counsel's mind that the crime was really committed by the prisoner, it may yet be very far from clear that this has been established by legal evidence; and he may direct his argument to the question, *not of guilt*, but of *proof of guilt*. He may test and watch the evidence; remark upon any want of incompleteness in

it; and expose its inconsistencies." (*Smith's Edn. for the Bar*, p. 148.)

Referring to the profession of the law, Sir Adam Bittlestone, our late esteemed Puisne Judge, in his address to the graduates at a Convocation of the Madras University, made these forcible observations:—"In the practice of this profession you must neither forget your duty to your clients nor your duty to yourself. The one demands of you that you should give to your client the full benefit of your knowledge, experience, and judgment; sparing no pains to render those as perfect as you can;—the other demands of you that you should never, even from zeal for your client, still less from any motive of self-interest, stoop to any dishonorable or unworthy practices. * * * * * The arms which an advocate wields, he ought to use as a warrior, not as an assassin. He ought to uphold the interests of his client *per fas*, but not *per nefas*. He ought to know how to reconcile the interests of truth and justice." "Remember," concluded this eminent Judge, "that the vocation of an advocate is to aid in the administration of justice; and his motto equally with that of the Judge should be *fiat justitiæ*."

Barristers enjoy certain privileges which other practitioners do not. The employment of a barrister is entirely honorary; he cannot maintain an action for his fees, nor can he be sued for the recovery of fees paid to him to attend on a trial, although he may have neglected to attend. It was held in *Bayles* v. *Grant*, that "the Court will not interfere in questions arising upon the practice of retainer." And in the same case the motion made for an injunction to restrain a particular counsel, who had acted for the defendant, from acting, at a subsequent stage of the proceedings, on behalf of the plaintiffs from whom he had received a retainer, *was refused*."—(*Petersdorff's Abridgement*, II, 378-9.)

But the nature of the contract between an attorney and

client is entirely different. When an attorney is retained to prosecute or defend a cause, he enters into a special contract to carry it on to its termination. So it has been held that no attorney shall be changed without the order of a Judge. (*Reg. Gen.* (*Pr.*) *H. T.* 1853) "Further, the attorney cannot voluntarily give up his client and act as attorney for the opposite party; and the Court will, in exercise of the authority they possess over their own officers, (and an attorney is held to be an officer of the Court in which he practices,) interfere for obvious reasons to prevent an attorney or solicitor, who has acted on one side and has either relinquished his client or been discharged on the ground of misconduct by him, from subsequently acting for the opposite party. *Davies* v. *Clough*, Sim. 292; *Cholmondeley* v. *Clinton*, 19 Ves. 261; *Parratt* v. *Parratt*, 17 L. J., Ch. 346. But an attorney who has been discharged by his client will not, in general, be restrained from acting for the other party in an action, unless indeed he has been guilty of misconduct amounting virtually to a discharge of himself, or unless the affidavits show that the client has confidentially made communications to him, the disclosure of which would be prejudicial to the suit. *Johnson* v. *Marriott*. Q. C. and M. 183, &c.—(*Petersdorff's Abridgement*, II, *p.* 39.)

Then as to Vakeels. The office of vakeel or pleader was instituted in Madras on the 18th January 1802 by Regulation X of 1802. But this was repealed in 1816, and another Regulation, namely Reg. XIV of 1816, was passed laying down a set of rules for the conduct of vakeels. The greater portion of this Regulation (XIV) is now in force, and directs that after a vakeel undertakes the prosecution or defence of any suit, he "shall thenceforth be precluded from being employed in the same cause against the party who had so retained him." (Sec. XXII.)

The following enactments may be referred to in regard to the advocates practising in the several Presidencies. Act

I of 1846; Act XX of 1853; Act XX of 1865; Act XXIX of 1865; and Madras Reg. XIV of 1816.

By reason of the contract of employment between the parties, an attorney, and, in India, a vakeel, is bound to exercise ordinary diligence, and to employ a fair average amount of professional skill and knowledge; and he is liable to his client for damage from a breach of duty in not using such diligence and skill; as, if he negligently or ignorantly conducts his client's suit, or suffers him to enter into covenants and stipulations more onerous than usual without explaining to him the peculiar liability that will be incurred. But if the attorney or vakeel can prove affirmatively that, even his diligence would have been ineffectual, it is a bar to the action, unless loss has occurred independent of the necessary result of the suit or proceeding. So, it is a fraud and a breach of faith to the client, if an attorney or vakeel, in any way uses to the client's prejudice, the knowledge he has gained of his client's affairs during the fiduciary relation that existed between them; and not only may he be made liable in an action for damages, but he may also be prevented, by injunction, from so using such knowledge. An attorney retained to conduct a case has authority to compromise unless expressly forbidden to do so. There is, and can be, no contract between a barrister and his client. If the barrister acts in good faith, he is not liable to his client; he may be liable if he acts towards him with fraud, malice, or treachery; but the relation of counsel and client renders the parties mutually incapable of making an alleged contract of hiring or service concerning advocacy, whether before, or during, or after the litigation.—(*Coll. Torts*, Sec. 340.)

No barrister, attorney, pleader or vakeel, shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course, and for the purpose, of his employment as such barrister, pleader, attorney or vakeel, by or on behalf of his client, or

to state the condition or contents of any document with which he has become acquainted in the course, and for the purpose, of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.—(*Indian Ev. Act*, Sec. 127.)

Provided that nothing in this section shall protect from disclosure.

(1.) Any such communication made in furtherance of any illegal purpose.

(2.) Any fact observed by any barrister, pleader, attorney or vakeel in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, pleader, attorney or vakeel, was or was not directed to such fact by or on behalf of his client.

(*Explanation*). The obligation stated in this section continues after the employment has ceased.—(*Ibid.*)

So, where comments are made orally in the conduct of a cause, as by a counsel, or a party conducting his own case, they are privileged. Considerable latitude is necessarily allowed to counsel, and it is pertinent to the cause for counsel to comment freely, and indulge even in any calumnious imputation which the facts before the Court, whether true or false, may appear to warrant. The mere strength of the expression is not to be too nicely objected to, though counsel ought not to avail themselves of their situation maliciously to utter words unjustifiable and irrelevant.

If the Court is of opinion that in the course of the examination of a witness any scandalous or otherwise improper question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakeel or attorney, report the circumstance of the case to the High Court or

other authority to which such barrister, pleader, vakeel or attorney is subject in the exercise of his profession. (Sec. 150, *Indian Evidence Act.*)

MAXIMS 54 and 55.

54. Libertas est naturalis facultas ejus quid cuique facere libet, nisi quod de jure aut vi prohibetur. *(Co. Litt.* 116.)—*Liberty is that natural faculty which permits every one to do everything but that which is prohibited by law or by power.*

55. Domus sua cuique est tutissimum refugium. (*5 Co.* 91.)—*To every one his house is his surest refuge; or every man's house is his castle.*

The absolute rights of man, says Mr. Blackstone, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the *natural liberty of mankind.* This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control unless by law; it being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endowed him with the faculty of free will.

The State is therefore bound to protect every person in the exercise of such birth-rights, except in cases in which such rights militate against public good. (Vide the next following Maxim). Every attack upon the person or property of a subject is carefully guarded against by the wholesome provisions of law, under which the offender is dealt with criminally, or civilly, or in both ways, according to the nature of the injury inflicted.

Whenever the law requires that any person should be

arrested, it carefully prescribes certain preliminary measures and safeguards, subject to which alone the arrest can take place.

Thus, in criminal cases, no person shall be arrested unless the Magistrate thinks, upon a complaint made to him on oath or solemn affirmation, that there are sufficient grounds for making the arrest; or unless the person commits the offence in the sight of a Magistrate or Police Officer; or unless there exists a reasonable suspicion of a person having committed an offence, &c., &c. And even after the arrest, no person is compelled to remain in confinement before conviction, it being optional with him to produce bail and obtain his conditional discharge, during the trial, unless his case be one of such a grave nature as to render it unsafe in the interests of society to set the accused person at large even during the trial.—(*Code of Criminal Procedure.*)

And in civil cases, no defendant can be arrested before the passing of a decree against him unless it is proved that he is about to decamp or make away with his property, with intent to avoid or delay the execution of any decree that may be passed against him; nor can a defendant be imprisoned after the decree, unless it is proved that he has fraudulently concealed, transferred, or removed his property, or committed any other act of bad faith. Here too, the defendant may obtain conditional freedom during the investigation of the case by tendering sufficient security.—(*Code of Civil Procedure.*)

Then, as regards a person's house, the law is equally cautious. For every unlawful trespass on one's land or house the sufferer can have his remedy, either in a Civil or Criminal Court, or both, according to the nature of the act committed; and the following observations will show to what extent and under what circumstances a forcible entry into a person's house is justifiable in particular cases,

Firstly.—It must once for all be stated that the house of

every one is to him as his castle and fortress, as well for his defence against injury and violence as for his comfort and repose * * * Every one may assemble his friends and his neighbours to defend his house against violence, but he cannot assemble them to go with him to the market or elsewhere for his safeguard against violence.—(*Semayne's case. Sm. L. C.* I, 86.)

Secondly.—When any house is recovered by any real action, or by *eject' firmæ*, the Sheriff may break the house and deliver possession of it to the plaintiff; for after judgment, it is not the house, in right and judgment of law, of the tenant or defendant.—(*Semayne's case. Sm. L. C.* I, 86.)

In the Indian Civil Procedure Code, Sec. 223, it is provided that, if the decree be for a house, &c., the Court shall order delivery thereof to be made, by putting the party to whom the house, &c., may have been adjudged, in possession thereof; and if need be by removing any person who may refuse to vacate the same.—(Sec. 223, *Civil Pro.*)

Thirdly.—In all cases where the king is a party, the Sheriff, if the doors are not open, may break a party's house either to arrest him or to do other execution of the king's process, if he cannot otherwise enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open the door. (*Semayne's case, Sm. L. C.* I, 86.) So, in the Indian Code of Criminal Procedure, it is laid down that "the police officer or other person authorised by warrant to arrest a person, may break open any outer or inner door, or window of any house or place, whether that of the person accused, or of any other person, in order to execute such warrant, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance. Additional precautions are necessary if the accused party is alleged to

have concealed himself in an apartment in the actual occupancy of gosha women.—(Sec. 180 and 181.)

If there is no reason to believe that any person liable to arrest under Chap. IX of the Code of Criminal Procedure *without a warrant*, has entered into or is within any house or place, and if ingress to such house or place be not allowed, the police officer shall send immediate information to any Magistrate having jurisdiction, and obtain a warrant; but if warrant cannot be obtained without affording the accused person an opportunity to escape, &c., the police officer may make an entry into the house or place and search therein for the accused person.—(Sec. 99 and 100, *Criminal Procedure Code.*)

The following provisions are made in the Revenue Recovery Act (Madras Act II of 1864.) "It shall be lawful for any destrainer to force open any stable, cowhouse, granary, godown, outhouse or other building; and he may also enter any dwelling house the outer door of which may be open, and may break open the door of any room in such dwelling house for the purpose of attaching property belonging to a defaulter and placed therein. (Sec. 19). Where a destrainer may have reason to suppose that the property of a defaulter is kept within a dwelling house, the outer door of which may be shut, or within any apartments appropriated to woman, which by the usage of the country are considered private, such destrainer shall represent the same to the officer in charge of the nearest police station. The officer in charge of the station shall send a police officer to the spot, in presence of whom the destrainer may force open the outer door of such dwelling house, and in like manner as he may break open the door of any room within the house, except zenana. The destrainer may also in the presence of police officer after due notice given to the removal of women within a zenana, and after furnishing means for their removal in a suitable manner, enter the

zenana apartments for the purpose of destraining the defaulter's property deposited therein. (Sec. 20). The distress shall be made after sunrise and before sunset. (Sec 15.)

Fourthly.—In all cases, where the door is open, the Sheriff may enter the house and do execution, at the suit of *any subject*, either of the body or of the goods. But it is not lawful for the Sheriff (on request made and denial thereof) at the suit of a *common person* to break the defendant's house, &c., to execute any process. (*Semayne's case. Sm. L. C.*, I, 88-89). In a civil case between *Khondasawmy Pillay* v. *Kristnasawmy Pillay*, the Madras High Court held "we are clearly of opinion that a person executing a process, directing a general attachment of movable property, having gained access to a house, has a right to remove the lock from the door of a room in which he has reasonable ground for supposing movable property to be lodged.—(V, *Mad. H. C. R.*, 189).

And *fifthly.*—A man's house is not a castle or privileged place of security to any one else but himself; so that the protection it affords cannot be extended to any third person who flies to the house for shelter, or to another man's goods which may be brought and conveyed into the house for the purpose of preventing any lawful execution, or of evading the ordinary process of law; for the privilege of his house extends only to him and to his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore in such cases, after denial on request made, the Sheriff may break the house. (*Semayne's case, Sm. L. C.* I, 90; see also Sec. 180 and 181 of the *Code of Civil Procedure.*)

The laws which declare the birthrights of the people, though indirectly, will be found under the maxim relating to the Sovereign (*Maxim* 23.)

MAXIMS 56 to 59.

(56.) Salus populi est suprema lex.—(13 *Co.* 139.)—*The welfare of the people is the supreme law.*

(57.) Lex citius tolerare vult privatum damnum quam publicum malum.—(*Co. Litt.* 132.)—*The law should more readily tolerate a private loss than a public evil.*

(58.) Privilegium non valet contra rempublicam.—(*Bac. Max.* 25.)—*A privilege avails not against public good.*

(59.) Reus laesae majestatis punitur, ut pereat unus ne pereant omnes.—(4 *Co.* 124.)—*A traitor is punished that one and not all may perish.*

While discussing the last preceding maxims, it was observed that the natural liberty of man consisted in his power to act as he thought fit without any restraint or control unless it be that of law. And it is clear that the law does not interfere with one's exercise of his natural rights, unless it be for the good of the public. Indeed every man when he enters into society gives up, says Blackstone, a part of his natural liberty as the price of so valuable a purchase; and in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man that reflects for a moment would wish to obtain the absolute and uncontrolled power of doing whatever he pleases; the consequence of which must be that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life.

Therefore political, or civil, liberty which is that of a

member of society is no other than natural liberty so far restrained by human laws, and no farther, as is necessary and expedient for the general advantage of the public.

So that "there is an implied assent on the part of every member of society that his own individual welfare shall in cases of necessity yield to that of the community; and that his own property, liberty, and life shall under certain circumstances be placed in jeopardy or even sacrificed for the public good."—*(Broom's Maxims.)*

But such interference with one's person or property will not on any account be permitted to extend beyond what may be essentially necessary for the public good; and it will be seen that for every item of sacrifice which a member of society makes in person or property for the public good, he will have a sufficient return either directly or indirectly. Being himself one of the public, he necessarily shares the benefit which accrues to the general public by any sacrifice which he has made on that account; and he is fairly compensated pecuniarly in particular cases, as whenever he gives up his land, &c., for public purposes.

It is upon these principles that the subjects of every State are bound to contribute towards the support of the Government, and towards the conservancy of their towns, &c., &c., by means of imperial or local taxes (*e. g.*, the late Income Tax Act, Municipal Act, &c., &c.)

On this principle, the people at large might at times be obliged to give up their very houses and lands whenever requisite for the general good, or for making improvements for the benefit of all; or for effecting some commercial purpose; or doing some other act of public benefit, such as making roads, constructing railways, excavating canals, &c. (Vide Land Acquisition Act X of 1870; Railway Act XVIII of 1854; Irrigation Acts I of 1858 and XII of 1866, &c.)

In like manner all citizens are liable to be summoned to

appear as witnesses; to act as jurors, assessors, or arbitrators; to assist the police in arresting the offenders; to prevent mischief by inundation, &c., &c., (Vide *Civil and Criminal Procedure Codes;* and Compulsory Labor Act I of 1858, &c.)

So, one's property is liable to be seized and sold, and his body arrested and incarcerated, whenever he fails to discharge his just debts, or whenever he is convicted of a criminal offence. (Vide *Penal Code* and *Codes of Civil and Criminal Procedure.*)

This is not all. No person is allowed to use his own property in such a manner as to cause a real annoyance or disadvantage to others. This subject will be treated of at some length when discussing the maxim "*Sic utere tuo ut alienum non lædas.*" And lastly, no one is allowed to put an end to his own life, as this would militate against the general convenience, &c. (Vide Maxims on suicide.)

Upon the same principle officers of Government entrusted with the performance of various public duties are protected from being prosecuted, if in discharging their duty in *good faith*, they happen to do injury to any person or property. And a similar protection exists in favor of private persons *bonâ fide* assisting public officials in the performance of their public duty or in endeavouring to preserve the life and property of citizens from fire, &c.

In conclusion it is to be observed that the law has so much regard to the public welfare, that even the Sovereign cannot confer a favor on a subject, if it occasion injury or loss to another; for the prerogatives of the Sovereign are for the public good. (Vide Maxims regarding the Sovereign.)

MAXIMS 60 and 61.

60. Consensus non concubitus facit matrimonium. (6 *Co.* 22.)—*Consent and not concubinage constitutes marriage.*

61. Subsequens matrimonium tollit pecatum praecedens. (*Reg. Jur. Civ.*)—*A subsequent marriage removes the previous criminality.*

Before proceeding further, it seems expedient to describe the beneficial effects (apart from religion) in which the public use of the marriage tie consists. They are according to Archdeacon Paley the following:—

1. The private comfort of individuals, especially of the female sex. It may be true that all are not interested in this reason; nevertheless it is a reason to all for abstaining from any conduct, which tends in its general consequence to obstruct marriage; for, whatever promotes the happiness of the majority is binding upon the whole.

2. The production of the greatest number of healthy children, their better education, and the making of due provision for their settlement in life.

3. The peace of human society, in cutting off a principal source of contention, by assigning one or more women to one man, and protecting his exclusive right by sanction of morality and law.

4. The better government of society, by distributing the community into separate families, and appointing over each the authority of a master of family, which has more actual influence than all civil authority put together.

5. The same end in the additional security which the State receives for the good behaviour of its citizens, from the solicitude they feel for the welfare of their children, and from their being confined to permanent habitation.

6. The encouragement of industry.

Many Christians consider marriage to be but a civil contract, which in its essence is a consent on the part of a man and woman to live with each other; and that the religious element does not require anything more of the parties. Therefore when the necessary formulæ, such as the publication of the banns, the procuring of a license, &c., have been complied with, and when the hands of the two contractees are joined together and the clergyman pronounces them to be man and wife, they are married; provided they understand that by that act they have agreed to live together as husband and wife. Under the Mahomedan law too, marriage is a civil contract founded on the intention of legalising generation. Proposal and consent are essential to a contract of marriage. Nevertheless, says a Christian author, it has grown out of some tradition of divine appointment of marriage in the persons of our first parents, or it may be that from a mere design to impress the obligation of the marriage contract with a solemnity suited to its importance, the marriage rite has been made a religious ceremony, although marriage in its own nature, and abstracted from the rules and declarations contained in the religious code, is properly a civil contract and nothing more. "It may generally be observed," says Mr. Stephen in his commentaries on the laws of England, "that the law considers marriage in the light of *contract;* and applies to it, with some exceptions, the ordinary principles which attach to contracts in general; allowing it to be valid only where the parties are, in the first place, *willing* to contract; secondly, *able* to contract; and lastly, *did* actually contract in the proper forms and solemnities required by law." (Vol. II, p. 226.) Under the Indian Marriages' Act (XV) of 1872, every marriage may be simply a civil contract, or a contract coupled with religious ceremony. Marriages may be solemnized in India by a clergyman or minister of religion, as defined in the said Act, or by or in

the presence of a Marriage Registrar under the said Act. (Section 5.)

The case is entirely different with the Hindoos. By no people is greater importance attached to marriage than by them. It is among them, with one sex, the female, indispensable; and with the other, the male, it constitutes the order of Grihasta (housekeeper) which is the second of the four orders by which the different periods of the human life are distinguished. It completes for the man of the three first classes, *i. e.*, Bramha, Kshatrya and Vysia, the regenerating ceremonies, expiatory of the sinful taint that every child is supposed to contract in the womb; and it is the only ceremony that is allowed for a man of the Sudra class, and also for the women of all the four classes. The binding circumstances essential to the completion of the marriage are gift and acceptance of the girl before she attains puberty.

The subject of the re-marriage of widows, adultery, and divorce, must now be noticed.

The re-marriage of a widow is sanctioned by the Christian and Mahomedan religions, but not by the Hindoo system, save that among the lowest classes of Sudras usage has more or less sanctioned such re-marriages. The British Indian Legislature has altered this portion of the Hindoo system so far as it affects civil rights, and has declared widow marriages among all the classes of Hindoos to be valid and the issue to be legitimate. (Act XV of 1856.)

Adultery is a civil offence under the English law, and the adulterer is only liable to damages; whereas it is a criminal offence under the Hindoo and Mahomedan laws. But the Indian Penal Code which applies to all classes of people in British India indiscriminately, makes adultery a criminal offence, and renders the adulterer punishable accordingly. (Section 497.)

Divorce by husband or wife is allowed among Christians

and Mahomedans, but not among Hindoos. Impotence in the man and confirmed barrenness in the woman, as also loathsome or incurable disease in either, and so forth, may justify separation, but will not sever the Hindoo marriage tie. Act XXI of 1866 and other Acts hereinabove enumerated provide rules for the dissolution of marriages among Christians, Parsees and others.

Now, as regards the second Maxim placed at the head of these observations, the Christian laws permit a man to marry a woman that had previously been living in concubinage.—*(Burns' Justice of the Peace,* I, 402. *Vide also Maxim regarding heirship.)* The law of the Mahomedans likewise permits such a marriage, and it is even tolerated among the lower classes of Sudras, (*Str. Manual,* Sec. 40); but the Hindoos of the first, second, and third classes (Bramha, Kshatrya and Vysia) and the higher orders of the fourth class (Sudras) are peremptorily prohibited from marrying any but a virgin.

The following are the enactments of the Indian Legislature with reference to marriage and divorce :—

The Indian Christian Marriages' Act (XV) of 1872. The Indian Divorce Act (IV) of 1869 applicable to Christians. The Native Converts' Marriage Dissolution Act (XXI) of 1866. The Hindoo Widows' Re-marriage Act (XV) of 1856. The Parsee Marriage and Divorce Act (XV) of 1865. And the General Act (III) of 1872, which provides a form of marriage for all persons who *do not* profess the Christian, Jewish, Hindoo, Mahomedan, Parsee, Buddhist, Sikh, or Jaina religion.

MAXIM 62.

Duas uxores eodem tempore habere non licet.—*It is not lawful to have two wives at a time.*

The equality in the number of males and females born into the world, intimates the intention of God that one woman should be assigned to one man; for if to one man be allowed an exclusive right to have five or more women, four or more men must be deprived of the exclusive possession of any; which could never have been the order intended. Polygamy not only violates the constitution of nature and the apparent design of the Deity, but produces to the parties themselves and to society in general, the following evil effects:—Contests and jealousies amongst the wives of the same husband; distracted affections, or the loss of all affection in the husband himself; a voluptuousness in the rich which dissolves the vigour of their intellectual as well as their physical faculties, producing indolence and imbecility both of mind and body; the abasement of one-half of the human species, who, in countries where polygamy obtains, are degraded into mere instruments of physical pleasure to the other half; neglect of children; and the manifold and sometimes unnatural mischiefs which arise from a scarcity of women. To compensate for these evils, polygamy does not offer a single advantage. In the article of population which polygamy has been thought to promote, the community gains nothing; for the question is not, whether one man will have more children by five or more wives than by one; but whether these five wives would not bear the same or a greater number of children to five separate husbands. And as to the care of the children when produced, and the sending of them into the world in situations in which they may be likely to form and bring up families of their own, upon which the increase and succession of the human species in a

great degree depend—this is less provided for, and less practicable, where twenty or thirty children are to be supported by the attention and fortunes of one father, than if they were divided into five or six families to each of which were assigned the industry and inheritance of two parents.

These very excellent observations of Archdeacon Paley are certainly applicable to all classes of people. In Christian countries bigamy or poligamy is universally prohibited; and in England, it is a felony under Geo. IV, Cap. 38, Sec. 22. The Hindoos deprecate bigamy as a rule. Abandoning one wife with a view to taking another is conduct for which the husband, says Narada, shall be brought to his senses by the king with severe chastisement. The same doctrine is held by Vishnu, the Smriti Chandrika, and other authorities on Hindoo law. It has been observed by Dascha very feelingly, "with sorrow does he eat who has two contentious wives." But an exception to this rule is sanctioned where bigamy becomes a matter of *necessity from a religious point of view* among the Hindoos. The future beatitude of a Hindoo depends, according to his religion, upon the performance of his obsequies by a son, as the means of redeeming him from a state of suffering after death. The dread is of what is called "*Put*," a place of horror to which the manes of the childless are doomed, there to be tormented with hunger and thirst for want of those oblations of food and libations of water, at prescribed periods, which it is the pious and the indispensable duty of a *son* to offer. Hence a son, who is thus designed to save a father from PUT, is called "*Putra*." Thus a Hindoo must of necessity have a son. One marriage failing in this its essential and most important object, another marriage, although the first wife may be alive, then becomes necessary; and hence until the object is secured a man may have a plurality of wives without limit. He ought not, however, to take an additional wife save under certain justifying circumstances. These are principally barrenness,

or the production of only daughters for a period of ten years; and almost all such circumstances as justify a divorce among Christians, afford also grounds for the second marriage of an Hindoo male, without, however, severing the first marriage tie; the system of divorce being unknown to the Hindoo law. The consent of the first wife, without any disqualifying cause on her side, does also of itself warrant a second marriage on the part of the husband. By the most uncharitable and unbecoming stretch of the privilege, thus exceptionally given to a Hindoo, it has been held that the absence of the foregoing justifying causes will not invalidate a second marriage in the lifetime of the first wife, however blameable the husband's conduct may be in that respect.—(*Sir T. Strange's H. L.*, I, 52, *&c.*)

A Mahomedan, if a freeman, can have four wives at the same time; and if a slave, two wives. But in practice, it is to be feared, the Mahomedans exceed that limit with impunity.

Then as regards females, there is no religion which allows her to have more than one husband at the same time. Christians and Mahomedans permit a woman to marry again after the death or divorce of her first husband; but the Hindoo law denies even this privilege to a female; for no divorce is allowed, and no widow can re-marry; although it must be remembered that this restriction is now removed, so far as the Legislature can interfere in such a matter, and so far as civil rights are concerned, by Act XV of 1865. The remarks made with regard to the religious necessity which enables a Hindoo to have more than one wife at a time, does not apply to females; for they are not in danger of "*Put*," and do not therefore stand in need of a "*Putra*," (son); at least not to the same extent, if any at all, as a *man*.

Under the Indian Penal Code, whoever, having a husband or wife living, marries *in any case in which such marriage is void*, by reason of its taking place during the life of such

husband or wife, commits a criminal offence and is accordingly punished.—(Sec. 494). Here the words in italics are to be particularly noticed; for according to that provision no person would be guilty, if the marriage in question be in consonance with the law to which he is subject, as will be seen from the foregoing observations. In the province of Malabar it is supposed that women of certain classes are allowed to have more than one husband at a time. This we apprehend is not quite correct; a Malabar woman marries but one husband, but consorts with many; so that the subsequent connections may more properly be classed as concubinage than marriage.

MAXIMS 63 to 65.

63. Vir et uxor censentur in lege una persona.—(*Jenk. Cent.* 27.)—*Husband and wife are considered one person in law.*

64. Uxor non est sui juris, sed sub potestate viri, cui in vita contradicere non potest, *A married woman is not independent, but is under the subjection of her husband, whom, in his life-time, she cannot contradict.*

65. Omnia quae sunt uxoris sunt ipsius viri; non habet uxor protestatem sui; sed vir.—(*Co. Litt.* 112.)—*All things which belong to the wife belong to the husband; the wife has no power of her own; the husband has it all.*

The husband and wife are considered to be one person among Christians as well as Hindoos. Menu says—"a husband is one person with his wife for all domestic and religious purposes; not for all civil purposes." This, it must be taken, is the true illustration of the Maxim according to the existing state of our Indian laws. For the Indian Succession Act, it will be observed, has almost abolished

the English doctrine of unity of persons between husband and wife so far as it regards property. It provides in Sec. 4, that—"no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done it if unmarried." This abolishes in British India the rule of English law that marriage is an absolute gift to the husband of the personal chattels of which the wife was actually and beneficially possessed at the time of the marriage in her own right, and of such other personal chattels as come to her during the marriage, and of the wife's *choses in action*, that is, things to which she has only a bare right enforceable by suit, such as, debts owing to her, arrears of rent, legacies, negotiable instruments, Government promissory notes, &c. (*Stokes' Succession Act*). Under Sec. 4, a husband is no longer able by his endorsement alone to pass his wife's negotiable instruments, nor has he any power to release or assign her *choses in action*. The Indian Succession Act of course does not, under Sec. 333, apply to Hindoos and Mahomedans. A Hindoo female has her own peculiar property called "Stridhana," which is exclusively hers and at her own disposal, except where it consists of land given to her by her husband, in whom the dominion therein continues to vest. She of course is to be guided by her husband in the disposal of her own property.

Under the Mahomedan law, a female has the absolute disposal of her own property, consisting of inheritance, dower, &c. It is optional with her to enforce her claim to dower at any time, and even by means of a law suit.

Under the English and Mahomedan laws, and the Indian Succession Act, a husband or wife is entitled to a share in the property left by his wife or husband dying intestate; while under the Hindoo Mitakshara law a widow succeeds to her husband's estate, only when he dies a divided mem-

ber of the family, and when he has left no male issue; and a husband inherits his deceased wife's separate property in the absence of certain other relations.—(Vide Maxims on Succession).

Under the English law the husband is, in general, entitled to absolute control over his wife's person.—(*Manby* v. *Scott, Bridg.* 233.) He can impose such corporal restraints as he may deem necessary for securing to himself the fulfilment of the obligations imposed on her by virtue of the marriage contract. He may in the plenitude of his power, adopt every act of physical coercion which does not endanger the life or health of the wife, or render cohabitation unsafe. And he may seize her, or obtain a *habeas corpus* to recover possession of her person, unless he has expressly abandoned his marital rights by executing a deed of separation (*Rex.* v. *Mead,* 2 *Kenyon,* 279; *S. C.,* 1, *Burn,* 542; *S. P. Anne Gregory's case,* 4 *id.* 1991), or the parties have been judicially separated. He then loses all control over her person. — (*Lister's Case,* 8, *Mod.,* 22; 1, *Sra.* 478; *Rex.* v. *Mead,* 1, *Burr,* 542; *Lord Vane's Case,* 13, *East,* 171 *n.*; 2, *Str.* 1202. *Lewis* v. *Ponsford,* 8 c., *&c.,* p. 687). And if it be shown that he has ill-treated her, and she has sworn the peace against him, the Court, on her being brought up by *habeas corpus,* will not compel her to return into his custody.—(*Anne Gregory's case*). So a husband engaged in treasonable schemes cannot oblige his wife to live with him.—(*Manby* v. *Scott, Bridg. Rep.* 243). Where a wife however absents herself from her husband on account of no misconduct on his part, and he afterwards by stratagem obtains possession of her person, and she declares her intention of leaving him again whenever she can, he has a right to restrain her liberty until she is willing to return to the performance of her conjugal duties. (*In re Cochrane,* 8. *Dowl. P. C.,* 630); but where a wife is voluntarily, and without any restraint, absent from her husband, a Court of common

law has no jurisdiction upon his application to issue a writ of *habeas corpus* to bring up her body. (*Exparte Sunderland*, 21, *L. J. Q. B.* 342; 17 *Jur.* 317; *Petersdorf's Abridgment*, Vol. V, page 63, &c.)

"The early codes of all nations," says Sir Thomas Strange, (I, 48) "seem to have subjected the wife, among the other members of a man's family, to corporal chastisement; the civil law, to the extent of allowing the husband, for some misdemeanours, *flagellis et fustibus acriter eam verberare*, —for others, *modicam castigationem adhibere*. Our own (English) gave the like permission, restricted only within somewhat more reasonable bounds; and Menu, whether he set, or only followed, the manly example, certainly includes the wife among objects of domestic discipline, when conceived to deserve it. Less brutal indeed in this respect than the civil law, with him the authorised instrument is 'a small shoot of a cane;' to which truth, however, compels to be added, the option of 'a rope;' the correction, however to be inflicted "on the back part only of the body, and not on a noble part by any means." For what sort of delinquencies such barbarism might be indulged in, may be gathered perhaps from an extract from *Harita* with the comment on that citation. But for the credit of Hindoo law, a maxim of authority deemed to be equivalent to that of Menu, says beautifully, '*strike not, even with a blossom, a wife, guilty of a hundred faults.*' And it may be confidently assumed that, at this day, in no British Court, whether administering English or Hindoo law, would the claim to corporally punish a wife be tolerated for an instant, even if it be so much as the lifting up a finger against a woman."

In conclusion, it is to be observed with regard to Hindoo females, that they are not such degraded and wretched galley slaves as some of our European readers may suppose them to be. The following observations appear in one of the volumes of the Calcutta Review (1869); and our readers

may be assured that all these observations are supported by authorities from Menu and others; and are applicable to the present state of Hindoo society:—"Looked on by the father as the highest object of tenderness, and named with a sweet-sounding name to enhance the idea of her beauty; addressed in ordinary conversation with polite and endearing terms, and respected with the respect that is paid to age, wealth and learning; married to an excellent and handsome youth without any pecuniary consideration, and left at her own disposal in all lawful and excellent recreations; regarded by the husband as one person with himself, and constantly supplied by him with fine ornaments and apparel; employed in the collection and expenditure of wealth, and entrusted with the entire control of the household; honored and treated with affection; confided in by the husband; consulted with on his affairs; permitted to exercise an ascendancy over him; and allowed to acquire property as "*Stridhun*," which is protected by strict injunctions from spoliation by her relatives;—woman is the same dear and beloved creature amongst the Hindoos, as amongst other nations; as she was amongst the civilized Greeks and Romans of antiquity; or as she is amongst the Europeans of the present day. The true state of Hindoo feeling towards woman may well be judged of from the high-strained feelings and elevated sentiments entertained towards her by the Rajpoot, the true heir of the ancient Hindoo. The steed, the sword, and the fair are the three great idols of his heart. He treats woman with a respect unusual in the East, and his devotion to her is so enthusiastic, that a glance from the eyes of his lady-love weighs with the gilded pomp of a sceptre."

Early marriages, polygamy, widowhood, sutteeism, ignorance and seclusion, are subjects which are generally brought forward as tending to make a Hindoo woman unhappy. We need not notice sutteeism any longer, as it was abolished by the Legislature so long as 40 years ago. Early marriages are confined to Brahmins and Vysias, and a very

few of the other classes, all of whom form but a very small proportion of the Hindoo population; and the same remark applies to widowhood; so that the practice of early marriages, or the condition of widowhood, is not likely to have any perceptible effect upon the Hindoo community in general; and we would add here that the objection on the score of widowhood may now be got rid of as the re-marriage of widows is sanctioned by the Legislature. As regards polygamy, it has been elsewhere seen that it is sanctioned as a necessity from a religious point of view, and it is gratifying to find that it has not been as extensively *practised* as to make its unpleasant effects a source of public grievance. The education of Hindoo females was duly attended to in the early days, and is now being revived again, although it had been neglected during the intermediate period. And lastly as to seclusion, history proves that in the early days, Hindoo women went abroad and appeared in public; they used to be present at feasts, entertainments and public spectacles; and we positively affirm that Hindoo women of the present day do actually enjoy all these privileges, as a rule, subject to exceptions in the case of meetings of a public character, where females have no immediate concern, and in the case of Rajpoot females, and a few other classes who observe the system of *Purdah* or *Gosha*. But these form but a very small minority of the general population.

Suits for the restitution of conjugal rights, should be brought within *two* years from the time when restitution was demanded and refused. (*Indian Limitation Act—Article* 42).

"Let mutual fidelity continue to death:" this in a few words may be considered as the supreme law between husband and wife.—*Menu*, IX, 101.

MAXIM 66.

Patria potestas in pietate debet, non atrocitate, consistere.—*The authority of a parent should consist in affection, not in barbarity.*

Parents are bound to maintain, protect, and educate their offspring; and these must in return obey and serve their parents, and provide for them when incapacitated by age or sickness from earning a subsistence for themselves. The conduct of parents towards their children and of children towards their parents supplies no exception to their legal obligations. It would be detrimental in the highest degree to the interests of society if parents were permitted to refuse to support those to whom they had given life, or to cherish one child, and wholly neglect another; or if children were allowed to decide whether or not their parents were worthy of their support in after years. The good and the bad, the dutiful and the undutiful, are alike entitled to necessary maintenance and protection, but no more.

This power of a parent over his children continues whilst the latter are minors, and parents may also delegate their authority over their children to schoolmasters or tutors, who stand in place of a parent, and who must be obeyed accordingly by those placed in their charge. Parents and their delegates may correct their children. In case of assault, it is a good defence to prove that it is merely the correcting of a child by a parent, or the correcting of a servant or scholar by his master or tutor; provided the correction be moderate in the manner, the instrument, and the quantity of it.—*Archibald's Crim. Law*, p. 568.

Upon this last mentioned subject there is no special provision in the Indian laws. But the power of correcting a

scholar by his tutor seems to have been indirectly recognized in the Indian Whipping Act (VI of 1864), which in Sec. 10, provides that in the case of a juvenile offender the punishment of whipping shall be inflicted in the way of *school discipline*, with a light rattan. The Indian Apprentices Act (XIX of 1850), Sec. 14, allows a master to inflict moderate chastisement on the apprentice for misbehaviour, such as may be given by a father to his child, thus sanctioning correction of a child by a parent also in an indirect way. It will be thus seen that the infliction of moderate chastisement by parents of their child; by the tutor of his scholar; and by the master of his apprentice, is lawful even in India; and accordingly all such cases will be justified in law under the Indian Penal Code, Sec. 79. If, however, the chastisement be excessive, the person inflicting the same will be liable to punishment. What constitutes excess in correction is a question of fact that must be decided in consideration of such circumstances as the state of strength and health of the child, scholar, or apprentice; the nature of the offence for which it is given; the instrument used to inflict it, &c., &c.

The exposure or abandonment, by a father, mother, or guardian, of a child under 12 years of age, the selling or buying, &c., of a minor under 16 years of age, for any unlawful and immoral purpose, &c., are punishable under the Indian Penal Code.

MAXIMS 67 and 68.

67. Meliorem conditionem suam facere potest minor, deteriorem nequaquam. (*Co. Litt.* 337.)—*A minor can make his own condition better, but by no means worse.*

68. Custos statum haeredis in custodia existentis meliorem, non deteriorem, facere potest. (7 *Co.* 7.)—*A guardian can make the estate of an existing heir under his guardianship better, but not worse.*

The rules which regulate the liability of minors have their origin, mainly but not exclusively, in considerations of intellectual deficiency. They have been founded to some extent on the necessity of subjecting young persons to parental or other control; on their physical incapacity to go through certain forms; and not unfrequently on their incapacity for sexual intercourse; but the most prominent consideration has of course, always been the absence of that knowledge and experience, which are necessary to enable any one to appreciate the consequences of his act. But it is obvious that an inquiry into a person's liability upon these principles in each individual case would be both difficult and inconvenient; and consequently the law is obliged to fix once for all an arbitrary limit based upon the age of the person sought to be made liable. This limit varies in different countries; and it also varies with reference to the nature of the duty or obligation which is in question. (*Markby*, p. 146.) The English law fixes the limit at twenty-one years of age, and the Hindoo and Mahomedan laws fix it at fifteen or sixteen, in cases of civil liability; while the period is reduced to seven years in criminal cases with reference to all classes of persons. The variation of periods of minority in different countries is owing to the precocity or otherwise of the children, and the habits and customs of the people of the respective countries; and the

great reduction of age made in regard to *criminal* liability is founded upon public grounds. All the pleas and excuses which protect the committer of a forbidden act from punishment which is otherwise annexed to it, may be reduced to this single consideration, the want or defect of *Will*. Where therefore an *unlawful act* is not combined with a *vicious will*, there can be no crime, and where there is a *defect of understanding* there can be no vicious will; so that under the law as it now stands, the capacity of doing ill or contracting guilt is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. The sparing of a boy (or girl) merely on account of his tender years, while in his whole behaviour plain tokens of a mischievous discretion are apparent, would be of dangerous consequence to the public, by propagating a notion that children might commit atrocious crimes with impunity. Thus in criminal cases, although the accused party may not have completed the age of majority, yet the deficiency is made up by the malicious will which actuated him to commit the offence; and he is made liable to punishment if he is above the *age of discretion*; the Maxim of Law being, *Malitia supplet aetatem*—(malice supplies the age). Such age of discretion is fixed in British India at seven years. (For further particulars, vide Maxims relating to a minor's liability in civil and criminal cases respectively.)

In the case of all classes of persons to whom the Indian Succession Act is applicable (*i. e.*, the classes of persons enumerated in detail under the maxim on Succession) and for the purposes of that Act, a minor means any person who shall not have completed the age of eighteen years.

Under the Indian Contract Act, the age of majority for the purposes of that Act is to be determined according to the law to which a party is subject, (Sec. XI). The English law extends the period of minority to twenty-one years; while the Hindoo and Mahomedan laws fix it at the comple-

tion of sixteen years, except in Bengal, where a Hindoo attains his majority at the end of the fifteenth year only. (*Chitty on Contracts*, p. 137; *Str. Man. of Hin. Law.*, Secs. 123 and 124; *Mac. Mah. Law*, Chap. VIII.) But in the case of minors under the Court of Wards, minority is made to extend up to the completion of the eighteenth year, (Reg. V of 1804 of the Madras Code.) Under the Marriage Act III of 1872, a man must have completed the age of eighteen years, and a woman fourteen years. Until the completion of the aforesaid respective periods, the law considers it necessary that protection should be afforded to persons against improvident bargains and artifices of designing persons. As a rule minors cannot enter into any contract except for necessaries, nor do anything prejudicial to their interests, as they are not considered free agents capable of acting for themselves. Therefore it is necessary that minors should be placed under proper guardians. Guardians are either natural or testamentary.

Under the English law, the father of a legitimate child male or female, or if he be dead, its mother, is entitled to its custody as its natural guardian. This guardianship for the nurture of the child continues till it has attained the age of fourteen. But ordinarily the father has legal power over his children till they attain twenty-one years of age. The Court may, on petition of the mother, make an order for her access to her children; and, if such children be within the age of seven years, for the delivery of them to the mother until they attain that age, subject to such regulations as the Judge may deem just and convenient; but no mother against whom adultery has been established in a Court of law, can have access to or the custody of her children. Even in the case of a father, the custody and education of his children would be withheld from him if he were living openly in adultery.—(*Cabinet Lawyer*, p. 169.)

The Hindoo law holds that the natural guardians of a minor are first his father, then his mother, elder brother, paternal relations, and maternal relations respectively.

Under the Mahomedan law the natural guardians of a minor are his father, paternal grandfather, and paternal kindred. Mothers, and widows *durante viduitate*, have a right to the custody of their sons, until they attain the age of seven years, and of daughters until the age of puberty.

As regards the appointment of a guardian by Will, Sec. 49 of the Indian Succession Act, provides that a father, whatever his age may be, may appoint a guardian for his child during minority. The English law authorises such course, and so does the Mahomedan law. But the Hindoo law gives no sanction in this respect; and the aforesaid Section 49 of the Succession Act, which authorises the appointment of a guardian by Will, is not one of the Sections of the said Act which are extended to Hindoos.

In the case of minor zemindars and landholders, &c., &c., guardianship is vested by law in the Court of Wards. *(Madras Reg.* V *of* 1802.*)*

The guardian of an illegitimate child is the mother under the English, Mahomedan, and Hindoo laws, except, however, in the case of the Sudras (4th class of Hindoos), among whom an illegitimate child succeeds to his father's property.

Act IV of 1861 provides for the appointment of persons for the custody and guardianship of minors (of any class, Hindoo, Mahomedan or Christian) by the Civil Courts; and Act XIX of 1841 provides for the protection of the property of minors. No acts of a guardian in regard to the property or liability of a minor is valid, unless it be clearly for the minor's benefit. All acts of the guardian of a Hindoo infant which are such as the infant might, if of age, reasonably and prudently do for himself, must be upheld when done for him by his guardians. Such a guardian may bind his ward by referring to a punchayet of their caste a ques-

tion of customary partition. (*Mad. H. C. R.*, II, 47.) A suit cannot be brought on behalf of a Hindoo minor to secure his share in undivided family property unless there is evidence of such malversation as will endanger the minor's interests if his share were not separately secured. (*Mad. H. C. R.*, I, 105; III, 69; III, 94.)

An infant cannot sue except by his next friend; and when a valid objection is made on the ground of the disability of the plaintiff, the suit ought to be dismissed. (*Mad. H. C. R.*, V, 435.)

Guardians *ad litem* should always be appointed by the court in which the litigation is pending. (*Ibid, Appendix*, page VIII.)

MAXIMS 69 to 73.

69. Quod nullius est, id ratione naturali occupanti conceditur. (*Br.* 353).—*What belongs to nobody is given to the occupant by natural right.*

70. Qui prior est tempore, potior est jure. (*Co. Litt.* 14.) —*He who is first in time has the strongest claim in law.*

71. Ferae igitur bestiae et volucres et pisces, id est, omnia animalia quae mari, coelo et terra nascuntur, simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt. (*Sand. Inst., Lib.* II, *Tit.* I.)—*Wild beasts, birds, fishes and all animals either in the sea, the air, or on the earth, so soon as they are taken by any one, immediately become by the laws of nations the property of the captor.*

72. Et quidem naturali jure communia sunt omnium haec, aer, aqua profluens, et mare, et per hoc litora maris. (*Sand. Inst., Lib.* II, *Tit.* I.)—*By the law of nature these things are common to mankind, the air, running water, the sea, and consequently the shores of the sea.*

73. Flumina autem omnia et portus publica sunt. *(Sand. Inst., Lib.* II, *Tit.* I.*)—All rivers and ports are public.*

Under these Maxims it is proposed to explain the origin and growth of property, and to notice certain other circumstances under which one may acquire property by the operation of the rule of *priority*.

Property is defined to be a collection of rights over a particular thing to which a person is entitled, and in the free exercise of which he is protected by the law of the land. The earliest of all titles in every system of jurisprudence is OCCUPATION. The first occupier of anything that belonged to nobody else before became the owner thereof. "The cultivated land," says Menu, is the property of him who cut away the wood, or who cleared and tilled it." (*Menu*, IX, v. 44—also *Gautama*, Dig. III, iv. 22.) The Mahomedans held that "whoever cultivates waste lands does thereby acquire the property of them. They are a sort of common goods and become the property of the cultivator, in virtue of his being the first possessor, in the same manner as in the case of seizing game or gathering firewood." (Grady's Edition of the Hedaya, p. 610.) The Roman Law considered *occupancy* to be one of two principal modes of acquiring property; the other mode being *tradition*, that is, the owner handing over the thing to another person, &c. (Justinian's Institutes, Lib. II, Tit. I). The commentators of the Laws of England held that *occupancy* was the original and only primitive method of acquiring any property at all. (*Bl. Com.*, II, 400, v. *Step. Com.*, II, 15.) The following are the observations of Sir W. Blackstone on the subject.

"There is nothing which so generally strikes the imagination, and engages the attention of mankind, as the *right of property;* or that sole and despotic dominion, which one man claims and exercises over the external things of the world, in total exclusion of the right of any other indivi-

dual. * * * By the Law of nature and reason, he who first began to use a thing, acquired therein a kind of transient property that lasted so long as he was using it, and no longer; or to speak with greater precision, the *right* of possession continued for the same time only that the *act* of possession lasted. Thus, the ground was in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it,—for rest, for shade, or the like,—acquired for the time, a sort of ownership, from which it would have been unjust and contrary to the law of nature, to have driven him by force; but the instant that he quitted the use or occupation of it, another might seize it without injustice. * * * But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion, and to appropriate to individuals, not the immediate use only, but the very substance of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable, as habitations for shelter and safety; and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructory property in them, which was to cease the instant that he quitted possession;—if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by, would have a right to inhabit the one and to wear the other. In the case of *habitations*, in particular, it was natural to observe, that even the brute creation, to whom everything else was in common, maintained a kind of permanent pro-

perty in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which they esteemed a flagrant injustice, and would sacrifice their life to preserve them. Hence a property was soon established in every man's house and home stall.

"And there can be no doubt that *moveables* of every kind became sooner appropriated than the permanent substantial soil; partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length, by usage, ripen into an established right; but principally because few of them could be fit for use till improved and meliorated by the bodily labor of the occupant, which bodily labor, bestowed upon any subject, which before lay in common to all men, is invariably allowed to give the fairest and most reasonable title to an exclusive property therein.* *

"Property both in land and moveables being thus originally acquired by the *first taker*, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him by the principles of universal law, till such time as he does some other act showing an intention to abandon it."

But in a civilized country there can be very few things without an owner; and although there may be (as in fact there is) unappropriated land or waste, the rule of natural law as above explained has been so much restrained by the laws enacted by the State that the said rule has but little practical application at the present day. Vide Act XXIII of 1863 and other Revenue Regulations which prescribe the mode of acquiring waste or unoccupied lands. It must however be added that a right to property may even at the present day be acquired by Possession or Prescription under certain circumstances, and a finder of a chattel apparently

without an owner may acquire property therein. (Vide Maxims on those subjects.)

Animals, though arranged under the division of moveable property, require separate remarks. Animals have in themselves a principle and power of motion, and, unless particularly confined, can convey themselves from one part of the world to another. As soon as they are taken by any one, they become the property of the captor by the law of nations, for natural reason gives to the first occupant that which had no previous owner. They are, however, distinguished into such as are *domitae*, and such as are *ferae naturae*, some being of a domesticated character and others of a *wild* untrained disposition.

In such animals as are of a tame and domestic nature, as horses, kine, sheep, poultry and the like, a man may have as absolute property as in any inanimate things, because these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property, but has the right to recover by process of law if necessary. (*Steph. Com.*, II, 4.)

But with animals *ferae naturae* the case is different. These are, generally speaking, not subjects of property; at least while living. Yet under certain circumstances a man may be invested with a *qualified* or special property in them; and this either (I) *per industriam* (by industry); (II) *propter impotentiam*, (on account of impotency), or (III) *propter privilegium* (on account of privilege.) (I) A qualified property may subsist in animals *ferae naturae per industriam*, by a man's reclaiming and making them tame by industry, art, and education, or by so confining them within his own immediate power, that they cannot escape and use their natural liberty, as deer in a park, hares or rabbits in an enclosed warren, doves in a dove house, phea-

sants or partridges in a mew, hawks that are fed and commanded by their owner; and fish in private ponds, or tanks. Bees are of the same description, so that by hiving and reclaiming them, a man acquires a qualified property within. (II) A qualified property may also subsist with relation to animals *ferae naturae, propter impotentiam*, on account of their own inability, as where hawks, herons, or other birds build in my trees, or coneys, or other creatures make their nests or burrow in my land, and have young ones there,—I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires; but till then, it is in some cases trespass, and in others felony, for a stranger to take them away. For here, as the owner of the land has it in his power to do what he pleases with them, the law therefore vests a property in him of the young ones in the same manner as it does of the old ones if reclaimed and confined; for these cannot, through weakness, any more than the others through restraint, use their natural liberty and forsake him. (3) A man lastly, may have a qualified property in animals *ferae naturae, propter privilegium*, that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in these animals (usually called game) so long as they continue within his liberty, and may restrain any stranger from taking them therein; but the instant they depart into another liberty, this qualified property ceases. (*Steph. Com.*, II, 4—9.)

It is material to remark with respect to all animals *ferae naturae* that they are the property of a man no longer than while they continue in his keeping or actual possession; for, if at any time they gain their natural liberty, his property instantly ceases, unless they have an *animus revertendi* (intention of returning), which is to be known by their usual custom of returning, or unless the owner instantly pursues them for the purpose of regaining them, for during such a

pursuit his property in the animals remains unaffected. (*Ibid.*, p. 7.)

As regards the ownership of wild beasts which a man has not captured, but has so wounded as to render capture easy, opinions differ. Menu holds that "the antelope is the property of the first hunter who mortally wounded it." Some Jurists of other nations also (such as Trebatius) have taken the same view; while others have thought that such wild beasts do not become any man's property until he has actually captured them. In the Institutes of Justinian, the latter opinion is confirmed on the ground that, "many accidents may happen to prevent you taking it." (Lib. II, Tit. I.) In Stephen's Commentaries of the Laws of England after laying down some nice distinctions, the author observes that these distinctions seem to show that in general the property is acquired by the *seizure* or *occupancy*, though that cannot prevail against the better claim of him in whose grounds the animal is both killed and started (and who therefore may be said to be entitled *ratione soli*), or of him who has already a qualified property in it *ratione privilegii*. (*Steph. Com.*, II, p. 20.)

"There are moreover some few things which notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being of such a nature that nothing but an usufructory property is capable of being had in them; and therefore they belong to the first occupant during the time he holds possession of them, *and not longer*. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences. The right to the use of water flowing in a natural and defined course exists by natural or universal law. As regards the extent of enjoyment or restraints thereupon, the reader is referred to the appropriate Maxim on the subject. The sea-shore between high and low water-mark is *primâ*

facie the property of the State; and the limit of the sea-shore is the line of ordinary high tides. There is a similar presumption as to the property in the soil of a river (not being a navigable river) flowing between the lands of two proprietors; if it be a navigable river, the soil of the bed is presumed to belong to the crown, at least as far as the flow of the tide. (Vide *Collett on Torts*, Sec. 168, &c.)

Another right, the invasion of which may be a tort, is the right of common. It is sometimes classed as an easement, but it differs inasmuch as it is a right to take a profit from the soil of another; and, though exercised over real property, the right is not necessarily annexed to other real property, as there may be a common in gross or privilege belonging to a person or office. The right may consist in a right to pasture cattle on the land of another, to catch fish in his tanks, to take firewood or timber from his jungle, or ores, lime, brick, earth, &c., from his land; but the instances of the right will vary with the peculiarities of every country. There may be several kinds of common; thus common may be *appendant*, as where the tenant has, by virtue of his tenancy, the liberty to depasture his cattle on the lord's waste, or to cut the firewood he needs from the lord's jungles; or common may be *appurtenant*, as where the liberty is not general, as to all tenants, but is specially annexed to some particular farm or house, and exists by grant or prescription; or common may be in *gross*, where it does not appertain to land, but to persons; or common may be by reason of *vicinage*, as where there is a liberty for one man's cattle to stray from off his own waste, and depasture on his neighbour's land; and then it is rather a license to trespass, and the liberty is extinguished by one enclosing his land. The right to take water from a well for domestic purposes is an easement, and not a right to take a profit. The foundation of the right of common is a grant, express or implied, from the owner of the servient tenement; for though custom or usage may be

evidence of the existence of the right, a custom to take a profit out of the property of another must be bad, since it is inconsistent with the idea of property that such a right should be acquired, except by grant from the owner. There may be a good custom to use land on a particular occasion, as for a festival. But a grant is implied from a prescriptive user, that is one open, uninterrupted, and of right. So, the extent of enjoyment is limited to what is reasonable, and is needed for use and not for sale, and it must not be destructive of the substance or beneficial use of the servient property. Similarly, the right may be extinguished by unity of possession, by release, and by some other acts peculiar to the right as by enclosure. (*Collett on Torts*, S. 217.)

All public streets in towns (not being the property of and kept under the control of Government, and not being private property); and the pavements, stones, and other materials thereof; and also all erections, materials, implements, and other things provided for such streets; and all trees standing thereon, belong to the Municipal Commissioners—(*Madras Municipal Act IX of* 1867, *and Madras Town's Improvement Act X of* 1865.)

A person may have property in the copy-right of a book. "A copy of right is the exclusive right of multiplying copies of an original work or composition; and consequently of preventing others from so doing; the great object of the Law of copy-right being to stimulate, by means of the protection secured to literary labor, the composition and publication to the world of works of learning and utility. (Broom's Maxims.) For further particulars on the subject, the reader is referred to Act XX of 1847.

One may likewise acquire a peculiar right called "Patent," with respect to a manufacture invented by him. The general rule with respect to patents is that the original inventor of a new manufacture of some utility, who has first brought

his invention into actual use, is entitled to priority as a patentee, and that consequently a subsequent original inventor will be unable to avail himself of his invention. The rules on the subject will be found in Act XV of 1859.

It only remains to add that besides prior occupation which forms the subject of the Maxims under consideration, there are, now-a-days, several other modes of acquiring property, such as accession, possession, succession, testament, &c., &c., and these will be separately treated under appropriate Maxims.

With reference to the Maxim, *Qui prior est tempore potior est jure*, quoted at the beginning of these observations, some additional remarks are necessary. The applicability of this Maxim arises also in cases of equitable and legal estates. Thus :—A contracts to sell his land to B, and receives a portion of the purchase money, but executes no deed of conveyance, nor delivers possession of the estate to B. Or A mortgages his estate to B, depositing only the title deeds, but not giving possession of the estate itself. In all such cases B is considered in equity to possess an interest in the estate; for, equity looks on that as done which ought to have been done; whereas the law does not countenance an interest unless it is completed in due legal form. Therefore B has an equitable estate and not a legal estate. If A sells and conveys the same land actually to C for valuable consideration, without notice of B's prior incumbrance, then C is said to possess a legal interest. Where both the contending parties have equitable interest equally, the court of equity prefers that interest which is prior in point of time. Where, however, one party has an equitable interest and the other a legal estate, the latter being the stronger (though not superior in point of time), will succeed. But it must be remembered that a party who buys property for valuable consideration *after* notice of the prior equitable interest, will be guilty of fraud,

such cases the Maxim under consideration will solve the difficulty. He who is first in point of time has a stronger claim; for the Registration Act provides that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the date of the registration. (Sec. 47.)

MAXIMS 74 to 79.

74. Cujus est solum ejus est usque ad caelum; et ad inferos. (*Co. Litt.* 4.)—*Whose is the land, his also is that which is above and below it.*

75. Aqua cedit solo. (*Co. Litt.* 4.)—*Water belongs to the soil.*

76. Aedificatum solo, solo cedit. (*Co. Litt.* 4.)—*That which is built upon the soil goes with the soil.*

77. Quicquid plantatur solo, solo cedit.—(*Went. Off. of Exec.* 58.)—*Whatever is planted on, or affixed to the soil, belongs to the soil.*

78. Quod per alluvionem agro tuo flumen adjecit, jure gentium tibi adquiritur. (*Sand. Inst., Lib.* II, *Tit.* I.)—*Whatever the river adds on to your land by process of alluvium, becomes yours by the law of nations.*

79. Partus sequitur ventrem. (2, *Bl. Com.*)—*The offspring follows the dam.*

These Maxims bear on the subject of Accession. The Latin word *accessio* means an increase or addition to some thing previously belonging to us. By the operation of these Maxims, all that lies upon, or above, or below one's land; all that is affixed to one's land, artificially or naturally; all

that the land produces, such as fruit, &c.; the rent, &c., of land or other property; the offspring of animals; do all belong to the owner of such property. "Unless there be a special agreement between the owners of the land and of the seed," says Menu, "the fruit belongs clearly to the land-owners; for the receptacle is more important than the seed." So, "should a bull beget a hundred calves on the cows, not owned by the master, those calves belong to the proprietors of the cows." (*Menu*, ch. IX, v. 50, 52.) Somewhat similar provisions are made in the Mahomedan Law. (*Grady's Edn. of the Hedaya*, pp. 245, 312, 419, &c.)

Land is *nomen generalissimum* (a generic name), and includes not only the surface of the earth, but everything above it and beneath it. He that acquires land may apply to his own use, all buildings, growing crops, and water thereon; and also mines, minerals, &c., beneath. Except, however, in cases where by an agreement land is granted to another with reservation to the grantor of minerals, &c. (*Br. Max.*)

So, if a person erects a building, or plants trees, &c., upon land belonging to another, such building, or trees, must belong to the owner of the land. And whether the person who erected the building or planted the trees is entitled to any compensation or not, is a question, the answer to which depends upon several contingencies, which are well described by Lord Chancellor Clare, who remarked that, "as to the equity arising from valuable and lasting improvements, I do not consider that a man who is conscious of defect in his title, and with that conviction in his mind, expends a sum of money in improvements, is entitled to avail himself of it. If the person really entitled to the estate will encourage the possessor of it to expend his money in improvements, or if he will look on and suffer such expenditure without apprising his title, and will afterwards endeavour to avail himself of such fraud, upon the ground of fraud, the juris-

diction of a court of equity will clearly attach upon the case." (*Henry* v. *Brown*) In *Mussumat Ram Rama and another* (defendants,) v. *Sheik Jan Mahomed* (plaintiff,) the Bengal High Court held that when a man builds a house on a piece of land supposing it to be his own, or believing that he has a good title, and the real owner perceiving the said mistake, refrains from setting him right, and leaves him to persevere in his error, a court of equity will not allow the real owner to assert his legal right against the other, without at least making him full compensation. (*Beng. L. R. App. C.*, Vol. III, p. 18.)

In a subsequent case (18th July 1871) *Sufder Ali Khan and others* v. *Jeockarem Sing*, the Bengal High Court made the following observations on the foregoing point:—"As regards the objection that the Lower Appellate Court is wrong in giving the plaintiff a decree for the demolition of the building, each case of this kind must depend upon its peculiar facts and circumstances. In some cases where a co-sharer stands by and allows his co-sharer to raise and complete a building under his very eyes, without any kind of objection whatever, such as in *Jonakee Dassia's case*, (Sudder Dewani Adalut, 1856) it was held that the co-sharer must be presumed to have given an implied consent, and is not entitled to demolish after the building is completed. In other cases where it was found that there has been some neglect on the part of the plaintiff, and there is some ground for belief in the good faith of the defendant, and it is seen that considerable expense has been undergone by him, the courts have only awarded damages to the plaintiff, and not ordered demolition. In a third class of cases, where the building is not of any permanent or substantial kind, or built at any very great expense, and where their materials may be removed without difficulty, a reasonable time is awarded to remove such materials, and the land is made over to the rightful owner. (*Calcutta W. R. Civil Rulings*, Vol. XVI, p. 162.)

The law applicable to cases to which the English Law is applicable in India is thus laid down in Act XI of 1855 :—

"If any person shall erect any building or make an improvement upon any land held by him *bonâ fide*, in the belief that he has an estate in fee-simple, or other absolute estate; and such person, his heirs, assigns, or his or their under-tenants be ousted from such lands by any person having a better title, the person who erected the building or made the improvement, his heirs or assigns, shall be entitled either to have the value of the building or improvement estimated or paid or secured to him or them; or at the option of the person causing the erection, to purchase the interest of such person in the lands at the value thereof, irrespective of the value of such buildings, or improvements. Provided that the amount to be paid or secured in respect of such building or improvement, shall be the estimated value of the same at the time of such erection. (*Ibid*, Sec. 2.) But nothing in this Act shall extend to any case to which the English law is not applicable."—(*Ibid*, Sec. 3.)

As to fixtures it has been held that the mere putting a chattel into the soil by another cannot alter the ownership of the chattel. To apply the Maxim, there must be such fixing to the soil as reasonably to lead to the inference that it was intended to be incorporated with the soil.—(*Wood* v. *Hewett*, 8 *Q. B.* 913.)

The principle of *Accession* which governs *Alluvial* lands requires particular mention :—"Alluvion is an imperceptible increase, and that is added by alluvion, which is added so gradually that no one can perceive how much is added at any one moment of time. Such alluvial soil added by a river to your land, becomes yours by the law of nations. But if the violence of a river should bear away a portion of your land and unite it to that of your neighbour, it undoubtedly still continues yours. If, however, it remains for a long time united to your neighbour's land, and the

trees, which it swept away with it, take root in his ground, these trees from that time become part of your neighbour's estate."—(Sand. Inst., Lib. II, Tit. I.) By the French Code, (Art. 559) the first owner of the land thus swept away, is bound to make his demand within one year after it has been taken possession of by his neighbour. In British India no period of limitation is specifically prescribed for bringing actions to recover such lands; so that all such actions will be governed by the general rule of limitation (the rule of 12 years) laid down for the recovery of immoveable property. (*Article* 145, *Schedule* II *of the Indian Limitation Act of* 1871.)

"When an island is formed in the sea, which rarely happens, it is the property of the first occupant; for before occupation, it belongs to no one. But when an island is formed in a river, which frequently happens, if it is placed in the middle of it, it belongs in common to those who possess the land near the banks on each side of the river, in proportion to the extent of each man's estate adjoining the banks. But if the island is nearer to one side than the other, it belongs to those persons only who possess lands contiguous to the bank on that side. If a river divides itself and afterwards unite again, thus giving to any one's land the form of an island, the land still continues to belong to the person to whom it belonged before. If a river entirely forsaking its natural channel, begins to flow in another direction, the old bed of the river belongs to those who possess the lands adjoining its banks, in proportion to the extent that their respective estates adjoin the banks. The new bed follows the condition of the river, that is, it becomes public. And if after some time the river returns to its former channel, the new bed again becomes the property of those who possess the lands contiguous to its banks."—(*Sand. Inst., Lib.* II, *Tit.* I.)

The case is quite different if any one's land is completely

inundated; for the inundation does not alter the nature of the land, and therefore when the waters have receded, the land is indisputably the property of its former owner.—(*Ibid.*)

Land gained from a river by gradual accretion belongs to the owner of the adjacent soil by the title of occupancy. (*Nasarvanjee Pestanjee* v. *Nasarvanjee Darasha*, IV, Bombay H. C. R., 345). The owner of land before it is inundated remains the owner of it while it is covered with water and after it becomes dry. (*Mussamat Juan Baidi* v. *Hur Gobind Ghose*, Privy Council Judgts, Suth. Edn., p. 208). Where an island (lunka) was formed in a river, the lands adjacent to the banks of which were part of the Zemindary, the island was not the waste land of any village, or a portion of the holding of the ryots in the Zemindary, but the Zemindar possesses in it all the incidents of ownership including the power of making leases. *Subboya* v. *Yarlagudda Aukinudin*, (II, M. H. C. R., 255.)

MAXIMS 80 to 83.

80. Possessio est quasi pedis positio. (3 *Co.* 42)—*Possession is, as it were, the position of the foot.*

81. In aequali jure melior est conditio possidentis. (*Plow.* 296).—*Where the right is equal, the condition of the person in possession is better.*

82. In pari delicto, potior est conditio possidentis. (4 *T. R.*, 564.)—*In equal wrong the condition of the possessor is the more favorable.*

83. Longa possessio parit jus possidenti et tollit actionem vero domino. (*Co. Litt.* 110).—*Long possession is like the right of possession, and takes away action from the true owner.*

Possession consists in a physical act accompanied by an act of the will. The first is not necessarily connected with any bodily contact with the whole or any part of the subject; but it implies the physical power of dealing with the subject immediately and of excluding any foreign agency over it. The act of the will must contemplate a dealing with the subject as one's own property, and not on behalf of another. The continuance of the possession depends on the union of these two essentials; and hence, if either one or the other cease, the possession is lost. The possession of a moveable is lost, when another makes himself master of it, either secretly or by force; then the exclusion is complete. But as to land it is clear, that although by mere absence the power of dealing with it at will, becomes a more remote relation, it is not at all put an end to by it. There must be something in addition to absence; hence he who occupies land in the absence of the possessor is not considered to have ousted, till the possessor has had notice, and is either unable to enter upon his possession or voluntarily refrains from so doing. (*Collett on Torts*, Sec. 162.)

One may possess corporeal things whether moveable or immoveable, but according to the differences in their nature the marks of possession will be different also: thus, one may possess moveables by keeping them under lock and key or otherwise retaining them at his disposal; one may possess cattle, either by shutting them up in his own close, or consigning them to the custody and charge of another; so again one may possess a house by dwelling in it, or having the keys thereof, or entrusting it to a tenant; or one may possess lands by cultivating them, reaping the fruit thereof, building on them or going or coming through them, and disposing of them at pleasure. (*Domat's Civil Law*, para. 2130.)

If a landowner allows a relative, dependant, or friend, to occupy rent-free a cottage and land upon his estate, he does not thereby necessarily part with the possession of it, but

may continue to exercise acts of ownership over the land so occupied. And generally as against third persons the possession of the tenant is the possession of the owner. So if he suffer his servant or workman employed upon his estate to live in a cottage thereon rent-free, the possession of the servant is the possession of the master, and no title can be gained by such occupation however long it may be continued. Proof of possession of the key of the building is no proof of the possession of the building itself. (*Collett on Torts*, Sec. 164.)

When property is in the possession of a person's wife, clerk, or servant, *on account of that person*, it is in that person's possession within the meaning of the Indian Penal Code, (Sec. 27.) The words in italics should be noticed. The Code makes a very marked distinction between a master's property remaining in the possession of a servant, &c., *on account of the master*, or on *account of the servant himself*. The test for ascertaining whether the possession in any particular instance was on account of the master or servant, is to see whether the occupation is subservient and necessary to the service. If it is so, then the occupation of the servant is that of the master; and if it is not so, the occupation is that of the servant himself; and the servant is in that case looked upon as a tenant. Or, as it is put in another case, if the servant occupies the building as a remuneration for services, he may be considered as occupying as a tenant; but not if he be *required* to occupy the building with a view to the more efficient performance of his duty. (*Russell on Crimes*, I, p. 421, &c.)

A trespasser cannot by the very act of trespass, immediately, or without any acquiescence on the part of the owner, become possessed of the land, or house, upon which he has trespassed, and which he tortuously holds. But if he is allowed to continue on the land or house, and the owner of the same sleeps upon his rights and makes no effort to

remove him, he will gain a possession, wrongful though it be, and cannot be forcibly ejected. The rightful owner cannot in any case, when he has a right of entry, be made responsible for damages in a trespass upon his own land; for he is not a trespasser if he has a right to go upon it. But if he assaults and expels persons, who having originally come into possession lawfully, continue to hold unlawfully after their title to occupy has been determined, he may be made responsible for the assault and indicted for forcible entry. (*Mayne's Penal Code.*)

In conclusion it may be stated that the general rule is that possession constitutes a sufficient title against every person not having a better title. "He that has possession of lands, though it be by *dissension*, hath a right against all men but against him that hath right; for till some act be done by the rightful owner to divest this possession and assert his title, such actual possession is *primâ facie* evidence of a legal title in the possessor, so that speaking generally, the burthen of possession of title is thrown upon any one who claims to oust him. The possessory title moreover, may, by length of time and negligence of him who had the right, by degrees ripen into a perfect and indefeasible title." (*Broom's Maxims.*)

The Hindoos likewise attach much importance to possessions—For, "possession, even independent of a title may be evidence of right. But it must be understood that it is independent of the *production of a title*, and not independent of *its existence*, for its existence is inferrible from that possession." (*Mitakshara*, III, v. 4 and 5.) "He who sees his land possessed by a stranger for twenty years, or his personal estate for ten years, without asserting his own right, loses his property in them." (Yagnavalkya in Mitakshara, III, v. 1.) The Mahomedan law has no rule of limitation, much less prescription. (Chap. XII of *Mac. Mah. Law.*)

The law now in force in British India as to the effect of possession is to be found in the acts and the decisions of the superior Courts as hereinafter summarised.

The Indian Evidence Act provides that where the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner, is on the person who asserts that he is not the owner. (Act I of 1872, Sec. 110.)

To oust parties in actual possession, though on a faulty title, a superior title must be established. (Madras Sudr D. I, p. 19, 37, 43, Nos. 4 of 1810, 9 of 1811, and 9 of 1807.) In India the title of possession must prevail until a good title is shown to the contrary. (*Roya Peola Venkata Naidu Bahadur* v. *Aroonala Roodrapah Naidu*, Privy Council. Judgts. Suth. Edn., 112.) When plaintiff's evidence fails to show title in him, but does not show title in another, the plaintiff may recover upon his possession against a defendant, the wrong-doer. (*Kullammal* v. *Kuppu Pillai*, *M. H. C.*, I, 85.)

By Sec. 15, Act XIV of 1859, if a person in possession of immoveable property is dispossessed otherwise than by course of law, he may, within 6 months, sue to recover possession without any reference to title set up by another which is left to be determined in a separate suit. A person forcibly dispossessed, and suing for possession within six months, is entitled to recover notwithstanding any other title. (*M. H. C.*, I, 85.)

But Sec. 15 of Act XIV of 1859 does not abridge any rights possessed by plaintiff, but is intended to give him the right if dispossessed, otherwise than by course of law, to have his possession restored without reference to the title on which he holds. (*Kunchi Komapen Kurupu* v. *Changaracha Kandil Chembata Amba.* *M. H. C.*, II, 313.)

Whenever a Magistrate is satisfied that a dispute, likely, to induce a breach of the peace, exists concerning any land,

house, water, fishery, or crop, he shall enquire, without reference to the merits of the claims of any party to a right of possession, and decide which party is in possession of the subject of dispute, and issue an order declaring that party to be entitled to retain possession until ousted by due course of law, and forbidding all disturbance until such time. If the Magistrate decides that neither of the parties is in possession, or is unable to satisfy himself as to which person is in possession, of the subject of dispute, he may attach it, until a competent Civil Court shall have declared the rights of the parties, or who ought to be in possession. (*Crim. Pro.*, Sec. 530, &c.)

The Indian Limitation Act IX of 1871, Sec. 29, provides that at the determination of the period thereby limited to any person for instituting a suit for possession of any land or hereditary office, his right to such land or office shall be extinguished.

MAXIM 84.

Praescriptio est titulus ex usus et tempore substantiam capiens ab auctoritate legis. (*Co. Litt.*, 113.)—*Prescription is title from use and time, taking substance from the authority of the law.*

Prior to 1871 there existed no law of Prescription for the Presidencies of Madras and Bengal. (V, *Madras H. C. R.*, 20; *and Bengal Law Reports, March* 1869, p. 323.) The Bombay Regulation V of 1827, provided that an uninterrupted enjoyment for more than 30 years was necessary for a person to acquire a title by prescription. Now the BombayRegulation has been repealed, and a set of rules has been enacted for the acquisition of ownership by possession, *i. e.*, prescription, throughout British India. Secs. 27 and 28 of the

Indian Limitation Act (IX) of 1871, Part IV, provide as follows:—

"Where the access and use of light or air to and for any building has been peaceably enjoyed therewith, as an easement, and as of right, without interruption, and for twenty years,

and where any way or watercourse, the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person, claiming title thereto as an easement, and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested. (Explanation.) Nothing is an interruption within the meaning of this section unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Illustrations.

(*a.*) A suit is brought in 1871 for obstructing a right of way. The defendant admits the obstruction but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him claiming title thereto as an easement and as of right, without interruption, from 1st January 1850 to 1st January 1870. The plaintiff is entitled to judgment.

(*b.*) In a like suit also brought in 1871, the plaintiff merely proves that he enjoyed the right in manner afore-

said from 1848 to 1868. The suit shall be dismissed as no exercise of the right by actual user has been proved to have taken place within two years next before institution of the suit.

(c.) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed.

Provided that, when any land or water upon, over, or from which any easement (other than the access and use of light and air) has been enjoyed or derived, has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty years; but B shows that during ten of these years, C, a deceased Hindu widow, had a life-interest in the land, that on C's death B became entitled to the land, and within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years."

In order to understand the foregoing provisions fully, it is necessary to understand what an easement is—" An easement is a right, liberty or privilege, which the owner of one tenement (called the dominant tenement), has acquired over another (called the servient tenement), to compel the

owner thereof to permit to be done, or to refrain from doing, something on the latter tenement for the advantage of the former. The right is, therefore, either affirmative or negative; it is incorporeal, and is imposed upon one real corporeal property, and must be for the beneficiary enjoyment (but without taking any profits) of another real corporeal property. The tenements must belong to different owners, and both the right and duty exist in regard to the properties and not the owners. The benefit or right is called an easement; the corresponding burden or duty is called a servitude, and is a dismemberment of the rights of dominion, or absolute property. A privilege granted to one personally, unconnected with the enjoyment by him of land, is not an easement, but a mere personal contract, operative between the parties, but not binding upon the land affected in the hands of others. Thus, A cannot grant to B personally a right of way over his land, so that it should be annexed as an incident to the estate. It would lead to much confusion to create such novel incidents; and it is not in the power of an owner of land to create rights not connected with the use or enjoyment of land, and to annex them to it, nor can he subject the land to a new species of burden so as to bind it in the hands of an assignee."—(*Collett on Torts*, Secs. 201 and 202.)

MAXIMS 85 and 86.

85. Haereditas est successio universum jus quod defunctus habuerat. (*Co. Litt.* 237.)—*Inheritance is the succession to every right which was possessed by the late possessor.*

86. Haeres est aut jure proprietatis, aut jure representationis. (3, *Co.* 40.)—*An heir is by right of property or by right of representation.*

As we have seen elsewhere, property both in land and

moveables being originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, remains with him until such time as he does some other act showing an intention to abandon it; for then it becomes, naturally speaking, public property, *publici juris*, once more, and is liable to be again appropriated by the next occupant. The most universal and effectual way of abandoning property *is by the death of the occupant*, when both the actual possession, and intention of keeping possession, ceasing, the property which is founded upon such possession and intention ought also to cease of course. For naturally speaking, the instant a man ceases to be, he ceases to have any dominion; else, if he has a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him; which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals and unconnected with civil society; for then by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But, as under civilised Governments which have been organized for the peace of mankind, such an arrangement would be productive of endless disturbance, the universal law of almost every nation, which is a kind of secondary law of nature, has either given the dying person a power of continuing his property by disposing of his possessions by Will; or in case he neglects to dispose of it, or be not permitted to make any disposition at all, the Municipal law of the country then steps in and declares who shall be the successor, representative or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion, which, its becoming again vacant, would occasion. And further, in case no testament is permitted by the law, none be made, and no heir can be

found so qualified as the law requires, still to prevent the robust title of occupancy from again taking place, the doctrine of *escheats* is adopted in almost every country, whereby the Sovereign of the State, and those who claim under his authority, are the ultimate heirs, and succeed to those inheritances to which no other title could be found.

The right of inheritance or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive, at first view, that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no natural, but merely, a civil right. It is true that transmission of one's possession to posterity has an evident tendency to make a man a good citizen, and a useful member of society: it sets the possession on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest ties and most tender affections. Yet reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original arose not from speculations altogether so delicate and refined; and, if not from fortuitous circumstances, at least from a plainer and more simple principle. A man's children, or nearest relations, are usually about him on his death-bed, and are the earliest witnesses of his decease. They become, therefore, generally the next immediate occupants, till at length, in process of time, this frequent usage ripened into general law. —(*Warren's Blackstone*, p. 416 and 417.)

The right of inheritance is not a natural right, but a right established by positive laws. A son has no greater right to take the property which belonged to his deceased father

than any other individual, and much less has the eldest son any right to take the property in exclusion to, and in preference of, his other brothers, or the sons in general in preference to their sisters or mother. Every nation has, therefore, its own law of inheritance. Generally the right of inheritance depends upon the fact of wedlock or the nature of kindred; but the different systems of law differ either by admitting different individuals, or admitting them to succession in a different order, or dividing the inheritance in different shares. A daughter, for instance, takes under the Mahomedan law half as much as the share taken by a son, where the deceased has left both a son and a daughter; but under the Hindu law she inherits only in default of sons, grandsons, and widows; and in that case she takes the whole estate; while under the English law, she takes an equal share with her brother in personal property. Again, when a person leaves sons, and sons of a deceased son, the latter under the Hindu and English laws inherit equally with the sons by what is called *jure representationis*, "the right of representation;" that is to say, the grandsons stand in the place of their father, and take the share which he would have taken, if he had survived the deceased; but under the Mahomedan law the grandsons obtain in such a case no share at all, being excluded by the sons as nearer of kin.—(*Elberling*, Sec. 80.)

With these preliminary observations we must proceed to see what laws govern inheritance among the respective classes of the people of India, and what are the peculiarities and the general rules of succession in each class.

The Indian Succession Act governs Europeans by birth or descent domiciled in British India; as also Eurasians or East Indians, Americans, and Native Christians.

Act XXI of 1865, and such parts of the Indian Succession Act as are alluded to in the said Act XXI, provide rules of succession for Parsees.

The Hindus, Mahomedans, and Buddhists have their own laws of succession preserved to them with the following modifications. Slavery, and rights arising out of an alleged property in the person or services of another as a slave, have been abolished by Act V of 1843. The doctrine that a Hindu widow cannot re-marry has been done away with for all civil purposes by Act XV of 1856. Suttee is forbidden by Regulation I of 1830. The rule that an abandonment of religion, Hindu or Mahomedan, deprives the person of the right of inheritance has been abolished by Act XXI of 1850. And lastly, the disposition of property by a will by a Hindu or Buddhist has been sanctioned by Act XXI of 1870, by which certain portions of the Indian Succession Act have been made applicable to them.

Under the Hindu law not only the death of the last owner, but also his retirement from the world as a devotee, as well as long absence without being heard of, open out the inheritance to the heirs. (As to what is long absence, see Maxim on the subject.) The law of inheritance of the Hindus is connected with their opinion as to a future state. Wealth, say the sages, is either for temporal enjoyment, or for spiritual benefit. Now since the acquirer is dead, he cannot have the temporal enjoyment of it; it is therefore right that he should enjoy its spiritual benefit. The inheritance is therefore to be applied for the benefit of the deceased, and the order of succession is regulated by the degree of benefit which his relatives are capable of conferring upon him. To extricate the spirit from its otherwise hopeless state, funeral rites are performed. To three, says Menu, must libations of water be made; to three must oblations of food be presented; the fourth in descent is the giver of those offerings, but the fifth has no concern with them. The spiritual benefit of the deceased is thus the original foundation of the law of inheritance; but the right of certain persons to *maintenance* has been subsequently recognized and has caused a new principle to be added, so that some

more persons have been admitted as heirs who would otherwise have been excluded. Upon these principles, heirs are divided into three grades; Sapindas, Samanodakas and Bandhoos. And Sapindas are again divided into nearer and remote Sapindas.

The nearer Sapindas are the three males in direct descent from the deceased, and the three males in ascent above him, and their male descendants to the second degree, who offer and partake of the rice-ball entire. The remoter Sapindas extend to the sixth male in direct descent from the deceased, and the sixth male in direct ascent, and the direct male descendants of these latter to the sixth degree. The Samanodakas, who make offerings of pinda or rice-ball on failure of the Sapindas, extend to the sixth male below and the sixth male above the Sapindas, and the direct male descendants of the latter six to the sixth degree. And Bandhoos, who offer the pinda on failure of the last two grades of heirs, are such as are in parallel grade to the individual himself (sons of father's sisters); such as are parallel to his father (sons of his paternal aunt, &c.); such as are parallel to his mother (sons of her aunt, &c.)

Hindu females cannot on account of their sex perform obsequies for the deceased and cannot therefore confer any spiritual benefit upon him or his ancestors. They are therefore disqualified as a rule from taking inheritance. To this rule, however, there are four exceptions for special reasons.

1. The widow, in consideration of the assistance rendered by her to her husband in the performance of his religious and other duties. A wife is considered half the body of her husband. If there be no sons the widow presents the funeral oblations and so she succeeds in default of sons.

2. The daughter, in consideration of the prospect of her raising male issue to her father, such son being qualified to perform his funeral oblations. She thus takes inheritance in default of widows.

3. The mother in consideration of her having borne the deceased in her womb and having nurtured him during his infancy, and also because she confers benefit on him by the birth of other sons who may offer funeral oblations in which he will participate. A mother therefore succeeds in the absence of daughters and daughters' sons.

4. The grandmother who succeeds for the same reason as the mother, but in default of the parents, brothers, and brothers' sons.

It is to be remarked here that whenever a female succeeds, she does not obtain a full proprietary right of the inheritance, but is only entitled to enjoy it: and that after her death it should go to the nearest heir of the person from whom she received it, who is in existence at the time of her decease.

The Hindu inheritance does not go simultaneously to a plurality of persons related to the deceased: one heir succeeds *in default* of the other; thus a widow succeeds in default of sons; daughters in default of a widow; daughter's sons in default of daughters; and so on. But the heirs of each class succeed simultaneously and take the inheritance in equal shares, as in the case of sons. The case is the same with daughters when the inheritance descends to them; and with brothers also.

There exists the right of representation among the Hindus; as if among several sons one or more is dead, and has left sons or grandsons, they represent their father or grand-father, and take his share. So, if there be two sons A and B, and B dies leaving three sons, the estate will be divided into two shares, of which A takes one and the three sons of B take the other among them.

The illegitimate son of a Soodra succeeds in default of the legitimate son, daughter, and daughter's son; and if the legitimate children be alive, an illegitimate son takes half such a share as falls to the legitimate, &c. Among

Brahmins, Kshatriyas, and Vysias, an illegitimate son does not inherit but is entitled to maintenance.

An adopted son takes the whole estate of the adoptive father; but on a son being born naturally to a man after he may have taken one in adoption, the adopted son takes a third share according to the Bengal, and a fourth share according to the other schools of law.

The rules governing the devolution of woman's property called Stridhana are different. It first descends to daughters, then to daughters' daughters, then to daughters' sons, sons, and sons' sons successively. Stridhana also descends to the husband and his heirs under certain contingencies.

The Hindu law recognises the distinctions between real and personal, and ancestral and self-acquired property. The effect of this distinction in regard to the alienation has been discussed under the appropriate Maxim, and in matters of inheritance, the self-acquired property of a person does not vest in his co-heirs though undivided. It belongs exclusively to the acquirer's individual line.

In the absence of heirs, property escheats to the ruling power, except it be the property of a Brahmin, which should, if there be no kin, go to a learned priest, and then to any pure Brahmin in preference to the king. But this exception founded by the Hindu law in regard to a Brahmin's property appears to have been negatived by the Privy Council; and the property of this privileged class also is now declared to be liable to escheat to the Crown. This is to be gathered from the judgment of the Privy Council in the case of the *Collector of Madras* v. *Cavali Venkatanarrainappah*, dated 30th July 1860.

Under the Hindu law, idiots, madmen, the deaf, and the blind who are so from birth; the dumb; those so lame as to be unable to walk on either foot; or such as may be without the use of both hands; those having diseases of an obstinate or agonizing nature, such as, atrophy and ulcerous leprosy;

and the impotent, are incompetent to inherit property. Loss of caste was also a ground of exclusion, but this part of the law has been abrogated by Act XXI of 1850.

These are the principal rules of the Hindu law of inheritance as collected from the works of Sir Thomas Strange, Mr. Elberling, and Mr. Justice T. L. Strange.

Now as to the Mahomedans, the order of succession depends upon a passage in the Koran which gives a detailed list of the heirs and the proportion of the estate which each heir is entitled to receive. The inheritance is opened out by the death and long absence of the last owner. (As to what is long absence, vide Maxim on the subject.)

The heirs are divided into sharers, residuaries, and distant kindred. The sharers are those for whom the law has provided certain specific shares, such as a half, a fourth, an eighth, two-thirds, and a sixth; they are parents, grandparents, husband or wife, and brothers or sisters.

The residuaries are sons and other relations, *i. e.*, persons who take the residue after the legal sharers are paid. It must be remembered that the portions of the heirs called sharers are so fixed that in most cases there must be a residue after the sharers have been satisfied; therefore the sons who are the principal residuaries have almost always the best chance of coming in for a good portion of the inheritance.

And the distant kindred are those who take the property in default of the first and second classes of heirs such as children of sons, sons' daughters, &c.

A plurality of heirs may succeed simultaneously according to their respectively allotted shares; thus, sons, daughters, widow, &c., may take together. The inheritance may partly ascend and partly descend, at the same time; thus, a son, an uncle, grandfather, and mothers may take together.

In default of the above heirs the estate goes to a successor

by contract; and in his default to acknowledged kindred, and last of all, the property falls to the public Treasury.

The other peculiarities of the Mahomedan law of inheritance are the following. There is no distinction between real and personal, or between ancestral and acquired property. Females are not only not excluded from inheriting, but also some of them, such as a widow, mother, daughter, and sister, are held to be very near heirs: females get always half the share of their brothers when inheriting with them, and take with the same full proprietary right as males; so that the property devolves after their death on *their* heirs. The same is the case with widows, who take their share without any restriction in the disposal of it; and after their death, the property inherited from the husband goes to their own heirs, and not to the heirs of their husbands. A right of representation is unknown; the nearer of kin excludes the more remote, and illegitimate children inherit only from the mother, and mother's kindred. According to most rules of inheritance the descendants exclude all other relations; but by Mahomedan law, the parents, children and the widow, or widower, are simultaneously called to inherit.

Under the Mahomedan law (1) Homicide; (2) Slavery; (3) Difference of religion; and (4) Difference of allegiance, are impediments to inheritance. But Homicide is only so far an impediment that the slayer is precluded from succeeding to the property of a deceased person whom he has slain. The other three impediments are now abolished—slavery by Act V of 1843; difference of religion by Bengal Regulation VII of 1832, and Act XXI of 1850—and difference of allegiance by the subversion of the Mahomedan supremacy. (*Elberling's and Macnaughten's Mahomedan Laws.*)

Now, under the Indian Succession Act all property of which the deceased has not made a testamentary disposition, which is capable of taking effect, devolves upon the wife or husband, or upon those who are of the kindred of the

deceased. Where the deceased has left a widow, if he has also left any lineal descendants, one-third of his property shall belong to his widow and the remaining two-thirds shall go to his lineal descendants according to the rules therein contained. If he has left no lineal descendants, but has left persons who are of kindred to him, one-half of his property shall belong to his widow and the other half shall go to those who are of kindred to him in the order and according to the prescribed rules. If he has left none who are of kindred to him, the whole of his property shall belong to his widow, and where the intestate has left no widow his property shall go to his lineal descendants, or to those who are of kindred to him, not being lineal descendants according to the prescribed rules; and if he has left none who are of kindred to him, it shall go to the Crown. (Secs. 25, 26, 27 and 28.) Succession to the immoveable property, in British India, of a person deceased is regulated by the law of British India, wherever he may have his domicile at the time of his death. Succession to the moveable property of a person deceased is regulated by the law of the country in which he had his domicile at the time of his death. (Sec. 5.) A plurality of heirs succeeds simultaneously; thus if the deceased has left a widow and lineal descendants, one-third of his property goes to the widow and the rest to the descendants and so on. (Sec. 27.) The right of representation is also recognized.

MAXIM 87.

Haeres legitimus est quem nuptiae demonstrant. (*Co. Litt.* 7.)—*The lawful heir is he whom wedlock shows to be.*

As a rule every nation attaches the utmost importance to a child born in wedlock, and disregards illegitimate issue.

Under the English law an illegitimate son has no right but what he can acquire. He can inherit nothing either from the mother or the father, he being looked upon as the son of nobody, *filius nullius*. A bastard by the English law is one that is not only *begotten*, but *born* out of lawful wedlock. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry; and herein they differ most materially from the English law, which though not so strict as to require that the child should be *begotten*, yet makes it an indispensable condition to make it legitimate that it should be *born* after the lawful wedlock.—(4, *Black. Com.*, 2, *Inst.* 96; and *Burns*, of *Justice of the Peace*, I, 402). If a woman grossly enceinte marry, it is the child of the husband; for when they testify their consent by a public marriage before the birth of the child, it is a public acknowledgment that the child is his; for at that time the child is one with the mother, and therefore in taking the mother, he takes the child with her· (*Per Lord Ellenborough, C. J., in R.* v. *Luffe*, 8, *East* 207). As all children born before matrimony are bastards, so are all children born so long after the death of the husband, that by the usual course of gestation they could not be begotten by him. (*Alsop* v. *Bowtrell, Cro. Jac.* 541.)

An illegitimate son among the Hindus "is even as a corpse though alive, and is thence called a living corpse." (*Menu*, Chap. IX, verse 178.) But it is a clear law that by birth, and without any form of legitimation, illegitimate children have a right to receive maintenance from the father if he be a Brahmin, Kshatrya or Vysia; and a right of inheritance to the father's property, if he be a Soodra. Among the lower classes of Soodras' children begotten before marriage are legitimised on marriage of the parents, should custom sanction such recognition. (*Str. Manual*, Sec. 41.)

The Mahomedan law holds illegitimate children to be entitled to inheritance from their mother only.

The Indian Evidence Act provides that "the fact that any person was born during the continuance of a valid marriage between his mother and any person, and within two hundred and eighty days after the dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had had no access to each other at any time when he could have been begotten. (S. 112.)

MAXIM 88.

Deus solus haeredem facere potest, non homo. (*Co. Litt.* 7).—*God alone, and not man, can make an heir.*

This Maxim naturally excludes every one who is not a man's own child or kin; and it is still the law of England. But a Hindu is allowed to *make* an heir when Providence has denied him one. It has been seen that there is a religious necessity for a Hindu to have a son, and for this purpose marriage is inculcated as a duty; but when marriage fails in this most important object, the law permits a man to make a son by the fiction of an affiliation, which consists in his taking in adoption the son of another person, the canon law being that it must be the son of a woman whom the adopter might have lawfully married. The most proper subject of adoption is the adopter's nearest Sapinda, who at the same time is not an elder relation, and whose mother of course is not within the degrees of relationship prohibited for purposes of marriage. The adoption should take place among the three superior classes at any time before the adoptee's Oopanayam; and among Sudras at any time before marriage. The ceremony of Oopanayam among the three superior classes is generally performed at the eighth, eleventh and twelfth year respectively. On the

whole, the validity of an adoption for *civil* purposes consists generally in the consent of the necessary parties, the adopter having at the time no male issue, and the child to be adopted being within the legal age, and not being one otherwise considered ineligible for adoption. (Vide Dattaca Chendica and other works on the subject.) This practice of adoption is not peculiar to Hindus alone. The Roman law recognised adoption subject to certain conditions, which will be found in Justinian's Institutes, Lib. I, Tit. XI.

Adoption is not known to the Mahomedan law in the sense in which it is known to the Hindu law; but the former recognises two classes of artificial heirs, viz:—the successor by contract, and an acknowledged kinsman. Should there be neither sharer nor residuary, nor any of the distant kindred alive and capable of inheriting, the estate goes (unless there be a widow or a widower who is first entitled to a share) to him who may be called the successor by *contract*. The form of this contract is as follows: a person of unkown descent says to another; "Thou art my mawla (master) and shall inherit to me when I die, paying my fine, when I commit an offence;" and the other answers: "I have accepted." Next to the successor by contract is a person in whose favour the deceased has made an acknowledgment of kindred, but of such a nature as not to establish his consanguinity. (*Elb.*, Secs. 92 and 93.)

A child born out of wedlock, if acknowledged, acquires the status of legitimacy. The validity of acknowledgment by a father of the parentage of a child would be by Mahomedan law obligatory not only on the acknowledger and on the person acknowledged, but on other persons also, though these last be co-heirs, and all deny the acknowledged person's descent. (*Beng. L. R.*, IV, *App. C. Juris.*, *p.* 55, *&c.*)

MAXIM 89.

Qui in utero est, pro jam nato habetur, quoties de ejus commodo quaeritur: (2 *Bl. Com.*)—*He who is in the womb is now held as born, as often as it is questioned concerning his benefit.*

For the purpose of succession under the Indian Succession Act, there is no distinction between those who were actually born in a person's lifetime, and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive. (Sec. 23.)

A child *in ventre sa mere* at the time of the father's death is by the rules of the Common Law of England, and by the Civil law, to all intents and purposes a child as much as if it had been born in the father's lifetime. (*Doe.* v. *Clarke.* 2, *H. Bl.* 401.)

Under the Hindu law, if the widow of a deceased co-heir happens to be pregnant at the time of his death, or is supposed to be so, either partition should wait, or a share should be set aside, to abide the contingency of her having an after-born son; failing which, the share so reserved reverts, and is distributable, among the co-heirs, subject to the maintenance of the widow. Or, should such a birth take place subsequently, though not apprehended at the time so as to have suggested the reservation of a share, an allotment must be made by contribution among the parceners who have divided, making due allowances, as in case of partition in the life of the father. (*Sir Th. Str.*, Vol. I, p. 207.)

So under the Mahomedan law, when the deceased leaves a wife pregnant, and he has sons, the share of one son must be reserved in case a posthumous son should be born. If he has no sons, and there are other relatives who would succeed only in the event of his having no child, as would be the case, for instance, with a brother or sister, no immediate

distribution of the property takes place; but if those other relatives would succeed at all events to some portion (larger without than with a child, as would be the case, for instance, with a mother) the property will be distributed, and the mother will obtain a sixth, the share to which she is necessarily entitled; and afterwards, if the child be not born alive, her portion will be augmented to one-third. (*Elb.*, S. 135.)

The right of an after-born son to a share, as a coparcener, in the divided property depends upon his mother being pregnant with him at the time of partition. *Vekeyamian* v. *Agneswariam*, IV, *Mad. H. C. R.*, 307.

MAXIM 90.

Nemo est haeres viventis.—*No one is heir of the living. (Co. Litt.* 8.*)*

The heir, of course, is one who takes property by descent; consequently so long as the ancestor is alive, the property cannot descend to any one, and therefore until the death of the ancestor takes place, it cannot be said for certain who will be his heir. This doctrine does not obtain among Hindu sons, who under the Benares and Madras schools acquire a vested right in their father's property by their very birth; so that a son during the lifetime of his father has a present proprietary interest in the ancestral property as a coparcener to the extent of his proper share; but beyond that, a son has vested in him no legal interest whatever whilst his father is alive. With this exception, the Maxim under consideration applies to Hindu law. For, besides a son, no other person has a vested interest in him; and therefore it is only among the persons actually alive at the death of an ancestor that we should look for heirs. The Maxim is applicable also to Mahomedans, and to all persons

governed by the Indian Succession Act to its fullest extent. It must be remembered, however, that the Indian Succession Act recognizes the right of representation among lineal descendants as under the Hindu law, which the Mahomedan law does not.

According to the Hindu law sons acquire rights only in the property which belonged to their father at the time of their birth, and have no legal claim to property, of which a *bonâ fide* disposition, effectual as against their father, had been made long before they were born. *(Royacherloo* v. *Venkatramiah*, IV, *Mad. H. C. R.*, 60; *and Yekeyamian* v. *Agneswariam*, IV, *Mad. H. C. R.*, 307.*)*

MAXIM 91.

In restitutionem, non in pœnam haeres succedit. *(2 Inst.* 198.*)—The heir succeeds to the restitution, not to the penalty.*

In the first place it is to be observed with reference to this Maxim, that it does not apply to the debts of a deceased ancestor which must be paid out of the deceased's assets into whosoever's hands it may find its way. This Maxim therefore applies to what are called penalties, and it may be added forfeitures also. If a penalty be adjudged against a father and he dies before the discharge of the same, his son will not be bound to make it good. In the case of *Mussumat Golab Koonwar* v. *The Collector of Benares*, where a forfeiture was ordered against three of four brothers constituting a joint Hindu undivided family, the Lords of the Privy Council held that the forfeiture did not enure for the benefit of the fourth brother; nor did it affect the rights of the fourth brother, who was entitled to his fourth share in all the ancestral property of the family; and that the widow of the ancestor was also entitled to maintenance. *(Sutherland's Edition*, p. 186.*)*

Under Section 61 of the Indian Penal Code, in every case in which a person is convicted of an offence for which he is liable to forfeiture of all his property, the offender shall be incapable of acquiring any property except for the benefit of the Government until he shall have undergone the punishment awarded, or until he shall have been pardoned. Mr. Mayne observes that the effect of the section is to combine, for the benefit of the crown, the English doctrines of forfeiture and escheat. It may be necessary to observe, he adds, that a party who labors under forfeiture stands in the way of the descent of property to others just as if he were not subject to any such incapacity, and therefore according to the English law, the attainder of an elder son would intercept the rights of a younger son and of all other collateral relations who could only take after him. If therefore he could not take for himself, and they could not take in consequence of his blocking up the way, the estate necessarily escheated. But it may be well questioned whether this would be the case with the Hindu, in Madras, where the sons take not *after*, but *along with*, the father, as his co-heirs.

MAXIM 92.

Reversio terrae est tanquam terra revertens in possessione donatori, sive haeridibus suis post donum finitum. (*Co. Litt.* 142.)—*A reversion of land is, as it were, the return of the land to the possession of the donor or his heirs after the termination of the estate granted.*

An estate in reversion is what remains in the grantor upon the creation of a lesser estate than his own; thus where a lease is made by an owner, his estate is a reversion, and will become an estate in possession on the expiration of the lease. So, where an estate is limited to some particular heirs of the donee so as to exclude other heirs, and if the

donee died without such particular heir, the estate should revert to the donor. Under the Hindu law a reversion occurs in Intestate successions, where a female is the person that inherits the estate. A female's interest in the property inherited from a husband, father, son, or grandson is very limited. It lasts only for her life; and she is not entitled to use the property, more than to enjoy its income for the purpose of her maintenance according to her station in life, or other necessary purposes, such as religious observances and the preservation of the estate. The rest of the returns from the property, and the corpus of the property itself, she is bound to preserve for the next heirs, who would be not *her own* heirs, but the heirs of the person from whom she took a life estate in the property. Such heirs can restrain her unlimited use of the property, and they succeed to it immediately on her death.

Under the Mahomedan law a reversion occurs in this way; any surplus left after distributing the estate among the heirs called fixed sharers, goes to those called residuaries; if there be no sharers, the whole property devolves on the residuaries; if there be no residuaries, the surplus reverts to the legal sharers.

MAXIM 93.

Ultima voluntas testatoris est perimplenda secundum veram intentionem suam. (*Co. Litt.* 322.)—*The last Will of a Testator is to be fulfilled according to his true intention.*

A 'Will' means the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death. A 'Codicil' means an instrument made in relation to a Will, and explaining, altering, or adding to, its dispositions. It is considered as forming an additional part of the Will. (*Indian Succession Act.*)

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While property continued only for life, testaments were useless and unknown; but when it became inheritable, the inheritance was long indefeasible, and children or heirs at law could not be cut off by Will. At length, however, it was found that so strict a rule of inheritance made heirs disobedient and headstrong while it defrauded creditors of their just dues, and prevented many provident fathers from dividing or charging their estates as the exigencies of their families might require. This introduced pretty generally the right of disposing of one's property, or part of it, by testament, that is, by written or oral instructions, properly witnessed and authenticated, according to the pleasure of the deceased. This record of intention we emphatically style a "Will." This was established in some countries much later than in others. In England, till modern times, a man could dispose of only one-third of his moveables to the exclusion of his wife and children, and in general no Will was permitted of lands till the reign of Henry VIII; and then only of a certain portion; for it was not till after the Restoration that the power of devising real property became so universal as at present. *(Warren Black. Com.*, p. 418.*)*

Now, in British India, the Indian Succession Act governs the testamentary succession of all classes of people, except Hindus, Mahomedans and Buddhists, in respect of Wills made after the 1st January 1866. And by Act XXI of 1870, the provisions of the Indian Succession Act, as regards execution, attestation, revocation, revival, interpretation, and probate, have been extended to Wills made on or after the 1st September 1870 by Hindus and Buddhists, with, however, the exceptions hereinafter mentioned. Therefore that portion of the Indian Succession Act, which relates to Testamentary Succession, now applies to the following persons :—

1. Europeans by birth or descent, domiciled in British India.

2. East Indians, or Eurasians.
3. Jews.
4. Armenians.
5. Parsees.
6. Native Christians.
7. Hindus (including Jains and Sikhs) in the territory of Bengal and in the towns of Madras and Bombay, with the reservations to be hereinafter noticed,
8. Buddhists in the territories of Bengal and in the towns of Madras and Bombay, under the reservations to be hereinafter noticed.

The classes of persons to whom the provisions contained in the Indian Succession Act in regard to Wills do not apply, are (1) Mahomedans whether of the Shia or Sunni sect, (2) Hindus, and (3) Buddhists, if, in the case of the two latter, residing beyond the municipal limits of the towns of Madras and Bombay.

Under the Indian Succession Act, every person of sound mind and not a minor may dispose of his property by Will (S. 46). A minor means any person who shall not have completed the age of eighteen years (S. 3). A married woman may dispose by Will of any property which she has the power to alienate by her own act during her lifetime. (Sec. 46, Expl. 1). Persons who are deaf, *or* dumb, *or* blind, are capable of making a Will, if they can understand what they are doing by it. It appears that a person who is deaf *and* blind *and* dumb is not capable of making a Will (Sec. 46, Expl. 2). One who is ordinarily insane may make a Will during an interval in which he is of sound mind. (Sec. 46, Expl. 3). Convicted criminals would also seem under the said Act to be capable of making Wills, and it would further appear that the Will of a man, who afterwards commits suicide, is not invalidated by such Act. But no person whatever can make a Will while he is in such a state of

mind, whether arising from drunkenness or from illness, or from any other cause, that he does not know what he is doing. (Sec. 46, Expl. 4.)

A Will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator (Sec. 48); a bequest upon an impossible condition (Sec. 113); and a bequest upon a condition the fulfilment of which would be contrary to law, or to morality (Sec. 114); are all void. And no person having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a Will executed not less than twenty months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the Wills of living persons (S. 105.)

Every Will shall be in writing. The testator shall sign or affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction. The Will shall be attested by two or more witnesses, each of whom must have seen the testator sign the Will as above; and each of the witnesses must sign the Will in the presence of the testator. (*Indian Succession Act*, Sec. 50.)

But any soldier employed in an expedition, or engaged in actual war, or any mariner being at sea, may if he has completed the age of eighteen years make Wills, in writing or by word of mouth. If the whole of it is in his handwriting, it need not be signed nor attested. (Sec. 52, *I. S. Act.*)

A Will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by Will. (Sec. 49.)

The reservations spoken of as having been made in regard to Wills executed by Hindus including Jains and Sikhs, and Buddhists, including Burmese, &c., residing in the territories of Bengal and the towns of Madras and Bombay,

to whom the Indian Succession Act is made applicable, are the following;—No testator shall bequeath property which he could not have alienated *inter vivos*, or to deprive any person of any right of maintenance of which but for the Succession Act, he could not deprive by Will. Nor can a testator create in property any interest which he could not have created before the 1st September 1870. And the law of adoption and intestate succession, are not affected in any way. (Act XXI of 1870.)

(*Note.*—What property a Hindu cannot alienate, &c., &c., &c., forms the subject of the Maxim on alienation.)

Then as regards Hindus residing beyond the Presidency towns of Madras and Bombay, their own laws are applicable. Hindu Wills have been recognised in Bengal on the ground that they are considered as gifts to take effect at a future time on the demise of the donor subject to all rules affecting gifts. (*Sir Thomas Strange*, I, 260.) In the Madras Presidency the law was for a long time unsettled as to Hindu Wills. The Lords of the Privy Council in their Judgment (IV, Moore, 345) after noticing Sir Thomas Strange's observations that the Hindu language has no term (meaning technical term) whereby to express what is known in England as a Will, argue that "it does not necessarily follow, that what in effect, though not in form, are testamentary instruments which are only to come into operation and affect property after the death of the maker of the instrument, were equally unknown." They then remark on the prevailing recognition of Wills in Bengal, and add, "even in Madras it is settled that a Will of property, not ancestral, may be good, and indeed the rule to that extent is not disputed in this case." (VI, *Moore*, 345.)

Madras Regulation V of 1829, Sec. 4, provides that Wills left by Hindus within the territories subject to the said Government shall have no legal force whatever, except so

far as their contents may be in conformity with the provisions of the Hindu law, according to the authorities prevalent in the respective provinces under this Presidency. And it has been held that the testamentary power of a Hindu is co-extensive with his independent right of alienation *inter vivos*. (*Villaynayagam Pillay* v. *Pache*, I, *Mad. H. C. R.*, 326.)

As to the formalities with which Hindu Wills are to be drawn up, the Madras High Court held in *Crinivasammal* v. *Vijayammal*, as follows :—

"It was argued that, as Wills are a foreign admixture, this supposed testamentary disposition must be considered a it would be in England; and of course there, by the Statute of Wills, it would be void. We are quite unable to assent to the agreement that, because a doctrine has been incorporated into the Hindu law from the law of a foreign country, as a necessary consequence, the whole of the foreign law relating to the subject-matter must be imported with it. As a matter of fact we know that attestation has, within the original jurisdiction of the High Court of Bombay, not been held indispensable. Where such introduction takes place, so far as it can be done, the foreign matter must be moulded according to analogies derivable from the indigenous law. There is no transaction of Hindu law which absolutely requires a writing. Contracts of every description, involving both temporal and spiritual consequences, may be made orally; and it would be singular if we were to attempt to rule that all other expressions of Will are valid when delivered by word of mouth, but that the expression by a man of his Will as to the disposition of his property after his decease shall be wholly invalid unless reduced to writing. So to decide would be to ignore analogy and create anomaly. (II, *Mad. H. C. R.*, p. 38.)

In Calcutta, it was held that in this country there are no

formalities to be gone through in order to the constitution of a valid will. (*Sudammed Mahofattur* v. *Soorjomoull Debee*, 8 *W. R.*, 458.)

And in Bombay the Will of a Hindu in writing signed by him, but not attested by witnesses, may be admitted to probate, and operates to pass not only moveable but immoveable property. (*Muncharjee Pestonjee* v. *Narayen Luxmanjee*, I, *Bombay H. C. R.*, p. 77.)

A Will made by a Hindu must be construed with reference to the usages, customs, and circumstances of the testator. (*Sreemutty Robatty Dossee* v. *Seti Chunder Mullik*, and *Sreemutty Soorjeemoney Dossee* v. *Deembundo Mullik*, VI, *Moore's J. Ap.*, 1 and 526.)

Under the Mahomedan law, legacies cannot be made to a larger amount than one-third of the testator's estate without the consent of the heirs. A legacy cannot be left to one of the heirs without the consent of the rest. There is no preference shown to a written over a nuncupative Will. (Vide Macnaughten's and Bailie's Mahomedan laws for further particulars.)

As regards stamps, registration, and deposit of Wills, vide the General Stamp Act and the Indian Regulation Act, 1871.

In the case of *Nabob Ameruddaula Muhommed Kakya Hussain Khan Bahadur Amir Jhung Paru, Jaghirdhar of Virathalabathi* v. *Nateri Srinivasa Charlu and 5 others*, plaintiff, during his son's minority, gave certain property to him, and on the delivery of possession got from him a document stipulating: (1), that he would not alienate; and (2) that at his death, the property should return to the father. This document was deposited with the father, and not heard of until the property was taken in execution for the son's debts many years after the gift:—*Held*, that by Mahomedan law as well as by the general principles of law,

such a restriction on alienation, especially after the gift had become complete long before, is absolutely invalid. (VI, *Mad. H. C. R.*, 356.)

MAXIM 94.

Quilibet potest renunciare juri pro se introducto. (2 *Inst.* 183.)—*Every one is able to renounce a claim introduced for himself.*

In *A. A. Cherukomru* v. *Ismala*, Mr. Justice Holloway observed as follows:—"The general rule is power of renunciation; but there are two marked classes of exceptions. There can be no renunciation of rights and consequent destruction of relative duties prescribed by an absolute law. (The case of the departing father declaring the tutors *aneclogisti*) '*ut ait Iulianus et est vera ista sententia: nemo enim ius publicum remittere potest huius modi cautionibus nec mutare formam antiquitus constitutam.*' Another is the case of rights inherent in man as man, or, as some would prefer saying, the natural conditions which are the source of rights of condition. '*Ius adgnationis non posse pacto repudiari non magis quam ut quis dicat nolle suum esse Iuliani sententia est.*' A man may renounce a concrete right but not one resulting from a natural condition. In English law the first of these exceptions has been frequently recognized (*Hunt* v. *Hunt*, of which I have a note but no report.) It is sometimes said there that on principle a man may renounce a right, but not one coupled with a duty." (VI, *Mad. H. C. R.*, 150.)

Every person may renounce his claim, right, or privilege, provided such claim right, or privilege, has existed for his own benefit. Thus, where consent to an agreement is caused by coercion, undue influence, fraud, or misrepresentation, the agreement is for obvious reasons not binding

upon the party whose consent was so obtained. But if the party does not choose to avail himself of the privilege of pleading such fraud, &c., as a defence to avoid the contract, the contract will be binding upon him (S. 19 of the Indian Contract Act.) So, every promisee may dispense with, or remit wholly, or in part, the performance of the promise made to him, or he may extend the time for such performance, or he may accept any satisfaction which he thinks fit in lieu of it. (*Ibid*, S. 63.) Where acts are done by one person on behalf of another, as for instance a minor, but without his knowledge or authority, he has a right to disown such acts, but he may elect to ratify them. (*Ibid*, S. 196.) No witness, who is not a party to the suit shall be compelled to produce his will, deeds, or any document, the production of which might tend to criminate him, but he may waive this privilege if he chooses to do so. (Sec. 130, *Indian Evidence Act.*)

So, when a share under the Hindu law, is not desired by a son or other heir, it may be effectually waived by his acceptance of a trifle in satisfaction upon the principle of *quisque potest renunciare juri pro se introducto;* his heirs being bound by his consent. (*Sir Thomas Strange*, Vol. I, pp. 195 and 207); and this upon the authority of the Mitakshara, Chap. I, Sec. 2, verse 12, which declares:—"To one who is himself able to earn wealth, and who is not desirous of sharing his father's goods, anything whatsoever, though not valuable, may be given, and the separation or division may be thus completed by the father; so that the children, or other heirs, of that son, may have no future claim of inheritance."

The Plaintiff having accepted a third share of the family property, and abandoned his claim to the rest, in consideration of the fact of the adoption, he could not be allowed to recover it afterwards. (*Samy Iyengar* v. *Alagasinga Iyengar*, III, *Mad. H. C. R.*, 33.)

Under the Mahomedan law an heir may choose to surrender his portion of the inheritance for a consideration. (*Macn. Mah. Law*, Chapter I, Sec. 87.)

A person who is appointed an executor by a will may renounce his executorship orally in the presence of the Judge, or by a writing signed by himself; but the renunciation must take place before probate. (Secs. 193 and 194, *Indian Succession Act.)*

But no person can renounce, so as to injure the rights of another or the public interest. Thus, for instance, a parent has a right to the custody of his or her children. This right is introduced not for the benefit of the parents, but for that of the children; so that no parent can renounce that right to the prejudice of his or her minor children. Whoever, being the father or mother of a child, under the age of 12 years, or having the care of such child, exposes or leaves such child in any place, with the intention of wholly abandoning such child, is punishable under the Indian Penal Code, (Sec. 317.)

Nor can a person waive his right against express statutory provisions, for such provisions being for the good of the general public, no one has the option of violating or infringing them. Thus, an agreement in restraint of marriage, or trade, or an agreement by way of wager, is void under Secs. 26, 27, and 30 of the Indian Contract Act; and the person in whose favour such voidability operates cannot be allowed to say,—"I waive the right of condemning the document; and I consent to its being enforced;"—because the right has been introduced not for his own individual benefit, but for the public good.

MAXIMS 95 and 96.

(95.) Alienatio rei prefertur juri accrescendi. *(Co. Litt. 185a.)—Alienation is favored by the Law rather than accumulation.*

(96.) Alienatio licet prohibeatur, consensu tamen omnium in quorum favorem prohibita est, potest fieri; et quilibet potest renunciare juri pro se introducto. *(Co. Litt. 98.)—Although alienation be prohibited, yet by consent of all, in whose favor it is prohibited, it may take place; for, it is in the power of any man to renounce a right existing in his favor.*

It is the well known policy of the English law to favor alienation, and to discountenance every attempt to tie up property unreasonably long, or in other words to create a perpetuity. Under the Hindu law, however, the power of alienation is restrained. Ancestral real property of a Hindu cannot be alienated without the consent, express or implied, of the co-heirs, except when they are minors and the alienation is for their benefit; in which case alone, their consent will be implied. Ancestral personal property may in the same manner be alienated, but only for purposes warranted by texts of law. All this, however, is applicable to joint property, or where the alienation affects property beyond the share of the alienor in ancestral property. There is no restriction with reference to property of whatever kind acquired by a single individual, if the alienation be made by himself. A married man, without male issue, may alienate his property of any kind to the prejudice of all other heirs. But no alienation of any property is valid, unless a sufficiency be left for the maintenance of those entitled to support. (*Sir Th. Str. Hin. Law*, I, 18 to 21, 25, 200 and 201; *Madras Sudr Udalut*, No. 374 of 1863, I, *Mad H. C. R.*, 412.) In Bengal the power of a father

over his property is less restrained, requiring for its alienation the concurrence of his sons, only in the instance of lands inherited; and even with regard to this, although a father in Bengal should alienate the whole of his property without the concurrence of his sons, the act would be valid, under a distinction peculiar to it in that part of India, maintaining the legal validity of acts, however, militating with the intention and policy of the law. The maxim of the civil law, *factum valet, quod fieri non debuit,* prevails in no Code more strongly than it does in that of the Hindus. (*Sir Th. Str.*, Vol. I, pp. 21 and 87.) In consequence of these restrictions, it was once held that no Hindu could dispose of his property by Will. And now, under Act XXI of 1870, although a Hindu is permitted to make a Will, yet in doing so, he is not permitted to break the rules of restraint laid down by the Hindu law upon alienations as above described; and it has been expressly provided in Act XXI of 1870 that no Hindu testator shall bequeath his property which he could not have alienated *inter vivos;* nor can he deprive by a Will any person of any right of maintenance existing under the Hindu law.

"Whatever may be thought of these clogs on the alienation of a Hindu's property," says Sir Thomas Strange, "in a country highly commercial like our own,—founded, as they are upon the benevolent principle of providing for those, in whose favor every man contracts a debt upon becoming the head of a family—in this view, they are not unfit to be enforced; and though experience in England may have led there to the gradual removal of all restrictions of the kind, let it not be forgotten by the readers of the 'Commentaries,' that, by its ancient law not only could the feud 'not be transferred from one feudatory to another, without the consent of the lord,' but that even, with it, it could not be alienated, 'unless the owner had also obtained the consent of

his own next apparent or presumptive heir;' insomuch, (adds their learned author,) that 'it was usual in ancient feoffments, to express that the alienation was made by consent of the heirs of the feoffer, or sometimes for the heir apparent himself to join with the feoffer in the grant;' precisely as has been seen to be the course by the Hindu law. Nor does the analogy of these prohibitions stop here, as we learn from their relaxation in our own country; by which a man was in progress of time, allowed to sell and dispose of lands that had been purchased by him; over which 'he was thought to have a more extensive power, than over what has been *transmitted* in a course of descent from his ancestors;' but the law still did not authorize him 'to sell the *whole*, even of his own *acquirements*, so as totally to disinherit his children,' any more than it permitted him, of his own mere will and power, to aliene his paternal estate at all." (*Sir Th. Str.*, I, 22.)

A Hindu may make an alienation of his property to take effect after his death; for, as we have already seen (Maxim 93,) the testamentary power of a Hindu in Madras is co-extensive with his independent right of alienation *inter vivos*. (*Valley-anayagam Pillay* v. *Pache*, I, *Mad. H. C. R.*, p. 326.)

According to Hindu law as current in Madras, the member of an undivided family may alienate the share of the family property, to which, if a partition took place, he would be individually entitled. There may be a valid sale of such a share upon an execution in an action of damages for a Tort. (*Verasawmy Gramany* v. *Ayasawmy Gramany*, I, *Mad. H. C. R.*, 471.)

A sale by a father is valid by the Hindu law to the extent of his own share of the undivided estate. There is no distinction, according to the Madras School, between a father and other coparceners. (*Palanevalappa Kamidan* v. *Mannaru Naicken*, II, *Mad. H. C. R.*, 416.)

In *Vencatachella Pillay* v. *Chinnaya Moodelliar*, the Madras High Court held as follows :—

"The decisions of this Court, as to the right of a coparcener to alienate his vested interest in the property held in coparcenery, do not go beyond establishing the validity of an alienation to the extent of the coparcener's share in the particular property which is the subject of the alienation. And they are founded upon the principle that each coparcener has a vested present undivided estate in his share, which he may at any time convert into an estate in severalty by a compulsory or voluntary partition, and that such estate is transferable like any other interest in property. Further than this the title of the 1st Defendant under the alienation in the present case cannot, we think, be carried.

"The estate of each coparcener gives him only the right to enjoy a fair proportion of the benefits of the whole family property in common with the other coparceners. But as respects the proprietary right to the corpus of the property, there is a perfect unity of title which makes the coparcenary to some extent of the nature of a joint tenancy; and until a partition takes place the coparceners continue seised by one and the same title of the whole and every portion of the property alike, the law recognizing the right of one coparcener to hold possession and manage for the joint benefit of himself and the rest.

"By the sale in the present case therefore, the vendor, Subbaroya, could not, in our opinion, transfer to the 1st Defendant's father a valid title to any specific portion of the joint family property, but only to his beneficial estate as an undivided coparcener with the incidental right of partition; and it follows that the 1st Defendant is not entitled to more than the moiety of the village lands which were alone the subject of the contract of sale." (V, *Mad. H. C. R.*, 170-171.)

The widow of an undivided Hindu in Madras has no right to sell his property for payment of his debts, even though it be self-acquired. (*Namasivaya Chetty* v. *Seevagami*, I, *Mad. H. C. R.*, 374.)

A Hindu wife or widow may alienate her Stridhana, whether it be moveable or immoveable, with the exception perhaps of land given to her by her husband. *Doe* on the demise of *Kullamal* v. *Kuppu Pillay*, I, Mad. H. C. R., p. 85. See also I, Strange, p. 28.

A sale by a Hindu widow of property derived from her husband, who is divided in interest from his own family, is valid for her life. Such a sale will not be set aside at the instance of a divided brother of the husband. (*Bagavatamma* v. *Papana Guru*, I, *Mad. H. C. R.*, 393.)

Land received by a woman from her husband as Stridhana cannot be alienated even after the husband's death to the prejudice of the daughters as next heirs without their consent. (*Gungadaraya* v. *Paramaswaramma*, V, *Mad. H. C. R.*, 111.)

In *Duntaluri Royapparaz* v. *Mallapadi Royadoo*, (II, H. C. R., 360-362,) the Madras High Court delivered the following Judgment:—"This is a suit to enforce a gift to plaintiff by a woman living under his guardianship as against her husband. The separate property of the woman was denied; but the Civil Judge, on the ground that the Inam Commissioner's Putta was conclusive upon that subject, declined entering upon that question; and, if his decree against the plaintiff is not sustainable, it will be necessary to direct an enquiry upon that matter, as we have several times held this view of the Inam Commissioner's functions to be unsustainable. The Judge dismissed the plaintiff's suit, because he held the gratuitous alienation of the woman's special property unenforceable against the husband.

"As to the absolute power of the woman to alienate her special property, *Kullammal* v. *Kuppu Pillay*, (I, Mad. H. C. R., 85) was quoted. The only point absolutely decided in that case was that a person ousted from property was entitled under Sec. 15 of the Limitation Act, to be replaced in possession, if he applied within six months. The case was absolutely decided upon this simple principle.

"With the view, however, of preventing further litigation, the Court laid down the following proposition, which is the result of the judgment:—A widow is not, as to her separate property, subject to the restrictions upon alienation that clearly apply to property which she takes through her husband upon the death of that husband. Taking, therefore, either the point actually decided in that case, or the question upon which the Court expressed its opinion, the present case is wholly different; and keeping in view the following passage from Colebrooke (Obl., Sec. 611) which was not quoted in the argument, 'and she is subject to his control even in regard to her peculiar and separate property,' a passage written by this greatest of all authorities with all the texts from *Jimuta Vahana* and his own *Digest* before him; and looking also at the repeated texts of Hindu law as to the absolute dependence as to every act of the woman, and at the fact, abundantly clear from the history of our own law, that so called absolute property is quite consistent with restricted power of alienation, and that this is still more conspicuously the case with the Hindu law, we could not, without the greatest consideration, conclude that a woman can, without the consent of her husband, during coverture, absolutely alienate even her own landed property.

"Here, however, it is not necessary to decide this question, because it is quite clear that this taking of the woman's property by the plaintiff, her kinsman, is wholly repugnant to the Hindu law.

"The *Mitacshara* (Chap. II, Sec. 11, Articles 32 and 33)

shows that for certain urgent needs the husband may take the woman's separate property, but that any other relative who takes it is to be punished for theft; and the *Dayabhaga* (Chap. IV, Sec. 1, Articles 23 and 24,) while, as is usual with authors of that school, asserting a more extensive power, still renders it obligatory upon her relative so taking her property, even with her consent, to restore it when he becomes rich. It is quite clear, too, from the context, that the taking must be only upon the ground of urgent and proved necessity. This, therefore, is a case in which without any allegation of necessity, if such necessity could in the lifetime of the woman's husband avail the plaintiff, he seeks through the agency of the Courts to do that which the Hindu law only forbids his doing—take to himself the property of his kinswoman.

"Looking at the existent guardianship, whether self-imposed, or not, we are not informed, it is quite clear that it would be difficult to establish a contract against the woman, and equally difficult to conclude that there was such freedom of will as could alone render a contract valid. The transaction, so far as these pleadings disclose it, would be one of very doubtful efficacy. On these grounds, therefore, we dismiss this special appeal with costs."

In cases of Zemindary or other proprietary estates paying revenue to Government, Regulation XXV of 1802 strictly restrains the alienation of proprietary rights except in manner therein provided, and invalidates disposal or transfer of such rights as against the Government and the heirs and successors of the alienor. Such alienation, however, would be valid as against the proprietor himself. A permanent lease is as much within the operation of the Regulation XXV of 1802 (Madras Code) as an absolute transfer by gift or sale. (*Subroyulu Naick* v. *Rama Reddi*, I, *Mad. H. C. R.*, 141).

Where a Zemindar in Madras alienated a part of his

Zemindary, and the terms of Regulation XXV of 1802, Sec. 8, were not complied with, it was held that the alienation was invalid against the plaintiff and the grandson of the Zemindar; but that as the defendant and his father had held the land for a lengthened period on a claim of right, the plaintiff's suit was barred by the Statute of Limitation. (*Syed Ali Sahib* v. *Zemindar of Salur*, III, *Madras H. C. R.*, 5.)

In *Pitchakutti Chetty* v. *Ponnamana Nachyar*, (I, Mad. H. C. R., 148,) a Zemindar granted part of his Zemindary absolutely, and died. His grantee was then dispossessed by a purchaser from his successor. It was held that as the conditions specified in Regulation XXV of 1802, Sec. 8, had not been observed by the former Zemindar, the grant was voidable on the determination of his interest, and that consequently the dispossession was legal.

A Zemindar has no more power to charge a perpetual annuity in favor of a stranger on the income of the Zemindary, than he has to alienate the corpus. (*Narayana Devu* v. *Harischendra Devu*, I, *Madras H. C. R.*, 455; *Maharaj Dhera Gurrud Narrayan Dev*, 5, *Moo.*, I., Ap. 82; *Chetty Comara Venkatachella Reddyer* v. *Rajah Rungasawmy Sreemunth Iyengar Bahadur*, 8, *Moo.*, I., Ap. 319.)

Each holder of a Shrotrium conferred for life can only alienate his own life-interest in it. (*Sunder Moorti Moodelly* v. *Vallayanayakan Ammal*, I, *Mad. H. C. R.*, 465.)

Under the Mahomedan law, which makes no distinction between ancestral and self-acquired property, and which holds each person to be absolute owner of the property inherited or acquired by him, no restriction has been laid upon the alienation of property *inter vivos*. But a Will cannot be made to a larger amount than one-third of the testator's estate without the consent of the heirs, nor can a legacy be left to one of the heirs without the consent of the rest. (*Mac. Mahomedan Law*, Chapter VI.)

The Indian Succession Act provides a rule against perpetuity, so that a bequest made by a person to whom the said Act applies is not valid, if the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the time of that period, and to whom if he attains full age the thing bequeathed is to belong. (Sec. 101.)

Under the Hindu law, perpetuity is not sanctioned save in the case of religious and charitable endowments. (*Koomara Asenia Kishna Deb* v. *Koomara Krishna Deb*, II, *Bengal Law Rep. O. C.*, p. 11.)

MAXIMS 97 to 99.

(97.) Thesaurus inventus est vetus dispositio pecuniae, &c., cujus non extat modo memoria, adeo ut jam dominum non habeat. (3 *Inst.* 132.)—*Treasure trove is an ancient hiding of money of which no recollection exists, so that it now has no owner.*

(98.) Thesaurus non competit regi, nisi quando nemo scit qui abscondit thesaurum. (3 *Inst.* 132).—*Treasure does not belong to the king unless no one knows who hid it.*

(99.) Occultatio thesauri inventi fraudulosa. (3 *Inst.* 132.)—*The concealment of a discovered treasure is fraudulent.*

The law of British India on the subject of treasure trove is thus stated in the Regulation. Whenever any hidden treasure consisting of gold and silver coin or bullion, or of precious stones, or other valuable property may be found buried in the earth, or otherwise concealed, the finder shall deposit the same in Court. The Court shall issue a notification inviting claimants if any to appear within six months. The Collector shall bring forward any claim of right which

the Government may appear to possess to such treasure. In the event of any claim being so preferred by Government, or by any individual, the Judge shall institute a summary enquiry; and if the title of Government or other person so claiming the treasure be established, he shall adjudge the same accordingly, subject to the payment of expenses and compensation to the finder. If, however, the claim so preferred be not well founded, or if no claim be preferred at all within the aforesaid period, the Judge shall adjudge the treasure to the finder; provided that if the value of the treasure exceeds one lac of rupees, the excess shall be declared to be at the disposal of Government. If on the other hand the finder shall neglect to give notice of his discovery within one month, he forfeits all rights to the treasure and compensation. (*Madras Regulation* XI *of* 1832, *and Bengal Regulation* V *of* 1817.)

The Indian Contract Act has the following provisions on the subject of goods found:—When a thing which is commonly the subject of sale is lost, if the owner cannot, with reasonable diligence be found, or if he refuses upon demand to pay the lawful charges of the finder, the finder may sell it,—(1) when the thing is in danger of perishing, or losing the greater part of its value; or (2) when the lawful charges of the finder in respect of the thing found amount to two-thirds of its value. The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and when the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward and may retain the goods until he receives it. A person who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a bailee. (*Indian Contract Act*, Sections 158-159, and Sec. 71.)

The Indian Penal Code, Sec. 403, Expln. 2, referring to offences under the category of Criminal Misappropriation of Property, provides as follows :—" A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or restoring it to, the owner does not take or misappropriate it dishonestly, and is not guilty of an offence ; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows, or has the means of discovering, the owner, or before he has used reasonable means to discover and give notice to the owner, and has kept the property a reasonable time to enable the owner to claim it. What are reasonable means, or what is a reasonable time in such a case, is a question of fact. It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it : it is sufficient if at the time of appropriating it, he does not believe it to be his own property, or in good faith believes that the real owner cannot be found."

If one be possessed of a jewel and cast it into the sea or public highway, this is such an express dereliction that the property will vest in the first fortunate finder who may seize it to his own use. (*Black. Com.*)

The Indian Limitation Act provides that an action for lost movable property not dishonestly misappropriated, or converted, should be brought within *three* years from the time when the property was demanded and refused.—(*Schedule* II, *Article* 47 *of Act* IX *of* 1871.)

MAXIM 100.

Quod nullius est, est domini regis. *(Fleta, 1, 3.)—That which is the property of nobody belongs to our lord the king.*

It is a general rule according to English law that whenever the owner, or person, actually seised of land, dies intestate, and without heirs, the law vests the ownership of such land either in the Crown, or in the subordinate lord of the fee, by escheat. *(Broom's Maxims.)*

Under the Mahomedan law, "on failure of all the persons enumerated as heirs, residuaries or distant kindred, the property escheats to the public Treasury. *(Mac., 12.)*

The Hindu law declares that, failing all the claimants specially enumerated, the property of *Kshatryas, Vysias* and *Soodras* vests by escheat in the king; but the estate of a Brahmin descends eventually to Brahmins or learned priests, and it cannot be taken as an escheat by the king. "This," says Menu (Ch. IX, 189), "is the fixed law." But in disposing of an appeal preferred against the decree of the Madras Sudder Udalut, in the suit of the *Collector of Masulipatam* v. *Cavali Vencata Narrainapah* (Suth. P. C. Judgments, p. 417), the Lords of the Privy Council held on the 30th July 1860, that on the death of a Brahmin without heirs, the Sovereign power in British India is entitled to take his estate by *escheat,* subject to the trusts and charges previously affecting the estate.

Under the Indian Succession Act if a man dying intestate leaves no widow, or lineal descendants, or kindred, the property goes to the Crown (Sec. 28), subject, of course, to the debts of the deceased. *(Stokes' Succession Act,* p. 17.)

MAXIMS 101 to 106.

(101.) Qui jure suo utitur neminem laedit. *(Br. Max.)—He who lawfully enjoys his own injures no one.*

(102.) Sic utere tuo ut alienum non laedas. *(9 Co. 59.)—So use your own as not to injure another.*

(103.) Aedificare in tuo proprio solo non licet quod alteri noceat. *(3 Inst. 201.)—It is not lawful to build upon your own land that which may be injurious to another.*

(104.) Aqua currit et debet currere, ut currere solebat. *(3 Bulstr. 339).—Water runs and ought to run as it used to run.*

(105.) Injuria non excusat injuriam. *(Br. Max.)—One injury does not excuse another injury.*

(106.) Lex non favet delicatorum votis. *(9 Co. 58.)—The Law does not favor the wishes of the dainty.*

A person may use or enjoy his own property in any manner he thinks best; but he should take care that his use or enjoyment does not injure another or another's property in any way, as his want of circumspection in this respect will render him liable to an action. Mere trifling inconveniences, however, which a person may be put to by another using or enjoying his property in a lawful manner will not be regarded as a legal injury. It must further be borne in mind that in applying these Maxims to any particular case, the intention of the wrong doer is not at all to be taken into consideration, for in civil cases we should simply regard the damage sustained by the complainant irrespective of the intention, good, or bad, of the defendant. The Maxim that the act itself does not constitute guilt unless done with a guilty intention or knowledge has not so much application in civil as it has in criminal cases. (Vide Maxim with reference to Intention.)

And it must be remembered, that, as observed in Aldred's case, (Coke's Reports, Vol. V, p. 102), four things are desired in a house; namely:—(1), *habitatio hominis;* (2), *necessitas luminis;* (3), *salubritas aeris; et* (4), *delectatio inhabitantis.*

Of these four desiderata, the first, which is that the house should be for the habitation of man, is the chief; the second and third, *i. e.*, the command of wholesome air and light, are actual *necessities* for the very existence of man; but the fourth is not so, as it is a mere matter of delight. Any injury committed in respect to the first three are considered to be actionable wrongs, but no action can arise on account of any obstruction raised as regards the fourth; for no one can acquire a prescriptive right in mere matters of delight. And even with reference to the first, second, and third desiderata thus said to be most requisite and *necessary* in a house, it must be clearly understood that "the right claimed must not be so large as to extinguish or destroy all the ordinary uses or profits of the property; for every prescription must be reasonable; and for such things as can have no lawful beginning, a prescription is not good. So, there can be no easement as to what is a mere matter of convenience and advantage: thus, there is no right to enjoy a certain prospect, except by express grant;" (Collett on Torts, Sec. 207.) Subject to these qualifications or exemptions, acts such as building on one's land so near his neighbour's that the rain water falls upon it; fixing a water spout so near another's house that the water falls down and injures it; digging a pit so near another's land that it falls into it; stopping light and air; obstructing a way or water course, &c., render the offender liable to an action as a general rule, subject to any right of easement which the defendant might have acquired by prescription so as to justify his acting as he did. How a prescription may be acquired will be seen from Maxim No. 84. With these

preliminary observations, we may now proceed to consider more particularly the different kinds of enjoyment incidentalto the possession of property.

AS REGARDS THE HOUSE.—If a person build on the edge of his land and the proprietor of the adjoining land, after the expiry of 20 years from the time when the house was constructed, dig so near, that the house falls down, an action is maintainable, because the plaintiff has by 20 years' use acquired a prescriptive right to the support of his neighbour's soil; and to infringe that right is an actionable injury. But if the owner of the land adjoining a *newly* built house, dig in a similar manner and produce similar results within the period of 20 years, then, though there is damage to the owner of the new house, yet as he acquired no right to the support of his neighbour's soil, no injury is, in legal contemplation, committed by its withdrawal; and consequently no action is maintainable. *(Broom's Maxims.)*

In *Akelandammal* v. *S. Venkatachella Mudaly*, VI, Mad. H. C. R., 112, the plaintiff and defendant, occupants of neighbouring houses, were joint tenants of a party wall; defendants unroofed their house, raised the wall and placed beams on it to re-build their house. The lower Appellate Court found, that in consequence of this alteration, the rain from defendant's house, descended upon plaintiff's verandah and caused damage to plaintiff; and decreed that defendant should restore the wall to its former height, and remove the beams placed on it. It was held by the Madras High Court on special appeal that, taking the finding to be that the alteration created "*stillicidium*," where it did not exist before, or that it rendered more burdensome an existent "*servitus stillicidii*," it would be very dangerous to hold that every trifling excess in the exercise of a servitude should justify the pulling down of the building creating the excess; that in the present case the damages should be assessed and awarded; and the injunction to

remove the roof of the house and reduce the wall, be made conditional upon the defendant not removing the cause of the nuisance to the satisfaction of the Court within two months. The High Court added that it was quite possible that a gutter would effect all that was needed, but the plaintiff was certainly to have every protection which the Court could grant if the injunction were granted on these terms, and compensation given for the damage which had already accrued; and that the defendant too was to be careful not to trifle with the order of the Court.

AS TO LIGHT AND AIR, every person may open any number of windows looking over his neighbour's land; and on the other hand the neighbour, *before* the expiry of the period of limitation, *i. e.*, 20 years, which period enables the other to acquire a right of prescription, may, by building on his own land, obstruct the light and air, which would otherwise reach it. (*Broom's Maxims*—and III, *Madras H. C. R.*, 145.) This subject will be discussed particularly hereafter.

In *Gibbon* v. *Abdul Raheman Khan*, the Calcutta High Court decided that no suit can lie to close doors opened by defendant in his own wall, on the ground of a possibility of his committing trespass on plaintiff's land. It will only lie, where the opening of the doors is in itself such an irremediable injury that the plaintiff would not be sufficiently compensated by money damages. The High Court added: "We do not decide that these doors being there, the defendant has a right to trespass on plaintiff's land."—*(Bengal Law Reports, App. Cl. Juris.*, III, 411.)

AS TO THE RIGHT OF WAY, every one has a right to use a public thoroughfare, but he must exercise his right with reasonable care, and is liable for the consequences of negligence in the use of it. A person in driving is not bound to keep to the regular side of the road; but if he does not, he is bound to use a greater degree of caution than if he kept to the proper side. And, generally, disobedience

to the rule* of the road is evidence against the driver. So, a foot-passenger is not bound to keep to the side of the road, and he is entitled to the exercise of reasonable care by drivers; still he is as much bound to look out for vehicles coming along and not negligently to run against the horses, as a driver is bound to be vigilant in not running against him. *(Collett on Torts,* S. 110.*)*

In a case which arose in Mangalore, between *Senappa Acharry* v. *Maghalinga Chetty and others,* the plaintiff, a goldsmith, sued for damages on account of defendants of the Chetty caste having stopped a marriage procession which he was conducting on the public highway. The defendants pleaded by way of confession and avoidance, that it was not usual for the people of plaintiff's caste to pass along the road which lay in front of the Padubidre pagoda, in a conveyance with music, as was the case on the occasion which gave rise to the suit. The Original Court decreed in favor of the plaintiff; but the suit was dismissed by the Principal Sudr Ameen on appeal. The Madras High Court held:—"We do not concur in the opinion of the Principal Sudr Ameen that the procession was one which the plaintiff was unauthorized to institute. Being conducted by him on the public highway, his right so to make use of the highway could only be questioned by the Magistrate, who for the preservation of the peace might, if he saw sufficient grounds, interdict the procession. The defendants clearly had no such authority. *(I, H. C. R.,* 50.*)*

AS TO WATERCOURSES, it is laid down that the right to use surface water (for there is no *property* in the water) flowing in a natural and defined course, exists by natural or universal law. Each proprietor of land through which water so runs has a right to use the same for any reasonable

* Madras Police Act, Sec. 50, provides that a person is punishable for driving, without reasonable cause, a carriage, &c., otherwise than on the left or near side of the road.

purpose of his own, not inconsistent with a similar right in the proprietors of the land above or below; but he may not seriously diminish the quantity or injure the quality of the water, which would otherwise descend, to the damage of a proprietor below, save under a title by grant or prescription; nor can he without the license, or grant of a proprietor above, pen or dam back the water so as to cause actual damage to him. But without causing that, he may divert, or throw back the water; but he must not shut the gates of his drains, and detain the water unreasonably, nor let it off in unusual quantities to the prejudice of his neighbours.

The rights and duties as to artificial watercourses exist, not at common law, but by contract, grant, or prescription, that is, the right to such a watercourse is an easement; but there can be no prescription where no grant ought, under the circumstances, to be presumed; thus if A, for his own convenience, drains his land, his mine, or his house, he may acquire the easement or right of discharging the water upon or through the land of B; but though B may use such water for any number of years, he will not thereby acquire a right to it; but A may, for his own purposes, divert or remove the watercourse; from the very nature of the case, no intention in A to subject himself to a permanent servitude, can be inferred. But if A has acquired the easement of discharging clean water only, he would be liable for polluting the stream, and much more would any one else. Although, as against A, B cannot acquire a right to the continuance of the stream, he may, it seems, acquire such a right by lapse of time against others, so as to prevent them from diverting or polluting the flow of water. *(Collett on Torts*, S. 191.*)*

So, where subterranean water flows in a known and defined course, its diversion or pollution will be an injury as much as if it ran on the surface. But usually the course of such water is not ascertainable, and the general rule is that

one man may, in his own land, sink a well or shaft for a mine, though he may thereby drain his neighbour's well dry; and there is no limit to the quantity of water he may raise, or the use he may make of it. A different rule would often interfere with the enjoyment of the property in the sub-soil. He who first applies running water to irrigation or other purposes, does not thereby acquire an extended right, as against others, until his enjoyment has been long enough to give him a title by prescription; but, till then, the right is only to the natural use, which must be such as not essentially to destroy the natural flow to the damage of those above or below him.

Surface waters not running in a defined channel, but spreading over the land, may be used by the occupant of the land for any purpose; but a natural visible supply from a spring-head must not be cut off, nor prevented from falling below into a regular natural channel, and drains should be so arranged as to restore the water at the boundary of an estate to its ancient or natural channels.

In *Kesava Pillai* v. *Peddu Reddy and others*, where a tenant by his lessor's permission erected a dam upon his holding, and thereby obstructed the natural flow of the water to other lands of the lessor, the Madras High Court held that the mere permission did not amount to a grant; that there was no implied grant of the right to use water so as to derogate from the rights of those through whose lands the stream would otherwise flow; that the right under the permission might be terminated by revocation of the latter; but that such revocation would only be permitted on the terms of the landlord paying to the tenant the expenses which that permission had led him to incur; and, that even when the dominant and servient tenements are the property of different persons, a man may license an act in its inception, and yet be entitled to relief, where the act is found to

injurious consequences which he could not have contemplated at the time of the license. (I, *Mad. H. C. R.*, 258.)

In *Krishna* v. *Royappa Shanbhoy* the suit was to establish a right of water and for damages for interruption of the same. The facts were these:—Plaintiff and defendant, by agreement between them, constructed a dam across a main channel, and from thence a smaller channel was made through the land of the defendant to the plaintiff's land, by means of which it was agreed that the plaintiff should be at liberty to irrigate his lands. This agreement was acted upon for a long course of years. Under these circumstances, the Madras High Court held that the agreement was not a mere parol license revocable at the pleasure of the defendant, but an agreement which created a right of easement, unlimited in point of time, to the use of the water by the plaintiff, and imposed upon the defendant the corresponding duty of allowing the accustomed supply to flow. A mere license differs in its effects from a license coupled with the creation of an interest. The former is revocable, but the latter is subject to the same incidents and is as binding and irrevocable as any other contract, gift or grant. The law in this country (India) does not require that any agreement between natives, whether in regard to the transfer or creation of an interest in land, or otherwise, should be in writing; nor does it distinguish between agreements under seal and by parol. And alluding to the case of *Kesava Pillai* v. *Peddu Reddy and others* (I, Mad. H. C. R., 258) referred to in the first preceding para., the High Court observed that that was a case of an arrangement between a landlord and his tenant as to something to be done on his own land, and cannot govern a case like the present of an agreement between strangers for the creation of an easement over one tenement in favor of another tenement. (IV, *Mad. H. C. R.*, 98.)

In *Ponnasawmi Tevar* v. *The Collector of Madura and 25 others*, the plaintiff sought to establish his right to an unin-

terrupted flow of water through a channel, which ran into a tank in a village, which was the plaintiff's property, and to compel the removal of sluices erected across the said channel by the 1st defendant's predecessor in office and used for the purpose of diverting the flow of the water. The High Court of Madras held that acquiescence in the sense of mere submission to the interruption of the enjoyment, does not destroy or impair an easement. To be effectual for that purpose, it must be attributable to an intention on the part of the owner to abandon the benefit before enjoyed; that the diversion of water was a continuing injury down to the time of the institution of the suit; and that the plaintiff's suit was not barred;—that it must appear from the circumstances in evidence in each case that the interference or obstruction complained of is not a trivial, but a substantial injury in order to warrant relief by way of injunction; that the right to an easement in the flow of water through an artificial watercourse is as valid against the Government as it is against a private owner of a land;—that the grant of an easement may be presumed from mere continued user of the privilege openly enjoyed by the occupiers of the dominant tenement, as of right throughout any long period of time, without interruption on the part of the proprietor of the servient tenement; but with this qualification, that the user should be for at least the period of adverse possession which is prescribed by S. 1, Cl. 15, of the Indian Limitation Act (XIV) of 1859 as a bar to the enforcing of a title to corporeal property, in the absence of any definite law of prescription in this Presidency. (V, *Madras H. C. R.*, 6.) With reference to the last part of the said ruling of the High Court, it is to be observed that a law of prescription is now laid down in the Indian Limitation Act (IX) of 1871; and that the period fixed is 20 years.

The principle, which the above instances have been selected to illustrate the Maxims, likewise applies where

various rights, which are at particular times unavoidably inconsistent with each other, are exercised concurrently by different individuals; as, in the case of a highway, where right of common of pasture and right of common of turbary may exist at the same time; or of the ocean which in time of peace is the common highway of all; in that of a right of a free passage along the street, which right may be sometimes interrupted by the exercise of other rights; or in that of a port or navigable river, which may be likewise subject at times to temporary obstruction. In these and similar cases, where such different co-existing rights happen to clash, the maxim *sic utere tuo ut alienum non lædas*, will it has been observed, generally serve as a clue to the labyrinth. And further the possible jarring of pre-existing rights can furnish no warrant for an innovation, which seeks to create a new right to the prejudice of an old one; for there is no legal principle to justify such proceeding. (*Broom's Maxims.*)

One may be liable to an action for nuisances committed even on his own land, if it results in injury to his neighbour; thus the setting up of noxious or noisy trades, as lime-kilns, tan-pits, forges, or the erecting privies, making cesspools; or burning lime or bricks so near a dwelling house that the smoke and smell thereof enter the house and render it unfit for habitation.—(*Collett on Torts*, S. 179.)

If a man establish an offensive trade (in an unsuitable locality and) near my dwelling house so as to render it uncomfortable, I may maintain an action on the case against him for a nuisance; for here is *damnum* coupled with *injuria*. But if I build my house near his premises, at all events if they have been so used for twenty years (or if the locality within which the trade is carried on be reasonably fit and proper for that purpose), the case is altered; and, although I have *damnum*, yet I shall maintain no action, since it is not coupled with what the law considers injuria. (*Smith's L. C.*, I, 249.) There may be a right by prescription

to carry on a noxious or noisy trade in a particular spot, but till such prescriptve right is acquired, it is no answer that the nuisance existed before the plaintiff went to live near it, or even perhaps before his house was built. No length of time can legalize a *public* nuisance, though it may supply a defence to an action by a private person. *(Collett on Torts,* S. 182.)

As to the negligent use of one's property, a person would be liable for the consequences of sheer negligence. So, if a man lop a tree standing on his own land and the boughs fall upon another person *ipso invito;* if a man shoot at a butt and hurt another man *unawares;* if a person assaults me and I lift up my staff to defend myself, and in lifting it, strike another; if one constructs a hay rick on the extremity of his own land so negligently, that in consequence of its spontaneous ignition his neighbour's house is burnt down; if a shop-keeper invites customers to his shop, and they suffer injury by means of a trap-door, which he negligently left open without any protection;—in all these cases actions are maintainable for damages for the injury sustained. *(Broom's Maxims.)*

So every occupier of land who allows wells or shafts to remain unguarded, is liable in damages to persons falling into them; provided they were lawfully traversing the land, and there was no negligence on their part. So if strangers are allowed to use a private way across land, or a particular pathway is used as the ordinary means of access to a dwelling house, liability will be incurred by neglecting to fence off dangerous places, adjoining such way. But there is no liability where a person strays off the road or pathway, though he does so in the night; provided the dangerous place was not immediately adjacent to the way. If there is leave to cross a field, &c., by several ways; and a man uses the more convenient but more dangerous way, and suffers, the owner is not liable. A third party, having leave to

place building materials on a private road, and placing them so negligently that another lawfully using the road is hurt, will be liable to him in damages. So, a shop-keeper who invites the public to his shop is liable for having a trap-door open without any protection by which his customers suffer. So, generally, a man may not make dangerous excavations near a public highway, nor do any other act, as discharging firearms near such road, likely to result in damage to others Where there is no duty to fence or protect a dangerous spot, there is no liability from the use of an obviously defective protection, but it might be otherwise from the use of a defective means of protection concealing the danger and so serving as a trap. *(Collett on Torts,* S. 129*).*

So persons having dangerous instruments in their custody should keep them with the utmost care. In *Lynch* v. *Nurdin,* Lord Denman observed; "If I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be brought out, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first. *(*I, *Q. B.,* 29—35*.)*

Where dangerous machinery is employed and the servant is, or professes to be, acquainted with its use, and requisite care is taken to guard against accident, the master is not liable. But where machinery was duly guarded when the servant entered into the service, but afterwards became dangerous, and the servant complained, but the master promised to have it made safe, he was made liable for subsequent damage to the servant. (*Collett on Torts,* S. 144.)

So, if a master employs ignorant, inexperienced men in dangerous employments, and exposes them improperly to risks of which he is cognizant, and which are not known to

the ignorant workmen, he will be liable for the consequences of his misconduct. So, if he frames rules, carelessly or improperly, for the management of the business, and these lead to dangers which, by proper rules, might have been avoided, he is liable. But if a rule framed to secure safety is habitually violated to the knowledge of the workman himself, he cannot recover damages from his master on the ground of the non-observance of the rule. It is also the master's duty to be careful that his workman is not induced to work under the notion that the machinery, tackle, scaffolding, or rope with which he works, is secure, when the master knows or has reasonable ground for believing that it is unsafe and dangerous. (*Collett on Torts*, S. 143.)

So, a landlord is responsible if he leases to another a house adjoining a road, which from age or faulty construction is dangerous, and damages others. If it became so after he leased it, he is not liable, unless he was bound to keep it in repair. The occupier is also liable, provided he knew or ought to have known, that the house was in a dangerous state, and chose to become and continue the occupier of it, with the knowledge of its dangerous condition. But the landlord is not liable to the tenant, unless he agreed to keep the house in repair though the roof falls in and hurts the tenant or his family. (*Collett on Torts*, S. 130.)

Another instance of actionable wrong arises from the negligent keeping of animals, either wild or domestic. Any one who keeps a wild animal, as a tiger or bear, which escapes and does damage, is liable without any proof of notice of the animal's ferocity; but where the damage is done by a domestic animal, the plaintiff must show that the defendant knew the animal was accustomed to do mischief. But the gist of the action is not the negligent keeping, but the keeping with knowledge of the mischievous propensity, whether the animal be of a savage or domestic

nature. A single instance of ferocity is sufficient notice. If a horse is negligently suffered to stray into a road, or on to another's land, and does damage by kicking, the owner is liable though the horse was not vicious. But a man is entitled to keep a ferocious dog for the protection of his premises, and to turn it loose therein at night. He has, though, no right to put a ferocious dog in such a situation in the way of access to his house, that a person innocently coming there for a lawful purpose in the daytime may be injured by it. But one may not shoot a dog though he is ferocious; to justify that, it must have actually attacked the shooter at the time. (*Collett on Torts*, S. 127.)

Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if the death had not ensued) have entitled the injured party to maintain an action and recover damages in respect thereof, the party who would have been liable if the death had not ensued, shall be liable to an action for damages, nothwistanding the death of the injured person, and although the death shall have been caused under such circumstances as amount in law to any felony or crime. (Act XIII of 1855.)

In actions for damages for injuries sustained, it is no good defence to say that the plaintiff too was guilty of misconduct. No misconduct, even wilful and culpable misconduct, would necessarily exclude plaintiff, who is guilty of it, from the right to sue; for not unfrequently, the rule holds that one injury does not excuse another injury. A trespasser though liable to an action for the injury he commits, does not necessarily forfeit his right to sue on account of an injury which he himself has sustained, as by falling into a hole newly excavated on defendant's premises adjoining to a public highway and unsafe to persons lawfully using the way with ordinary care. (*Broom's Maxims.*)

There are *three* exceptions to the rule that a person is accountable for so using his property as to injure that of another; as for instance, where the injury is the result of an inevitable accident; where the complainant is himself guilty of contributory negligence; and where the injury complained of is of a very trifling nature. Indeed, in all these cases, the injury complained of by the plaintiff is no injury at all in the eye of the law.

No person would be liable if the damage was the result of an inevitable accident, and not the consequence of any default of his own; as where his horse was frightened, and became ungovernable in consequence of a clap of thunder, or the noisy approach of a cart, or the rush of a Railway train, or the discordant sounds of tom-toms. But where the facts are such as to establish a *primâ facie* case against the defendant, the burden of proving that he was without fault is on him. The degree of care to be exercised on any occasion, as for instance, in using a public thoroughfare, depends greatly upon the damage likely to result to others from the want of care; thus a man who traverses a crowded street with edged tools, or bars of iron, must take especial care that he does not hurt others, and is bound to keep a better look out, than the man who merely carries an umbrella. (*Collett on Torts*, S. 125.) Vide also Maxim 284 on Accidents.

As to contributory negligence, if the plaintiff so far contributed to the damage by his own want of ordinary care and caution, that, but for such negligence or want of care, the misfortune would not have happened, he is the author of his own wrong. But mere negligence will not disentitle the plaintiff, unless by the exercise of ordinary care he might have avoided the consequences of the defendant's negligence; or if the defendant might, by the exercise of caution on his part, have avoided the consequences of the neglect or carelessness of the plaintiff.

Thus, if the plaintiff has wrongfully, or negligently left his cattle or goods on the road, the defendant may not drive over them, if by care he might avoid doing so. (*Collett on Torts*, S. 123.)

So in *Beni Madhabdoss* v. *Ramjoy Rokh*, the Calcutta High Court observed that, "Where a person, having a right of way over another's ground, permits others to divert that right of way by the erection of a building at more or less expenditure, and further permits the owner to habituate himself and his family to the convenience and comfort of the building so erected, and allows that state of things to continue for seven years, the claim of such person to destroy the building so erected, and put an end to the convenience which defendant has enjoyed, merely for the purpose of shortening the plaintiff's access to a particular locality, is an unreasonable claim, such as a Court of equity and good conscience ought not to enforce. (*Bengal L. R., Appellate Civil Jurisdiction*, I, p. 215.)

And lastly, as to trifling inconveniences, the law is that "Trifling inconveniences merely are not to be regarded, for, *Lex non favet votis delicatorum, i.e.*, the law does not favor the wishes of the dainty." So an action does not lie, if a man build a house whereby his neighbour's prospect is injured, or open a window whereby his neighbour's privacy is disturbed. And so, the establishment of a rival school which draws away the scholars of a school previously established; the construction of a wall on one's own land in such manner as to obstruct the light and air of his neighbour who may not have acquired a right to them by grant or adverse user; the building of a mill near the mill of one's neighbour to the grievous damage of the latter; the digging in one's own land, so as to intercept or drain off the water collected from underground springs in his neighbour's well;—these and similar cases are not actionable wrongs; and although it may seem to be a hardship upon

the party injured to be without a remedy, yet Courts of justice ought *not* to be influenced by such a consideration. Hard cases are apt to introduce bad law. (*Broom's Max.*)

As regards the amount of personal inconvenience, the infliction whereof by another may be deemed to justify the interference of a Court of equity, or may sustain an action at law, the true test would seem to be that suggested by Knight Bruce, V. C., in *Walter* v. *Lelfe,* in these words—"Ought the inconvenience in question to be considered in fact as more than fanciful, or as one of mere delicacy or fastidiousness; as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among the English people?" (*Broom's Com.*) That this is also the test applied by our Judges in British India, is evident from the following:

In a case reported in the Bengal Law Reports, vol. iii, p. 18, it was held by the Calcutta High Court that for a "*prospect,*" which is a matter but of delight and not of necessity, no action lies for the stopping thereof; and yet it is a great commendation of a house if it has a large and long prospect. But the law does not give an action for such things of delight, that is to say, such an action founded upon a right said to have been gained by prescription. (Vide also *Aldred's case,* Coke's Reports, V, 107.)

In *John George Bagram* v. *Khettranath Karformah,* the plaintiff sought in a suit on the Original side of the Calcutta High Court to remove an obstruction to the enjoyment of light and air, and for damages. The suit was dismissed; and the dismissal was confirmed in appeal. In the coure of their judgment the Calcutta High Court made (*inter alia*) the following observations:—"When a man erects a house at the extremity of his own boundary, and uses the light which passes over his neighbour's land, and through the windows of the house, he is in fact as much in possession

of that part of every ray of light which enters his house as he is of the way over his neighbour's land; and after 20 years' uninterrupted enjoyment, he may be presumed to have acquired as great a right to prevent the obstruction of the light *necessary* for the habitation of his house, as he has to prevent the obstruction of a stream of water on his neighbour's land above his own: he appropriates to his own use for the purpose of habitation, and uses for that purpose as of right, every ray of light, which passes over his neighbour's land; and after 20 years' enjoyment with the acquiescence of his neighbour, he has as great a right to have light pass in its natural and accustomed course, so far as is necessary for the reasonable and comfortable use of his house, as he would to have to a stream of water passing over his neighbour's land, without obstruction. But he cannot appropriate more of the light than is necessary. If he requires more either for luxury or for delight, or to increase the value of his property, he must obtain an express grant. The law of presumption (*i. e.*, by prescription) will not assist him." It was further observed that, "principles of general convenience, upon which the presumptions of right to light by prescription or grant depend, require that lights in a dwelling house, which have been uninterruptedly used for a long time, should not be darkened so as to render the house unfit for comfortable habitation; but they do not require such presumption as would impede the erection of buildings on the servient tenement which would not deprive the dominant house in any degree of what was reasonably necessary for comfortable habitation." Because, "a right to the unobstructed access of light is not a property or interest in the light itself; nor a right to be enjoyed in, or over, the soil of the adjacent owner." (*Bengal Law Reports*, III, p. 18, &c.)

And for the disturbance of a neighbour's privacy by a person opening a window in a wall of his own house, it has

been held, as above seen, that no action is maintainable, for the law does not favor the wishes of the dainty; nor does it encourage one to enjoy luxury at the expense of another. So far back as 1844, a suit was filed in the Court at Trichinopoly in the Presidency of Madras, in which plaintiff, a Mahomedan, questioned the right of his neighbour the defendant to place a window in an upstair room recently constructed by him—the Pundit Sudr Ameen before whom the suit was filed dismissed the suit; but the Assistant Judge in appeal decreed that the windows should be blocked up as affording to a person so disposed, facilities for prying unobserved into those portions of his neighbour's house which were gosha. The suit was carried before the Madras Sudr Udalut Court, who dismissed the plaintiff's claim, making the following observations :—" It is obvious that a doctrine such as the foregoing is erroneous, and cannot stand for a moment in a Court of Justice, contravening as it does an acknowledged principle of law, ' *Cujus est solum, ejus est usque ad cœlum.*' If it were allowable (which cannot be doubted) to build an upper room, it was allowable to place windows in it." (*Madras Sudr Udalut Decrees*, II, p. 81, No. 80 of 1844.)

Again in 1866, a similar question came before the Madras High Court in *Komathi* v. *Gurunadha Pillai ;* and it was held that the invasion of privacy by opening windows is not treated by the law as a wrong for which any remedy is given. The following is taken from the judgment of his Lordship, Mr. Justice Holloway :—" As to the English law as to the invasion of privacy by the opening of windows, the following passage is directly in point :—'Again there is another form of words which is often found in the cases on this subject, namely, the phrase, ' invasion of privacy by opening windows.' That is not treated by the law as a wrong for which any remedy is given. If A is the owner of beautiful gardens and pleasure grounds, and B is the

owner of an adjoining piece of land, B may build on it a manufactory with a hundred windows overlooking the pleasure grounds; and A has neither more nor less than the right, which he previously had, of erecting on his land a building of such height and extent as will shut out the windows of the newly erected manufactory.' * * * * This shows that the law of England does not recognise the right here claimed. It has, however, been recognised by continental jurists. * * * * * * We have, therefore, to choose in this case between the views of the continental lawyers and those of our own; and I confess that I look with so much apprehension upon the establishment, among a very litigious people, of rights of a very shadowy character that I cannot doubt that the English rule is the safer one. I cannot but think that the establishment of such a right would lead, in populous neighbourhoods, to a very mischievous abridgment of the liberty of property, and in rural neighbourhoods it would be difficult to say to what inordinate lengths such a claim might not extend. I am of opinion that there is no such right of privacy." (III, *Mad. H. C. R.*, 141.) In the same case his Lordship, Mr. Justice Innes, also held the same view, and explained the inconsistency of the principles on which the continental systems of law (the French and so forth) are based. His Lordship observed :—" A has a piece of ground in a street and a house upon it; and B possesses a piece of ground on one side of it (say the south), immediately adjoining the house of A. A's house faces the street to the west, but has several windows and a door open to the south. Soon after the erection of A's house, C purchases of B the ground adjoining to the south of it. He goes to examine his purchase, and standing upon his own open ground, receives the rays of light from various directions, and among others from the direction of A's windows and doors. In common parlance he sees through A's windows and doors and invades A's privacy. This is not regarded in any system of law as an actionable wrong, simply because,

if a man turns his eyes in a particular direction, he must perceive the object, which the rays of light from that direction convey to them; and it would be too absurd to say that a man may not come upon his own ground and turn his eyes in any direction he pleases. But if C builds upon a portion of his ground, the right which was *not* denied him when he received it on a large scale, the right, that is of looking in every direction, trespassing with his eyes upon A's privacy, and viewing the interior of his room from any part of his open ground, is at once gone. True it is that the angle of vision, which was before only limited by the extent of C's ground, is now narrowed and confined to the space occupied by the few windows which C can put into the north wall of his house. Yet this more limited means of reception of the rays of light by the eyes, and the more limited view which he thereby obtains of the interior of A's house, becomes a wrong, whereas a more complete traverse of it from the open ground was not so regarded."—*(Ibid.)*

In Bombay, a somewhat different decision was passed by the High Court of that Presidency in *Maneshauk Hargonan* v. *Trikam Narsi*; but it had reference to the usage of a particular locality. There the Honorable Judges observed, "A series of decisions extending over a long number of years has settled the question, that in accordance with the usage of Gujerat, a man may *not* open new doors and windows in his house, or make any new apertures, or enlarge old ones in a way, which shall enable him to overlook those portions of his neighbour's premises, which are ordinarily secluded from observation, and in this manner to intrude upon that neighbour's privacy; and that an invasion of privacy is an infraction of right for which the person injured has a remedy at law. The rulings of the late Sudr Court and present High Court on this point have been founded on the long established usage of the province, and though

opposed to the doctrine of the English law, must be upheld and affirmed. The decision of the Madras High Court in *Komathi* v. *Gurunadha Pillai*, (III, M. H. C., 141), which has been cited to show that an invasion of privacy is not an actionable injury, is not an authority which we can follow in a matter of this kind which is governed by the usage of the District, which has been frequently declared. The usage is not altogether singular, as a similar custom is recognised by the law of France, (V, *Bombay, H. C. R.*, p. 42.)

Hitherto we have been discussing the Maxims with reference to the civil liability which a person would incur by the improper or negligent use of his property. Under the Indian Penal Code, some negligent acts can be made the subject of an indictment also, as for instance, a negligent act likely to spread infections of any disease dangerous to life, negligent driving or riding on a public way, negligent navigation of a vessel, negligent conduct with respect to any poisonous substance, or any fire, or combustible matter, or explosive substance, or machinery in one's possession or charge, or pulling down or repairing buildings, or any animal, are all offences, and the offenders are punishable in a Criminal Court. (Vide Chap. XIV, *I. P.* C.)

And with respect to Nuisances, it is to be remarked that they are of two sorts, public and private. Those which only affect individuals can only be made the subject of a civil action as shown in the preceding pages, and the offenders are not liable to be prosecuted in a Criminal Court.

But public nuisances can and ought to be made the subject of a criminal prosecution. The law gives no private remedy for anything but a private wrong. Therefore no action lies for a public or common nuisance, but the remedy is an indictment in a Criminal Court. The reason of this is that the damage being common to all the subjects of the Crown, no one individual can be said to have sustained any particular proportion of it; or if he could, it would be

extremely hard if every subject in the kingdom were allowed to harrass the offender with separate actions. (*Black. Commentaries*, 1—219.) But a civil action can be maintained for any *special damage* done to an individual by means of any public nuisance.

A public nuisance is thus defined in the Indian Penal Code. "A person is guilty of a public nuisance who does any act, or is guilty of an illegal omission, which causes any common injury, danger, or annoyance to the public, or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage." (S. 268, *I. P. C.*); and the offender is criminally punishable under S. 290 of the same Code.

A Magistrate may order the removal of a public nuisance; may prohibit the repetition or continuance of public nuisances, and is empowered to prevent obstructions. (*Criminal Procedure Code*, S. 518, &c., and *Town Police Magistrates' Act* XXI of 1864.)

In illustration of the abovementioned Section 268 of the I. P. C., Mr. Mayne observes that, "in general it may be laid down that anything which seriously affects the health, comfort, safety, or morals of the community, may be indicted as a public nuisance. For instance, keeping filth upon premises, or exercising offensive trades, which destroy the purity of the air, keeping a savage bull in a field through which there is a footway; keeping ferocious dogs unmuzzled; bringing a horse diseased with glanders into a public place to the danger of infecting the Queen's subjects; exposing a child infected with small-pox in the public streets; keeping gunpowder, naptha, or similar inflammable property, in such large quantities as to be dangerous to life and property; keeping brothels and common gambling houses; brick burn-

ing, when carried on in such manner as to be generally noxious or offensive to the neighbourhood;" &c., &c., &c. (For references see Mr. Mayne's Com. on I. P. C.)

And under the I. P. C. "nothing is an offence which is done by an accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means, and with proper care and caution. Thus A is at work with a hatchet; the head flies off, and kills a man, who is standing by. Here if there was no want of proper caution on the part of A, his act is excusable and is not offence. (S. 80.)

We have so far discussed Maxims with reference to one's liability for wrongs committed in the *use* or *enjoyment* of his own property. It must be remembered that the foregoing Maxims are applicable also to acts affecting one's *disposal* of one's own property, and even to acts affecting one's *own body*. So, if a person removes, conceals, delivers, or transfers, his own property without adequate consideration, intending thereby to cause loss to his creditors, &c.; or if he shoots his own horse, or throws his own ring into the sea, intending to cause loss to others, he will be guilty of the offences falling under Secs. 421, 425, &c., of the Indian Penal Code, and is liable to be punished accordingly. And so, is a person punishable under Sec. 309 of the Indian Penal Code for attempting to commit suicide and doing any act towards the commission thereof, because the suicide of a person causes injury to his people and to the public in general as shown under Maxim relating to offences.

And as regards the power of speech or giving expression to one's thoughts, any person is at liberty to use his gift of language in any way he thinks proper, either in speaking or writing; but he should take care that he does not insult or defame any other person thereby; for if he does so, he will render himself liable to a civil or criminal action according to

the nature of each particular case. (S. 499, *I. P. C.*) But under the Indian Penal Code, this restriction does not extend to the imputation of any truth which the *public good* requires to be made; to the expression in *good faith* of any opinion respecting the conduct of a *public* servant in the discharge of his *public* duties, or respecting the conduct of any person touching any *public* question, or respecting the character of any such persons, only so far as his character appears in that conduct;—to the publication of a substantially true report of the proceedings of a Court of Justice;—to the expression of any opinion respecting the merits of any civil or criminal case which has been decided by a Court, or respecting the conduct of a party, witness or agent in any such case, or respecting the character of such person as far as his character appears in that conduct and no further;—to the expression in *good faith* of any opinion respecting the merits of a *public* performance; to censures passed in *good faith* by a person having lawful authority over him; to accusations preferred in *good faith* to a duly authorized person; to an imputation made in *good faith* by a person for the protection of his interest; and to a caution intended for the good of any person or the public. (Exceptions to S. 499 of the *I. P. C.*)

MAXIM 107.

Commercium jure gentium commune esse debet, et non in monopolium et privatum paucorum quaestum convertendum.—*(3 Inst. 56.) Commerce, by the law of nations, ought to be common, and not be converted into a monopoly, or to the private gain of a few.*

"Man has been defined by some naturalists as an *exchanging animal*,—an animal who buys and sells,—that being an act performed by no other living creature, and thereupon suitable as a distinction in character, though others much more exalted, might readily be found. The practice

of exchanging one commodity for another is doubtless coeval with the first herding of mankind together. No man, even in the rudest savage state, and who lives in the society of neighbours, can rest satisfied with such objects as he can procure or fashion by his own labor. He must depend on others for assistance, while he assists them in return. The cultivator of the ground would exchange some of its produce for an animal from the flocks of his neighbour, and both would be glad to give a portion of their wealth for the clothing or weapons made by a third party. Thus *exchange* becomes a matter of convenience between two parties, each of whom is anxious to obtain a share of the other's goods for a share of his own, and mutual advantage is the result. Such desires and practices must have been displayed in the very earliest stages of society. As mankind advance in their social condition, the practice of exchanging increases; the desires and necessities become more urgent; each person finds it more profitable and agreeable to adopt and hold by one fixed employment, and to sell the produce of his labor for a variety of articles made by others, than to attempt to make everything for himself; and, finally for the sake of convenience, a class of persons are engaged to conduct the exchanges from one hand to another. In this improved condition, the production of articles of general consumption is called *manufacturing;* while that department of industry in which the exchanging is transacted is called *trade* or *commerce.*" *(Chambers.)*

But the advantages of commerce are lost if it is subjected to restrictions and interferences either on the part of the State, or of one powerful individual or an influential few. The Native laws of India, however, did at one time sanction such restraints. "Once in five nights," says Menu, "or at the close of every half month, according to the nature of the commodities, let the king make a regulation for market prices in the presence of the experienced men. Let the

king establish rules for the sale and purchase of all marketable things, having duly considered whence they come, if imported; and whither they must be sent, if exported; what may be gained by them; and what has been expended on them. With vigilant care should the king exert himself in compelling merchants and mechanics to perform their respective duties; for when such men swerve from their duty, they throw this world into confusion." (*Menu*, VIII, 401—402 and 418.) But under the British rule all such interferences with commerce have been done away with. The effect of sellers being left to consult their own interests and inclinations, may to a casual observer seem to be unfavorable to the interests of the public in general; but in reality, we may rest assured, the public reap the greatest possible advantage from a system of free trade. It is therefore held to be a matter of the greatest importance never to interfere in any shape, to prevent men from dealing in whatever manner they choose, provided they act in conformity with strict justice. Of course there may be an exceptional state of circumstances when the Government would be justified in taking, and indeed would be called upon to take, the initiative and the lead in opening up any special branch of industry, as for instance, in India, where the population are ignorant of the advantages of western modes of art and manufacture for promoting the welfare and material prosperity of the country; but when once the lesson has taken effect and the people become alive to the benefits opened out to them, it then becomes the duty of the State to retire, and refrain from interfering any further with private enterprize.

One of the classes of constructive frauds, and so deemed because inconsistent with the general policy of the law, is, says Mr. Justice Story, that of bargains and contracts made in restraint of trade. And here, the known and established distinction is between such bargains and contracts as are in general restraint of trade, and such as are in restraint of it

only as to particular places or persons. The latter, if founded upon a good and valuable consideration, are valid. The former are universally prohibited. The reason of this difference, is that all general restraints upon trade have a tendency to promote monopolies, and to discourage industry, enterprize, and just competition, and thus to do mischief to the individual, by the loss of his livelihood and the subsistence of his family, and mischief to the public by depriving it of the services and labor of a useful member. But the same reasoning does not apply to a special restraint not to carry on trade in a particular place, or with particular persons, or for a limited reasonable time; for this restraint leaves all other places, persons, and periods, available for the purpose of carrying on the trade or calling thus partially restrained. And it may even be beneficial to the country that a particular place should not be overstocked with artizans or other persons engaged in a particular place or business; or a particular trade may be promoted by being for a short period limited to a few persons; especially if it be a foreign trade recently discovered, and capable of being beneficial but to a small number of adventurers. And, for a like reason, a person may lawfully sell a secret in his trade or business, and restrain himself from using that secret. *Story on Equity*, p. 278 to 280. Vide also IV, *Mad. H. C. R.*, 77; *Mitchell* v. *Reynolds in Sm. L. C.*, 340; *and Veerapermall Pillay* v. *Cammiade, Martin and Co.*, VIII, *Madras Jurist*, 206.

Under the Indian Contract Act all contracts, by which any one is restrained from exercising a lawful profession, trade or business of any kind, are to that extent void. The following are exceptions:—

1. One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries

on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

2. Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership, within such local limits as are referred to in the last preceding exception.

3. Partners may agree that some one or all of them will not carry on any business other than that of the partnership, during the continuance of the partnership. (S. 27.)

It must be borne in mind, however, that such agreements in restraint of trade are *divisible*. (S. 27, *Ind. Con. Act.*) And accordingly it has been held that where such agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void as being in restraint of trade, whilst the other is not, the Court will give effect to the latter and will not hold the agreement to be void altogether. *(Chitty on Contract,* p. 617.*)*

Not only should the commerce be unrestrained, but there should also be no monopoly of trade. Monopoly is an exclusive right secured to one or more persons to carry on some branch of trade or manufacture; or the sole power of selling any species of goods. Monopolies, therefore, are not recognized in British India except in two cases; firstly, the exclusive right of an invention or improvement of any manufacture; and secondly, the monopoly of certain trades carried on for the support and benefit of the State.

As to patents, the general rule is that the original inventor of a new manufacture is entitled to priority as a patentee, and that consequently any subsequent inventor will be unable to avail himself of his new invention. The duration of this privilege and the conditions upon which it is granted will be found in Act XV of 1859.

As to the monopoly of any article of commerce reserved for the advantage of Government, the reader is referred to the legislative enactments in force relative to the manufacture and sale of salt and opium.

MAXIM 108.

Obligatio est juris vinculum, quo necessitate astringimur alicujus solvendae rei secundum nostrae civitatis jura. *(Just. Inst.* Lib. III, Title XIII.*)—An obligation is a tie of law, which binds us to render something according to the rules of our civil law.*

"Obligatio" is, as the Maxim expresses it, a *vinculum, i. e.*, a chain—a special tie—between two or more particular persons. Unless an action *could* be brought to enforce an obligation, the obligation has no legal validity. It is by having an action attached to it that an obligation, properly so called, a *civil obligation*, is distinguished from a *natural obligation*, which, however clearly it may be recognized as a part of man's duty, yet is not made compulsory by having an action attached to it. The person bound by an obligation, is, according to the nature of each particular contract, obliged *dare, i. e.*, to give the absolute ownership of a thing; or *facere, i. e.*, to do or not to do some act; or *praestare, i. e.*, to provide or furnish any advantage or thing, the yielding which could not be included in the limited sense of the word *dare*. The word *solvere* is used in the maxim as a general expression for the fulfilment of an obligation, and includes those three words *dare, facere* and *praestare*, which are used to embrace all the possible duties that an obligation could create. (Vide *Sand. Inst. of Justinian*, p. 409.)

The English lawyers generally use the word *obligation* in a strict and technical sense, namely, as importing only one particular species of contracts, that is, *Bonds*; and they

adopt the term "Contract" when they wish to convey the more extensive idea of the responsibility which results from the voluntary engagement of one individual to another, as distinguished from that class of liabilities which originate in torts, or wrongs unconnected with agreement. In the language of English law, therefore, the term "Contract" comprises, in its full and more liberal signification, every description of agreement, obligation, or legal tie, whereby one party binds himself, or becomes bound, expressly or impliedly, to another to pay a sum of money, or to do or omit a certain act; but in its more familiar sense, it is most frequently applied to agreements not under seal. *(Chitty on Contracts,* 1.*)*

The French Civil Code (Art. 1101) defines a contract as a convention by which one or more persons create an obligation towards one or more other persons to do or not to do something. The Italian Civil Code (Art. 1098) defines a contract as the agreement of two or more persons to establish, regulate, or dissolve between themselves a juridical bond. The New York Civil Code, (S. 744) defines a contract as an agreement to do or not to do a certain thing. The following definition of a contract is laid down in Savigny's System of Modern Roman Law, (S. 140.) "A contract is the agreement of several persons in a concurrent declaration of intention, whereby their legal relations are determined."

The Indian Contract Act (IX of 1872) is now the governing law of British India on the subject; except in matters of sale of immovable property, bills of exchange, &c., in regard to which we are still left to gather the rule from the English and Native laws; and except also, we may suppose, in cases of contracts coming before the High Courts of Judicature, as the statutes, by which they are bound to decide questions of contracts between Hindus and Mahomedans according to their respective laws, have not

been repealed. The following is the definition of contract as laid down in the Indian Contract Act; namely, "When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence he is said to make a *proposal*. When the person to whom the proposal is made, signifies his assent thereto, the proposal is said to be *accepted*. A proposal when accepted becomes a *promise*. Every promise and every set of promises forming the consideration for each other is an *agreement*. An agreement enforceable by law is a *contract*." (Sec. 2, *Ind. Contr. Act.*)

It must be remembered that *the intention of the parties governs the contract*, whatever that contract may be. But the difficulty of ascertaining that intention is very great. "The person to whom the promise is made, or promisee, as he is called, may say," observes Mr. Justice Markby, "that he intended one thing, and the promiser may say that he intended another. In which sense is the promise to be taken? Paley discussing this question, says: 'It is not the sense in which the promiser actually intended it, that always governs the interpretation of an equivocal promise; because, at that rate, you might excite expectations which you never meant, nor would be obliged to satisfy. Much less is it the sense in which the promisee actually received the promise; for, according to that rule, you might be drawn into an engagement you never designed to undertake. It must, therefore, be the sense (for there is no other remaining) in which the promiser believed that the promisee accepted his promise.' Austin, remarking on this passage of Paley, says that if this rule be adopted, should the promiser misapprehend the sense in which the promisee accepted the promise, either the promisee will be disappointed, or he will get more than he expects; and he suggests that the true guide is the understanding of both parties. Paley's

two first propositions are undoubtedly correct. Austin's criticism, however, on what Paley considers as the only other possible alternative is, as undoubtedly sound. But with the greatest respect for so high an authority, it appears to me that Austin, in his own suggestion, merely falls back on the old difficulty; for the difficulty arises when the parties aver that they understood the promise in different ways, which in every equivocal promise is, of course, possible.

"The practical solution of the difficulty is, I think, simple enough. Austin rightly points out that there is a distinction between the intention of the parties, and the sense of the promise. But this distinction hardly avails anything for our present purpose. Even the sense of the promise may be different to different persons; the promiser may consider that his words bear one sense; the promisee may consider that they bear another; and a stranger may consider that they bear a third. There is but one way out of this difficulty. The Judge, who has to decide what legal obligation has resulted from the transaction, may fairly use all these as a guide to his own conclusion. Having first ascertained the terms in which the parties expressed themselves, he may hear what each party says as to their true interpretation, and what each respectively says he intended by them; he may also consider what interpretation would be put upon them by an uninterested man of ordinary understanding. He may even go further, and consider the surrounding circumstances, so far as they throw light upon either the sense of the promise, or the intention of the promiser, or the expectation of the promisee. But after all, he must put upon the words his *own* interpretation; and from the sense which *he* attaches to the words he must *presume* the intention. So that the current phrase 'the intention governs the contract' is really only true to this extent, that it governs the contract where both parties are agreed what the intention was. Where there is a dispute as

to the intention, the contract (strictly speaking) is governed by the intention, as it is presumed from the sense which, under all the circumstances, the Judge thinks fairly attaches to the promise." (Secs. 173 and 174.)

According to the Hindu and Mahomedan laws, where a contract is in itself legal and the parties are capable of contracting, the principal point insisted upon is the mutual intention and consent. For this purpose the terms of the contract must be clearly understood; and where such is the case, no stress is laid on the reduction of its stipulations to writing or the execution of a deed,—oral agreements being of equal validity with written covenants. *(Houston's Hin. and Mah. Law.)*

Under the Indian Contract Act, all agreements are contracts (or in other words, all agreements are enforceable by law) if they are made by the free consent of the parties competent to contract, for a lawful consideration, with a lawful object, and are not expressly declared by the Indian Contract to be void. (Ibid, S. 10.) Hence it may be said that (1) consent and capacity of the parties, and (2) the lawfulness of the object and consideration, are the essentials of a contract. The Hindu and Mahomedan laws likewise consider the foregoing to be essentials of a valid contract.

The succeeding Maxims will illustrate each of these conditions and other particulars connected with a contract; and the reader is further referred to the undermentioned enactments in regard to the various subjects or branches of a contract:—

The Indian Contract Act.
Act IX of 1872.

Bills of Exchange.
Act VI of 1840.
„ V of 1866.

Hire or Rent of Land.

Reg. IV of 1822.
Act VIII of 1865. } Madras.
„ II of 1871.

Reg. LI of 1795.
„ XXX of 1803.
Act VI of 1853.
„ X of 1859.
VI of 1862.
XIV of 1863.
VIII of 1865.
„ IV of 1867.
} Bengal and N. W. Provinces.

„ XIX of 1868. —Oudh.
„ XXVIII of 1868. —Punjab.

Loans and Interest.

Act XXXII of 1839.
„ XXVIII of 1855.

Mortgages.

Act I of 1803.
Reg. XXXIV of 1863. } Bengal.
„ XVII of 1806.
„ V of 1827. —Bombay.

MAXIMS 109 and 110.

(109.) Minor ante tempus agere, non potest in casu proprietatis, nec etiam convenire. *(2 Inst. 291.)—A minor before majority cannot act in a case of property, not even to agree.*

(110.) Furiosus stipulare non potest, nec aliquid negotium agere, qui non intelligit quid agit. *(4 Co. 126.) —A mad man, who knows not what he does, cannot make a bargain, nor transact any business.*

We have seen while discussing the preceding Maxim that to constitute a binding agreement, there must exist the

assent of the parties that a certain act shall be done or omitted. But a person cannot be said to assent that he will be bound, unless he be endowed with such a degree of reason and judgment as will enable him to comprehend the subject of negotiation. Hence it is that the assent which is requisite to give validity to a contract, necessarily presupposes a free, fair, and serious exercise of the reasoning faculty; or in other words the power, both physical and moral, of deliberating upon and weighing the consequences of the agreement about to be entered into. If therefore either of the parties to an agreement be absolutely deprived of the use of his understanding, or if he be deemed by law not to have attained to it, there can in such a case be no *aggregatio mentium*; and consequently no agreement shall bind him. Upon these principles, contracts of persons of non-sane minds and infants are not binding. *(Chitty on Contracts*, p. 131.*)*

The Indian Contract Act provides that every person is competent to contract, (1) who is of the age of majority, (2) who is of sound mind, and (3) who is not disqualified from contracting by any law to which he is subject. (Section 11.)

Firstly, as to Minors:—Generally judgment ripens with years. The law not being able to ascertain in each individual case whether the contracting party is fit to be entrusted with the control of his affairs or not, is obliged to fix an arbitrary limit of age under which all persons are supposed deficient in that qualification. The Indian Contract Act has not fixed any period of minority, but Section 11 of that Act provides that such period shall be determined according to the law to which the party is subject. In the English law, the age of twenty-one years has been fixed as the period when an absolute and unlimited legal liability to contract shall commence. *(Chitty on Contracts*, p. 137*)*; whereas under the Hindu and Mahomedan laws the age of majority is fixed at sixteen years, except in Bengal where

fifteen years is the limit in the case of a Hindu. But with reference to minors under the charge of the Court of Wards, majority does not commence until the eighteenth year; and under Indian Succession Act minority ends with eighteenth year also. (Vide Maxim relating to Minor and Guardian.)

Secondly, as to insanes:—A person is said to be of unsound mind for the purpose of making a contract if, at the time when he makes it, he is incapable of understanding it and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind. A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals. A sane man who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts. *(Ind. Cont. Act*, S. 12.)

And *thirdly*, as to persons otherwise disqualified from contracting by any law to which he is subject, it is to be observed that an English married woman has in general no capacity to contract, so as to sue or be sued either with, or without her husband, on her contracts made during coverture; for she has in contemplation of law no separate existence, her husband and herself being in law but one person; nor has she any means of satisfying her engagements, her husband being entitled to her rights. *(Chitty on Contracts*, p. 169, &c.); but the case might be different with Europeans domiciled in India, and with others, who are affected by the Indian Succession Act, which (Sec. 4) holds that the interests and powers of any person are not lost or acquired by marriage; thus recognizing the separate

estate and legal existence of a married woman. It must also be added that Hindu and Mahomedan married women are always capable of entering into contracts, for the laws recognize their separate estates and legal positions. Contracts of alien enemies, outlaws, bankrupts, and insolvent debtors, are not ordinarily enforcible. *(Chitty on Contracts,* p. 174, &c.*)* For further particulars, vide Maxim 137, "You ought to know with whom you bargain."

But with reference to all the foregoing classes of incapacitated persons, it must be observed that if any such person, or any one who is legally bound to support such person, is supplied by any other person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person. *(Ind. Cont. Act,* S. 68.*)*

MAXIMS 111 and 112.

(111.) Ex nudo pacto non oritur actio. *(Plow. Com.,* 305.*—From a nude contract, i. e., from a contract without consideration an action does not arise.*

(112.) Pacta quae contra leges constitutiones que vel contra bonos mores fiunt, nullam vim habere, indubitati juris est. *(Br. Max.)—It is a principle of law that contracts which are opposed to laws and constitution of the realm, or which are contrary to good morals, shall have no effect.*

The earliest records of the law of England show that the above Maxim *ex nudo pacto non oritur actio* was always recognized in that country. But it is a principle not peculiar to English law. It obtained generally speaking, in the Civil law; and indeed the English have borrowed from the Roman Jurists the term *nudum pactum,* as applied to promises without consideration. It is equally a maxim in

the French law that a consideration or cause is essential to the validity of a promise. A gratuitous undertaking may form the subject of a moral obligation,—it may be binding on honor,—but it does not create any legal responsibility. It is not unreasonable to assume that it was entered into improvidently; or that the party to whom it was made has not sustained any serious injury from the neglect to observe it; and the law cannot reasonably be expected to enforce such an imperfect obligation of this nature. *(Chitty,* p. 17.*)* Under the Hindu law, not only must the parties be in a legal state to contract, but the subject or cause of their contracting must be a competent one according to the apprehension of the law. *(I, Str. Hin. Law,* 128.*)*

According to the Indian Contract Act, a lawful consideration is essential to the validity of a contract, and a consideration is thus defined :—"When at the desire of the promiser, the promisee, or any other person, has done or abstained from doing, or does, or abstains from doing, or promises to do or to abstain from doing, something, such an act, or abstinence, or promise, is called a *consideration* for the promise."

An agreement made without consideration is void, unless (1) it is expressed in writing and registered under the law for the time being in force for the registration of assurances, and is made on account of natural love and affection between parties standing in a near relation to each other; or unless (2) it is a promise to compensate, wholly or in part, a person, who has already voluntarily done something for the promiser; or something which the promiser was legally compellable to do, or unless (3) it is a promise made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part, a debt of which the creditor might have enforced payment, but for the law for the limitation of suits. In any of these cases, such an agreement is enfor-

cible by law. *(Ibid,* S. 25.*)* But nothing in this Section 25 shall affect the validity of a contract as between the donor and donee of any gift actually made; and an agreement to which the consent of the promiser is freely given, is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promiser was freely given. *(Ibid,* S. 25.*)*

The consideration or object of any agreement is lawful, unless it is forbidden by law, or is of such a nature that if permitted it would defeat the provisions of any law; or is fraudulent or involves, or implies, injury to the person or property of another; or the Court regards it as immoral or opposed to public policy. In each of these cases the consideration or objects of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void. *(Ind. Con. Act.)*

A contract for the division of gains acquired by fraud; a contract that one would pay another a certain sum of money if he could get him an employment in the public service; a contract that one should receive a certain sum of money if he drops a prosecution of some public offence; a contract for letting a female for prostitution; and an agreement in restraint of marriage of any person other than a minor cannot be enforced. *(Ind. Con. Act.)*

An agreement by which any person is restrained from exercising a lawful profession, trade or business of any kind, is void to that extent, except that an agreement not to carry on business of which the good will is sold, and also the agreement made between partners prior to dissolution in reasonable restraint of trade, are not invalid. *(Ind. Con. Act*

Every agreement by which any party thereto is restrained absolutely from enforcing his rights under, or in respect of, any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent ; except that the contract to refer any dispute to arbitration is not void. *(Ind. Con. Act.)*

Agreements by way of wager are void, except a subscription, &c., in favor of the prizes of the value of Rs. 500 or upwards for horse-racing. *(Ibid.)*

In *Kandan Chetty* v. *Coorjee Seit*, it was held that a contract to pay money in consideration of one's foregoing a criminal prosecution was opposed to public policy and that it would not be enforced. The consideration to support the promise in such a contract was vicious. (II, *Mad. H. C. R.*, 187.)

In *Pichakutty Moodelly* v. *Narrainappah Iyen*, it was held that a contract would be vitiated by reason of illegality, if it appeared upon the face of the plaint, or if it were established by evidence independently of the written agreement, that the arrangement was that the defendant should use corrupt or illegal means, or improperly exercise any personal influence which he possessed, or professed to possess over a public servant, in order to obtain a more favorable assessment on certain lands. (II, *Mad. H. C. R.*, 243.)

Contracts savouring of maintenance and champerty being opposed to public policy, are not enforcible. Maintenance of suits is where one officiously intermeddles in a suit depending in any Court which no way belongs to him, by maintaining or assisting either party with money or otherwise to prosecute or defend it. And Champerty is the purchasing a suit or right of action of another person, or rather it is a bargain with a plaintiff or defendant to divide the land or

other matter sued for, between them, if they prevail at law; whereupon the purchaser is to carry on the party's suit at his own expense. These are under the English law public offences, and all contracts which have either of these offences within their object or operation are invalid. *(Chitty on Contracts,* p. 622.*)* In India too, such contracts would be void on the score of fraud, or of being against public policy. Indeed it seems to be the tendency of the Indian Courts to discountenance such contracts. *(Pitchacootty Chetty* v. *Kamala Naiken,* I, *Mad. H. C. R.,* 157; *Grose* v. *Amritmayi Dase,* IV, *Beng. L. R., Origl. Juris. Civil,* 1 to 50; and *Mulla Jaffaraji Tyeb Ally Saib,* v. *Yacali Kadar Bi,* VII, *Mad. H. C. R.,* 128.*)* The following is taken from the Judgment of Mr. Justice Holloway in the last-mentioned case.

"It is an agreement to maintain a suit already commenced by lending funds for its conduct, and a bargain to have the whole of the thing in dispute and something more. Only half of it is asked in the present suit, and the stipulation for the whole will be a merely philological not a legal objection to calling the transaction Champerty. That this is illegal both by the Common and Statute law of England there is no doubt. (*Tindal,* C. J., 7 *Bing.* 378; *Eldon,* C. 18, Ves. 129). This last case is important as affirming the criminal law of England upon this matter as stated in Hawkins. These great masters of the law of England were therefore unaware that the doctrine of Champerty and Maintenance had disappeared from the law both civil and criminal. Further the Statute (1, Hawk. P. C. 462, 8th Ed.) and the Common Law which it affirmed is the law of this Court. The last Edition of Russell shows very clearly that it is still an indictable offence, and there is not a single case to justify the notion that the Judges have illegally repealed these Acts of Parliament.

"*Findon* v. *Parker*(*a*) (the poor man of Lord Abinger)

(*a*) 11 M. and W., 682.

was decided on the ground that those who agreed to conduct the suit had a common interest and was clearly within the exception of Section 14 of Hawkins. The dictum of the Chief Baron was not the ground of the decision.

"*Sprye* v. *Porter*,(*a*) went on the express ground that the declaration was not bad upon its face, because it did not appear that any suit was depending or that any suit was to be instituted. It seems not to have been noticed that 7th, 8th, and 9th pleas were on demurrer held good. They stated a case of maintenance by a promise to supply information and evidence. Again no authority for the abolition of the doctrine, but quoting *Stanley* v. *Jones*, 7 Bing, as authority for its existence.

In *Fischer* v. *Kamala Naick*, the Court went solely upon the ground that there was no quality of Maintenance or Champerty in it. The case is, as Phear, J., says, an authority for applying the rule if such an agreement is contrary to public policy on this ground and not the contrary. (IV, *Ben. L. R.*, 48.)

"*Anderson* v. *Ratcliffe*, (E B., and E. 806) is not a case of Champerty, but distinctly recognizes its existence.

Cockell and Taylor (15 Beav, 106, 115,) was a sale of an interest in a fund in Court.

"*Knight* v. *Bowyer*, (23, Beav 609, 628; 2 De G. and J,, 421-444) decides that a purchase by an attorney may be impeachable by the client, but does not in itself render the transaction null and therefore a defence to third persons on the ground of the absolute invalidity of the title conveyed by it.

"The cause of *Earle* v. *Hopwood* (9, C. B. N. S., 566) expressly decides that a contract is illegal upon the ground of this abolished doctrine of maintenance, and the judgment shows that it would have been even more clearly illegal if

(*a*) 7 E. and B., 58.

there had been a stipulation for the division of the fund. The relation was that of attorney and client, but the judgment goes expressly upon the general doctrine.

"There is therefore nothing whatever to justify the notion that where the law of England prevails, and in this Court it does, where there is nothing in the law of contracts of Hindus and Mahomedans to affect it, such a contract as this is not void. It is a contract distinctly forbidden and indictable by common law and by statute, and nothing is clearer than the invalidity of any contract which even tends to violate an Act of Parliament. *Fisher* v. *Bridges*, (3 E. and B. 642) was a strong application of this undoubted rule. The criticisms upon the case do not touch its applicability here, for this contract is a direct violation of the statute and of the common law.

"In IV, Beng. L. R. O. C. I., the learned Judges in a case differing from the present by the circumstance that it was complicated by the question, whether the agreement of the widow could bind the reversioner, were somewhat hampered by the question whether the law of the Original jurisdiction or that of the Mofussil ought to prevail, and set aside the sale on the ground that it was a gambling speculation. Mr. Justice Phear however expressed a strong opinion from his own observation that such trafficking in litigation was contrary to public policy and ought to be held void everywhere. Although not strictly necessary in the present case in which the law of England governs, and in which not only is there a stipulation to lend money for carrying on the depending suit on condition of a share (or rather the whole) of the proceeds, but to make the plaintiff master of the litigation by compelling it to be carried on by an attorney determined by him, I must express my entire concurrence with the opinion of Phear, J.

"The next question is whether this contract is vicious and impeachable upon other grounds than the plain provision of

the common and statute law against maintenance. Now although in the case (*Grose* v. *Amirtamayi Dasi*, IV, *Beng. L. R. O. C. J.*) Mr. Justice Phear clearly expresses, and Mr. Justice Macpherson plainly indicates, that even in the Mofussil contracts infected with maintenance and Champerty are void upon the ground of public policy, a proposition covering more than this case requires,—the Chief Justice, without saying that he differs, says (p. 29) that if not void on the ground of Champerty, it was so against the reversionary heirs, on the ground that it was an unconscionable bargain and a speculative if not a gambling contract. For this position he refers to a batch of cases in the Privy Council now reported at XII, Moo., 275. The reference to gambling there was made to show that the gambler had not fairly laid down his stake, that the contract was for present payment of a certain sum which was never paid, and that specific performance ought not to be granted when the one side was only ready to pay, now that the risk had ceased altogether. The iniquity of getting the whole stake on the other side when the risk has been diminished is the point (p. 308). I doubt therefore whether this case is a distinct authority for the judgment of the Chief Justice. If, however, it would be void as a gambling transaction, it can scarcely be improved by the circumstance that the plaintiff staked nothing at all, that he played the game with loaded dice.

"I have been pressed to give my opinion whether irrespectively of the Common law such contracts ought to be held void on the ground of their antagonism to public policy. I here call in aid the vigorous observations of Phear, J., and as the present case does not absolutely demand the decision, I shall be more brief than the importance of the question would otherwise require. "Hume, quoted 1 R. C. and M. 254, points out that associations for carrying on law suits were substituted for the old associations for robbing and violence. (See Chap. XIII.)

"In this country it may be added that this is now the favorite instrument for revenging private quarrels. A suit against a man's enemy is commenced in the name of another, promoted by the money of the enemy, and sustained by the perjury which he suborns. The state of Hindu societies with joint families, dissatisfied junior members, adoptions, real or fictitious, affords a fine field for the operations of these speculators in litigation. At the elbow of every man with a grievance real or imaginary is one of these unclean animals busily engaged in fanning into a law suit every trifling difference. Where a Zemindary is concerned the operations are on a larger scale. The claimant is taken up either by an individual speculator or a joint stock company. Having nothing he is prepared to promise everything, and agreements stipulating for enormous sums of money are executed in favor of these people. The suit is promoted with their money, and the victory leaves the victor and the vanquished together prostrate at the feet of these unholy speculators. The nominal plaintiff is not the "poor man" of Lord Abinger but the poor neighbour of Quirk, Gammon and Snap. Let a man with the smallest knowledge of this country cast his eyes upon the widespread ruin and immorality created by these proceedings, and he will scarcely doubt that it is contrary to public policy, if the welfare of a country is any element therein, to permit these creatures to bargain for the proceeds of the litigation, which they have commenced, fomented and carried on without the smallest interest, other than the nefarious bargain, in the suit which they are conducting. On that portion of public policy, which consists in the purity of the administration of justice, the effect is still more directly pernicious. The unlimited supply of evidence to support any claim, true or fictitious, renders it easy for these speculators to produce for the support of any claim with equal ease, whether it is true or false, a body of people called skilled witnesses, whom by any mode of cross-examin-

ation directed merely to inconsistencies in the story which they come to tell, it is impossible to break down.

"It creates much surprise in some quarters, when those acquainted with the country give as a reason for attaching no weight to a body of this sort of evidence when opposed to probabilities which to those ignorant of the country appear slight, that one of these speculators is the parent of the suit; and the result is that the native Judge as well as the European is often led by his knowledge of this mechanical system of weighing evidence to say that he can see, that is, assign no ground for discrediting this body of evidence which is not inconsistent with itself, or not contradicted. The permission of these bargains tends directly to multiply this enormous evil. No man's rights are secure; and if by accident the right decision is arrived at, the fruits of the victory are not the victor's. It is a perfect case of "*sic vos non vobis.*" Let any respectable Hindu be asked his opinion upon the point, and I will guarantee that he will regard this as a very feeble picture of the organized iniquity, misery, and mischief resulting from the permission of these bargains. Whatever therefore the state of things in England, there can exist no doubt that all the evils against which the statute of Edward was directed exist in their full enormity in this country, aggravated by the character of the people to an extent which our own country cannot furnish and never could have furnished an example. Although therefore not necessary to the decision of this suit, I should, if necessary, have held this to be a contract which ought not to be supported." (VII, *Mad. H. C. R.*, 143-148.)

And lastly, all agreements, the meaning of which is not certain, or capable of being certain, are void. *(Ind. Con. Act.)*

MAXIM 113.

Nil consensui tam contrarium est quam vis atque metus. *(Br. Max.)—There is nothing so much opposed to a contract as coercion and threat.*

One of the essentials of a valid contract is the free consent of the parties. Consent is said to be free when it is not caused by coercion, &c. Coercion is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. *(Ind. Con. Act,* Sec. 15.*)* Coercion is equally fatal to the validity of an agreement under the Hindu and Mahomedan laws. *(Mac. Hin. and Mah. Laws.)*

MAXIM 114.

Conditio praecedens adimpleri debet prius quam sequatur effectus. *(Co. Litt.,* 201.*)—A condition precedent must be fulfilled before the effect can follow.*

A contract to do or not to do something, if some event collateral to such contract does or does not happen, is called a contingent contract; and such a contract cannot be enforced by law, unless and until that event has happened. *(Ind. Con. Act,* S. 31, &c.*)* Where the right to demand the performance of a certain act, depends on the execution by the promisee of a condition precedent, or prior act, it is clear that the readiness and offer of the latter to fulfil the condition, and the discharge or hindrance of its performance by the promiser, are in law equivalent to the completion of the condition precedent, and will render the promiser liable upon his contract. *(Chitty on Contr.* 667.*)* And if the event in question

becomes impossible, such contracts become void. *(Ind. Con. Act.)*

In Messrs. *Shand & Co.* v. *Atmakuri Adinaraya Chetty,* the plaintiffs entered into a contract in writing by which the defendant was to deliver 2,450 bundles of gingeely seed, on being put in possession of the necessary funds. In a suit for damages by reason of non-delivery,—the Madras High Court held that the plaintiffs, before they could recover, must show that they paid or tendered the amount stipulated, and that the vendor's right under the contract cannot be controlled by the course of dealing between the parties. (II, *Mad. H. C. R.*, 193.)

MAXIM 115.

Quicquid solvitur, solvitur secundum modum solventis; quicquid recipitur, recipitur secundum modum recipientis.—*(2 Vern.*, 606.*)* *Money paid is to be applied according to the intention of the party paying; and money received is applied according to that of the recipient.*

Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

But where the debtor has omitted to intimate, and there are no other circumstances indicating, to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

And where neither party makes any appropriation, the

payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law of limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably. *(Ind. Con. Act.)*

In *Moniappah* v. *Vencatroyadu*, it was held that an unappropriated payment is to be applied to the earliest debt, although the debt is barred by the law of limitation, where the facts do not raise any question which might affect such priority. (VI, *Mad. H. C. R.*, 32.)

In *Hirada Karibasapah* v. *Gadagi Muddapah*, it was held that payments unapplied by either the debtor or the creditor, should be appropriated to the earlier items making up the debt due. (VI, *Mad. H. C. R.*, 197.)

MAXIM 116.

Omnis ratihabitio retrotrahitur et mandato priori æquiparatur. (*Co. Litt.*, 207.)—*A subsequent confirmation has a retrospective effect and is equivalent to a prior command.*

Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority. Such ratification may be expressed, or may be implied in the conduct of the person on whose behalf the acts are done. But no valid ratification can be made by a person whose knowledge of the facts of the case is materially defective. A person ratifying any unauthorised act done on his behalf, ratifies the whole of the transaction of which such act formed a part. An act done by one person on behalf of another without such other person's authority, which, if done with authority, would have the effect of subjecting a

third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect. (*Ind. Con. Act.*)

On the subject of ratification of Torts the following is taken from Collett's Torts, Sec. 166:—"Another doctrine applicable indeed to Torts generally, but practically most often applied to trespasses upon property, is that of the ratification of a wrongful act by a party to whose use and benefit the act was done. But to make the subsequent ratification equivalent to a precedent command, the act of trespass must have been committed in the name, and avowedly on behalf, and for the benefit, of the party subsequently ratifying it. Further, it must be shown that he was in a situation to have originally commanded the act at the time it was done, and that the act was ratified and adopted by him with full knowledge of its being a trespass, or of its being tortious, or that, in ratifying and taking the benefit, he meant to take upon himself, without enquiry, the risk of any irregularity which might have been committed, and adopt the transaction, right or wrong. Offers to compromise are of themselves no evidence of ratification. On the other hand, if, at the time the act, otherwise wrongful, was done, the party ratifying it might himself have lawfully done it, he may thus take advantage of the act: Thus, if A assuming to be the bailiff or agent of B, but really without authority, distrains for rent when B might lawfully have done so, B may ratify the act and take advantage of it, and the ratification will make A bailiff at the time. One of several partners has no authority to use the name of the firm to order a wrongful act, and therefore his co-partners are not liable for such tort; but they may be if they afterwards adopt and take the benefit of such wrongful act."

MAXIM 117.

Nihil tam conveniens est naturali aequitati, quam unumquodque dissolvi eo ligamine quo ligatum est. (2, *Inst.*, 356.)—*Nothing is so consonant to natural equity as that every contract should be dissolved by the same means which rendered it binding.*

An obligation is not void but by release, a record by a record, a deed by a deed, a parol promise or agreement by parol, and an Act of the Legislature by an Act of the Legislature. But this rule does not apply where the party, seeking to be relieved from a contract, pleads *accord and satisfaction*, and not *release*. (*Broom's Maxims.*) The Indian Evidence Act, Sec. 92, provides that where the terms of any contract have been reduced to writing, or where any matter is required by law to be reduced to the form of a *document*, no evidence of an *oral* agreement or statement shall be admitted as between the parties or their representatives, for the purpose of contradicting, varying, adding to, or subtracting from, its terms; except where it is sought to invalidate the document on the ground of fraud, illegality, &c.; or where a distinct subsequent *oral* agreement to rescind or modify such *written instrument*, is set up in defence; provided that such original instrument is not required by law to be in writing, or has not been registered under the Registration Act, &c.

Sections 37 to 72 of the Indian Contract Act contain rules for the performance of contracts; Secs. 73, 74 and 75 provide rules for the consequences of breach of contracts; Sec. 5 states the rule for the revocation of a proposal; and Sec. 66 for revoking a voidable contract.

MAXIM 118.

Participes plures sunt quasi unum corpus, in eo quod unum jus habent, et oportet quod corpus sit integrum et quod in nulla parte sit defectus. (*Co. Litt.* 164.)—*Many partners are as one body, inasmuch as they have one right, and it is necessary that the body be perfect and that there be defect in no part.*

Partnership is the relation which subsists between persons who have agreed to combine their property, labor, or skill in some business, and to share the profits thereof between them. Persons who have entered into partnership with one another are called collectively a "Firm." A lender advancing money on condition that he shall receive interest at a rate varying with the profits, or that he shall receive a share of the profits; a servant or agent remunerated by a share of the profits; a widow or child of a deceased partner receiving annuity out of profits; and persons receiving a portion of profits for sale of goods;—are not partners; nor should the property left in the business by a retiring partner or deceased partner's representatives, be considered as partnership property. (*Indian Contract Act.*)

Every partner is liable for all debts and obligations incurred, while he is a partner in the usual course of business, by or on behalf of the partnership; but a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of such firm for anything done before he became a partner. A person who has led another to believe that he is a partner in a particular firm is responsible to him as a partner in such firm; and any one consenting to allow himself to be represented as a partner, is liable as such, to third persons who on the faith thereof give credit to the partnership. (*Ibid.*)

A contract of partnership can be annulled, or altered, only

by the consent of all of the partners. If from any cause any partner ceases to be so, the partnership is dissolved as between all members; and a partnership is also dissolved by the death of any partner. (*Ibid.*)

At the suit of a partner the Court may dissolve the partnership in the following cases:—(1.) When a partner becomes of unsound mind. (2.) When a partner, other than the partner suing, has been adjudicated an insolvent under any law relating to insolvent debtors. (3.) When a partner, other than the partner suing, has done any act by which the whole interest of such partner is legally transferred to a third person. (4.) When any partner becomes incapable of performing his part of the partnership contract. (5.) When a partner, other than the partner suing, is guilty of gross misconduct in the affairs of the partnership or towards his partners. (6.) And when the business of the partnership can only be carried on at a loss. A partnership is in all cases dissolved by its business being prohibited by law. (*Ibid.*)

After the dissolution of partnership the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership. Persons dealing with a firm will not be affected by a dissolution, of which no public notice has been given, unless they themselves had notice of such dissolution. In the absence of any contract to the contrary, after the termination of a partnership, each partner or his representatives may apply to the Court to wind up the business of the firm, to provide for the payment of its debts, and to distribute the surplus according to the shares of the partners respectively. (*Ibid.*)

MAXIMS 119 to 125.

(119.) Caveat venditur. *(L. 328.)—Let the seller beware.*

(120.) Caveat emptor; qui ignorare non debuit quod jus alienum emit. *(Hob. 99.)—Let the purchaser beware; no one in ignorance ought to buy that which is the right of another man.*

(121.) Vigilantibus et non dormientibus jura subveniunt. *(2, Inst., 690.)—The law assists the vigilant and not those asleep.*

(122.) Scientia utrinque par pares contrahentes facit. *(3, Bur., 1910.)—Equal knowledge on both sides makes the contracting parties equal.*

(123.) Nihil dat qui non habet. *(Jur. Civ.)—He gives nothing who has nothing.*

(124.) Derivativa potestas non potest esse major primitiva. *(Noy. Wing., 66.)—The power derived cannot be greater than that from which it is derived.*

(125.) A piratis et latronibus capta dominium non mutant. *(1, Peters, 1.)—Chattels taken or captured by pirates or robbers do not change their ownership.*

These maxims convey a caution both to the seller and buyer, and define their rights and liabilities as among themselves and with reference to third parties. The seller must remember that when he sells a thing to another, he sells every right and interest possessed by himself in regard to that thing, without any reservation whatsoever, except it be by any special agreement. And on the other hand the seller can convey to the purchaser nothing more than what he himself possesses; so that he must be careful not to sell as his own what in fact belongs to another; for if he did so, he would be liable to refund the purchase money, or make good damages, subject to certain conditions to be noticed

hereafter. The purchaser must likewise understand that he buys only the rights and interests of the seller and nothing beyond them; so that the purchaser must be careful, and indeed the law expects him to be more careful even than the seller, in regard to the bargain he makes; for if he buy a thing which does not belong to the seller, he will be obliged to restore the thing to the real owner, without the sale price being refunded to him, either by the owner or seller, subject, however, to conditions to be noticed hereafter.

The following may fairly be laid down as general propositions as to the rights and liabilities of different parties in matters of sale and purchase.

FIRST.—*As between the seller and buyer.*—The seller cannot dispute the buyer's title to the thing sold, unless the transaction is tainted with fraud, or unless there is a special agreement which governs the whole transaction.

SECONDLY.—*As between the buyer and third parties.*—The buyer is bound to give up the thing purchased, if it be found to belong to a third party, unless such third party be guilty of fraud in the matter.

THIRDLY.—*As between the seller and buyer again*, after the property purchased is restored to the third party.

(*a.*) The seller need not repay the purchase money to the buyer,

if their (seller's and buyer's) knowledge of the circumstances relating to the subject of matter of sale were equal;

or if the seller alone knew his defective title, and the buyer too might have known it by due care and diligence.

(*b.*) The seller must refund the purchase money to the buyer,

if the seller alone knew his defective title, and the

buyer could not have known it even by due care and diligence;

or if the seller knowing his defective title, practised fraud upon the buyer in regard to the same.

The principles and authorities for all the said propositions are briefly the following:—

As to the first proposition:—No seller can dispute the title of the buyer. Having conveyed all his rights and interests, the seller has no power to call in question the title of the buyer. The contract of sale is always binding on him. All agreements are contracts, that is, enforcible by law, if they are made by the free consent of parties competent to contract, for a lawful consideration, and with a lawful object, and are not expressly declared by the Contract Act to be void. (Sec. 10 *of the Indian Contract Act*, 1872.) Further, the Indian Evidence Act provides that when a person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representatives shall be allowed in any suit or proceeding between himself and such person or his representatives, to deny the truth of that thing. *Illustration*:—A intentionally and falsely leads B to believe that certain land belongs to A; and thereby induces B to buy and pay for it. The land thereupon becomes the property of B; but A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title. (Sec. 115 *of the Indian Evidence Act*.)

The same principle applies when property is sold in execution of a decree; for the Court sells the property in order to satisfy the debt due by the defendant; in fact, the Court does what the defendant himself would have done if he wanted to discharge the debt. So that, no judgment debtor can recover the property after it has been sold in

execution of the decree passed against him or his privy, unless the auction purchaser be guilty of fraud.

In a suit in Bengal under Act X of 1859, a decree was passed in favor of A and against B. In execution of that decree, B's land was sold and purchased by C. Subsequently a review of judgment was granted and the aforesaid decree was set aside on the ground that it was obtained by fraudulent means. After this B filed a suit to annul the sale of the said land, and recover it from C. It was held by the Calcutta High Court that the mere circumstance of the decree under which the sale had taken place having itself been set aside, did not invalidate the sale, the plaintiff B having failed to show that the purchaser C was a party to the fraud which led to the decree and the sale. (*Ingal Kishor Banerjee* v. *Abkoycharan Sarma*, Beng. L. R., App. Civil, I, 84.) The same principle was adopted in the case reported in the Beng. L. R. App. Civil, I, 56.

But a seller can always seek to impeach the sale on the ground that it was effected by fraudulent means. Some instances of this will be found under Maxim 137 (entitled "You ought to know with whom you bargain.") The same ground of fraud would avail even as regards the other two propositions (2nd and 3rd) to be hereafter explained ; for fraud vitiates everything: every contract is voidable for fraud, (Sec. 19, Indian Contr. Act) ; and even a judgment of a competent Court may be set aside on the ground of fraud. (Sec. 44, *Indian Evidence Act.*)

Second proposition ;—It is clear that the right derived by a purchaser cannot be greater than that possessed by the seller ; so that, if the seller had no title to the property sold, the purchaser can have none. If therefore the property sold by one to another be afterwards proved to belong to a third party, the purchaser must restore the property to the real owner. It is nothing but fair that if A and B were to deal with property belonging to C, without his

consent, the rights of C should not in any way be affected thereby, unless where the owner C is guilty of fraud in the matter.

In *Nathulal Chowdry* v. *Chadi Shi*, the facts were that A, a Hindu under the Mitakshara law, sold the undivided ancestral estate of his family, without the consent of his co-heirs, not for the benefit of the estate, but in order to pay off a personal debt. An innocent person B purchased the property for value. Within 12 years from the date of sale, the sons and grandsons of A, since deceased, brought a suit against B, and were held entitled to recover possession of the property, without making any refund of the purchase money. (*Beng. L. R.*, App. Civil, IV, 15.)

In *Verabadra Pillay* v. *Hari Rama Pillay, &c.*, plaintiff purchased a piece of land from the 1st defendant, who had purchased it from the person admitted to be the owner in 1856. The 2nd defendant claimed under a subsequent sale by the same owner. The Madras High Court disposed of the case on the simple principle that after the conveyance to the 1st defendant, the owner of the land had nothing whatever to convey; and it held therefore that the 2nd defendant took nothing; and that the plaintiff was entitled to recover the land. The High Court added—"there is not a suggestion in this case of any fraud on the part of the plaintiff; and the mere fact of his absence or silence for a period short of the period for bringing an action prescribed by the statute of limitations, was a matter altogether indifferent." (III, *Mad. H. C. R.*, 38.) And in *Rajan* v. *Basava Chetty*, the Madras High Court observed that even the owner's knowledge of the sale of his property between strangers would not make the owner a party to the sale, quoting the dictum of a great civilian who says, "If one sells my farm, I knowing of it and not consenting, I have entered into no contract of sale; but if I, on account of that transaction, accept the price, it is the correct decision that it should appear that I

have sold the farm." In delivering the judgment of the Court, Mr. Justice Holloway observed that there can be no question after recent decisions, that this is also the law of England; and his lordship pointed out that a "contractor who seeks to bar one, *primâ facie* the legal owner, by evidence of ratification, or of facts cogent enough to prove one, not a formal to be a substantial party, must make and prove such a case, for he is one who seeks to displace a legal title." The Court added that, "no looser rule ought to be adopted in this country. As such looser rule would be more dangerous here, so there is less excuse for it. The state of a Hindu family, as to the number and relationship of its members, can be, with the utmost readiness, ascertained by any man who makes reasonable inquiry, such as every contractor is bound to do, and every honest contractor does do." (II, *M. H. C. R.*, 428.)

In *Gallachinna Guruvappah Naidu* v. *Kali Oppiah Naidu and another*, the plaintiff sued, on a mortgage bond executed in 1861 by the 1st defendant, to recover the amount due as against the 1st defendant personally, and against the mortgaged property, which was in the possession of the 2nd defendant under a deed of sale executed to him in 1862 by the 1st defendant. The Civil Court found in effect that both plaintiff and 2nd defendant were innocent parties; and that the 1st defendant had imposed upon them both—in the case of the plaintiff, by selling the property to the 2nd defendant, without the plaintiff's knowledge where he (plaintiff) had a mortgage lien upon it—and in the case of the 2nd defendant, by selling the property to him without notice of the previous mortgage. "If this be a correct view of the facts of the case," the Madras High Court observed, "we find it difficult indeed to understand why the plaintiff should be deprived of that security, which the 1st defendant had given to him, and the 2nd defendant be confirmed in a right which the 1st defendant could not give

him." The final decree was in favor of the plaintiff. (IV, *Mad. H. C. R.*, 434.) The same principle was extended to a case where the previous lien was simply a *hypothecation*. (*Sadagopa Charyar* v. *Ruthna Mudali*, V, *Mad. H. C. R.*, 457.)

And as to the *third proposition, i. e.*, as to cases in which the seller *is*, or is *not* bound to repay the purchase money to the buyer, if the latter is evicted by a third party, it must be remembered that the law assists those that are vigilant and not those that are asleep, so that the buyer should be careful from whom he buys. If the property purchased by him be restored to another, as being the rightful owner, as explained under the above-mentioned second proposition, the purchaser cannot *always* expect to recover back his sale price from the seller;—the success of his claim to such refund depending upon a variety of circumstances:—viz:

(*a.*) Equal knowledge on both sides makes the contracting parties equal. So that if a purchaser knew as much as the seller that the property purchased belonged to some third person, the purchaser cannot, after being compelled to deliver up the property to the rightful owner, turn round upon the seller and ask him to pay back the sale price. The same rule holds good where both the contracting parties were equally ignorant of the defective title of the seller, (see Maxim as to ignorance on both sides); and also where the defects are *patent*, and such as the buyer could by proper diligence have discovered; for the law will not assist an improvident purchaser. From *Attwood* v. *Small*, the principle is clearly deducible that if a purchaser, choosing to judge for himself, does not effectually avail himself of the knowledge or means of knowledge accessible to him or his agents, he cannot afterwards be permitted to say that he was deceived and misled by the vendor's misrepresentations. The knowledge of his agents is as binding on him as his own

knowledge. It is his own folly and laches not to use the means of knowledge within his reach, and he may properly impute any loss or injury in such a case to his own negligence and indiscretion. (*Broom's Maxims.*)

In *Sowdamini Chowdrain* v. *Krishna Kishor Poddar*, A obtained a decree against B; and in execution of that decree, a piece of land was sold by auction, and purchased by C, and C became the owner of the right, title, and interest which the judgment debtor B had in the land. Subsequently D filed a suit against the auction purchaser C and obtained a decree for the land on the ground that he (D) was the owner; and that therefore the property was not affected by the auction sale, as the judgment debtor had no interest in it whatever. After this, C filed a suit against the judgment creditor and debtor (A and B) to recover the amount paid for the land purchased at the auction sale. In this case, the Calcutta High Court held that, "C was not entitled to recover either from the decree holder or judgment debtor. If the decree holder had sold this property himself by private sale, believing the property to be his own, the rule of *caveat emptor* would have applied, and the purchaser could *not* have recovered back the purchase money from him. If the judgment debtor had sold the property believing it to be his own, the purchaser could not have recovered back the purchase money from him. Then why should it be recovered back from the decree holder, because, believing the property to be the property of the judgment debtor, he applied to the Court to cause it to be seized and sold in execution of the decree; and because the Court, believing it to be the property of the judgment debtor, caused it to be sold, and the purchase money to be paid over to the decree holder? If a vendor by private sale does not guarantee a title, I cannot understand upon what principle it can be concluded that a decree holder, who asks to have property sold in execution, or that the Court which causes it to be sold,

guarantees title. There is no allegation or proof whatever of fraud or misrepresentation, or that the decree holder did not honestly believe that the property which was sold belonged to the judgment debtor. If the purchase money realized by sales in execution is to be recovered back from decree holders, upon the mere ground of defect of title, where there is no fraud, decree holders would be frequently compelled to refund money which has been paid over to them in satisfaction of their decree, after it is too late to obtain a fresh execution. A purchaser at a sale in execution knows that all that he purchases is the right and title of the judgment debtor. He knows that no one guarantees to him that the judgment debtor has a good title. He purchases the property with his eyes open, and regulates the price which he bids for the land with reference to the circumstances under which he is purchasing and the risk he runs. (*Beng. L. R., Full Bench Rulings*, IV, p. 11.)

If, however, an auction sale is set aside for irregularity under Sec. 257 of the Code of Civil Procedure, the purchaser is entitled to recover back the purchase money under Sec. 258 of the Act. (*Ibid.*)

In *Sheik Mahomed Baseralla* v. *Sheik Abdulla*, the decree holder caused certain property to be sold by auction in execution of his decree, alleging it to belong to his judgment debtor. The decree holder purchased it himself and set off the price against the amount of his decree, which was thus satisfied. It was afterwards found that the judgment debtor had no interest in the property, and that there was no fraud on his part, and it was accordingly recovered by the real owner. Then the decree holder applied for fresh execution against the judgment debtor; and it was held that no such fresh execution could issue. If the decree holder had taken proper care, he would not have caused another person's property to be sold. He was in no better position than a stranger. If in this case, the auction purchaser had

been a stranger, he would not have been entitled to recover his purchase money; and this must be the case even where the purchaser is the decree holder himself. (*Bengal Law Reports*, IV, Appendix 35.)

In *Mahomed Mohideen* v. *Ottagil Ummachee and another*, plaintiff alleged that he purchased two kánam claims of a woman named Ayesha, whose representatives the defendants were alleged to be, and that he sued upon them and was defeated; and he therefore sought to recover the purchase money with interest from the defendants. It was quite consistent with the plaintiff's allegations that the kánam claims of the vendor were perfectly valid, and it was at any rate clear that whatever title the vendee had was conveyed to him, and that so far from disaffirming the contract, he proceeded to sue as her assignee, and it was only when defeated, that he sought to recover the purchase money. The Madras High Court observed:—"It is quite clear that such an action could not in English law be maintained. Lord Alvanley in *Johnson* v. *Johnson* points to the real distinction—'We by no means wish to be understood to intimate that where under a contract of sale, a vendor does legally convey all the title which is in him, and the title turns out to be defective, the purchaser can sue the vendor in an action for money had and received. Every purchaser may protect his purchase by proper covenants: where the vendor's title is actually conveyed to the purchaser the rule of *caveat emptor* applied.'" Then the High Court concluded by saying: "We are satisfied that the rule of English law is as beneficial as it is plain, and that the right to disaffirm the contract had been lost by the conduct of the plaintiff; and that this action for the return of the purchase money, will not lie." (I, *Mad. H. C. R.*, 392.)

(*b.*) But the case is different where the defect of title in the seller is a *latent* one, and of such nature that the purchaser could not by the greatest care and attention on

his part discover it; and also where the vendor be cognizant of the defect and do not acquaint the purchaser with the fact of its existence; for in this case the contract would not be considered binding at law, and equity would not enforce a specific performance.

It appears, however, to be settled that if the subject matter of the contract of sale be agreed to be taken "with all faults," the insertion of this condition will excuse the vendor from stating those within his knowledge, although he will not be justified in using any artifice to conceal them from the purchaser. And even if the purchaser might, by the exercise of proper precaution, have discovered the defect, equity will not assist the vendor in case he has industriously concealed it, and the vendor must refund the sale price. (*Broom's Maxims.*)

In *Narrainsawmy Naik* v. *Sarvana Mudalie and* 12 *others*, the plaintiff purchased some lands at a sale held in execution of a decree obtained by a person against 1st and 2nd defendants in the District Moonsiff's Court of Tripassore. The sale was directed by the said Court. Between the date of the decree and sale, the village in which the lands were situated was transferred from the jurisdiction of the said Moonsiff to the District of Conjeveram. The Madras High Court held that the sale was therefore a nullity and conferred no title upon the plaintiff; but that the plaintiff was entitled to recover from the 1st and 2nd defendants the amount of the purchase money paid by him, as the plaintiff was not guilty of impropriety of conduct with respect to the execution and sale." (VI, *Mad. H. C. R.*, 58.)

In connection with the above positions, it must be understood that an express agreement between the vendor and vendee puts an end to all such difficulties as have been above noticed. "A warranty of title amounts to a contract by the seller that, in consideration of the buyer purchasing the property and paying the consideration money, he (the

seller) will make good to the buyer any loss which the buyer may incur by reason of the buyer not having a good title to the property. This is an absolute contract from the moment it has been entered into, and the buyer can sue upon it at once, if he can show that the seller has not a good title in accordance with his undertaking; and that he has sustained loss in consequence ..... In this case, the plaintiff is bound to show that there has been a breach of the undertaking by the defendant, that is, that the defendant has not a good title. The proceedings of a third party against the defendant in respect of this property would not be in any way conclusive between the present parties as to the goodness or badness of the defendant's title, even if those proceedings had been finally determined in the highest Court of Appeal. The defendant, notwithstanding those proceedings, was at perfect liberty to show in this action that he had a good title to the property sold." (*Syed Esuff Ally* (*defendant*) v. *Syed Mahomed Jawar Ally Khan*, (*plaintiff.*) Calcutta High Court, 25th February 1866, *Rev., Civil and Criminal Reporter*, Vol. III, No. 7.)

It must be remembered that *all* the foregoing observations relate to the sale of *immoveable* property. As to the sale of "goods" which means and includes every kind of *moveable* property, the following provisions are made in the Indian Contract Act of 1872:—

Section 108.—No seller can give to the buyer of goods a better title to those goods than he has himself, except in the following cases:—

Exception 1.—Where any person is, by the consent of the owner, in possession of any goods, or of any bill of lading, dock warrant, warehouse keeper's certificate, wharfinger's certificate or warrant or order of delivery, or other document showing title to goods, he may transfer the ownership of the goods of which he is so in possession, or to which such documents relate, to any other person and give such

person a good title thereto, notwithstanding any instructions of the other to the contrary: provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods.

Exception 2.—If one of several joint owners of goods has the sole possession of them by the permission of the co-owner, the ownership of the goods is transferred to any person who buys them of such joint owner in good faith, and under such circumstances, &c., (as per 1st Exception.)

Exception 3.—When a person has obtained possession of goods under a contract voidable at the option of the other party thereto, the ownership of the goods is transferred to a third person, who before the contract is rescinded buys them in good faith of the person in possession, unless the circumstances which render the contract voidable amounted to an offence committed by the person in possession or those whom he represents.

In this case the original seller is entitled to compensation from the original purchaser for any loss which the seller may have sustained by being prevented from rescinding the contract.

And Section 109.—If the buyer or any person claiming under him is, by reason of the invalidity of the seller's title, deprived of the thing sold, the seller is responsible to the buyer, or the person claiming under him, for loss caused thereby, unless a contrary intention appears by the contract.

In furtherance of the foregoing observations the reader is referred to the Maxim relating to "warranty."

The rule of *Caveat emptor* is applicable under the Hindu law also—*Narada* ordains thus:—"A buyer ought at first himself to inspect the commodity and ascertain what is good and bad in it; and what, after such inspection, he has agreed to buy he shall not return to his seller, *unless it had*

a concealed blemish." This is indeed a provision similar to that which obtains in the Mahomedan law, giving an option of inspection; and with respect to articles not of a perishable nature, the contract may be rescinded within ten days. For other articles of a perishable nature, there are different periods allowed, subject to the payment of a small fine by the person desirous of rescinding. (*Mac. Hin. Law.*)

Under the Mahomedan law there is a peculiar sale called *Shufaa, i. e.*, pre-emption. The right of pre-emption is defined to be a power of possessing property which has been sold, by paying a sum equal to that paid by the purchaser. A partner in the property sold, a participator in its appendages, and a neighbour, whether he is a Mahomedan or not, may claim the right of pre-emption. It is necessary, however, that the person claiming this right should declare his intention immediately on the hearing of the sale, and that he should, with the least practicable delay make affirmation, by witnesses of such his intention, either in the presence of the seller or of the purchaser, or on the premises. (*Mac. Mah. Law.*) This Mahomedan doctrine of pre-emption is not law in the Madras Presidency. (*Ibrahim Saib* v. *Muni Mir Udin Saib*, VI, *Mad. H. C. R.*, 26)

MAXIM 126.

Simplex commendatio non obligat. *(Br. Max.)—A simple commendation does not oblige, i. e., does not imply a warranty.*

No warranty will necessarily be implied from a simple commendation of the quality of goods by the vendor; such commendation being in most cases regarded merely as an invitation to custom, since every vendor will naturally affirm that his own wares are good, unless it appear on the evidence, or from the words used, that the affirmation at the time of sale was intended to be a warranty, or that such must be its

necessary meaning. It is therefore laid down that in a purchase without warranty, a man's eyes, taste, and senses, must be his protection; and that where the subject of the affirmation is a mere matter of opinion, and the vendee may himself institute enquiries into the truth of the assertion, the affirmation must be considered as a "nude assertion." And it is the vendor's fault from his own laches that he is deceived. (*Broom's Max.*) But there may be cases in which commendation may amount to more than a nude assertion; for the assertion may amount to a warranty; or it may be fraudulent; in either case, the party making the affirmation as to the quality of the contract will be bound by it. An implied warranty of goodness or quality may be established by the custom of any particular trade. (*Ind. Contr. Act.*)

On the sale of provisions, there is an implied warranty that they are sound; and on the sale of goods by sample there is an implied warranty that the bulk is equal in quality to the sample. Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample or after inspection of the bulk. But if the contract specifically states that the goods, though sold as of a certain denomination, are not warranted to be of that denomination, there is no implied warranty. Where goods have been ordered for a specified purpose, for which goods of the denomination mentioned in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose. Upon the sale of an article of a well-known ascertained kind, there is an implied warranty of its fitness for any particular purpose. In the absence of fraud and of any express warranty of quality, the seller of an article, which answers the description under which it was sold, is not responsible for a latent defect in it. (*Ind. Contr. Act.*)

When a specified article, sold with a warranty, has been delivered and accepted, and the warranty is broken, the sale is not thereby rendered voidable. But the buyer is entitled to compensation from the seller for loss caused by the breach of warranty. (*Ibid.*)

Where there has been a contract with a warranty for the sale of goods, which at the time of the contract were not ascertained, or not in existence, and the warranty is broken, the buyer may accept the goods or refuse to accept the goods when tendered; or keep the goods for a time reasonably sufficient for examining and trying them and then refuse to accept them; provided that, during such time, he exercises no other act of ownership over them than is necessary for the purpose of examination and trial. In any case, the buyer is entitled to compensation from the seller for any loss caused by the breach of warranty; but if he accepts the goods and intends to claim compensation, he must give notice of his intention to do so within a reasonable time after discovering the breach of the warranty. (*Ibid.*)

For more particulars, vide Maxim *Caveat emptor.*

MAXIM 127.

Mandatarius terminos sibi positos transgredi non potest. (*Jenk. Cent.* 53)—*A mandatory cannot exceed the bounds placed upon himself.*

A *mandatum* is a species of bailment which according to the judgment of Lord Holt in *Craggs* v. *Barnard,* is distributed into six classes. (*Sm. L. C.*, I., p. 190.)

1. *Depositum,* or naked bailment of goods to be kept for the use of the bailor.

2. *Commodatum;* where goods, that are useful, are lent to the bailee gratis to be used by him.

3. *Lakatio rei;* where goods are lent to the bailee to be used by him for hire.

4. *Vadium;* that is, pawn.

5. *Lakatio operis faciendi;* where goods are delivered to be carried, or something is to be done about them, for a reward to be paid to the bailee.

6. *Mandatum;* a delivery of goods to somebody who is to carry them, or to do something about them gratis.

The above different classes of bailees cannot exceed the bounds placed upon them. If they do so, they will be liable for damages, and will also in certain cases be punished criminally for breach of trust under Secs. 405 to 409 of the Indian Penal Code.

The Indian Contract Act treats of bailments of the above classes under one head called Bailment, which is thus defined in Sec. 148:—A bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the bailor. The person to whom they are delivered is called the bailee. If a person already in possession of the goods of another, contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.

A bailor is bound to disclose to his bailee material faults in the goods bailed of which the bailor is aware; and if he fails to do so, he is responsible for damages arising to the bailee from such faults. If the goods are bailed for hire the bailor is responsible for such damage whether he was or was not aware of the existence of such faults.

In all classes of bailments, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his

own goods of the same bulk, quality, and value as the goods bailed. If he takes thus much care, he is not responsible for the loss, destruction, or deterioration of the thing bailed, unless there be a special contract to the contrary.

Where the goods are to be kept, or to be carried, or to have work done upon them by the bailee for the bailor gratuitously, the bailor shall repay to the bailee the necessary expenses incurred by him for the purposes of the bailment.

The lender of a thing for use gratuitously may at any time require its return though he lent it for a specific time or purpose. But if on the faith of such loan made for a specific time or purpose, the borrower had acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived. (*Ind. Con. Act.*)

As to pledges. The bailment of goods as security for payment of a debt or performance of a promise is called a pledge. The bailor in this case is called the pawner, and the bailee is called the pawnee. The pawnee may retain the goods pledged for the payment of the debt and interest due thereon, and also of all the necessary expenses incurred in respect of the possession or preservation of the goods pledged. If the pawner makes default in payment of the debt, &c., at the stipulated time, the pawnee may bring a suit against the pawner upon the debt; or he may sell the thing pledged on giving the pawner reasonable notice of the sale. If the proceeds of such sale are less than the amount due, the pawner is liable to pay the balance, and if the proceeds are greater than the sum due the pawner shall pay the surplus to the pawner. (*Ind. Contr. Act*, Ss. 172 to 176.)

A person who is in possession of any goods or of a bill of lading, dock-warrant, warehouse keeper's certificate, whar-

finger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents, provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawner is acting improperly. Provided also that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud. (*Ibid*, S. 178.)

Where a person pledges goods in which he has only a limited interest, the pledge is valued to the extent of that interest. (*Ibid*, S. 179.)

As to hypothecations. Where the borrower pledges his land as collateral security for the repayment of the debt, without giving up possession of the property to the creditor, the property is said to be *hypothecated*. In *Chetty Gandan* v. *Sunderam Pillay*, the Madras High Court observed that " the contract is one of hypothecation and it is thus defined by a modern jurist : " *Et quia hypotheca constituitur desuper rebus ideo dicitur jus in re, seu jus reale vel actio realis, quia per illam non obligatur persona debitoris sed res et sequitur fundum et datur contra possessionem.*" Its remedies seem to show clearly that when land is the subject of the hypothecation, it is necessarily a contract which gives an interest in immoveable property, for it is clear that any subsequent sale must be made subject to it. (II, *Mad. H. C. R.*, 51.) A creditor suing under such a contract must prove that there was an actual pledge, and that the land was part of the debtor's estate at the time of pledge. (See above authority.) An instrument of hypothecation is to be viewed as a mortgage instrument, and such as could have been registered under Reg. XVII of 1802. (II, *Mad. H. C. R.*, 108.)

A *drishtabandhaka* which names a time for payment of the money borrowed, and stipulates that on default the mortgagee shall be put into exclusive possession and enjoyment of

the property, will not be treated strictly as a conditional sale, even though the instrument expressly provide that on default, the transaction shall be deemed an outright sale; and in a suit by the mortgagee for possession, the Court, in decreeing the right thereto, will give the mortgagor a day for redeeming. (I, *Mad. H. C. R.*, 460.)

As to mortgages and equity of redemption—Under the common law of England the mortgagee has not only the possession but also absolute property of the mortgaged land on the debtor's failing to perform the condition. But equity has always regarded a mortgage as redeemable till foreclosure; and in enforcing a lien, it gives the debtor an opportunity of barring the mortgage or sale of the property to which the lien extends, by paying the amount due with interest by a day named by the Court (II, *Mad. H. C. R.*, 51.) This principle of equity is now acted on by the Courts with reference to mortgages, and the mortgagor does not lose his equity of redemption, though the stipulated time for payment has been allowed to pass by, and though there should be a contemporaneous agreement clogging that right. (I, *Mad. H. C. R.*, 460, and II, 420.)

As to the mortgagee's right of foreclosure:—A mortgagee, however, has the right of foreclosure where the mortgagor entirely fails to redeem. There exists no reason whatever why the mortgagee should be deprived of the remedy given by his contract. (II, *Mad. H. C. R.*, 289.)

As to re-purchase. It is incorrect to suppose that the condition for repurchase with a stipulation for an absolute sale in case of failure to pay at the time, is a penalty which cannot be enforced. (II, *Mad. H. C. R.*, 420.) When *bonâ fide* sale is accompanied by a power to re-purchase, this will not make the transaction a mortgage, if such does not appear to have been the intention of the parties. The best general test of such intention is the existence or non-existence of a power in the original purchaser to recover

the sum named as the price for such re-purchase; if there is no such power, there is no mortgage. (II, *Mad. H. C. R.*, 460.) A party mortgaged a land to another, the mortgage instrument providing that the mortgagee should be entitled to purchase the land, if it were not redeemed by a specified date. After this date, the mortgagee accepted from the mortgagor a small sum in part payment of the mortgage money. It was held that this was a waiver by the mortgagee of his right to purchase. (I, *Mad. H. C. R.*, 69.) Where a mortgage bond contained an agreement to repay the money with interest by a certain day, and stipulated that if the mortgagor failed to pay the amount, the mortgagee should be put in possession of the land, and he might enjoy it, and that when the mortgagor had the means he would redeem the land and pay the debt with interest and take back the bond, it was held that on the mortgagor's default, the mortgagee might sue for the money, and that he was not bound to accept the land and forego his right of action. (I, *Mad. H. C. R.*, 114.)

MAXIMS 128 and 129.

(128.) Qui facit per alium facit per se. (*Co. Litt.*, 258.)—*He who does anything by another does it by himself.*

(129.) Respondant superior. (4, *Inst.*, 114,)—*Let the principal answer.*

An agent is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done or who is so represented is called the principal. No person who is not of the age of majority, or who is of unsound mind can become an agent; nor can one such appoint an agent. No consideration is necessary to create an agency. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally; unless by the

ordinary custom of trade a sub-agent *may*, or from the nature of the agency *must*, be employed. The agent is responsible to the principal for the acts of the sub-agent; and the sub-agent is responsible for his acts to the agent, and not to the principal, except in cases of fraud or wilful wrong. (*Ind. Con. Act.*)

When acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. But such a ratification of unauthorised acts cannot injure third persons. (*Ind. Con. Act.*)

An agency is terminated by the principal revoking his authority, or by the agent renouncing the business of the agency, or by the business of the agency being completed, or by either the principal or agent dying, or becoming of unsound mind, or by the principal being adjudicated an insolvent. (*Ind. Con. Act.*)

An agent is bound to conduct the business of his principal according to the directions given, or in the absence of such directions according to the prevailing custom in such matters with skill and diligence. And the principal is bound to indemnify the agent against the consequences of lawful losses. (*Ind. Con. Act.*)

As regards the effect of contracts entered into with third persons through an agent and obligations arising from acts done by an agent, it has been laid down that they may be enforced in the same manner as if the contracts had been entered into and the acts done by the principal in person.

In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. Such a contract shall be presumed to exist in the following cases:—(1) Where the contract is made for the sale or purchase of goods for a merchant resident abroad. (2). Where the agent does not disclose the name of his principal. (3) Where the principal though disclosed cannot be sued. (*Ind. Con. Act.*)

In *Albert Foster Pater and another* v. *Henry Evans Gordon and another*, the facts of the case were the following :—Defendants contracted with plaintiffs as agents of the captain and owners of a certain ship then in the Madras roads. The plaintiffs were aware of this at the time when the contract was made. The captain was at the time in charge of his ship. At the time of the contract, nothing was said by either party as to the person or persons on whose credit the contract was made. All that occurred was that defendants, known by plaintiffs to be acting as agents for the captain and owners of the ship, agreed with plaintiffs to carry certain of their goods on board the ship to Calcutta. The defendants did not, at the time of the contract, in terms say that they contracted only as agents. The plaintiffs did not know the names of the owners nor of the captain ; nor had they any further or other knowledge of the latter than that which his designation by his office of master of the ship conveyed. Under these circumstances the High Court of Madras held that, in the absence of anything more than knowledge that defendants were acting as agents of the master and the owners of a ship in the roads, a decision declaring the agents liable was strictly in accordance with the English law. (VII, *Mad. H. C. R.*, 82.)

The master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrong-doer,—he who had selected him as his servant from the knowledge of, or belief in, his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorised by him to appoint servants for him, can make no difference. (*Broom's Maxims.*) The principle upon which a master is in general liable to answer for accidents resulting from the negligence or unskilfulness of his servant, is, that the act of

his servant is in truth his own act. If the master is himself driving his carriage, and from want of skill causes injury to a passer by, he is of course responsible for that want of skill. If, instead of driving the carriage with his own hands, he employs his servant to drive it, the servant is but an instrument set in motion by the master. It was the master's will that the servant should drive, and whatever the servant does in order to give effect to his master's will may be treated by others as the act of the master, *Qui facit per alium facit per se.* The general rule being that "a master is responsible for all acts done by his servant in the course of his employment, though without particular directions;" even whilst engaged in private business of his own, provided he be at the time engaged generally on that of his master. The tests applicable for determining the liability of the master being, was the servant in the employ of his master at the time of committing the grievance? and was he authorised by his master to do the act complained of? 'The master,' observes Maule, J; 'is liable even though the servant in the performance of his duty, is guilty of a deviation or failure to perform it in the strictest and most convenient manner. But where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it." (*Broom's Maxims.*)

Thus the Maxim *Respondeat superior* is generally applicable in *Civil* cases. But in *Criminal* cases the rule is that every one must answer for his own acts, and must stand or fall on his own behaviour. A master is not responsible for the acts of his servant, unless he expressly command or personally co-operate in them; in which case the master would be liable as an abettor, according to the rules laid down in Chapter V of the Indian Penal Code. A servant is not excused from the consequences of his having committed

an offence against the law, simply because he did it by the command of his master; for he is bound to *obey lawful commands only*. But "nothing is an offence which is done by a person, who is, or who by reason of a mistake of fact, and not by reason of a mistake of law, in good faith, believes himself to be, bound by law to do it." So, if a soldier fires on the mob by order of his superior officer in conformity with the commands of law, he commits no offence. (Vide Secs. 76, 77, 78 and 79 of the Indian Penal Code and Maxims 50 and 51 regarding the liability of the servants acting under the orders of their superior.)

In certain cases, however, a master is criminally liable for the wrongful omission of his agent; and *vice versâ*. Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held or riot committed, and any person having or claiming an interest in such land, is punishable under Sec. 154 of the Indian Penal Code, if he, or his *agent* or *manager*, knowing that such an offence is being or has been committed, &c., do not give the earliest notice thereof to the Police. And in the same manner the *agent* or *manager* is punishable for failing to give such earliest notice. (*Indian Penal Code*, Sec. 156.)

Where one employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act. (*Indian Contract Act*, Sec. 224.)

MAXIM 130.

Principalis debet semper excuti antequam perveniatur ad fidei jussores.—*The principal should always be exhausted before coming upon the sureties.*

A contract of guarantee is a contract to perform the

promise or discharge the liability of a third person, *in case of his default.* The person who gives the guarantee is called the surety; the person in respect of whose default the guarantee is given is called the principal debtor; and the person to whom the guarantee is given is called the creditor. A guarantee may be either oral or written. Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. A surety is discharged by the release or discharge of the principal debtor; or where the creditor compounds with, or gives time to, or agrees not to sue, the principal debtor. But the creditor's mere forbearance to sue the principal debtor does not discharge the surety. Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor. (Sections 124 to 147 of the *Indian Contract Act.*)

A person who has formally undertaken to execute a matter for another becomes responsible for the due discharge of the trust reposed in him, even though no expectation of reward for his services has been held out. Sureties who have made themselves responsible for the appearance or honesty of a debtor, (not for payment of his debt,) are only personally answerable. On their demise their sons are not liable, unless the parents should have received indemnification. Sureties for payment, jointly bound, are answerable each to the extent only of his proportion unless otherwise agreed upon. (*T. L. Str. Man. Hin. Law,* 103.)

MAXIMS 131 and 132.

(131.) Assignatus utitur jure autocris. (*Hal. Max.*, 14.)—*That which is assigned takes with it for its use the rights of the assignor.*

(132.) Cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit. (II, *Co.*, 52.)—*The grantor of anything to another grants that also without which the thing granted would be useless.*

Whenever anything is authorised, and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorised in express terms be also done then, that something else will be supplied by necessary intendment. But if when the maxim comes to be applied adversely to the liberties or interests of others, it be found that no such impossibility exists, that the power may be legally exercised without the doing that something else, or, even going a step further, that it is only in some particular instances, as opposed to its general operation, that the law fails in its intention unless the enforcing power be supplied,—then, in any such case, the soundest rules of construction point to the exclusion of the maxim, and regard the absence of the power, which it would supply by implication, as a casus omissus. (*Broom's Maxims.*)

Further, a grantor is presumed to grant all that is necessary for the enjoyment of the property granted. If land, or a building, or portion of the same, is granted, a right of way to it is incident to the grant, as being directly necessary for the enjoyment of the grant. If A sells B an upper story, reserving to himself all below the upper story, B has a right to prevent A, or his assignees of the lower part, from disturb-

ing the walls or beams of the lower story upon which the upper story rests. For, without this right, the right in the upper story would be useless.

Under certain enactments power is given to a Railway Company within its provisions to use and employ locomotive engines. If then such locomotive engines cannot possibly be used without occasioning vibration and consequent injury to neighbouring houses,—upon the principle of law that, *cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit*, it must be taken that power is given to cause that vibration without liability to an action. The right given to use the locomotives would otherwise be nugatory, as each time a train passed upon the line and shook the houses in the neighbourhood, actions might be brought by their owners, which would soon put a stop to the use of the Railway. *(Broom's Maxims*, 488.*)*

Again rent is incidental to the land. By the grant of land, right to rent is also presumed. But if one gives another mere right of recovering rent, he cannot have the land.

An agent having authority to do an act, has authority to do every lawful thing which is necessary in order to do such act. An agent having authority to carry on a business has authority to do every lawful thing necessary for the purpose, or such as is usually done in the course, of conducting such business. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence in his own case under similar circumstances. (*Ind. Con. Act.*, Secs. 188 and 189.)

Where land or other property is granted to another, the latter takes all the rights possessed with reference thereto by the grantor. In fact the grantee stands in the place of the grantor; for he can have no more or less powers than those which the grantor himself had. So a grantee is bound

by the easements or other rights created by the grantor upon his property.

A person leases an estate from another, and sub-lets it to a third party. The determination of the principal lease by the effluxion of time, breach of condition, &c., will draw with it the determination of the sub-lease also; for it was only incidental to the principal lease, and the sub-lessee can have no more privilege than the principal lessee, from whom he derived his right, had.

But such incidental power should be exercised with care, and be confined to enforcing the power actually granted. Thus, if a person leases his house to another, but reserves to him the right of passing through the house to a backyard where he has some trees which are not included with lease, he cannot enter the house except at seasonable times and upon previous notice.

MAXIMS 133 and 134.

(133.) Qui sentit commodum sentire debet et onus; et e contra: (1, *Co.*, 99.)—*He who enjoys the benefit ought also to bear the burden, and the contrary.*

(134.) Terra transit cum onere. (*Co. Litt.*, 231.)—*Land passes with its encumbrances.*

If a party ratifies a contract entered into without his authority, he must adopt the whole of it, both the beneficial and the prejudicial part thereof. The doctrine of estoppel also may be supported by the first of the above Maxims. For, after making a party believe a state of things for his advantage, he cannot afterwards turn round upon him when it is burthensome. A person succeeding to the estate, pays also the debts. And so he who bears the burden enjoys the profits.

If land is mortgaged to A, the debt remains a charge on the land into whosoever's hands it may subsequently pass by sale, &c., &c., &c., provided the mortgagee is not guilty of fraud. (Vide *Maxim Caveat emptor, &c.*)

MAXIMS 135 and 136.

(135.) Conventio vincet legem. (6, *Taunt.* 430.)—*An agreement overcomes law.*

(136.) Conventio privatorum non potest publico juri derogare. (*Wing,* 746.)—*A private agreement cannot affect public rights.*

As a rule the agreement entered into by the parties have the force of law, so far as they affect such parties or their privies; but this rule can have no application where the interests of the public are injured, or where considerations of decency or morality require that such agreements ought not to be performed; or where the agreements are opposed to express Enactments. So rigorous is the rule that even a contract made in a foreign country cannot be enforced in British India, if it is against the law of this country, notwithstanding that it may be valid in the country where it was made (*Broom's Max.*) In Appeal No. 12 of 1807, the Madras Sudder Adalat held that notwithstanding that an express stipulation for submitting to the jurisdiction of the Recorder's Court was embodied in the bond by the obligor, that Court could not entertain a suit upon the bond, the obligor being an inhabitant of the Zillah of Chingleput. (*Madras Sudder Decrees,* I, p. 24.) Courts of law cannot be ousted of their jurisdiction by the mere agreement of the parties. So, if parties agree that all disputes that may arise between them shall be referred to arbitration, that will

not prevent either of them from bringing an action against the other. But they may by agreement make it a condition precedent to bringing an action that the amount to be paid shall be settled by arbitration. (*DeLatour*, III, p. 294.)

137.

Scire debes cum quo contrahis. (*Manual*)—*You ought to know with whom you bargain.*

No one should bargain with those who are naturally incompetent to contract, or who are rendered incompetent by law; such as insanes, minors, persons in a fiduciary relation, &c., &c. The result of dealing with persons having a defective title is explained under the Maxim of *caveat emptor*. The following will serve to illustrate the Maxim now under consideration more fully, laying down the duties of a person dealing with persons incapacitated in various ways.

AS TO PERSONS IN A FIDUCIARY RELATION:—In *R. A. Pushong* v. *Munia Halwani*, where the plaintiff sued the defendant to regain possession of land alleged to have been taken by the latter on a deed of sale executed to him by the former, the Calcutta High Court held as follows:—"Assuming, however, that the contract was proved, we learn from defendant's own admissions that it was entered into with the lady (plaintiff,) at a time when he undertook to be her legal adviser, or manager. It lay at the very initiation of a fiduciary relationship between himself and her. Now, it is always held in Courts of Equity that a contract of sale or conveyance entered into by one with a person who stands relatively to him in a position of confidence or trust, is liable to be called in question by the vendor, and to be set aside at his instance, if it be found that the other party made an unfair use of his advantages. So also, when the

seller labors under such disabilities, or is so situated as to be peculiarly liable to be imposed upon; and bargains with widowed or single purdah women fall within this class. But especially in a case where any person acting as an attorney, or as a skilled legal adviser, enters into a contract of purchase with his client in respect of the subject of litigation or advice, the contract is liable to be questioned by the other side at any time; and when it is questioned, every presumption is made against its being just. Undue influence is presumed to have been exerted until the contrary is proved; and it is incumbent upon the purchaser, if he relies upon the contract, to show that all its terms and conditions are fair, adequate and reasonable. Failing that, his claim under the contract and his rights under it, must go. (*Bengal L. R., Appellate, Civil*, I, 95.)

As to Gosha females:—The aforesaid principle was applied with regard to Gosha or Purdah women by the Privy Council in *Mussumat Azeezoonnissa and Essah Bebee* v. *Baqur Khan*. (*Calcutta W. R.*, XVII, p. 393.)

As to Hindu Widows:—Under the Hindu law a widow, though she takes as heir, takes a special and qualified estate. If there be collateral heirs of her husband, she cannot, of her own will, alienate the property, except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity. The restrictions on her power of alienation are inseparable from her estate, and independant of the existence of heirs capable of taking on her death. If for want of heirs, the property, so far as it has not been lawfully disposed of by her, passes to the Crown, the Crown has the same power of protecting its interest as an heir, by impeaching any injurious alienation by the widow. Therefore, the onus is on those who claim

under an alienation from a Hindu widow, to show that the transaction was within her limited powers. (*The Collector of Masulipatam* v. *Cavali Narrainappah, Privy Council Judgt., Suth. Edn.*, p. 476.)

As to Minors:—A debt incurred by the head of a Hindu family, residing together, is under ordinary circumstances presumed to be a family debt; but when one of the members is a minor, the creditor seeking to enforce his claim against the family property, must show that the debt was contracted for the benefit of the family. (*Thandavarain Moodelly* v. *Valliammal*, I, *Mad. H. C. R.*, 398.)

As to Co-parceners:—It is the firmly settled rule of Hindu law, resting upon the authority of the *Mitakshara* and repeated judicial decisions, that a managing co-parcener has not the capacity to alienate or charge the share of his minor co-parcener in immovable ancestral property, except for the purpose of providing for some family need, or the performance of an indispensable religious duty; or except the alienation or charge be for the benefit of the joint estate; and that in every case to which the rule is applicable, the onus of showing, either by direct or presumptive proof, a *primâ facie* case in support of the existence of the condition necessary to give the legal capacity to make the disputed disposition, lies upon the party claiming to have acquired under it a title to the minor's share of the property. Upon the question of what is the amount of proof which the law renders necessary to discharge that burthen of proof, it was held by the Madras High Court, that where the dispute as to the validity of a sale or mortgage of family property is with the person to whom it was made, and the pecuniary consideration for it has not been advanced for the purpose of discharging an antecedent charge on the property, or an old debt incurred by an ancestor,—the case of the vendee or mortgagee, as regards the existence of a family need or sufficient beneficial purpose requiring the advance of the

consideration money, must be established by positive proof; but that between a *bonâ fide* sale or mortgage for an advance made to pay off a pre-existing mortgage claim, or an unsecured debt of an ancestor, and one not made for that purpose, there was this distinction to be observed, that the burthen of establishing by direct proof that such prior claim or debt was incurred for a proper family purpose is not cast upon the vendee or mortgagee. He is only required to show this presumptively. But to do so it is incumbent on him to give proof, not only of the consideration for the sale or mortgage having been *bonâ fide* advanced in discharge of an antecedent debt, but also of an enquiry productive of results which warranted his reasonably believing that such debt was a family obligation, and the sale or mortgage a prudent arrangement for its discharge. (*Sarvana Tewan* v. *Muttayi Ammal*, VI, *Mad. H. C. R.*, 371.)

As to expectant Heirs:—It is well settled as a general doctrine of equity, that to persons in the position of an expectant heir, a degree of protection is extended, approaching nearly to an incapacity to bind themselves by any contract; and that it is incumbent upon those who have dealings with expectant heirs relative to their reversionary interests to make good the bargain; that is, to be able to show that a full and adequate consideration was paid. (1, *Bro. C. C.* 9; 9, Ves. 246; *Peacock* v. *Evans*, 16, Ves. 512; *Gowland* v. *Defaria*, 17, Ves. 20.) And while the pressure of the distress which induced originally the expectant heir to enter into the contract, continues, no length of acquiescence, nor even confirmation, will prevent such heir from coming to Equity to set aside the contract. (*Gowland* v. *Defaria*, 17, Ves. 20; *Crowe* v. *Ballard*, 3, *Bro. C. C.* 117; *Digest and Jurist.*) But this extraordinary protection of equity must be withdrawn if it shall appear that the transaction was known to the father, or other person standing in *loco parentis*, even although such parent or other person

took no active part in the negociation, provided the transaction was not opposed by him, and so carried on though in spite of him; and further, if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not in any respect act upon it, so as to alter the situation of the other party, or his property; at least, if he does so, the proof lies upon him of showing that he did so under the continuing pressure of the same distress which gave rise to the original dealing. (*King* v. *Hamlett*, 2, Mg., &c., K. 456, *Digest and Jurist.*)

AS TO PAGODA MANAGERS:—The paid managers of the affairs of a pagoda have no power as such to encumber the pagoda property, or to settle large outstanding demands against it. Persons dealing with such managers are bound to enquire into the extent of their authority, and if they fail to do so, they will be held to have notice of all such facts as that enquiry, if made, would have brought to their knowledge. (*Sambanda Modalliar* v. *Nanasambanda Apandara*, I, *Mad. H. C. R.*, 298.)

AS TO MALABAR TARVADS:—It is the unquestionable law of Malabar that Tarvad property is inalienable, except in cases of adequate family necessity. In such cases, alienations will be upheld: but it is upon the purchaser to make out with abundant clearness that the purpose was a proper one. According to the state of Hindu families a purchaser would be affected with notice by much slighter evidence than a purchaser in other countries. (*Koyiloth Putenpuroyl Manoki Koran Nair* v. *Putenpuroyil Manoki Chanda Nair*, I, *Mad. H. C. R.*, 294.)

AS TO OTHER PERSONS HAVING A QUALIFIED INTEREST:—Where the purchaser of immovable property deals with a person having a qualified power of dealing with that property, it lies upon the purchaser to give some reasonable account of the need which actually existed, or was alleged

to exist for the sale. *(Vadalai Ramakistnamah* v. *Manda Appiah,* II, *Mad. H. C. R.,* 407.*)*

In *Mohabeer Kover and others* v. *Joobahsing and another,* the Calcutta High Court held, that where property was sold by one who has a qualified interest in it, on the plea of necessity, it is sufficient for the purchaser to be satisfied of the fact of necessity, and he need not enquire into its causes; and then the Court made the following observations:—"According to the Zillah Judge, if family embarrassment exists such as is about to cause the sale of valuable landed property, it is not sufficient to entitle the purchaser to relief that he should show the existence of such embarrassment, but he must enquire into the circumstances connected with that debt; must go into the history of the matter in which the embarrassment originated; and trace back the whole claim of transactions from the beginning. We think that it is going too far, and is not borne out by the decisions of the Privy Council upon this point. (*Calcutta W. R., Civil,* XVI, 221.)

Where it was sought to charge a Zemindary with debts, contracted by persons who were at the time usurpers in wrongful possession of the Zemindary, solely on the ground that the documents evidencing the loans recited that they were for the purpose of discharging the kists due to Government, the Madras High Court held, that in the absence of any evidence on behalf of the creditor as to the circumstances in which the transactions were had with the usurping Zemindar in possession, and the failure to connect the loans with the debts contracted by the former and lawful Zemindars, the suit was rightly dismissed." (*Chedambara Setti* v. *Srimutu Muttuvijia and others,* III, *Mad. H. C. R.,* 260.)

General Observations:—In *Hunoomanpersaud Pandy* v. *Mussumat Babooe Munraj Koonweree,* the Privy Council held as follows:—"Now, it is to be observed that a lender

of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know, or to come prepared with proof of, the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career, would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently this *dictum* may perhaps be supported on the general principle that the allegation and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground, in such suits, of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded. Their Lordships think that the question on whom does the onus of proof lie in such suits as the present, is one not capable of a general and inflexible answer. The presumption proper to be made will vary with circumstances, and must be regulated by and be dependant on them. Thus, where the mortgagee himself with whom the transaction took place is setting up a charge in his favour made by one whose title to alienate he necessarily knew to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir; namely, those facts which embody the representations made to him of the alleged needs of the estate, and the motives influencing his immediate loan." (*Moo. I. Appeals.*)

MAXIMS 138 and 139.

(138.) Nemo ad regem appellet pro aliqua lite, nisi jus domi consequi non possit. *(Manual).—No person should appeal to the king in any suit, unless he cannot obtain his right at home.*

(139.) Ne lites immortales essent dum litigantes mortales sunt. *(Br. Com.)—Let not strife be immortal, while those that strive are mortal.*

The principles set out in the above Maxims are of the most wholesome and salutary character, and ought to be borne in mind by every individual that wends his way in the world. Although the law, when properly administered, is not capable of working any injury whatsoever, yet a recourse to law, even in a right cause, is fraught with very great difficulties and inconveniences. The delay which must necessarily occur in carrying a suit through all its stages; the expense, such as the value of stamps, pleader's fees, and cost of procuring evidence; the anxiety of mind under which the party must labor during the pendency of the suit; the hostile spirit which one party may be induced to display towards the other, his witnesses, and advisers, as well during the progress of the suit as long after its termination; the temptation for perjury and forgery; and all the concomitant miseries that attend litigation—are evils incidental to every strife at law, which no Code of Procedure can prevent, and which very often counterbalance the advantages of a decree that a party may succeed in obtaining. Instances of parties unsuccessful in litigation, dying a sudden death upon receiving intelligence of the unfavorable termination of their suits, and cases of such persons even murdering their triumphant opponents, or committing some other offence on their person or property, are unfortunately not very rare. While such is the result of a law-suit in a right cause, there is no lack of instances in

which Courts of Justice are resorted to for purposes of oppression. "Things which are best in their proper use afford," says an English Jurist, "great temptations as well as facilities for their abuse; and therefore we need not be surprised that justice herself is sometimes rendered subservient to vile purposes. We have heard of robbery being committed even of a Judge's wig; we have known purses disappear during the trial of a criminal; and why should not a writ or an indictment be ingeniously converted into an instrument for transferring money from the pocket of one man into that of another? An action at law is not without its anxieties and its expenses; it is not agreeable, for instance, to be defendant in a suit for false imprisonment, for slander, or for illegal distress, especially when the plaintiff is a pauper; but to find one's self presented by the jurors of our Lady the Queen as a criminal, to undergo the ordeal of a trial at the old Bailey, is so repugnant to the feelings of most persons although supported by the consciousness of innocence, that they would, in most instances, willingly make a money commutation. It is the knowledge of this fact that renders legal process, especially of a criminal nature, available as a mighty engine of oppression and extortion. Private individuals, actuated by the desire of plunder or revenge, are ready, and often able to put the law into motion in order to accomplish their base object; they find or they create some groundwork, which, however slight, however rotten, may yet answer the end. Unhappily they can find disreputable members of the legal profession capable of lending, or rather selling, themselves to private speculations of this character; there are also other members of the profession, who without intending to do wrong, are equally dangerous,—we mean those who enter with such blind and rampant zeal into their client's views, that they disregard all manifestations and proofs of his want of care or want of honesty on the one hand, and of the complete defence which may exist on the other." (*D'Latour*, p. 179.)

Under these circumstances, it behoves a sensible man to endeavour to settle amicably out of Court any dispute in which he may be involved, and to have recourse to law in those cases only in which he finds conciliatory measures prove utterly unavailing, and even then, not to plunge too deeply into a law-suit with a litigious spirit in order to gain his cause *per fas per nefas*. It must be remembered that law allows the determination of causes by private arbitration; and provides a machinery for legalizing and enforcing such private awards; and that moreover, a procedure is laid down for convening arbitrations through the Courts, Civil or Revenue; and for the compromise of cases even after the institution of the suit. (*Code of Civil Procedure, &c., &c., &c.*) It is remarkable that, even in criminal matters, the law allows a compromise in cases in which the offence consists *only of an act*, irrespective of the intention of the offender, and for which act the person injured may bring a civil action. (*Indian Penal Code*, S. 214.)

And when, with all this, a party seems determined to seek redress in a Court of Justice, and goes to an Advocate to ask him to help him in that respect, it is the duty of the latter to give his client such advice as would deter him from going to law unnecessarily; warn him of the consequences of an unsuccessful termination of his case; and to use every reasonable means in his power to effect a reconciliation between the parties. If, however, a suit is nevertheless lodged in the Court, it then no less becomes the duty of the Judge to prevent everything that would tend to promote litigation.

MAXIM 140.

Ubi jus ibi remedium. (*Co. Litt.*, 197.)—*Where there is a right, there is a remedy.*

The general rule is that Civil Courts shall take cognizance of all suits of a *civil* nature. (S. 1 of the *Code of Civil Pro-*

cedure.) If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it. Indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. *(Per Holt, C. J., in Ashby v. White et alios, Sm. L. C., I. 237.)*

Civil actions are generally of the following classes:—

I. ACTIONS ON CONTRACTS,—which are generally with reference to lands, houses, movable property, money, negotiable securities, policies of marine assurance, policies on lives, fire policies, warranties, guarantees, wages; accounts; landlord and tenant; master and servant; carriers; innkeepers, &c., &c., &c. (Vide Maxims on Contracts for further particulars.)

II. ACTIONS ON TORTS.—A tort has been described by an English Statute as a wrong independent of contract. It may be described as an invasion by A of B's rights, either of property, person, liberty, or reputation. The Roman law called such wrongs, *delicts*, and they have been defined as spontaneous; that is, free or voluntary actions, or omissions contrary to law. The wrong being an act which is against right or law, the obligation to make reparation for the damage arises from the fault, and not from the intention; and conversely, a thing which is not a legal injury or wrong, is not made actionable by being done with a bad intent. But in many cases, to constitute an act a legal wrong or injury, the existence of a malicious intention is necessary. Hence negligence, or imprudence, may render a man responsible; and the principle pervading the law of torts is, that all persons are liable for all the natural and legal consequences resulting from acts or omissions by them in violation of the rights of others. There are two ingredients in a tort; the *injury* or legal wrong which is always essential; and the *damage* which is generally present, and sometime said to be essential. *(Collett's Torts,* Secs. 1 to 4.)

. Surely every *injury* imports a *damage*, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it costs him nothing, no, not so much as a little *diachylon*, yet he shall have an action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage, for it is an invasion of property, and the other has no right to come there. And it is no objection to say that this will occasion multiplicity of actions; for if men will multiply injuries, actions must be multiplied too, *for every man that is injured ought to have his recompense.* (Per *Holt*, C. J., in *Ashby* v. *White*; *Sm. L. C.*, I, 239.)

III. ACTIONS FOR THE RESTITUTION OF CONJUGAL RIGHTS, CUSTODY OF CHILDREN, MAINTENANCE, &c.—(Vide Maxims on Marriage, and Husband and Wife, Parent and Child.)

IV. ACTIONS REGARDING TESTAMENTARY AND INTESTATE SUCCESSION.—(Vide Maxims on Succession and Wills, &c.)

V. AND ACTIONS FOR THE BARE DECLARATION OF RIGHTS. —The Civil Courts may make binding declarations of right, without granting consequential relief. (Sec. 15, *Civil Proc. Code.*) But in order to entitle a plaintiff to a bare declaration of right under Sec. 15, Act VIII of 1859 (*i. e.*, Civil Procedure Code,) he must make out, to the satisfaction of the Court, some act done by the defendant which is hostile to and invades that right, and which would justify an injunction, or decree for damages, or a decree for delivery of possession, being passed against the defendant, if the Court had so thought fit to exercise its discretion. *Kenaram Chuckerbutty* v. *Deonath Panda*, 9 W. R., 325. And a declaratory decree ought only to be passed where some

injury appears so probable as to lead to the conclusion that unless stayed by the declaratory decree the inchoate or threatened injury is inevitable. *Pareejan Khatoon* v. *Bycount Chunder Chuckerbutty*, VII, W. R., 96. Nor can a suit be entertained where the plaintiff, who merely seeks for a declaration of title is in possession of all his alleged rights, and is not in a position to bring an action. *Padagaligum Pillay* v. *Shunmoogum Pillay*, II, *Mad. H. C. R.*, 333. A suit lies by a reversioner to declare that an alienation by a Hindu widow shall not be binding upon him after her death. *Sheneak Ram Roy* v. *Syed Mahomed Shamsal*, *Bengal L. R. A. C.*, 196; and *Teramal Shamsal* v. *Venkataram*, II, *Mad. H. C. R.*, 378.

The rule, as above illustrated, that every person who is injured ought to have his recompense, is open to some qualification. So, (1) acts of the State, such as, seizure, revenue, criminal matters, and the like; (2) matters relating purely to religious observances; (3) things which are against the law, or public policy or morality; or public rights and conveniences; and (4) acts or omissions which the law does not esteem as injuries,—are not made the subject of civil action.

The first of these exemptions (Acts of State) forms the subject of the Maxims relating to the Crown, and the remaining three exceptions will be illustrated by means of the Maxims, which will presently follow.

In conclusion, it is necessary to explain what a cause of action means. "The words *cause of action*," says Mr. Justice Holloway, in *DeSouza* v. *Cole*, may have either the restricted sense of immediate occasion of the action, or the wider sense of necessary conditions of its maintenance. In one sense, it is the mere matter of fact; the failure of the defendant to do or forbear from doing, to give or make good, that which the plaintiff's right entitles him to insist upon. In the other, it is the matter of fact *plus* the right resident in the

plaintiff. Failing the former, the injury is inconceivable; failing the latter, the right cannot assume the special shape of an action. *(III, Mad. H. C. R., 406.)*

And the following note by the same learned Judge in the case of *Pattasamy Mudali* v. *Adimala Mudali,* is very instructive:—"Lens quoted Forster Process Privat-recht, 1-227, note 4, (2nd edition 1869) says, 'the right of suit is just as little an independent right as an annexum or appendage to it. The right does not, through the infraction, become converted into a right of action; the action thus is no new right which is generated by the lesion; finally, it is also not the right itself in so far as to become perfectly available and complete; it must put itself in motion for its establishment. All these forms of expression of our civilians do not hit the mark, and have their root partly in the inordinate thrusting upon the field of law of those views of an organism so dear to the historical school, and partly in the standpoint of the much-despised law of nature, despite of that school not overcome. The actio is without doubt the right itself, but only in so far as it reacts with elastic recoil against a foreign and accidental invasion. The right of action is the legal potentiality whereby the person entitled is able to invoke the established organs of legal protection, when he is accidentally provoked thereto by the lesion of another. It is the power of the right enabling it to force the injurer, by means of the organs of the collective body, to a recognition of itself.' This criticism puts by implication all the views now entertained and is itself a masterly exposition."

"Arndts, who had in his former editions treated the action 'as an appendage of the right,' has in his 5th and 6th Editions, in deference to the criticisms of Unger, Böcking, Demelius, and Lens, withdrawn that expression and now (Sec. 96) defines the action in its material (other than processual) sense, 'a power indwelling in the right of asserting itself against the wills of others striving against it.'

"Unger, after shortly refuting the antiquated opinion that actions formed a distinct class of rights, says, (II, p. 353) 'The right of action as the legal potentiality of the right making itself available by means of a complaint is not a self-subsisting right distinct from the actionable right, nor is it..... an external appendage, a special addition to the right: the complaint is rather identical with the right itself; the actio is the right itself as judicially pursuable, the right, as right of battle (the right in *sago* in distinction from the right in *togâ*) a part essentially appertaining to the contents of the right, not in independent right existing beside it, or a mere addition entering into connection with it.'

"Again, as to the cause of action he says, 114, 'The ground of complaint in the material sense (*causa actionis, causa petendi*) is the legal relation from which the complaint emanates, the right of which it is an essential part, the right in which it brings itself to recognition and efficacy. In so far as the right itself springs from certain matters of fact, these *right engendering* matters of fact are the remoter ground of origin of the complaint, the *causa causae actionis* (*causa remota actionis*) while the right itself forms its closest ground (*causa proxima actionis*, 627 D. de. e. r. i. 44., 2); in this sense, it is customary to distinguish the material ground of complaint into the immediate (based on the right) and the mediate (based on fact.")

"Wrongly does Bekker regard the injury as the *causa proxima actionis* as the ground of plaint, and in this manner confuses the ground and occasion of the plaint, against which Puchta had already warned us. Note 1, Sec. 114.

"It would be easy to add numerous authorities not in all points accordant with themselves, but all accordant in rejecting the old doctrine as to the action. No part of the scientific theory of law has been subjected to more searching criticism and even reconstruction than this. Induced by Savigny's great work and a celebrated work of Kierulff,

criticism has carefully tested all their results, and it is no disrespect to Savigny to say that even some of his views must be abandoned.

"It was Mr. Austin's misfortune that he wrote in a time at which the science of law was indeed reviving, but before its progress during the last forty years, which is greater than any made since the great Frenchman of the sixteenth century. English books still seem to know only the very respectable but quite subordinate names of Pothier and Domat." *(V, Mad. H. C. R., 423, 424.)*

MAXIMS 141 to 143.

(141.) Actio non datur non damnificato. *(Jenk. Cent., 69).—An action is not given to him who is not injured.*

(142.) In jure non remota causa, sed proxima, spectatur. *(Bac. Max., Reg. 1).—In law the proximate, and not the remote, cause is to be recognised.*

(143.) Consequentiae non est consequentia. *(Manual).—The consequence of a consequence does not exist.*

The class of cases which forms one of the exceptions to the rule, that there is no wrong without a remedy, is that in which damage is incurred by the plaintiff, but not occasioned by anything which the law esteems an injury. In such cases parties are said to suffer *damnum sine injuria*, (a loss without injury) and can maintain no action. The mode of determining whether damages have or have not been occasioned by what the law esteems an injury is to consider, *whether any rights existing in the party damnified, have been infringed upon; for if so, the infringement thereof is an injury;* and if an injury be shown, the law will presume that some damage resulted from it. *Ashby* v. *White et Alios, Sm. L. C.*, I. 245, *&c.*

Where legal proceedings have been taken for the *bonâ fide* purpose of assisting some supposed right, or prosecuting a

civil charge, which in the event proves groundless, it has been held, in order to facilitate the administration of justice, that unless there be both malice *and* an absence of reasonable and probable cause, the persons against whom the proceedings are taken, has no legal ground of action. (*Sm. L. C.*, I, 246, and III, *Mad. H. C. R.*, 238.) There is no fixed rule as to what is a reasonable ground of suspicion. A charge may be reasonable or unreasonable with reference to the circumstances and character of the party making it, or of the party charged. A constable, though he ought to be protected in the execution of his duties, ought also to be guided by ordinary reason, care, and caution. Still, if one charges another with felony, and desires a constable to take him, and he do so without a warrant, he is not responsible for the imprisonment, though the charge is false and no felony had been committed. It would be most mischievous, that, (the charge being apparently reasonable), the constable should be bound first to try, and at his peril, exercise his judgment on the truth of the charge. He that makes the charge is alone answerable. (*Collett on Torts*, Sec. 45.)

The immunity of certain privileged or confidential statements defamatory of third persons, on the ground that they are made *bonâ fide* in the assertion of a right, or the performance of a duty, or that they are fair criticisms upon matters of public interest, furnishes another head of *damnum obsequi injuria*. In the absence of actual malice if a man, in good faith, and believing the matter to be true, makes a communication in the discharge of some public or private duty, whether legal, moral, or social, or in the conduct of his own affairs, and with a fair and reasonable hope of protecting his own interest in a matter where it is concerned, such communication, if made to a person having a corresponding duty, or interest, is privileged, though it contains criminatory matter, which otherwise would be slanderous and actionable. If the occasion is such as repels the pre-

sumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice, in fact; but the libel itself may be looked at for this purpose. A plea of privileged communication must allege that the defendant made the communication on a lawful occasion, believing it to be true, and without malice, or at least *bonâ fide*. There are various occasions on which such privilege exists. Thus, what is sworn to by a witness or party, in the course of a judicial proceeding before a Court of competent jurisdiction, is not actionable, though it is false, scandalous, and malicious; provided it is not wholly irrelevant. The pertinence of the matter is a protection, and the proper remedy is a prosecution for perjury. But if the Court has no jurisdiction in the matter, and no right to entertain the proceeding, and the charge is recklessly and maliciously made, it is not privileged. So, where comments are made orally in the conduct of a cause, as by a counsel or a party conducting his own case, they are privileged, considerable latitude being necessarily allowed; and it is pertinent to the cause for counsel to comment freely, and indulge even in any calumnious imputations which the fact before the Court, whether true or false, may appear to warrant. The mere strength of expressions is not to be too nicely objected to, though counsel ought not to avail themselves of their situation maliciously to utter words unjustifiable and irrelevant. So, judicial officers are not responsible for slanderous words, though false and malicious, if they are material, and relevant to a cause or matter in issue before them, and within their jurisdiction. (*Collett on Torts*, S. 87.)

The case of the school set up near another school is one of the earliest on the subject of damage without legal cause of action, and possesses much interest. Such and other cases of the kind are not actionable. Serious damages, even actual nuisances, have been held not actionable, as

being either not temporal injuries, or only such as must be expected to result from the reasonable exercise of legal rights. (*Sm. L. C.*, I, 245.)

There are some cases in which damage is sustained by one man in consequence of the act of another, which act would be considered tortious by the law, if the damage incurred could be properly *deduced from it*, but which nevertheless is dispunishable; because the damage actually incurred is *too remote* to be the subject-matter of an action; in other words, because it is not the natural consequence of the act committed by the defendant. Thus, if the plaintiff is made ill and put to medical expense by the defendant's slander of him, that will not be sufficient special damage to support an action. (*Sm. L. C.*, I, p. 255.)

What is an injury when done by one person, is not always a legal wrong or injury, if done by another; thus, moderate correction by a schoolmaster is not a legal wrong, though it could be an assault between other parties; so an arrest by a policeman, or imprisonment by a magistrate may not be actionable, though precisely the same acts if done by a private person, would be so. So it is said that there may be both injury and damage, but there will be no action if the damage is too remote. It is more correct to say, that there is then no legal connection between the two: thus, if A slanders B; and C, believing it, beats B, the damage therefrom is, in respect to A, one without injury. (*Collett on Torts*, p. 4, Sec. 6.)

There are certain cases in which an act may in law be an injury and may produce damage to an individual, and yet be one in which the law affords no remedy, or at least no immediate remedy. These are cases in which the act done is a grievance to the entire community, and *no one* of them is injured by it more than another. In such cases the mode of punishing a wrong-doer is by *indictment* only, for otherwise he would be ruined by a multiplicity of actions. Still if any

person have sustained a *particular damage* therefrom *beyond that* of his fellow citizens, he may maintain a civil action in respect of that *particular damnification*. (*Ashby* v. *White*. *Sm. L. C.*, I, 252.)

In conclusion, no civil action can be maintained where the right of suit is taken away by any express enactment, as for instance certain questions with reference to a suit already decreed, must be determined by order of the Court executing the decree and not by a separate suit. (Sec. 283 of Act VIII of 1859 and Sec. 11 of Act XXIII of 1861, and *Sunjeviah* v. *Nanjiah*, IV, *M. H. C.*, 453.)

The following cases afford further illustration of the Maxims under consideration :—

In *Sudharam Pattar* v. *Sudharam*, the plaintiff sued for a decree declaratory of the right of a person to the membership of a Samaj (Society,) upon the allegation that the other members had excluded him from the Samaj. The Calcutta High Court held that as such exclusion neither deprived him of caste, nor affected any right of property, the suit was not cognizable by the Civil Court. The members of the Samaj were sole judges whether a particular person was entitled to continue as a member or not. (*Bengal L. R.*, III, Appendix, 91.)

In the case of *Hurruck Chund Motee Chund* v. *Kooshale Chund Goolal Chund*, it was held that the members of a caste possess the right of expelling one of their body, except when done from malicious motives. (*Borr.*, I, p. 38.)

In *Hopkinson* v. *Marquis of Exeter*, before the Master of Rolls, a member of a club sued for his restoration to the membership of that club from which he had been, as he thought unjustly, excluded. The club was partly of a political character, but its objects were mainly social; and the Court refused to interfere with the decision of the other members, who had excluded the plaintiff, notwithstanding that rights of property were involved. (37, *L. J.*, ch. 173.)

In *Nitai* v. *Shabal Shaba*, the contract sued upon ran thus,—"We shall not without your permission join any other Samaj (community); if we do so, we shall pay fifty rupees with interest." Plaintiff sought to recover Rs. 50 from defendant, on the ground that the latter committed a breach of the said contract. A question arose, can an agreement, thus to remain for ever in a particular community of men, be enforced, or a penalty allowed for breach of that agreement? The Calcutta High Court held that such an agreement cannot be enforced, and that the suit must be dismissed. (*Beng. L. R.*, II, *Short notes*, page v.)

In the case of *Koni Chetty and* 2 *others* v. *Veriappa Chetty and* 28 *others*, an agreement entered into between the plaintiffs and defendants, members of the same caste, contained a stipulation that in the event of the defendants objecting to the receiving of a girl from, or the giving of a girl to, the plaintiffs in marriage, the defendants should be bound to return Rupees 500 with interest, which the plaintiffs had paid to the defendants under the agreement. It was found by the Civil Judge that the 15th defendant's son was engaged to be married to the 2nd plaintiff's daughter, and that the marriage was broken off on the part of the 15th defendant. The Madras High Court held, on special appeal, that this was *primâ facie* a breach of the agreement which entitled the plaintiffs to recover, and that it was for the defendants to show that it did not bring them within the terms of the agreement. (*Madras H. C. R.*, IV, 325.)

The omission of a mere courtesy cannot be taken to be equivalent to slandering or libelling a man, and is not an actionable wrong. (*Sri Raja Setarama Krishna Rayadappah Ranga Raz Bahadur Garoo*, Zemindar of Bobbily, v. *Sri Raja Sanyasi Razu Pedda Baligara Simhalu Bahadur Garoo*, Zemindar of Salur, III, *Mad. H. C. R.*, 4.)

In Bengal, the plaintiff, a malee or gardener, sued in the lower Court for the affirmance of certain rights, to supply

flowers at the performance of stated religious ceremonies, which the defendant had invaded and himself supplied the flowers; and he obtained a decree. In appeal, it was held, that such an action was against the policy of law as administered in our Courts, being of the nature of a right to a monopoly within certain localities, and accordingly the decree of the Court below was reversed. (*Gyan Chunder Malee*, appellant, 5th February 1857. *D. L.*, I, p. 9.)

In *Parythy Caytholaba Moodelly* v. *Toonary Ryroo*, the plaintiff's claim to the exclusive right of midwifery was rejected, the Sudder Udalat Court of Madras holding that such a right cannot, under existing circumstances and in conformity with the principles of unrestrained liberty of thought and action enjoyed by all, be upheld in the Courts of Justice under British rule. (*Mad. Sudder Udalat decisions*, II, 83.) And upon the same principle claims to the exclusive right of shaving within certain limits cannot be upheld. (*Cooppa Moottoo* v. *Baupen*, *Madras Sudder Decrees*, II, 77.)

Note.—For further particulars on the subject, vide Maxims relating to the enjoyment of Property.

MAXIM 144.

Non pertinet ad judicem secularem cognoscere de iis quae sunt mere spiritualia annexa. (2 *Inst.*, 488.)—*It belongs not to the secular Judge to take cognizance of things which are merely spiritual.*

It will be observed that our Courts are temporal Courts and not spiritual; consequently any acts which are purely religious cannot be taken cognizance of by the Courts here, unless they affect civil rights also in some way. Matrimonial jurisdiction, however, has been specially conferred upon the High Courts of Judicature by the Letters Patent, and upon

the District Civil Courts by certain Acts of the Imperial Legislature. (*Acts* XXI of 1866, IV of 1869, XV of 1865 and III of 1872.)

In the case of *Streemun Sadagopa* v. *Kristna Satacharyar and another*, the Madras High Court held that a Hindu priest cannot sue in respect of the withholding of religious observances due to his sacred rank, but unconnected with any special office held by him, although the non-performance of such observances may have caused him some ascertainable pecuniary loss. (I, *Mad. H. C. R.*, 301.)

In the case of *Archakam Strinivasa Dikshatalu* v. *Udayagiry Anantha Charlu*, the plaintiff sued to establish his rights to receive certain honors in the temple of Tirupathy Sri Kottanda Ramasawmy Devasthanam as appertaining to his office of priest of the temple and to recover damages for the invasion of his right by first and second defendants. The question was whether the Civil Courts were competent to entertain suits of this nature; and the Madras High Court passed the following judgment:—"We think that they are. There is here no question of the regulation of religious ritual as was the case in Special Appeal, No. 94 of 1861; or of a right to votive offerings or payment of respect by the wardens and worshippers of the temple, such as was claimed in the case reported in Madras High Court Reports, Vol. I, p. 301. The question here relates to a right appertaining to an office in the temple, and the decision of the High Court in Original Suit, No. 79 of 1865 (not reported) bears us out in the conclusion which we have arrived at, as to the jurisdiction of the Civil Courts in suits in which a right is claimed in connection with religious worship, which is not a mere matter of religious ceremonial, and which does not trench on the rights of the worshippers at a temple to show to the claimant or to withhold from him reverence or respect. (IV, *Mad. H. C. R.*, 349.)

In *Maadan* v. *Erlandi*, the plaintiff sued to recover the amount of marriage fees, which the defendant became liable to pay for the use of a temple upon the defendant's marriage with a woman residing in the village wherein the temple was situated, by virtue of a long established custom. Held, that, the existence of the alleged immemorial custom not having been established, the plaintiff was not entitled to maintain the suit. *Semble*:—that if the existence of the custom had been made out, there would probably be an obligation to pay the fees claimed. (I, *Mad. H. C. R.*, 147.)

In the case of *Narasimma Chariar and* 11 *others* v. *Sri Kristna Tata Chariar*, the plaintiffs, members of the Tengalai sect of Brahmins, sued the defendants, the trustees of a temple at Conjeveram, for the recovery of the money value of certain holy cakes, which they alleged they were entitled to receive from the defendants, for commencing the recital of a Sanscrit verse and reading a certain Tamil chant, which offices they (plaintiffs) had the hereditary right of performing in the said temple. The Munsiff decreed in favor of some of the plaintiffs. The defendants appealed; and the Civil Judge dismissed the suit, on the ground that the question incidentally involved was one of a religious character. Held, that the Civil Judge was wrong; that the claim was for a specific pecuniary benefit, to which plaintiffs declared themselves entitled on condition of reciting certain hymns; and that, undoubtedly, the right to such benefits is a question which the Courts are bound to entertain. (VI, *Mad. H. C. R.*, 449.)

MAXIMS 145 and 146.

(145.) Allegans suam turpetudinem non est audiendus. *(4 Inst. 279.)—A person alleging his own infamy is not to be heard.*

(146.) Ex turpi causa non oritur actio. *(Cowp. 343.)—An action does not arise from a base cause.*

No action arises out of an infamous, base, fraudulent, indecent, immoral, or illegal consideration. What are such considerations will be seen from the Maxims on the subject of Contracts. It is true that the objection that a contract is immoral or illegal as between the plaintiff and the defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy which the defendant has the advantage of contrary to the real justice of the case as between him and the plaintiff, and because the Courts will not lend their aid to a plaintiff in such a position. So, if the plaintiff and defendant were to change sides, and the defendant were to bring the action against the plaintiff, the latter would have the advantage of it; bringing in another principle of the law, where both being equally in fault, the condition of the defendant is the better. (Per *Lord Mansfield in Holman* v. *Johnson—Chitty on Contract*, p. 610.)

It is a rule of law that no evidence of an oral agreement or verbal statement shall be admitted as between the parties to a written contract, for the purpose of contradicting, varying, adding to, or subtracting from, the terms of such a contract; but an exception to this rule is sanctioned, so that any fact may be proved which would invalidate a document, or which would entitle a person to a decree, or order relating thereto in his favor, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact, or in law. (Sec. 92, *Indian Evidence Act.*)

147.

Actio personalis moritur cum persona. *(Noy. Max.* 20).—*A personal right of action dies with the person.*

As a rule, the personal representatives of a deceased person may sue for the recovery of all debts due to the deceased, and also to enforce all contracts made with the deceased, whether broken in his lifetime, or afterwards, the breach of which occasions an injury to the personal estate, and which are neither limited to the lifetime of the deceased, nor revoked by his death. An action, however, is not maintainable for a breach of promise of marriage made to the deceased, where no special damage is alleged; and, generally, with respect to injuries affecting life or health of the deceased, such, for instance, as arise out of the unskilfulness of a medical practitioner, or the negligence of an attorney, or a coach proprietor, the maxim as to *actio personalis* being applicable, unless some damage done to the personal estate of the deceased be stated on the record. But, where the breach of a contract relating to the person occasions a damage, not to the person only, but also to the personal estate; as, for example, if in the case of negligent carriage or cure, there was consequential damage; if the testator had expended his money or had lost the profits of a business, or the wages of labor for a time; or if there were a joint contract to carry both the person and the goods, and both were injured;—it seems a true proposition, that, in these cases, the executor might sue for the breach of contract, and recover damages to the extent of the injury to the personal estate.

On the other hand, the personal representatives are liable as far as they have derived assets which belonged to the deceased on all covenants and contracts of the deceased broken in his lifetime, and likewise on such as are broken

after his death, for the due performance of which his skill or taste was not required, and which were not to be performed by the deceased in person. (*Broom's Maxims*, p. 904, &c.)

The death of the plaintiff or the defendant shall not cause the suit to abate if the cause of action survive. (Sec. 99, *Code of Civil Procedure.*)

No action commenced under Act XII of 1855 for wrongs committed in the lifetime of the deceased person shall abate by reason of the death of either party, but the same may be continued by or against the executors, administrators, or representatives, of the party deceased; provided they have assets belonging to the deceased.

MAXIMS 148 to 150.

(148.) Felonia, ex vi termini, significat quodlibet capitale crimen felleo animo perpetratum. *(Co. Litt.* 391.)—*Felony, by force of the term, signifies some capital crime perpetrated with a malignant mind.*

(149.) Crimina morte extinguantur. *(Jenk. Cent.* 160.) —*Crimes are extinguished by death.*

(150.) Liberta pecunia non liberat offerentum. *(Co. Litt.*, 207.)—*Money being restored does not set free the party offering.*

Sir William Blackstone defines a crime to be "an act committed or omitted in violation of public law, either forbidding or commanding it." "This definition," says Mr. Henry John Stephen, "scarcely points out the difference between "a *crime* and a *civil injury*;" and this learned author lays down the following as more appropriate definition:—"A crime is the violation of a right when considered "in reference to the evil tendency of such violence as "regards the community at large." The Indian Penal Code

(which make no distinction between a felony and misdemeanour, and calls every crime an offence), contained (in Sec. 40) the following definition:—"The word 'offence' denotes "a thing made punishable by this Code." But this definition gave rise to a great discussion by the High Court of Madras and the Legislative Council of the Governor-General. A majority of the High Court was of opinion that the words "made punishable by this Code" were equivalent to "represented or declared punishable by this Code;" and that consequently, as Section 5 of the Indian Penal Code preserved the effect of all special and local laws, acts punishable by such laws were offences within the meaning of the Penal Code, (III, *Madras H. C. R.*, App. XI.) On the other hand the Supreme Council was of opinion that the effect of Sec. 40 was to limit the word 'offence,' wherever it occurred in the Penal Code, to an act for which an express penalty was provided by that Code. This controversy has now been put an end to by the Legislature passing an Act (XXVII of 1870) to amend the Indian Penal Code, and declaring in Sec. 2 that, "except in the Chapter and Sections mentioned in "Clauses two and three of this Section, the word 'offence' "denotes a thing made punishable by this Code."

Clause 2.—"In Chapter IV, and in the following Sections, namely 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined."

Clause 3.—"And in Sections 141, 176, 177, 201, 202, 213, 216 and 441, the word offence has the same meaning, when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months, or upwards, whether with or without fine."

It is very necessary to bear in mind the distinction between "*crimes*" (or offences) and "civil injuries." The

distinction consists in this;—"that civil injuries, otherwise called private wrongs, are an infringement or privation of the civil rights, which belong to individuals considered merely as *individuals;* and crimes, otherwise called public wrongs, are a violation of the same rights considered in reference to their effect on the *community*, in its aggregate capacity. As, if I detain a field from another man to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land; but treason, murder, and robbery, &c., are properly ranked among crimes, since, besides the injury done to individuals, they strike at the very being of society, which cannot possibly subsist, where actions of this sort are suffered to escape with impunity. In all cases, the crime includes an injury. Every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community. Thus treason in imagining the Sovereign's death involves in it conspiracy against an individual, which is also a civil injury; but as this species of treason, in its consequences, principally tends to the dissolution of Government and the destruction thereby of the order and peace of society, the law denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual, but the law of society considers principally the loss which the State sustains by being deprived of a member, and the pernicious example thereby set for others to do the like. Robbery may be considered in the same view; and somewhat more; it is an injury to private property; but were that all, a civil satisfaction in damages might atone for it: the public mischief is the thing for the prevention of which our laws have made it a felonious offence. In these gross and atrocious injuries, the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the *individual;* the satisfaction to the *community*

being so very great. And indeed, as the public crime is not otherwise avenged than by forfeiture of life or property, it is in many instances impossible afterwards to make any reparation for the private wrong, which can only be had from the body or goods of the aggressor. But there are crimes of an inferior nature, in which the public punishment is not so severe; and herein the distinction of crimes from civil injuries is very apparent. For instance, in the case of battery, or beating another, the aggressor may be indicted for this, at the suit of the Crown, for disturbing the public peace and be punished criminally by fine and imprisonment; and the party beaten may also have his private remedy, by action of trespass, for the injury which he in particular sustains, and recover a civil satisfaction in damages." *(Black. and Stephen's Commentaries,* IV, 80.*)*

So, in the case of a nuisance, if it is a public one, it can only be the subject of an indictment; for, otherwise, the offender might be ruined by a million of suits. But a private individual may sue for any special damage he has suffered from the nuisance. Thus, a man may be indicted for digging a hole in the high road, and be also sued by a person who has fallen into it and broken his leg. A public nuisance is an act or illegal omission which causes any common injury, damage, or annoyance to the *public,* or to the *people in general,* who dwell or occupy property in the vicinity; or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right. (Sec. 268, *I. P. C.*) On the other hand, if a nuisance affects only *individuals,* it cannot be made the subject of an indictment, but may be the ground of a civil action for damages only.

Among the cases that come before a Magistrate, there is a distinction between cases of a criminal nature and those of a civil nature. Of the latter class are cases for maintenance, &c., brought under the Presidency Police Act

and the Code of Criminal Procedure. And all other cases are of the former class. This distinction is to be borne in mind, because the procedure in either case will be different; thus a defendant is capable of being examined as a witness on oath in a civil proceeding held before a Magistrate; while he is not a competent witness in criminal proceedings. As a rule, if an Act speaks of an *order* to be made in the case, it is presumed that the legislature intended to treat it as a civil case; while, if the Act speaks of a *conviction*, the presumption would be that the case was regarded as a criminal one. (*R.* v. *Lloyd* and *R.* v. *Bissex.*)

All criminal prosecutions will be at an end upon the death of the actual offender, on the principle that crimes are extinguished by death. So that, no penal action can be taken against his heir, unless such heir has benefitted from the wrong committed by his ancestor, as for instance, by possessing or concealing property known to him to have been stolen by his ancestor, or allowing the continuance of a nuisance committed by his ancestor, to his advantage. It is also remarkable that the death of an offender does not discharge his property from liability to the recovery of fines imposed upon him. (Sec. 70, *I. P. C.)*

On the other hand, no criminal prosecution can abate by the death of the injured party, because in the generality of criminal cases, the Sovereign is the prosecutor, and in his political capacity the Sovereign never dies. Even in cases affecting individuals themselves, there are cases in which the death of the injured party does not put an end to the criminal proceeding. In Sec. 499 of the Indian Penal Code, it is provided that it may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

In conclusion it must be observed that no offence can be

purged by any means other than the legal punishment awarded according to law. The restitution of stolen property, or a compromise entered into with the injured person, will not exonerate the offender from the legal penalty; for the object of the criminal law is not so much the good of any particular individual, as the welfare of the whole public. So that harbouring an offender, offering or taking gifts, &c., to screen an offender from punishment, or to recover stolen property; intentional omission to apprehend an offender on the part of a person bound by law to do so, &c., &c., &c.; are offences under the Indian Penal Code. Secs. 212 to 227. So that no offence can be compounded or compromised, with the exception of cases in which the offence consists only of an act irrespective of the intention of the offender, and for which act the person injured may bring a civil action. Thus a simple assault or adultery may be compounded, whereas an assault with an intent to commit murder may not be so. (Vide Exceptions to Secs. 213 and 214, Indian Penal Code.)

It is considered convenient to divide offences into the following classes for the purposes of this work; namely,—

Offences relating to religion.
Do. against nature.
Do. against the State.
Do. against public justice and public servants.
Do. affecting the public peace, health, morality, trade, commerce, marriage, &c., &c.
Do. against private persons and property.
Do. against one's own property and person.
Abetments of the foregoing offences.
Attempts to commit the said offences.

The following are the excuses for the commission of these offences :—

Want of criminal intention.
Misfortune.

Infancy.
Insanity.
Drunkenness.
Ignorance of law and fact.
Necessity, compulsion.
Self-defence.
Consent.
Slight harm.

The principles upon which the aforesaid several classes of *offences* and *exceptions* are founded, and the object and measure of *punishments*, will be explained under the Maxims immediately following.

(N. B.—It must be remembered that, besides the above-named offences, there are others under the local and special laws,—such as laws relating to the Army, Navy, Conservancy of towns, Abkarry, Salt, Customs, Post Office, Telegraphs. Railway, &c., &c.)

MAXIM 151.

Nec veniam, laeso numine, casus habet. *(Jenk. Cent.*, 167.) — *Where the divinity is insulted the case is unpardonable.*

It must be the policy of every good Government to preserve the religion of its subjects. Her Majesty the Queen in her Proclamation of 1858 declares that, "firmly relying ourselves on the truth of Christianity, and acknowledging with gratitude the solace of religion, we disclaim alike the right and desire to impose our convictions on any of our subjects. We declare it to be our Royal will and pleasure that none be in anywise favored, nor molested, or disquieted, by reason of their religious faith or observances; but all shall alike enjoy the equal and impartial protection of the law."

A person destroying, damaging, or defiling any place of worship, or any object held sacred by any class of persons with the intention of insulting the religion of any class of

persons; a person who voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship or religious ceremonies; a person who with the intention of wounding the feelings of any person, or of insulting the religion of any person, commits any trespass in any place of worship, or in any place of sepulture, &c.; and any person, who, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound or gesture in the hearing or sight of that person, &c.;—are all punishable criminally, under Sections 295 to to 298 of the I. P. C.

The original framers have made the following observations with reference to Section 298 abovementioned. "In framing this clause we had two objects in view; we wish to allow all fair latitude to religious discussion, and at the same time to prevent the professors of any religion from offering, under the pretext of such discussion, intentional insults to what is held sacred by others. We do not conceive that any person can be justified in wounding, with deliberate intention, the religious feelings of his neighbours by words, gesture, or exhibition. A warm expression dropped in the heat of controversy, or an argument urged by a person, not for the purpose of insulting and annoying the professors of a different creed, but in good faith for the purpose of vindicating his own, will not fall under the definition contained in this clause."

MAXIM 152.

Peccata contra naturam sunt gravissima. *(3, Inst. 20.)* —*Crimes against nature are the most heinous.*

An offence against nature is of the darkest nature and was once punishable in Europe with burning alive. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, are punishable under the Indian Penal Code.

MAXIMS 153 and 154.

(153.) Nemo patriam in qua natus est exuere nec legeantiae debitum ejurare possit. *(Co. Litt., 129.)—A man cannot abjure his native country, nor the allegiance which he owes to his Sovereign.*

(154.) Crimen laesae majestatis omnia alia crimina excedit quoad poenam. *(3, Inst., 210.)—The crime of treason exceeds all other crimes as to its punishment.*

The duty of allegiance—*natural* or *local*—is founded in the relation which subsists betwixt him who owes it and the Crown, and in the privileges derived by the former from that relation. Of "natural" allegiance, says Sir M. Foster, the whole doctrine is comprehended in the Maxim *Nemo potest exuere patriam*, whence it follows that a natural-born subject owes allegiance at all times and in all places to the Crown, as the head of that society whereof he has through life been a member. "Local" allegiance is found in the protection which a foreigner enjoys for his person, his family, and effects during his residence here. The tie in question is severed therefore, *ipso facto*, on the determination of such residence. Protection and allegiance are, then, reciprocal obligations, and the allegiance due to the Crown must clearly be paid to him who is in the full and actual exercise of the regal power. *(Br. Com.)*

Such being the case, the consequences of any offence against the Sovereign are very disastrous. The crime of high treason, in its own direct consequences, is calculated to produce the most malignant effects upon the community at large. Its direct and immediate tendency is the putting down the authority of the law; the shaking and subverting the foundation of all Governments; the loosening and dissolving the bands and cement by which society is held together; the general confusion of property; the involving a

whole people in bloodshed, and national destruction: and accordingly, the crime of high treason, has always been regarded by the law of this country as the offence, of all others, of the deepest dye, and as calling for the severest means of punishment. (*Warren's Blackstone.*)

Therefore, waging war or attempting to wage war, or abetting the waging of war against the Queen; concealing with intent to facilitate a design to wage war; assaulting the Governor-General, Governor, &c., with intent to compel or restrain the exercise of any lawful power; waging war against any Asiatic power in alliance with the Queen; committing depredation on the territories of any power at peace with the Queen; receiving property taken by war or depredation mentioned in Secs. 125 and 126; a public servant voluntarily allowing a prisoner of State or war in his custody to escape; and aiding the escape of, rescuing, or harbouring such prisoner, are all offences, and the offenders are punished accordingly. (Secs. 120 to 190, *I. P. C.*)

And upon the same principle offences relating to the Army and Navy, and against the Queen's Coin and Government Stamps, are punishable under Chapters VII and XII of the Indian Penal Code.

MAXIM 155.

Injuria illata judici, seu locum tenenti regis, videtur ipsi regi illata, maxime si fiat in exercentem officii. (3 *Inst.*, 1).—*An injury offered to a Judge, or person representing the King, is considered as offered to the King himself, especially if it be done in the exercise of his office.*

This Maxim is founded upon the one which relates to the Sovereign himself; for, unless the hands of the Courts of Justice or other tribunals are strengthened with sufficient power, protected against insult and contempt, and kept in the purest possible state, the duties devolving upon the

Sovereign cannot be satisfactorily performed. And for this purpose, offences by or relating to public servants; contempts of lawful authority of public servants; false evidence, and offences against public justice, are all punishable under Chapters IX, X and XI of the I. P. C.

MAXIM 156.

Lex citius tolerare vult privatum damnum quam publicum malum. *(Co. Litt., 132.)—The law should more readily tolerate a private loss than a public evil.*

With reference to royal dignity and prerogatives and the duty which the people owe to the Sovereign, it has been established as a Maxim in law that protection and subjection are reciprocal; so that, while the Sovereign commands subjection on the part of the people, he should extend protection to them on his own part. Under the preceding Maxims it has been shown how people are liable to be punished for failing in their duty of subjection by waging war, &c., against the Sovereign and committing various offences in relation to the public servants, public justice, &c. Now it remains to be shown how the Sovereign in return protects the rights and liberties of his people; and this will be shown first with reference to offences against the public in general, and then with reference to offences against individuals and their property. The Maxim now under consideration refers to offences against the public. All offences against public tranquillity, such as unlawful assembly; ryot; affray; all offences affecting the public health, safety, decency and morals, such as public nuisance, rash navigation or driving in a public thoroughfare, negligent conduct with reference to poisonous substances, fire, combustible matter, explosive substance, machinery and animals; sale, &c., of obscene books, singing obscene songs, &c., &c.,; all offences relating to weights and measures used in public

merchandise; all offences relating to documents, and to trade and property marks; offences in the shape of criminal breaches of contract of service; and offences relating to marriage,—are all punishable under Chapters VIII, XIII, XIV, XVIII, XIX and XX of the I. P. C.

MAXIMS 157 to 161.

(157.) **Furtum est contrectatio rei alienae fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerat.** *(3 Inst., 107).—A theft is the fraudulent handling of another's property with the intention of stealing, without the consent of the owner.*

(158.) **Nemo de domo sua extrahi potest.** *(Br. Max.)—No one can be turned out of his own dwelling house.*

(159). **Mayhemium est inter crimina majora minimum; et inter minora maximum.** *(Bracton.)—Mayhem is the least amongst great crimes; and the greatest among small ones.*

(160). **Homicidium vel hominis caedium, est hominis occisio ab homine facta.** *(3 Inst., 54.)—Homicide or slaughter of a man, is the killing of man by man.*

(161.) **Injuria fit ciscuis convicium dictum est, vel de eo factum carmen famosum.** *(Bracton.)—An injury is done to him to whom a reproachful thing is said or concerning whom an infamous song is made.*

Upon the principles explained in the preceding Maxim, the Sovereign is bound to protect the people individually as regards their person, property, and reputation. Murder; culpable homicide not amounting to murder; injuries to unborn children, &c.; hurt; criminal force and assault; wrongful restraint and confinement; kidnapping; abduction; slavery; forced labor, rape, &c.; are all offences punishable under Chapter XVI of the I. P. C.

Thefts; extortion; robbery; dacoity; criminal misappropriation of property; criminal breach of trust; receiving stolen property; cheating; mischief; criminal trespass; &c.; are punishable under Chapter XVII of the I. P. C.

Defamation; criminal intimidation; insult and annoyance; are punishable under Chapters XXI and XXII of the I. P. C.

MAXIMS 162 and 163.

(162.) Interest reipublicae ut quilibet re sua bene utatur. *(6, Co., 37.)—It is to the advantage of the State that every one uses his property properly.*

(163.) Majus est delictum seipsum occidere quam alium. *(1 Inst., 43.)—It is a greater crime to kill oneself than another.*

These Maxims refer to offences which one might commit with reference to his own property or person. The necessity of one's using his property in such a manner as not to injure another has been shown at large when discussing the Maxim relating to the enjoyment of property. The Indian Penal Code provides that whoever conceals, removes, transfers, or delivers to any person any property fraudulently, intending thereby to prevent its seizure as a forfeiture or in execution of a decree; whoever fraudulently suffers a decree to be passed or executed against him for a sum not due, &c., &c., are punishable under Sections 206, 208, 421 to 424 of the Indian Penal Code. Whoever destroys or otherwise injures his own property with intent to cause wrongful loss or damage to any person, is punishable for mischief under Sec. 425. Whoever signs his own name to a document intending that it may be believed that it was signed by another person of the same name will be punished for forgery under Sec. 464 of the Indian Penal Code.

Any person who uses his own property, such as machinery, fire, animals, combustible or explosive substances in a rash or negligent manner, so as to endanger human life or to cause injury or hurt to any person, or whoever commits any other public nuisance so as to cause injury or annoyance to the public, though upon his own land, are punishable under Chapter XIV of the Indian Penal Code.

As to offences against one's own person, it may at first sight appear absurd to punish one for such offences. But it must be remembered that a person committing suicide is guilty of a double offence; one spiritual, in evading the prerogative of the Almighty and rushing into His immediate presence uncalled for; and the other temporal, against the Sovereign, who has an interest in the preservation of all of his subjects. The law has therefore ranked suicide amongst crimes. On this subject Archdeacon Paley observes that besides the general reasons, each case will be aggravated by its own proper and particular consequences; by the duties that are deserted; by the claims that are defrauded; by the loss, affliction or disgrace which our death, or the manner of it, causes our family, kindred, or friends; by the occasion we give to many to suspect the sincerity of our moral and religious professions, and together with ours, those of all others; by the reproach we draw upon our order, calling or sect; in a word, by a great variety of evil consequences attending upon peculiar situations, with some or other of which every actual case of suicide is chargeable.

So, the practice of Suttee was abolished by Regulation XVII of 1829 of the Bengal Code and by Regulation I of 1830 of the Madras Code. The preamble of the last mentioned enactment ran as follows:—"The practice of Suttee or of burning or burying alive the widows of Hindus, is revolting to the feelings of human nature. It is nowhere enjoined by the religion of the Hindus *as an imperative duty;* on the contrary, a life of purity and retirement on

the part of the widow is *more especially or preferably inculcated*, and by a vast majority of that people throughout India, the practice is not kept up nor observed. The measures hitherto adopted to discourage and prevent such acts have failed of success, and the Governor in Council is deeply impressed with the conviction that the abuses in question cannot be effectually put an end to, without abolishing the practice altogether." * * *

The Indian Penal Code provides that whoever attempts to commit suicide (which of course includes Suttee,) and does any act towards the commission of such offence, or abets the commission of suicide is criminally punishable. (Secs. 306 and 309.) And a woman who causes herself to miscarry; or any person who causes a woman with child to miscarry, &c., are punishable under Sec. 312.

MAXIM 164.

Unum qui consilium daret, alterum qui contractaret, tertium qui receptaret et occuleret pari paenoe singulos esse abnoxios. *(Manual.)—That one who advises, another who aids, a third who harbours and conceals; each of them is subject to a like punishment.*

A person abets the doing of a thing, who—*First*, Instigates any person to do that thing; or,

Secondly.—Engages with one or more person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or,

Thirdly.—Intentionally aids by any act or illegal omission, the doing of that thing. A person who by wilful misrepresentation or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or

procures or attempts to cause or procure a thing to be done is said to instigate the doing of that thing. Whoever prior to or at the time of the commission of an act, does something in order to facilitate the commission of that act, and thereby the commission thereof, is said to aid the doing of that act. A person abets an offence who abets either the commission of an offence, or the commission of an act which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor. The abetment of an illegal act may amount to an offence, although the abettor may not himself be bound to do that act. To constitute the offence of abetment, it is not necessary that the act abetted should be committed or that the effect requisite to constitute the offence should be caused. It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor or any guilty intention or knowledge.

EXPLANATION 4.—The abetment of an offence being an offence, the abetment of such an abetment is also an offence. It is not necessary to the commission of the offence of abetment by conspiracy, that the abettor should concert the offence with the person who commits it. It is sufficient if he engaged in the conspiracy in pursuance of which the offence was committed. (Sec. 107, &c., *I. P. C.*)

The subsequent Sections of the Indian Penal Code provide for the punishment of the abettors. As a general rule if the act abetted is committed in consequence of the abetment, the abettor is liable to the same punishment as is provided for the act or offence itself. (Vide Secs. 109 to 139, *I. P. C.*)

MAXIMS 165 and 166.

(165.) Cogitationis poenam nemo meretur. (2 *Inst., Jur. Civ.*, 658.)—*No man deserves punishment for a thought.*

(166.) Scribere est agere. (2, *Rol. Rep.*, 89.)—*To write is to act.*

The Indian Penal Code provides that whoever attempts to commit an offence or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, is liable to punishment. (Sec. 511.)

Prior to the completion of a crime three stages may be passed through. *First*, an intention to commit the crime may be conceived. *Secondly*, preparation may be made for its committal. *Thirdly*, an attempt may be made to commit it. Of these three stages, the mere forming of the intention is not punishable under the Penal Code. Nor is the preparation for an offence indictable. "Between the preparation for the attempt and the attempt itself, there is a wide difference; the preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations are made." (*Mayne's Com. on I. P. C.*, pp. 361 and 362.)

It is impossible to lay down a clear rule on such a subject, or to define what is such an act done in furtherance of a criminal intent as will constitute an attempt. Acts remotely tending to the commission of an offence are not, it seems, sufficient to bring a case within the said Section. On the other hand, acts immediately and necessarily connected with the commission of the offence, and which constitute a commencement of execution of the offence, not being completed only because the offender is hindered by circumstances independent of his will, as by seizure by the Police, &c., are attempts. The Court should be satisfied that the

offender had in his mind the design to commit a certain offence, and that he had begun to move towards an execution of his purpose: there must also be proof of some act, not of an ambiguous kind, but directly approximating to the commission of the offence. When the offender's design is made manifest by any such act, it becomes an attempt cognizable as an offence, and punishable under the said Section. (*Morgan's and Macpherson's Commentaries on the Ind. P. Code.*)

MAXIMS 167 to 169.

(167.) **Actus non facit reum, nisi mens sit rea.** (*3 Inst.*, 107.)—*The act itself does not constitute guilt, unless done with a guilty intention.*

(168.) **Nullus videtur dolo facere quo suo jure utitur** (*Dig.* 50, 17, 155.)—*No one is deemed to be guilty of an offence who exerts his legal rights.*

(169.) **Acta exteriora indicant interiora secceta.** (*8, Co.* 146.)—*External actions indicate internal secrets.*

With a few exceptions, a criminal intention or knowledge is an essential element in an offence. Murder does not consist simply of taking human life; the act must be done with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that the person is likely by such act to cause death. (299, I. P. C.) And a criminal trespass, consists not only in entering into or upon any land, but in doing so with intent to commit an offence, &c. (Sec. 441, I. P. C.) Theft is not the mere taking of another's property, but the taking must have been with a dishonest intention. (Sec. 378, I. P. C.)

It is thus necessary in criminal cases, as a general rule, that the *will* should join with the act. "There are three cases in which the will does not join with the act:—I, Where there is *defect of understanding*. For, where there is no

discernment, there is no choice; and where there is no choice, there can be no act of the will, which is nothing else than a determination of one's choice to do, or to abstain from, a particular action; he, therefore, that has no understanding, can have no will to guide his conduct. II, Where there is understanding and will sufficient residing in the party, but not called forth and exerted at the time of the action done, *which is the case of all offences committed by chance or ignorance.* Here the will sits neuter; and neither concurs with the act, nor disagrees from it. And III, where the action is *constrained by some outward act and violence.* Here the will counteracts the deed, and is so far from concurring with it, that it loathes and disagrees with what the man is obliged to perform. In order to make a complete crime cognizable by human laws there must be both a will and an act. For, though in *foro conscientiae,* a fixed desgin or will to do an unlawful act is almost as heinous as the commission of it, yet as no temporal tribunal can search the heart or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish what it cannot know. For which reason, in all temporal jurisdiction, an overt act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man becomes liable to punishment. And as a vicious *will* without a vicious *act* is no crime; so, on the other hand, an unwarrantable *act* without a vicious *will* is no crime at all. So that, to constitute a crime against human laws, there must be, *first,* a vicious will; and *secondly,* an unlawful act consequent upon such vicious will."

"Malice," says, Lord Campbell, C. J., "in the legal acceptation of the word is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another. Malice is of two kinds —malice in law, and malice in fact. Malice *in law* is where

a wrongful act is done intentionally, without just cause or excuse. If, for instance, I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, and without just cause or excuse. And if I traduce a man whether I know him or not, and whether I intend to do him an injury or not, the law considers it as done of malice, because it is wrongful and intentional; it equally works an injury whether I meant to produce an injury or not; and if I had no legal excuse for the slander, why should there not be a remedy against me for the injury which it produces? Such being legal malice, it follows that some acts are in law always malicious, without any proof being given of personal ill-will or ill-feeling. Malice *in fact* is said to be of two kinds, viz., personal malice against an individual, and that sort of general disregard of the right consideration due to all mankind which, indeed, *may* not be previously directed against any one, but is nevertheless productive of injury to the complainant. This seems very nearly equivalent to saying that malice in fact may be proved to have existed in one or other of two ways:—either by direct evidence, as of expressions used, of declarations made, or of conduct generally, evincing enmity towards a particular individual; or, again it may be shown by proof of some act from which a jury would be held justified in *inferring* a malicious motive; and the act relied upon as evidence of malice may possibly be one not aimed at the particular individual who has suffered by it. (*Broom's Com.*, pp. 710 to 711.)

A malicious intention in fact is a matter of inference from all the circumstances of the particular case; but nevertheless the terms, *malice* and *malicious*, being technical terms of law, involve, as indeed all other technical expressions do, the application of legal judgment and consideration to the facts as found by a jury. Where a defendant is proved to have done that, the malicious doing of which is prohibited

by the law, malice is a *primâ facie* inference from the very act, for he must be presumed to have intended to do that which he did, and an *intentional* violation of the law is a *malicious* violation of it. The proof of facts in justification, excuse, or alleviation, must be, in such cases, incumbent on the defendant. And where the offence consists, not merely in the doing a particular act, but in the doing it maliciously, and with *intent* to effect a *specified criminal object*, evidence that the defendant intended to effect that purpose is in like manner *primâ facie* evidence of malice. It seems to be a general rule that a gross, unfeeling, and vicious disregard of consequences, however pernicious they may be to society, or, however fatal to the individual in particular, is equivalent to express malice, or perhaps, to speak more correctly, is strong, if not conclusive, evidence of a specific intention to injure. (*Starkie on Evidence*, II, 675, &c.)

Where any doubt arises whether the party acted maliciously, or with such a fair and *bonâ fide* intention as would in law protect him, or whether the particular injury resulted from accident,—such a case would seem to be a pure question of fact for the consideration of the jury, who are to decide whether the act was intentional, and if so, by what motive the agent was really actuated. (*Ibid*, p. 676.)

In Woodfall's case, Lord Mansfield lays down the law in such clear terms as, once understood, ought to prevent the possibility of error in this respect. He says,—"When an act in *itself indifferent, if done with a particular intent*, becomes criminal, then the intent must be proved and found; *but* where the act is *itself unlawful*, that is *primâ facie*, and unexplained, the proof of justification or excuse lies on the defendant; *and in failure thereof* the law *implies* a criminal intent." (*Norton's Law of Evidence*, 7th Ed., Sec. 682.)

In *ex-parte Karaka Nachiar*, who was charged with dacoity, the Madras High Court made the following

observations;—"But the ground on which we intend to dispose of the case is, that all that was done, was done under a claim of right in good faith entertained by the first accused person. The question of good faith is no doubt a question of fact, but looking at the manner in which, and the length of time for which, the first accused has been putting forward her claim, and the success also which has attended her efforts in the Civil Courts, we think that we are entitled to regard the reality of her claim of right as a fact admitted on all hands. There can be no reasonable doubt of it, and, so far as we can see, its reality has never been questioned; certainly, it has not been in the proceedings of the Court of Session; all that has been objected to it, either by the complaint, or by the Court of Session, is that it is not a claim which could be sustained in a Court of law. That may be so; but it is clear that, however erroneous the claim of right, if in fact, the conduct of the accused was solely induced by such claim, there is an end of any charge of robbery. If a person has violated the orders of a Civil Court, or, acting under an erroneous notion of his rights, has used force or otherwise committed a breach of the peace, there are sufficient ways in which the authority of the Civil Court may be vindicated; or the breach of the public peace, or the use of force to private persons, be adequately punished; but to go further than this, would be to distort every instance of a trespass or assault in assertion of the rights of property, into a case of robbery or dacoity. On this ground, therefore, which we think admits of no question, and which goes to the whole merits of the case, we think that there is nothing, as apparent from the evidence before the Magistrate, which could legally justify a charge of dacoity against these accused persons, and we must therefore set aside the order for their committal made by the Sessions Judge." (III, *Mad. H. C. R.*, 257.)

The law excuses a person when he commits an unlawful

act by misfortune or chance and not by design. Here the will observes a total neutrality and does not co-operate with the deed, which therefore wants one main ingredient of a crime. The Indian Penal Code provides that nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner and by lawful means and with care and caution. Thus A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence. (Sec. 80.) And nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property. Thus, A, in a great fire, pulls down houses in order to prevent the conflagration from spreading. He does this with the intention, in good faith, of saving human life and property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence. (*Ibid*, Sec. 81.)

MAXIMS 170 and 171.

(170.) **In omnibus poenalibus judiciis et aetati et imprudentiae succurritur.**—*In criminal proceedings regard is to be shown to immature years and mental imbecility.*

(171.) **Malitia supplet aetatem.** *(4 Co., 72.)—Malice supplies age.*

The law affords excuses for the commission of offences on the ground of infancy and insanity, on the principles explained while discussing the preceding Maxim with regard to the criminal intention.

As to infancy which involves a defect of understanding, it excuses an offender under the following circumstances:— The Indian Penal Code provides that nothing is an offence which is done by a child under seven years of age (Sec. 82); and nothing is an offence which is done by a child above seven years and under twelve, and who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion, (Sec. 83). These periods are much below the age of majority fixed by the English or Indian laws for civil purposes; and the reason of this reduction is quite clear. The principal element in *criminal* cases is the *malicious intention;* and therefore all those who are capable of forming such an intention are held liable under the criminal law. A capacity for committing a crime is acquired at an earlier age than a capacity for carrying on a civil transaction. Every day experience shows us that any child, who is able to talk and move about, knows that it is wrong to cut another with a knife, and that he would be chastised for doing so; but no *such* child understands that it is wrong to make contracts in restraint of trade, or by way of wager; and that any money which he may lay out on the strength of such contracts cannot be recovered back. There may be exceptions no doubt to this proposition; but it is obvious that it would be highly inconvenient to fix the age in each case; and that therefore a limit should be fixed once for all, however arbitrary such a course may certainly appear to be. Thus, the law, in consideration of circumstances such as those abovementioned, has determined that, while the period of legal capacity shall begin at the age of 16, 18 or 21 in various civil matters generally, such period shall be *only seven years,* (and in some cases twelve), in criminal cases, on the assumption that the deficiency in age is made up by the malice which actuated the offender in the commission of the offence; *malitia supplet aetatem* (malice supplies the age). (Vide Maxim relating to Minor and Guardian.)

With reference to the aforesaid Sections 82 and 83 of the Indian Penal Code, Mr. Mayne observes that "these Sections leave the law very much as it is in England and Scotland, making allowances for the comparative precocity of children in the East. According to English law, life is divided into three periods. Up to seven years there is an absolute incapacity for crime, and this is so enacted by Sec. 82. After fourteen, a youth is in precisely the same state as to criminal responsibility as any grown man; Sec. 83 makes this period of responsibility come two years earlier. In the intermediate period, criminal responsibility rests upon the state of the mind, and this also agrees with Sec. 83. Nothing is said in the Code, however, upon the presumption which is to be drawn, in the absence of all evidence, as to whether a child in this transition stage is of sufficient maturity to be called to account for its actions or not. Possibly this was passed over as being a matter of evidence."

Then as to insanity, the Indian Penal Code provides (Sec. 84) that nothing is an offence which is done by a person who at the time of doing it by reason of unsoundness of mind is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. This Section is thus explained in Morgan and Macpherson's Commentaries:—"Whether the want of capacity is temporary or permanent, natural or supervening, whether it arises from disease, or exists from the time of birth, it is included in the expression "unsoundness of mind." Thus, an idiot who is a person without understanding from his birth, a lunatic who has intervals of reason, and a person who is mad or delirious, are all persons of "unsound mind." There are numerous degrees of insanity. It has been said that but a very little cloud floating over an otherwise enlightened understanding will exempt from criminal responsibility; nor on the other hand will every glimmering of reason over the darkness of a troubled

mind subject the unfortunate being to the heavy pains provided for wilful wrong-doing. According to the Code, unsoundness of mind, to make a man irresponsible, must reach that degree which is described in the latter part of this General Exception. An idiot or lunatic, even if he is conscious of his act, has not capacity to know its nature and quality, and is therefore not responsible. Madmen, especially under the influence of some delusion, may have capacity enough to know the nature of the act, but unless they also know that they are doing "what is either wrong or contrary to law," they are not responsible. A common instance is, where a man fully believes that the act he is doing (*i. e.*, killing another man) is done by the immediate command of God; he acts under the delusive belief that what he is doing is by the command of a superior power, which supersedes all human laws. Again, a person under an insane delusion as to existing facts, supposes another man to be in the act of taking away his life, and he kills that man, as he believes in self-defence, he is not responsible. But if his delusion was, that the deceased had inflicted some injury on him, or had caused the death of his relations, &c., and he killed him in revenge for such supposed injury, he would be liable to punishment. As to the knowledge that what is done is "either wrong or contrary to law," it must be remembered that the law is administered upon the principle that every one knows it, as he is bound to know it. The question in each case must be whether the accused person was in a state to know the nature of the act and its criminal character as against the law (which he is bound to know) of the land,—or, what is in substance the same, whether he was conscious of doing what he ought not to do. The enquiry must be directed to the particular thing done, and not to any other, because a man may be responsible for some things and not for others. Of course also, it has reference to the time of the transaction

and not to any other time; but to ascertain the state of the mind at that particular time, its conditions both before and after may be enquired into. It is understood in science, and it has sometimes been recognised in law, that a person may be conscious of what he is doing, and may know the moral, legal, and natural consequences of his act, and yet may be impelled to do the thing by a power which he cannot resist. The Penal Code, however, does not appear to admit of any such excuse as homicidal mania, or an irresistible impulse to destroy life. Insanity is usually relied on by way of defence in charges of murder, and of offences against the person. In offences against property, such as theft, cheating, &c., which often require some art and skill for their completion, and argue a sense of the advantage of acquiring other people's property, this defence must be received, as indeed it should in all cases be received, with the utmost caution.

MAXIM 172.

Quodcunque aliquis tutelam corporis sui fecerit, jure, id fecisse videtur. *(2, Inst., 590.)—Whatever any one does in defence of his person,* that *he is considered to have done legally.*

This is a rule of convenience and is intended to protect the life, liberty, and property of a person. The law on the subject, and the limitations under which the privilege is to be exercised, are laid down in the Indian Penal Code as follows: Nothing is an offence which is done in the exercise of the right of private defence. Every person has a right to defend his own body and the body of any other person, against any offence affecting the human body; and to defend the moveable or immoveable property of himself or of any other person against any theft, robbery, mischief, or criminal trespass, or any attempts to commit the said offences. The right of private defence exists also against the act of a

person of unsound mind. But the right of private defence in no case extends to the inflicting of more harm than is necessary to inflict for the purposes of defence; and there is no private defence at all against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done or attempted to be done by a public servant, or by the direction of a public servant, acting in good faith under colour of his office, though that act may not be strictly justifiable by law; nor is there any right of private defence in cases in which there is time to have recourse to the protection of the public authorities. (Sec. 96, &c., *of the Indian Penal Code.*)

N.B.—Of the several excuses for the commission of crime, it will be seen that "want of criminal intention," infancy, insanity, and self-defence have been explained under the preceding Maxims; and with reference to other excuses, viz., misfortune (or accident); drunkenness, ignorance, consent, slight harm (subtleties), and necessity,—the reader is referred to the appropriate Maxims under those titles, where those subjects are separately treated, as they refer to criminal as well as civil cases.

MAXIMS 173 to 184.

(173.) Melior est justitia vere praeveniens, quam severe puniens. *(3, Inst., Epil.)—Justice truly preventing is better than severely punishing.*

(174.) Culpae poena par esto. *(Manual.)—The punishment should be proportioned to the crime.*

(175.) Eo sunt animadvertenda peccata maxime, quae difficilime pro. *(Manual.)—Offences should be most severely punished which are most difficult to be provided against.*

(176.) Multiplicata transgressione crescat poenae inflictio. *(Manual.)—The infliction of punishment increases with multiplied crimes.*

(177.) **Minima poena corporalis est major qualibet pecuniaria.** *(2, Inst., 220.)—The smallest bodily punishment is greater than any pecuniary one.*

(178.) **Qui non habet in aere, luat in corpore; ne quis peccetur impune.** *(2, Inst., 173.)—What a man cannot pay with his purse, he must suffer in person, lest any one should sin with impunity.*

(179.) **A spoliatus debet ante omnia restitui.** *(Manual.)—A person who is wrongfully deprived of his property, is entitled to the restitution of that property before all others.*

(180.) **Delinquens per iram provocatus puniri debet mitius.** *(Manual.)—A delinquent provoked by anger ought to be punished mildly.*

(181.) **Nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa.** *(5, Co., 61.)—No one ought to be twice punished if it be proved to the Court that it be for one and the same cause.*

(182.) **Respiciendum est judicanti, ne quid aut durius aut remissius constituator quam causa deposcit; nec enim aut severitatis aut elementiae gloria affectanda est.** *(3, Inst., 220.)—It is a matter of import to one adjudicating that nothing either more severe, nor more lenient than the cause itself warrants should be done; and that the glory neither of severity nor clemency should be affected.*

(183.) **Titius semper est errare acquitando quam in puniendo, ex parte misericordiae quam ex parte justitiae.** *(H. H. P. C., 290).—It is always safer to err in acquitting than in punishing—on the side of mercy than of strict justice.*

(184.) **Minatur innocentibus, qui parcit nocentibus.** *(4, Co., 45.)—He threatens the innocent who spares the guilty.*

On the principle of *Praestat cautela quam medela* (caution is better than care), the law aims primarily at preventing offences, either by rendering their commission impossible,

or by nipping the evil in the bud, by keeping a constant vigilance over individuals of suspicious character, and by various other safeguards; and this end the law tries to gain by requiring proofs of title in writing; compelling the registration of such written instruments; administering oaths to witnesses before calling upon them to give evidence; prohibiting people from carrying arms, &c., without licenses; punishing such acts as rash or negligent driving or navigation, riotous behaviour, and unlawful assemblies; interdicting the sale of spirituous liquors except under certain fixed rules and conditions; examining weights and measures in all suspicious cases; exacting security for the preservation of the peace, and for good behaviour from vagabonds and dangerous characters; by investing Police officers and also the general public, with the power of using all lawful means to prevent an offence, if it be imminent, or in the course of commission, &c., &c., &c. (Vide Criminal Pro. Code, Police Acts, Indian Penal Code, and Acts relating to Registration, Oaths, and Arms, &c., &c.)

But with all these preventive measures, it is impossible to expect that no offences should be committed at all; and various provisions are therefore made for punishing persons who may be proved to have committed offences. As to the end or final cause of punishment, Mr. John Stephen observes that "this is not by way of atonement or expiation for the crime committed, for that must be left to the just determination of the Supreme Being; but as a precaution against future offences of the same kind." (*Steph. Com.*, IV, 89.) It is very interesting to read the ordinances of Menu on the subject. He says that "iniquity committed in this world produces not fruit immediately here, but, like the earth, in due season;" nevertheless, "if the king were not, without indolence, to punish the guilty immediately, the stronger would roast the weaker like fish in a spit;" immediate punishment of the offenders is therefore necessary, because,

"punishment governs all mankind; punishment alone preserves them; punishment wakes while their guards are asleep; the wise consider punishment as the perfection of justice." And as to the measure of punishment, Menu ordains, "let a king, having considered and ascertained the *frequency* of a similar offence, the *place*, and *time*, the *ability* of the criminal to *pay* or *suffer*, and the crime itself, cause punishment to fall on those who deserve it." But "first let him punish by gentle admonition; afterwards by harsh reproof; thirdly, by deprivation of property (fine); after that by corporal pain; but when even by corporal punishment he cannot restrain such offenders, let him apply to them all the four modes with vigour." And in conclusion Menu pronounces "a king to be equally unjust in releasing the man who deserves punishment, and in punishing the man who deserves it not: he is just who always inflicts the punishment fairly as ordained by the law," (*Menu*, Chapters, IV, VII, VIII and IX.)

It has been seen that human punishment is inflicted as a precaution against future offences of the same kind; and this is effected in three ways. *First*, by the amendment of the offender himself, for which purpose fines, imprisonment and whipping are inflicted; *Secondly*, by depriving the party injuring, of the power to do future mischief, which is effected by either putting him to death or condemning him to perpetual confinement or transportation;—and *Thirdly*, by deterring others by the dread of his example from offending in the same way, which is the reason why all executions of justice are carried out openly and publicly.

"Punishments have been often and anxiously considered by the legislature with a view to mitigating their severity, without at the same time affording impunity to crime. This has been done by men inspired by enlightened philanthrophy, aiming patiently at the true medium between justice and mercy, and actuated by the spirit breathing in

the grand and solemn language of one of our ancient statutes, "the state of every king, ruler, and governor, of any realm and dominion, or commonalty, standeth and consisteth, more assured by the love and favor of the subjects towards their Sovereign ruler and Governor, than in the dread and fear of laws, made with rigorous pains and extreme punishment for not obeying of their Sovereign ruler and Governor: and laws, also, made for the preservation of the common weal, without extreme punishment or great penalty, are more often for the most part obeyed and kept, than laws and statutes made with great and extreme punishments; and in special, such laws and statutes so made, whereby not only the ignorant and rude unlearned people, but also learned and expert people, minding honestly, are often and many times, trapped and snared, yea, many times, for words only without either fact or deed, done or perpetrated." (*Warren's Black. Com.*, p. 722.)

The punishment to be inflicted must be proprotionate to the crimes proved to have been committed. The perpetrators of those offences should be punished most severely which are most difficult to be detected or provided against. Punishments should likewise increase with the increase of offences; for, in such cases, it is clear that the measure of punishment once awarded has not proved sufficiently deterrent. On the same principle a party convicted of several offences simultaneously, or successively at intervals, ought to have increased punishment awarded to him. On the contrary, juveniles and persons driven by provocation to commit offences should be leniently dealt with, for, in both these cases that animus which forms the essence of criminal offence does not exist to such an extent as it generally does where it influences a free and voluntary agent. The smallest bodily punishment is greater than any pecuniary one, and a person who cannot pay a fine should suffer bodily imprisonment instead. No female should be

whipped; and in the case of juveniles, the whipping must be in the form of school discipline. (Vide Penal Code and Whipping Act.)

In dealing out punishment, it is always safer to err on the side of mercy in awarding a less punishment, or in discharging an offender without any punishment; but at the same time it must not be forgotten that undue exercise of mercy is culpable, inasmuch as it encourages the vicious in their evil pursuits.

On the whole we should bear in mind the tenth article of the famous Bill of Rights (quoted in Warren's Blackstone, p. 648.) It declares, "excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." And the following rules laid down by Bentham are worth studying.

First rule.—The evil of the punishment must be made to exceed the advantage of the offence.

Second rule.—The more deficient in certainty a punishment is, the severer it should be.

Third rule.—Where two offences are in conjunction, the greater offence ought to be subjected to severer punishment, in order that the delinquent may have a motive to stop at the lesser.

Fourth rule.—The greater an offence is, the greater reason there is to hazard a severe punishment for the chance of preventing it.

And fifth rule.—The same punishment for the same offence ought not to be inflicted upon all delinquents. It is necessary to pay some regard to the circumstances which affect sensibility.

And with reference to the said fifth rule, Bentham makes the following observations:—"The same nominal punishments are not the same real punishments. Age, sex, rank, fortune, and many other circumstances ought to modify the punishment inflicted for the same offence. If the offence is

a corporal injury, the same pecuniary punishment would be a trifle to the rich and oppressive to the poor. The same punishment which would brand with ignominy a man of a certain rank, would not produce even the slightest stain in case the offender belonged to an inferior class. The same imprisonment would be a ruin to a man of business, death to an infirm old man, and eternal disgrace to a woman, while it would be next to nothing to an individual placed under other circumstances. Let it be observed, however, that the proportion between punishments and offences ought not to be so mathematically followed up as to render the law subtle, complicated, and obscure. Brevity and simplicity are a superior good. Something of exact proportion may also be sacrificed to render the punishment more striking, and more fit to inspire the people with a sentiment of aversion for those vices which prepare the way for crimes." (*Bentham's Theory of Legis.*, p. 325, &c. Vide also *Stephens' Com.*, IV, 86.)

The following are the punishments to which offenders are liable under the Indian Penal Code and the Whipping Act.

1. Death.
2. Transportation.
3. Penal servitude.
4. Imprisonment.
5. Forfeiture of property.
6. Fine.
7. Whipping.

1. DEATH may be awarded in all cases of murder; abetment of suicide of a person under 18 years of age, of a person of unsound mind, or of one who is intoxicated; waging war against the Queen; abetment of mutiny when the mutiny is in consequence committed; and giving or fabricating false evidence by which an innocent man is convicted and executed. Moreover, death is the only punishment where a murder is committed by a life-convict.

2. TRANSPORTATION for life may be substituted for death in all cases, except murder by a life-convict. The unlawful return from transportation and the being a thug are the only offences for which the punishment of transportation for life must be awarded. Again, transportation for any term short of life may be awarded when an offender is punishable with imprisonment for seven years or more.

3. Whenever any European or American is convicted of an offence punishable with transportation, he shall be sentenced to Penal servitude instead of transportation.

4. IMPRISONMENT.—Fourteen years is the longest period to which imprisonment extends. In two instances (robbery or dacoity with attempt to cause death or grievous hurt, and attempt to commit robbery or dacoity when armed with deadly weapons), the minimum of imprisonment is seven years; but in no other case is any minimum fixed. The maximum periods of imprisonment awardable for different offences is fourteen years; ten years; seven years; five years; four years; three years; two years; one year; six months; three months; one month; and twenty-four hours. And solitary imprisonment may be awarded in certain cases.

5. The forfeiture of all property is a punishment to which all offenders are liable, who are guilty of any offence punishable with death; and of waging, or preparing, or attempting to wage, or abetting the waging of war against the Queen. In the former instance it is at the discretion of the Court to adjudge or not that the forfeiture shall take place; whereas in the latter the forfeiture of all property is an essential part of the punishment and the Court has no discretion in the matter.

6. FINE.—When a fine is the *only* punishment awardable, the amount is unlimited in two certain cases of riot; and in other cases the maximum amount is fixed at 1,000 Rs., 500 Rs., and 200 Rs. Again fine is awardable in addition

to imprisonment; or as an alternative punishment in certain cases.

7. WHIPPING.—A juvenile offender who commits any offence which is not punishable with death, may be punished with whipping in lieu of any other punishment. In the case of adults, whipping may be inflicted in lieu of or in addition to any other punishment, regard being had, in some instances, to the circumstance whether the guilty party is an old offender or not. The maximum number of lashes to be inflicted is one hundred and fifty, if inflicted with a cat-o'-nine tails; or thirty stripes if a rattan be employed. In case of juvenile offenders, the whipping as abovementiond shall be inflicted in the way of school discipline with a light rattan; and as abovementioned also, no female shall be whipped in any case.

A person who has once been *tried* for an offence, and *convicted* or *acquitted*, shall not be liable to be tried for the same offence again. (Vide S. 460 of the Code of Criminal Procedure for further particulars.)

Upon conviction of any offence by means of which or in consequence of which the possession of property shall have been transferred, the tribunal disposing of the case should order the restitution of such property, if forthcoming, to the person from whom the property was removed by the act of the offender, notwithstanding that the property might in the meantime have passed through the hands of several persons by sale, pledge, &c., &c., (*Indian Contract Act, Criminal Procedure, &c.*) In the same manner, whenever a prisoner is sentenced to fine, the Court may order the whole or any part of such fine to be paid to the prosecutor in compensation for expenses properly incurred in the prosecution, and for the offence complained of where such offence can be compensated by money. *(Crim. Pro. Code.)*

In conclusion, it is to be observed that in any case of conviction, the Sovereign (and in India the Governor-General

in Council or the Local Government) has the prerogative of granting a *pardon* to the convict either conditionally or unconditionally. (Vide Maxims 25 and 26.)

MAXIM 185.

Actus curiae neminem gravabit. *(Jenk. Cent.,* 118.)—*An act of Court injures no one.*

This Maxim means that no one suffers by an act of the Court, such as delay, &c. If a suit be adjourned to some future day to suit the convenience of the Court, the delay will not affect the parties; and what was to have been done on the first day will be done on the day on which the case comes on before the Court after the adjournment, *nunc pro tunc*—(*Code of Civil and Criminal Procedure.*) So if a defendant is likely to decamp or make away with his property, taking advantage of the Court having for some reason or other delayed the passing of the judgment, the Court on the application of the plaintiff, grants a writ of arrest, or attachment, or injunction, to secure the eventual execution of the decree, &c.—(Vide Code of Civil Procedure.)

In an action to recover one-half of an estate, the Court of original jurisdiction gave a decree for the whole. The lower Appellate Court entered a non-suit because, *inter alia*, the plaintiff had sued for only a half, while the decree below extended to the whole. In special appeal it was held that the order of the lower Appellate Court was erroneous; that the obvious error of the decree of the original Court, should have been amended; and that the plaintiff ought not to be punished for a mistake originating with the Court itself, and over which the plaintiff could have had no control.—(*Ramacomar Goh's* case: *D'Lateur's Notes*, III, 588.)

The old law of limitation (Act XIV of 1859) came into operation on the 1st January 1862. By an order of the

Civil Court, it was declared that all suits brought on the 4th January 1862, when the Court was re-opened after the adjournment for the Christmas holidays, should be treated as if brought under the law of limitation which was in force before 1862. A suit which was barred by Act XIV of 1859 was accordingly brought on the 4th January 1862. The Civil Judge considered that the suit was not barred in consequence of the order above alluded to. But the High Court held that the suit was barred; and observed as follows: "We consider it wholly impossible to say that there was any default here of the Court or its officer; and the cases, of which *Nazer* v. *Wade*, to which we referred during the argument is the last, have no application. We will only observe that the Maxim "*actus curiæ neminem gravabit* requires much qualification; and that *Leech* v. *Lamb* is a very strong authority for saying that the dictum of Coltman, J., that a Court will always correct the mistakes of its officer is by no means universally true." (II, *Mad. H. C. R.*, 268.)

MAXIMS 186 and 187.

(186.) Cursus curiae, est lex curiae. (3, *Bulst.*, 53.)—*The practice of the Court is the law of the Court.*

(187.) Via trita via tuta. (*Br. Max.*)—*The customary way is the safe way.*

Authority given to a tribunal will be of no avail, unless the tribunal has the means of carrying it out; and in order to carry it out, the tribunal must have power to make certain rules of practice to regulate the matters of detail which no Legislative enactment can possibly prescribe. So it has been provided that the High Court shall make and issue general rules regulating the practice and proceedings of that Court and the Courts subordinate to it, &c. (Vide Amendment of Civil Procedure Code, Act XXIII of 1861,

Sec. 40; and Criminal Procedure, Section 262.) The Indian Evidence Act provides that the order in which witnesses are to be produced and examined shall be regulated by the law and *practice* for the time being relating to the Civil and Criminal Procedure; and in the absence of any such law and practice, by the discretion of the Court. (Sec. 135.)

MAXIM 188.

Boni judicis est ampliare jurisdictionem. (*Chan. Prac.* 329.)—*A good Judge will, when necessary, extend the limits of his jurisdiction.*

This Maxim does not mean that a Judge is ever at liberty to exceed his jurisdiction. All that is meant by this Maxim is, as observed by Mr. Wharton, that a good Judge should amplify the remedy given by the law so as, in the most perfect manner, to do the most complete justice, not letting substantial justice to be frittered away by nice technicalities, or himself lay hold of such technicalities as a means of avoiding giving decision according to the very right in *broad and substantial* justice.

MAXIMS 189 and 190.

(189.) Quando aliquid mandatur, mandatur et omne per quod per venitur ad illud. (5, *Co.*, 116.)— *When anything is commanded, everything by which it can be accomplished is also commanded.*

(190.) Quando aliquid prohibetur, prohibetur omne per quod devenitur ad illud. (2, *Inst.*, 48)—*When anything is prohibited everything relating to it is prohibited.*

Authority given to an officer will be of no avail unless he has the means of carrying it out; so that a police officer

who has power to prevent offences and arrest offenders, ought likewise to have power to demand the aid of the citizens, to enter into dwelling houses under certain circumstances, to pursue offenders beyond the jurisdiction of such officer, &c. (Secs. 91, 99 & 103, *Criminal Procedure Code*); and to do every other lawful thing which is essentially necessary for the accomplishment of the purpose ordained. This is the effect of the first of the foregoing Maxims. And according to the second Maxim, if an act is prohibited by law, everything relating to it is also prohibited; so that all that one would do in furtherance of the thing ordered must be such as is not prohibited in itself. Thus:—a police officer is prohibited from arresting certain classes of offenders without a warrant. (*Schedule appended to the Criminal Procedure Code*); so that every power which a police officer has in other respects must be considered to be prohibited in respect to such classes of offences.

For further particulars, Vide Maxims 131 and 132.

MAXIMS 191 and 192.

(191.) **Cui licet quod majus non debet quod minus est licere.** (*4, Co., 23.*)—*He who has authority to do the more important act shall not be debarred from doing the less important.*

(192.) **Omne majus continet in se minus.** (*5, Co., 115.*) —*The greater contains in itself the less.*

Every suit shall be instituted in the Court of the *lowest* grade competent to try it. But the District Court may transfer such suits to its own file or to that of any other Court, provided the value of the suit does not exceed the amount of jurisdiction of any such Court;—so that a suit cognizable by a District Munsiff may be tried by a Subordinate or District Court. (Sec. 6 of the *Code of Civil Pro.*)

And in like manner any offence may be tried by a Court superior to the Court by whom it is specifically made triable, and powers given to a Subordinate Magistrate may be exercised by the District Magistrate. (*Code of Civil Pro.*, Sec. 30, and *Expl.* No. 3 *of the Schedule.*)

In *The Queen* v. *Nabadwip Chandra*, the Calcutta High Court held that "the construction of Section 29 of the Letters Patent is that the High Court has power, if in its discretion it thinks right to exercise it, to transfer the investigation or trial of any criminal offence committed in Calcutta to a Mofussil Court which is otherwise competent to try it, or to direct the trial by the High Court of an offence committed in the Mofussil. The expression competent to investigate it "does not include competency as regards local jurisdiction; but only competency with regard to the offender, the nature of the offence, and punishment. (*Beng. Law Rep., Orig. Crl.*, I, 15.)

MAXIM 193.

Actus judiciarius coram non judice irritus habetur de ministeriali autem a quocunque provenit ratum esto. *(Loffi's Rep.*, 458.)—*A judicial act done in excess of authority is not binding; otherwise as to a ministerial act.*

In order to understand this Maxim aright, it is necessary to know the distinction between judicial and ministerial acts. "A judicial act may, perhaps, be defined as one which is to be done or not as the judgment of the person required to do it dictates; while a ministerial act is one which the law requires to be done, without reference to the judgment, where certain circumstances exist. The former is discretionary, the latter imperative; and an act is not the less ministerial because it requires the exercise of the judgment in the preliminary task of determining whether all the

facts exist which are the necessary basis of the ministerial act required to be done. To make an order, or to adjudicate upon the guilt or innocence of an accused person, is a judicial act depending altogether on the view, which the magistrate or judge in the exercise of his judgment, takes of the law and the facts of the case. But the mere entering upon the enquiry is ministerial; the law casts on the magistrate the duty of holding it; the discharge of that duty is in fact initiatory to the judicial proceeding; and the magistrate has no discretion to exercise as to whether he shall hold it or not. (*Ferguson* v. *Earl of Kinnoul*, 9 Cl. and F. 251, 263, 313, better known as the *Auchterarder case*. *Max. Magistrate's Guide*, p. 5.)

The word "Judge" denotes every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which if not appealed against, would be definitive, or a judgment which if confirmed by some other authority would be definitive. A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment, with or without appeal is a Judge. But a Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court *is not a Judge*. (Vide Indian Penal Code, Sec. 19 and illustratians.) But explanation 2 of Section 193, Indian Penal Code, shows that an investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice; thus an enquiry before a Magistrate for the purpose of ascertaining whether a person ought to be committed for trial is a stage of judicial proceeding.

As to extent of jurisdiction possessed by officials of different grades, the reader is referred to the Codes of Civil and Criminal Procedure, &c.

MAXIMS 194 to 196.

(194.) Omnis querela et omnis actio injuriarum limitata est infra certa tempora. *(Co. Litt., 114.)—Every plaint and every action for injuries are limited within certain time.*

(195.) Vigilantibus et non dormientibus jura subvenient. *(Wing, 692.)—The vigilant and not the sleepy are assisted by the laws.*

(196.) Contra non valentem agere nulla currit praescriptio. *(Br. Max.)—Limitation will not begin to run whilst a party is incapacitated from acting.*

Relative to the doctrine of limitation of actions, Mr. Justice Story observed that "it is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt from lapse of time, but to afford security against stale demands after the true state of the transaction may have been forgotten or be incapable of explanation by reason of the death or removal of the witnesses. In ancient possessory actions, there was a time of limitation settled beyond which no man could avail himself of the possession of himself, or his ancestors, or take advantage of the wrongful possession of his adversary; for if he were negligent for a long and unreasonable time the law refused afterwards to lend him any assistance to recover the possession merely, both to punish his neglect, and also because it was presumed that the supposed wrong-doer had in such a length of time procured a legal title; otherwise he would sooner have been sued....." And further Sir *W. P. Wood*, V. C., remarks in *Manley* v. *Bewicke*, (3, *K. V. J.*, 352) that the legislature has in this, as in every civilized country that has ever existed, thought fit to prescribe a certain limitation of time, after which persons may suppose themselves to be in peaceable possession of their property,

and capable of transmitting the estates of which they are in possession, without any apprehension of the title being impugned by litigation in respect of transactions which occurred at a distant period, when evidence in support of their own title may be a most difficult problem. (*Broom's Maxims.*)

Now in India there exists a complete law of limitations called "The Indian Limitation Act" (IX of 1871.) It provides once for all that subject to certain provisions every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor, shall be dismissed, although limitation has not been set up as a defence. (Sec. 4.) The Act then prescribes different periods for different actions in detail, and lays down exceptions, under certain conditions, in the case of plaintiff's minority, defendant's absence from British India, &c., &c.

It is remarkable that the aforesaid new Limitation Act, unlike its predecessor, provides that at the determination of the periods thereby limited to any person for instituting a suit for possession of any land or hereditary office, his right to such land or office shall be extinguished. (Sec. 29.)

Notwithstanding the rules of limitation, if a person executes a document promising to pay, wholly or in part, a debt of which the creditor might have enforced payment but for the law of limitation of suits, such document is valid; and is *not* considered to have been made without consideration—(Sec. 25, *Indian Contract Act.*) This is not all. Where a debtor, owing several distinct debts to one person, makes a payment, omitting to intimate, and there are no other circumstances indicating, to which debt in particular the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits, (*Ibid*, Sec. 60.) And where neither party

makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the Law of Limitation. (*Ibid*, Sec. 61.)

As for the Law of Limitation with reference to civil and criminal cases prosecuted on behalf of the Crown—vide Maxims 31 and 32—vide also Maxims relating to possessions and prescriptions.

The equitable doctrine of laches and acquiescence does not apply to suits for which a period of limitation is provided by the Limitation Act. (*Rama Row* v. *Raja Row*, II, *Mad. H. C. R.*, 114.) The doctrine of acquiescence or laches will apply only to cases, if such there are, in which they can be regarded as a positive extinguishment of right. When they go merely to the remedy, the Courts have no power arbitrarily to substitute an extinguishing prescription different from that determined by the Legislature. (*Pedda Muddalaty* v. *Tima Reddy*, II, *Mad. H. C. R.*, 270.)

MAXIM 197.

Ibi semper debet fieri triatio, ubi juratores meliorem possunt habere notitiam. *(7, Co., 47.)—A trial should always be had where the jury can get the best information.*

This principle is adopted in Civil and Criminal cases, generally. Suits for lands or other immoveable property are cognizable by the Court within the limits of whose jurisdiction such land or property is situate; and all other suits are cognizable by the Court within whose jurisdiction the cause of action has arisen, or the defendant at the time of the commencement of the suit dwells or personally works for gain. *(Code of Civil Procedure; Letters Patent of the High Court; and Small Cause Court Act.)*

And so every offence shall be enquired into in the district

in which it was committed, or in which any consequence has ensued by reason of such offence. A is wounded in Rampore, and dies in Jubbulpore. The case may be tried in either of the said districts. (Vide Code of Civil Procedure for other particulars.)

MAXIM 198.

Audi alteram partem. *(Br. Max.)—Hear the other party.*

It is an indispensable requirement of justice that the tribunal that has to decide shall hear both sides. The effect of this rule in civil cases is simply to give the opposite party every opportunity for appearing and stating his case; so that, if he does not choose to avail himself of the opportunity thus accorded, the case will be heard ex-parte; and a decision given accordingly on the merits; whereas in criminal cases the rule is so rigid that no case shall proceed ex-parte at all in the absence of the defendant, except, however, in some minor cases as will be presently seen.

The Civil Procedure Code provides that if the plaintiff shall appear and the defendant shall not appear in person or by a pleader, and it shall be proved to the satisfaction of the Court that the summons was duly served, the Court shall proceed to hear the suit ex-parte. The defendant, however, is at liberty, either whilst the suit is pending, or within 30 days after any process for enforcing the decree has been executed, to apply to the Court to set aside the decree, on the ground that the summons was not duly served on him, or that he was prevented by any sufficient cause from appearing when the suit was called for hearing. (Secs. 111 and 119 of the *Civil Procedure Code* and *Indian Limitation Act*, Article No. 157.)

In criminal cases of whatever nature, in which the Magistrate thinks fit to issue a summons, he may, if he sees

sufficient cause, dispense with the personal attendance of the accused person, and permit him to appear by duly authorised agent. But the Magistrate may at any stage of the proceedings direct the personal appearance of the defendant. (Sec. 157, *Criminal Procedure Code.*) But there is no jurisdiction for hearing *other* cases ex-parte, in the absenceof defendant or his agent.

But in a case of a civil nature tried by a Magistrate, as in the case of maintenance for a wife or child, he may proceed to try the case ex-parte in the absence of the defendant, after having been satisfied that a good and valid summons has been served upon the defendant. (*Police Act.*)

MAXIMS 199 and 200.

(199.) Pendente lite nihil innovetur. *(Co. Litt., 344.)*—*During litigation nothing new should be done.*

(200.) Ne faciat vastum vel estrepementum pendente placito dicto indiscusso.—*That he commit not waste or destruction pending the said suit.*

These are very important rules tending, as they do, to prevent mischiefs which, when committed, cannot be adequately compensated by damages. As for instance, in a suit where the plaintiff seeks to establish his right to certain fruitful or ornamental trees, or to an ancient house, if the defendant were to cut down the trees or pull down the house during the progress of the suit, the plaintiff will be irreparably damaged; and even if he should obtain a decree in his favor, he will no way gain his real object. Section 92 of the Civil Procedure Code provides for granting injunctions commanding the party to refrain from wasting, damaging, or alienating the property forming the subject of the suit. And upon the same principle, if during the progress of a suit, the

defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of his property, &c., the Court has power under Section 81 of the Civil Procedure Code, to call upon him to furnish security and to direct his property to be attached until further order.

The Civil Procedure Code (Sec. 240) also provides that after any attachment shall have been made, any private alienation of the property attached shall be null and void.

In *Anandaloll Doss* v. *Radhamohanshaw*, the Calcutta High Court held that a private *bonâ fide* sale, for the value of the property attached under the Code of Civil Procedure, made during the continuance of the attachment is, by Sec. 240 of that Act, null and void *only as against the attaching* creditor, or persons who may acquire right under, or through the attachment, and not as against the whole world. (*Beng. L. R. Full, B. A.*, II, 49.)

So, when a party applies for an amendment of an issue pendente lite in a civil case, it will be refused, if the amendment is likely to introduce a new contract, or a new breach, and so require the pleadings to be substantially amended. Neither will it be granted where it would introduce an essentially new fact into the case, or import new terms into the agreement. In a word, an amendment would be refused if it appear probable that the variance may have prevented the defendant from pleading a good bar to the action, or if the amendment is one which might have induced the defendant to plead different pleas or to demur. (*Powell's Law of Evid.*, p. 203, &c.)

In criminal cases, as it is the duty of the Judge to amend a defective indictment, when the prisoner cannot fairly complain that he is required suddenly to meet a charge for which he is not prepared, so it is equally the duty of the Judge not to endanger the liberty of the subject, nor to encourage carelessness of prosecutors, by permitting the

form of an indictment to be altered substantially from what it was when the prisoner was called on to plead to it. On this head it has been said by a learned writer that no general rule can be laid down for the guidance of the Court in all cases. It is very possible that an amendment, which in one case might not prejudice a prisoner might in another case prejudice him materially. The inclination of the Court will still be in *favorem vitæ* (in favor of life.) The Court will look at all the circumstances of the case to ascertain whether the transaction would be changed by the amendment, and will not forget that the protection of the weak from oppression, and of the presumptively innocent from injustice is a higher object even in the estimation of positive law than the detection and punishment of the guilty. (*Powell's Evid.*, p. 219.)

201.

Dies dominicus non est juridicus. (*Co. Litt.*, 135.)—*Lord's day (Sunday) is not juridical, (i. e., not a day for legal proceedings.)*

The rule prevailing in England, (and therefore prevailing also *probably* in those Courts in India in which English law and practice are in force,) is thus stated in Wharton's work on Maxims:—"None of the Courts of law or equity can sit upon this day; nor is the execution of any civil process, nor the performance of any work save of necessity, or charity, lawful. An exception, however, to the rule is that bail may take their principal. So also, the defendant may be re-taken after an escape, if it be negligent, and without the consent or knowledge of the Sheriff or other officer. Arrest, also, in criminal cases, as for treason, felony, or breach of the peace, and all proceedings and acts

necessary for the immediate protection and safety of the State may be considered exceptions;—indeed they are most of them so made by Statute.

In India, in Courts to which the English law is not made applicable, the Maxim under consideration applies only to the sittings of Courts and other public offices; and not to other matters. In their Proceedings of the 30th July 1869, the Madras High Court were of opinion that, "the Session Judge is correct in his opinion that an arrest under civil process of a Mofussil Court on a Sunday in this country is perfectly legal. Service of process on a Sunday was made illegal in England by an express enactment; and there is no similar enactment in force within Mofussil. (IV, *M. H. C. R.*, App. LXII.) The Civil Procedure Code is silent on the subject.

In *Govind Hoomar Choudry* v. *Hargopal Naj*, the Calcutta High Court held that the reception of a plaint on a Good Friday was not illegal, although by the Circular Order such day is an authorised holiday. (*Beng. L. R.*, Appendix III, 72.)

In a case which arose in British Burmah, *D. Abraham* v. *the Queen*, where the point for disposal was whether the proceedings should be questioned, the appellant having been arrested on a Sunday, it was held that assuming that the Lord's Day Act (29 car. 2, c. 7) was in 1863 a part of the law administered in High Court at Fort William in its Original Civil Jurisdiction, it does not therefore apply in a criminal appeal in the Recorder's Court in Burmah. (*Beng. L. R.*, App. Crl., I, 17.)

Under English law all contracts made on a Sunday, or performed on a Sunday, are void; and indeed some such acts are criminally punishable. But such is not the case in India, under the Indian Contract Act, and the Indian Penal Code, which are of universal application throughout British India.

In the computation of time in legal proceedings, Sunday must be reckoned, unless it is the last day, when the following day is allowed to the party required to take the step. (*Indian Limitation Act*, Sec. 5, &c.)

MAXIMS 202 and 203.

(202.) Veritas, a quocunque dicitur, a Deo est. (*4, Inst., 153.*)—*Truth, by whomsoever pronounced, is from God.*

(203.) Mentiri est contra mentem ire. (*3, Buls., 260.*) —*To lie is to go against the mind.*

These Maxims show that the natural propensity of man is to speak the truth, and, consequently to believe statements made by others. There are, however, two opinions as to the nature of truth and belief. On the one hand, it is contended that a tendency to speak truly and to believe others is part of the constitution of the human mind, and is the ultimate ground of all the credit which we give to testimony; while on the other hand, it is held that our experience of the agreement between the testimony and the facts testified to, is the sole ultimate reason of our belief. But the best and most generally approved opinion seems to be the former. "The wise and beneficent author of nature, who intended that we should be social creatures, and that we should receive the greatest and most important part of our knowledge by the information of others, hath," says Dr. Reid in his profound enquiry into the human mind, "for these purposes, implanted in our nature two principles, that tally with each other. The first of these principles is a propensity to speak truth, and to use the signs of language, so as to convey our real sentiments. This principle has a powerful operation, even in the greatest liars; for where they lie once, they speak truth a hundred times. Truth is always uppermost, and is the natural issue of the mind. It requires no art or training, no inducement or temptation, but only that we yield to a

the deepest penetration; because, in many cases, they would be able to find good reasons for believing testimony, which the weak and ignorant could not discover. In a word, if credulity were the effect of reason and experience, it must go up and gather strength, in the same proportion as reason and experience do. But if it is the gift of nature, it will be strongest in childhood, and limited and restrained by experience; and the most superficial view of human life shows, that the last is really the case, and not the first. It is the intention of nature, that we should be carried in arms before we are able to walk upon our legs; and it is likewise the intention of nature, that our belief should be guided by the authority and reason of others, before it can be guided by our own reason. The weakness of the infant, and the natural affection of the mother, plainly indicate the former; and the natural credulity of youth and authority of age as plainly indicate the latter. The infant, by proper nursing and care, acquires strength to walk without support. Reason hath likewise her infancy, when she must be carried in arms; then she leans entirely upon authority, by natural instinct, as if she was conscious of her own weakness; and without this support, she becomes vertiginous. When brought to maturity by proper culture, she begins to feel her own strength, and leans less upon the reason of others; she learns to suspect testimony in some cases, and to disbelieve it in others; and sets bound to that authority, to which she was at first entirely subject. But still, to the end of life, she finds a necessity of borrowing light from testimony, when she has none within herself, and of leaning, in some degree, upon the reason of others, where she is conscious of her own imbecility. And as in many instances, Reason, even in her maturity, borrows aid from testimony; so in others she mutually gives aid to it and strengthens its authority. For, as we find good reason to reject testimony in some cases, so in others we find good reason to rely upon

it with perfect security in our most important concerns. The character, the number, and the disinterestedness of witnesses, the impossibility of collusion, and the incredibility of their concurring in their testimony without collusion, may give an irresistible strength to testimony compared to which its nature and intrinsic authority is very inconsiderable."

The remarks of Bentham in the matter are worth studying. He says,—"That there exists in man a propensity to believe in testimony, is matter of fact, matter of universal experience; and this, as well on every other occasion, and in any private station, as on a judicial occasion, and in the station of judge.

"The existence of the propensity being thus out of dispute, then comes the question that belongs to the present purpose—is it right to give way to this propensity? and if right in general, are there no limitations, no exceptions to the cases in which this propensity must be admitted?

"To the first question the answer is—Yes; it is right to give way to this propensity: the propriety of doing so is established by experience. By experience, the existence of the propensity is ascertained: by experience, the propriety of acting in compliance with it is established.

"Established already by experience, by universal experience, it may be still further established by direct experiment, should any one be found willing to be at the charge of it. Continue your belief in testimony, as you have been used to believe in it, the business of your life will go on as it has been used to do: withhold your belief from testimony, and with the same regularity as that with which you have been in use to bestow it; you will not be long without smarting for your forbearance. The prosperity with which the business of your life is carried on, depends on the knowledge you have of the states of men and things, viz., of such men and such things as your situation in life gives you occasion to be acquainted with: and of

that knowledge it is but a minute and altogether insufficient portion that you can obtain from your own experience, from your own perceptions alone; the rest of that of which you have need, must come to you, if it comes to you at all, from testimony.

"And what is it that, by thus rendering it a man's *interest*, renders it *proper* for him to bestow a general belief on testimony? It is the general conformity of testimony to the real state of things—of the real state of things to testimony, of the facts reported upon, to the reports made concerning them.

"And by what is it that this conformity is made known? Answer again—By experience. It is because testimony *is* conformable to the truth of things, that, if you were to go on treating it as if it was not conformable, you would not fail of suffering from it.

"And by what is it that this conformity is produced? The question is not incapable of receiving an answer, and therefore, being a practically important one, it is neither an improper nor an unreasonable one: a little further on an answer will be endeavoured to be given.

"Forasmuch as, in a man, whether on a judicial occasion, or on a non-judicial occasion, in a judicial station, or not in a judicial station, there exists a general propensity to believe in evidence; and forasmuch as in general the giving way to that propensity is right, being found to be attended with consequences advantageous upon the whole; so, when, on a judicial occasion, and in a judicial station, a man having received evidence, has grounded his belief on it, pronounced a decision in conformity to such belief, and in the exercise of judicial power, acted in conformity to such decision, there exists on the part of men at large, failing special and predominant reasons to the contrary, a propensity to regard such belief as rightly bestowed; and to yield to this propensity.

also is right, and in general productive of beneficial consequences, as is also established by experience.

"Ask what is the ground—the foundation—or more simply and distinctly, the efficient cause of the persuasion, produced by evidence—produced by testimony? An answer that may be given without impropriety, is—*Experience*: experience, and nothing but experience.

"Experience?—of what? Of the conformity of the facts which form the subjects of the several assertions of which testimony consists, with the assertions so made concerning these respective facts.

"In the course of the ordinary and constant intercourse between man and man in private life, propositions affirming or disaffirming the existence of this or that fact, are continually uttered in a vast variety of forms. For the most part, occasions of obtaining perceptions, of and in relation to the facts in question, present themselves; the perceptions thus obtained are found conformable to the description given by those assertions. Testimony being thus for the most part found true in past instances, hence the propensity to expect to find it true in any given future instance: hence, in a word, the disposition to belief.

"On the other hand, in some instances, instead of such conformity, disconformity is the result presented by the surer guide, perception; hence, the disposition to disbelief.

"The number of the instances in which, to a degree sufficient for practice, this conformity is found to have place, is greatly superior to the number of the instances in which it is found to fail. Hence, the cases of belief constitute the general rule—the ordinary state of a man's mind; the cases of disbelief constitute so many cases of exception; and to produce disbelief requires some particular assignable consideration, operating in the character of a special cause.

"The disposition or propensity to belief may, in this sense be said to be stronger than the disposition, the propensity

to disbelief. Were the proposition reversed, the business of society could not be carried on: society itself could not have had existence. For the facts which fall under the perception of any given individual are in number but as a drop of water in the bucket, compared with those concerning existence of which it is impossible for him to obtain any persuasion otherwise than from the reports, the assertions, made by other men."

It is thus clear that men speak truth whenever there is no special cause to lead them to falsehood; and that men believe the statements of each other when there is nothing to excite their suspicion as to the faithfulness thereof. All this disposition in human being sis quite natural; and therefore this disposition cannot be said to be confined to any particular class or community. But a belief is pretty widely prevalent that the Hindu code allows a lie to be told. This is not in principle true. That code is as forcible as any other religious code in deprecating the vice of lying and in inculcating the virtue of truth. Menu says;—"Headlong in utter darkness shall the impious wretch tumble into hell, who, being interrogated in a judicial enquiry, answers questions falsely." And "by truth is a witness cleared from sin; by truth is justice advanced; truth must therefore be spoken by witnesses of every class." (*Menu*, Ch. VIII, 83.) It is no secret, however, that the Hindu code makes an exception to the rule in cases where one is obliged to speak an untruth from pious motives. But this privilege is restricted to a very few and most exceptional cases; so that one that fairly interprets and scrutinises the passages in Menu, will feel convinced that the relaxation of the general rule of veracity in those extremely limited instances is not calculated to lead to the production of any evil in point of morals; and that after all, the exceptions spoken of by Menu are mostly affecting those puzzles in morals, which have long been the subject of great discussion and difference of opinion

among the moralists, even of the Western School. Moreover, it must be remarked that Menu does not say that a divergence from truth, even in such restricted cases, is a virtue; but, on the contrary, the sage declares, "You will thereby commit a sin no doubt, but it is a venial sin produced by the utterance of a benevolent falsehood" (VIII, 106); and then the sage proceeds to lay down rules for expiating the sin thus committed.

On the foregoing subject, the dictum of Sir Thomas Strange, one of the greatest European authorities upon Hindu law, is worth studying—"Sufficient be it to observe," says that learned author, "that Hindu pleading was noticed with commendation by Sir William Jones; and that, with some trifling exceptions, the Hindu doctrine of evidence is, for the most part, distinguished nearly as much as our own by the excellent sense that determines the competency, and designates the choice of witnesses, with the manner of examining, and the credit to be given them; as well as by the solemn earnestness, with which the obligation of truth is urged, and inculcated; insomuch that less cannot be said of this part of their law, than that it will be read by every English lawyer with a mixture of admiration and delight, as it may be studied by him to advantage. Even the *pious perjury*, which it has been supposed to sanction, being resolvable, after all, into no greater liberty, than what our juries (not indeed with perfect approbation) have long been allowed to take, where the life of a prisoner, on trial before them, is at stake. Credit is to be given to the pregnant brevity of the Hindu oath; viz., "What ye know to have been transacted in the matter before us, between the parties reciprocally, declare at large and with truth;" as also to the noble warning, with which the subject, as detailed by Menu, (VIII, 13), is ushered in, that, "either the Court must not be entered by judges, parties, and witnesses, or *law* and *truth* must be openly declared."

With reference to the veracity of Indian witnesses, the Honorable Mr. Justice Phear made the following observations in the course of an address delivered by him at a meeting of the Bethune Society in Calcutta in 1866:—"The witnesses that come into Court have no idea of giving evidence in our English sense of the word. They come there honestly to support that side which they believe to be true. They come to state what is the story which they have learned to believe, and when they give utterance to representations which to our English ears look as if they intended to say that they had seen this, that they had perceived that, they are not mendacious. They do not mean to deceive you; they are simply intending to vouch that story which they believe honestly to be true, and which they believe they have been summoned to the Court to vouch. The admirers of existing systems, who think that everything is perfect, very easily find excuses for deficiencies which are not easily remedied. And one of the very first that is put forward, one that I have heard so often and often that I am doubtful how I ought to answer it,—is that the testimony of witnesses throughout this country, and the evidence even of documents, is, from the circumstances inherent in the people, so untrustworthy, that the ordinary rules for judging upon matters of fact are not to be followed, but that the most eccentric routes to a conclusion which can be devised are preferable thereto. Gentlemen, I do not share that belief. My short experience on the original side of the High Court has led me to the conclusion that the intrinsic value of oral testimony in this country is pretty much the same as it is in England."

In the Legislative Council of the Governor General of India, on the 9th April 1872, the Honorable Mr. William Robinson (a member of the Council for Madras) stated as follows:—"I have listened with great pain to opinions of a general and sweeping character expressed here in the heat

of debate, in respect to the truthfulness and integrity of our Native fellow subjects. I have no sympathy with—I repudiate as wrong—every and any general imputation against them on these scores. I affirm without hesitation that while the ethnical condition of the people is naturally somewhat different from our own—perhaps, not always intelligible to our alien understanding and sympathies—yet the country and its people are full of that mutual truth and integrity which are essential to social and commercial life. And I think that the truth and faith, which are met with, even amongst the lower orders of those who come before our Courts of Justice—always a deceptive theatre from which to draw our impressions of the real drama of life of a country like this—bear comparison very fairly with what we meet with, under similar circumstances, in many European countries."

So, we may safely hold that *even* in India, as in other countries, the force of evidence rests on the general proposition that men speak truth rather than falsehood; and that the principles of legal evidence are the same as those on which people act in every-day life. "But," observes Mr. Norton, "in legal investigations there is more inducement to deceive than in ordinary matters; the interests at stake are greater and more conflicting; and the despatch of public business forbids unlimited time being devoted to any one inquiry. In a philosophical inquiry, such as that of Darwin on the Origin of Species, the subject may be taken up and laid aside at pleasure; materials of proof may be gathered for years and at long intervals; in a judicial trial all the evidence must be concentered to a focus. The expense, again, and the vexation of forcing a litigant to bring forward all the proofs which he possibly might be able to advance, present a very serious obstacle to its being in every case required. Hence the considerations which limit the bounds of judicial investigations are those of *Vexation*,

Expense, Delay. Instances may easily be imagined, and constantly occur in practice, in which, notwithstanding it might be desirable to adduce a particular piece of evidence before coming to a decision, yet a consideration of the vexation, expense, or delay attending its production, necessitates a decision without it; and on the whole, balance of public convenience as well as justice will be found in favour of acting upon *general* rules, not making exceptions on account of supposed cases of particular hardship. As it has been repeatedly said, and by *Rolfe*, B., in *Winterbottom* v. *Wight*, 'Hard cases make bad law.' Where none of these preventive obstacles presents itself, a wisely constructed Law of Evidence will strive to admit everything which can throw light upon the subject under investigation."

The Indian Evidence Act, 1872, is now the governing law on the subject in British India; and the succeeding Maxims, relating to evidence, have therefore been illustrated with special reference to the provisions of the said Act.

MAXIM 204.

In judicio non creditur nisi juratis. *(Cro. Cor., 64.)—In law none are believed except those who are sworn.*

We have seen, while discussing the preceding Maxim, that men speak truth when there is no *special cause* to lead them to falsehood; and that in legal investigations there is more inducement to utter lies than in ordinary matters. There, therefore, arises a great necessity for ascertaining in all judicial inquiries whether there exists any cause to induce the witness to swerve from the path of truth, and to put him in the most favorable position for his delivering himself of a veracious statement; and these objects, the law, as it prevails in British India, strives to attain by means

of the following safeguards or guarantees :—(1) the Popular guarantee ; (2) the Obligatory guarantee ; and (3) the Penal guarantee.

First, as to the Popular guarantee, Bentham observes :— "Of the degree of force with which the moral or popular sanction acts in support of the law or rule of veracity, a more striking or satisfactory exemplification cannot be given than the infamy which so universally attaches to the character of a liar, and the violent and frequently insupportable provocation given if any one, in speaking to, or in the presence of another, applies to him that epithet. There has not, I suppose, existed anywhere, at any time, a community,—certainly there exists not among the civilized communities with which we have intercourse,—one, in which the appellation of a liar is not a term of reproach. Among the most egregious and notorious liars that ever existed, I cannot think that there can ever have been a single individual to whom it must not have been a cause of pain, as often as it happened to him to hear the appellation applied to himself; to whom it would not have been a matter of relief and comfort, had it been possible for him to have disburthened his character from the load of it." In order to gain the object thus aimed at by the Popular guarantee, the law directs that the examination of a witness shall be conducted *vivâ voce, in open Court, and in the presence of the party to be affected by such examination, such* party being moreover entitled to *cross-examine* the witness for the purpose of testing his veracity. (*The Indian Evid. Act* and *Pro. Codes.*) "This power and opportunity to cross-examine, it will be recollected (says Starkie, p. 195) is one of the principal tests, which the law has devised for the ascertainment of truth, and this is certainly a most efficacious test. By this means the situation of the witness, with respect to the parties and the subject of litigation, his interest, his motives, his inclinations and prejudices, his

means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his power of descerning facts in the first instance, and his capacity for retaining and describing them, are fully investigated and ascertained, and submitted to the consideration of the jury, who have an opportunity of observing the manner and demeanour of the witness; circumstances which are often of as high importance as the answers themselves. It is not easy for a witness who is subjected to this test, to impose upon the Court; for, however artful the fabrication of the falsehood may be, it cannot embrace all the circumstances to which the cross-examination may be extended; the fraud is therefore open to detection for want of consistency between that which has been invented, and that which the witness must either represent according to the truth for want of previous preparation, or misrepresent according to his own immediate invention. In the latter case, the imposition must obviously be very liable to detection; so difficult is it to invent extemporaneously, and with a rapidity equal to that with which a series of questions is proposed, in the face of a court of justice, and in the hearing of a listening and attentive multitude, a fiction consistent with itself and the other evidence in the cause."

Secondly.—As to the Obligatory guarantee, the law directs that "every person giving evidence on any subject before any Court, or person hereby authorised to administer oaths or affirmation, *shall be bound* to state the truth on the subject." (*The Indian Oath's Act*, 1873, Sec. 14.) Every witness, before proceeding to give his evidence, is reminded of this legal obligation to speak the truth, by his being made to repeat certain words to the effect that he shall speak the truth, &c. This is called an oath, or solemn affirmation, or affirmation, according to the form which the words intended to remind the witness of the aforesaid obligation, may be made to assume, with special reference

to the witness being a Christian, Mahomedan, Hindu, or a follower of any other religion, or an Atheist. But it must be remembered that as this obligation to speak truth is cast on a witness by an express provision of the law, and as ignorance or mistake of law is no excuse, it has been provided that, "no omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding, or render inadmissible any evidence whatever, or shall affect the obligation of a witness to state the truth;" (*The Indian Oath's Act*, Sec. 13); and further, "if the party or witness refuses to make the oath or solemn affirmation, he shall *not* be compelled to make it;" (*Ibid*, Sec. 12) for, the obligation to speak the truth being imperative, the witness will be liable to punishment for making a *false* statement, whether such statement be made on oath or not. (*Indian Penal Code*, Secs. 191 to 193.) If so, it may be asked why should any oath or affirmation be administered at all? "The good man, it is sometimes said, will speak the truth without an oath, while the bad man mocks at its obligation. To this, however, the following answer has been given:—'It must be owned that great numbers will certainly speak truth without an oath; and too many will not speak it with one. But the generality of mankind are of a middle sort; neither so virtuous as to be safely trusted, in cases of importance, on their bare word; nor yet so abandoned as to violate a more solemn engagement. Accordingly we find by experience, that many will boldly say what they will by no means adventure to swear: and the difference, which they make between these two things is often indeed much greater, than they should; but still it shows the need of insisting on the strongest security. When once men are under that awful tie, it composes their passions, counterbalances their prejudices and interests, makes them mindful of

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what they promise, and careful what they assert; puts them upon exactness in every circumstance; and circumstances are often very material things. Even the good might be too negligent, and bad would frequently have no concern at all, about their words, if it were not for the solemnity of the oath." (*Best on Evidence*, Sec. 59.)

And *Thirdly*, as to the Penal guarantee, it is to be observed that a severe punishment has been annexed to the offence of lying before a Court of Justice by the *Indian Penal Code*, (Sections 191 to 193, &c.); and it is expected that the fear of such punishment must generally deter witnesses from making false statements.

These are the principal guarantees of veracity; and they may be substantially reduced to two tests, *Oath and Cross-examination*, for all practical purposes.

MAXIM 205.

Facultas probationum non est angustanda. *(4, Inst., 279.)* —*The faculty of proof is not to be narrowed.*

The liberty of adducing evidence to support his case ought to be most freely conceded to every litigant. The practice of modern legislation in India has been to adhere to this principle to the utmost possible extent. Witnesses, who at one time were held to be incompetent on the ground of sex, pecuniary or proprietary interest, infancy, or want of religious belief, &c., are no longer held so. All persons are now competent to testify, unless the Court considers that any person is prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving

rational answers to them. A witness who is unable to speak, may give his evidence in any other manner in which he can make himself intelligible, as by writing or by signs; but such writing must be written and the signs be made in open Court. In all civil proceedings the parties to the suit and the husband or wife of any party to the suit are competent witnesses; and in criminal proceedings against any person, the husband or wife of such person, respectively, is a competent witness. An accomplice is a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. *(Indian Evidence Act.)*

But the Maxim under consideration is subject to certain exceptions, which, together with the reasons upon which they are founded, will be presently noticed.

The Sovereign cannot be compelled to give his evidence. The provision in the Indian Evidence Act, which lays down broadly that "all persons shall be competent to testify" does not include the Sovereign, because the Sovereign is not bound by any statute unless he is expressly named therein; and no process can be directed against his person. (Vide *Maxims relating to the Sovereign.*) And certain other evidence is excluded on the ground of public policy. It must be remembered that the law attaches a great importance to the public interest; and therefore whenever the public interest is likely to be injured by the production of any piece of testimony, written or oral, the law sanctions its non-production, either absolutely or conditionally. So it is laid down that no Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting. No person who is or has been married shall be compelled to disclose any communication made

to him, during the period of the marriage, by a person to whom he is or has been married. No one shall be permitted to give any evidence derived from unpublished official records relating to the affairs of the State, except by the order of the Head of the Department concerned. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interest would suffer by the disclosure. No Magistrate or Police officer shall be compelled to say whence he got any information as to the commission of any offence. No barrister, attorney, pleader, or vakeel shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such, by or on behalf of his client; provided that this privilege does not extend to any such communication made in furtherance of any illegal purpose; nor to any fact observed by any barrister, attorney, pleader, or vakeel in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment. The same provision applies to interpreters, clerks, or servants of barristers, attorneys, pleaders or vakeels. No one shall be compelled to disclose any confidential communication between him and his legal professional adviser, unless he offers himself as a witness. No witness who is not a party to the suit shall be compelled to produce his title deeds, unless he has agreed in writing to produce them. The Court may forbid any question which it regards as indecent or scandalous, although they may have some bearing on the questions before the Court, unless they relate to facts in issue, &c. The Court shall forbid any question which appears to be intended to annoy or insult; or which, though proper in itself, appears to the Court needlessly offensive in form. And in conclusion, some restriction is placed upon the privilege of an advocate in asking questions affecting the witness' character. (*The Indian Evidence Act.*)

A prisoner in criminal proceedings is not allowed to testify. One of the guarantees of truth is oath or affirmation; but no oath would have any effect against a prisoner's desire to obtain an acquittal; and to compel him to swear would in most cases be a direct creation of the crime of Perjury. It may be said that by refusing to swear prisoners, the innocent ones would suffer, for against the sworn statements of those who accuse them, they can only adduce their bare statements, and that therefore it may be left optional with prisoners to take oath or not. But were this the law, and if any prisoner were to decline to be sworn, his very refusal would involve such a fatal admission of his guilt, that it would be no more optional than if the law prescribed a penalty for the refusal. So it has been laid down that no oath or affirmation shall be administered to a prisoner. (*Crl. Pro. Code*, Sec. 345, and *Oath's Act*, Sec. 5.)

And for obvious reasons the law excludes evidence of all such matters as are *not* relevant to the case. (Vide *Maxim Res inter alios acta, &c.*)

While thus, on one hand, parties are allowed to adduce any evidence they like, subject to certain exceptions, the law on the other hand has put into the hands of the Judge a very great amount of discretion as to the admission of evidence. "The Judge may, in order to discover, or to obtain proper proof of, relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact, relevant or irrelevant, and may order the production of any document or thing; provided that the judgment be based upon facts declared by the Evidence Act to be relevant, and duly proved; and provided also that the Judge shall not compel any witness to answer any question, or to produce any document, which such witness would be entitled to refuse to answer or produce under the Evidence Act. The same power is accorded to juries or assessors, subject to the Judge's sanction. (*Ibid.*)

"In order to encourage witnesses to come forward voluntarily, they, as well as parties, barristers, attorneys, and in short all persons who have that relation to the suit which calls for their attendance, are protected from arrest, while going to the place of trial for the purpose of the cause, and while returning home; *eundo, morando, et redeundo.* The service of a subpœna or other process is not necessary in order to afford the witness this protection; provided he has consented to come without such service, and actually does attend in *good* faith. In determining what constitutes a reasonable time for going, staying, and returning, the Courts are disposed to be liberal; and provided that it substantially appears that there has been improper loitering or deviation from the way, they will not strictly inquire whether the witness or other privileged party went as quickly as possible, and by the nearest route." (*Taylor on Evidence*, Sec. 936.) This protection extends only to arrests in civil suits. A witness may be arrested at any time on a charge of crime. Home itself affords no protection in such a case. The insolvent, as we frequently see, sits safe behind his railings; and no Bailiff can break through their feeble frame; but the Police officer would not respect the strongest door, where it opposed his entrance to arrest a person on a charge of crime. Bail may arrest the party for whom he is security at any time; for this is said not to be taking but re-taking. (*Norton on Evidence*, and IV, *Mad. H. C. R.*, 145.) Where a writ of attachment for contempt was issued by the Court against a party to a suit in that Court, it was held, he could not claim privilege from arrest, while proceeding to Court for the purpose of attending the hearing of his suit. The privilege under which a witness, who is arrested on his way to Court, is entitled to his release, is the privilege not of the witness, but of the Court, for the purpose of ennuring to the administration of justice. (*Beng. Law R., John* v. *Carter*, IV, *O. S.*, 90.)

Besides Act I of 1872, the following laws are in force as to evidence in India:

22, Vic., Cap. XX. An Act to provide for taking down evidence in suits and proceedings pending before tribunals in Her Majesty's dominions in places out of the jurisdiction of such tribunals.

24, Vic., Chap. XI. An Act to afford facilities for the better ascertainment of the law of foreign countries when pleaded in Courts within Her Majesty's dominions.

31 and 32, Vic., Cap. XXXVII. An Act to amend the law relating to documentary evidence in certain cases.

Vide also Civil and Criminal Procedure Codes.

MAXIM 206.

Lex non requirit verificari quod apparet curiae. (9 *Co.* 54.) —*The law does not require that which is apparent to the Court to be verified.*

The law, while it scrupulously exacts evidence of all matters coming judicially before the Courts, will, for reasons founded upon public policy and general convenience, dispense with proof of certain matters, and accept them as true, although they are not subjected to the ordinary guarantees of truth, viz., oath and cross-examination. When the Courts thus accept such matters as evidence, they are said to have taken judicial notice of the same. No fact of which the Courts will take judicial notice need be proved. The Courts shall take judicial notice of the following facts:—

(1.) All laws or rules having the force of law now or heretofore in force or hereafter to be in force in any part of British India.

(2.) All public acts passed or hereafter to be passed by Parliament, and all local and personal acts directed by Parliament to be judicially noticed:

(3.) Articles of War for Her Majesty's Army or Navy.

(4.) The course of proceeding of Parliamentand of the Councils for the purpose of making Laws and Regulations established under the Indian Councils Act, or any other law for the time being relating thereto:

(5.) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland:

(6.) All seals of which English Courts take judicial notice. The seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor General or any Local Government in Council: The seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by any Act of Parliament or by other Act or Regulation having the force of law in British India:

(7.) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment to such office is notified in the *Gazette of India*, or in the Official Gazette of any Local Government.

(8.) The existence, title, and national flag of every State or Sovereign recognized by the British Crown:

(9.) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Official Gazette:

(10.) The territories under the dominion of the British Crown:

(11.) The commencement, continuance, and termination of hostilities between the British Crown and any other State or body of persons:

(12.) The names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attornies, proctors, vakils, pleaders and other persons authorized by law to appear or act before it:

(13.) The rule of the road on land or at sea:

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book, or document as it may consider necessary to enable it to do so. (*The Indian Evidence Act.*)

No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings. Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions. (*Ibid.*)

MAXIMS 207 and 208.

(207.) Non potest probari quod probatum non relevat. (*Halk. Max.*, 50.)—*It is not allowed to prove that which being proved would not be relevant.*

(208.) Lex rejicit superflua. (*Jenk. Cent.*, 133.)—*The law rejects superfluities.*

As it is the object of the pleadings to reduce the case of each litigating party to one or more substantial issues which involve the merits of the question; and as for this purpose none but material allegations, which tend to the raising of such issues are admissible; so it is the object of evidence to provide that, when such allegations have been made and such issues settled, they shall be supported by strictly relevant proof. Here the question arises what is it that constitutes judicial *relevancy*? The answer to this question is to be

found in several of the wide exceptions which are made by English text writers to the equally wide exclusive rules that evidence must be confined to the point in issue; that hearsay is no evidence; and that the best evidence must be given. But our Indian Legislators have, by a comparison and collection of these exceptions, succeeded in forming a collection of positive rules as to the relevancy of facts to the issue, which will admit every fact which a rational man could wish to have before him in investigating any question of fact. (*Stephen.*)

So, under the Indian Evidence Act I of 1872, the following are declared to be relevant:—namely, all facts in issue and all collateral facts, which form part of the same transaction; which are the immediate occasion, cause or effect of facts in issue; which show motive, preparation, or conduct affected by a fact in issue; which are necessary to be known in order to introduce or explain relevant facts; which are done or said by a conspirator in furtherance of a common design; which are either inconsistent with any fact in issue; or inconsistent with it, except upon a supposition which should be disproved by the other side; or render its existence, or non-existence morally certain; which affect the amount of damages in cases where damages are claimed; which show the origin or existence of a disputed right or custom; which show the existence of a relevant state of mind and body; which show the existence of a series of occurrences of which a relevant fact forms a part; which show (in certain cases) the existence of a given course of business, (Sec. 5, &c., *In. Ev. Act.*) These are relevant facts; *i. e.*, in other words, evidence may be adduced with reference to these facts. Then the Indian Evidence Act declares certain other matters to be relevant, namely:—Admissions or confessions of the parties. Judgments in rem; statements made by third parties; and statements made by a person who is dead or cannot be found or produced; and statements

recorded in public or official books and opinions of third persons. These five last mentioned subjects being important, they will be explained separately under appropriate Maxims.

The character of a party is generally irrelevant. It will be a source of a great evil if the character of parties in civil actions is allowed to be called in question; any ill-bent defendant, who has been sued for any small sum may choose to attribute various kinds of wicked acts to a plaintiff sheerly from ill-will. Moreover, evidence of character has very little to do with civil actions. Say for instance, a suit is filed on a contract; what does it matter whether the plaintiff or defendant is a bad man or a good man? The question to be determined is simply, whether the contract was or was not entered into; and this has nothing to do with the character of the parties. But there are cases, in which evidence of character of a party is essential, as (1stly) when the character of a party is directly in issue, as in the case of libel, slander, or adultery, and (2ndly) in cases in which it is necessary to ascertain the amount of damages. In criminal cases too, the same rule must hold good; but from motives of humanity, prisoners are allowed to call witnesses to prove their general good character, where the object of the prosecution is the punishment of the offender; for such evidence will materially help the Judge in passing sentence. If the evidence for the prosecution be doubtful, sufficient proof of a prisoner's good character will at once induce the Judge to acquit the prisoner; and if the evidence against him is strong, evidence of his good character will go a great way in extenuation of the punishment to be awarded, although no evidence of good character can of itself prove a prisoner to be innocent of the particular offence charged. But then the prisoner in bringing forward evidence of his character, must confine himself to his general character, *i. e.*, in what estimation he is held by the people generally. He cannot prove any particular act of his

good character; for this would not show him to be a good man; as it is possible that the worst man might have done one good deed at least during his lifetime. Another condition on which a prisoner is permitted to put in evidence of his good character is, that that evidence must itself be relevant to the matter under investigation; thus, a prisoner charged with having committed a murder, is not permitted to show that his character in money-dealings has been very good. While thus a prisoner is allowed to prove his own good character, the prosecutor is peremptorily precluded from proving the prisoner's bad character, for obvious reasons. It must always be the object of the prosecutor to prove the perpetration of the particular offence by the prisoner; and the fact of a prisoner being a bad man can in no possible way tend to bring the particular offence home to him. Moreover, if a prosecutor is allowed to prove the prisoner to be a person of bad character, because of his having committed twenty such offences on former occasions, the prisoner must with good reason be allowed an opportunity to defend himself against all those twenty imputations. So twenty charges would spring out of one; and in many cases, the prisoner could not be expected to be prepared to disprove all those offences which are foreign to the one, of which he stands charged. But if a prisoner had been, on former occasions, *tried* and *convicted* for those offences they may be included in the present indictment and proved in cases falling under Chapter XII or XVII of the Indian Penal Code, as stated in Section 75 of the said Code; for this course does not necessitate the enquiry into the truth or otherwise of the prosecutor's allegation on the one hand, and will, on the other, help the Judge in determining the amount of punishment to be awarded in the case in hand, if the case be proved by other evidence. Whenever the prisoner avails himself of the right of calling witnesses to prove his good character, the prosecutor can, in reply, adduce evidence of prisoner's

bad character. But such evidence must be confined to general reputation; and no individual opinion of a prisoner's character or of particular facts is admissible.

The Indian Evidence Act provides (Section 52) that in civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him, is irrelevant except in so far as such character appears from facts otherwise relevant. But in criminal cases the fact that the person accused is of a good character is relevant under Section 53. Further, Section 54 provides that in criminal proceedings the fact that the accused person has been previously convicted of any offence is relevant; but the fact that he has a bad character is irrelevant unless evidence has been given that he has a good character, in which case it becomes relevant. But this Section does not apply to cases in which the bad character of any person is itself a fact in issue. And under Section 55, the fact that the character of any person is such as to affect the amount of damages which he ought to receive is relevant in civil cases. In conclusion, the Evidence Act explains that in Sections 52, 53, 54 and 55 aforesaid, the word "character" includes both reputation and disposition; but evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

No evidence is adducible in any case except as to matters which are thus declared, by the Evidence Act, to be relevant, notwithstanding that the parties may have introduced any other matters into their pleadings; for all such matters are considered as superfluous; and the law rejects all superfluities.

MAXIM 209.

Melius est petere fontes quam sectari rivulos.—*It is better to seek the fountains than to follow the rivulets.*

The law is not only desirous to have evidence of every matter in dispute, but is also particularly anxious that the evidence to be adduced must be the best. The rule is that the best evidence, which the nature of the case will admit, ought to be produced. This is an important rule, the effect of which is to exclude all such evidence which shows that some still higher species of evidence exists in the possession of the party. As to oral evidence, the law directs that, it must in all cases whatever be direct, that is to say:—if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; and if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. (*Indian Evidence Act*, Section 60.) So that any evidence which is second-hand or mediate, or, as it was formerly called, hearsay evidence, is not admissible, except in cases in which statements of relevant facts were made by a person who is dead, or who cannot be found, &c., as will be fully explained under the Maxim *Res inter alios acta, &c.* And in the same way, the contents of a document must be proved as *primary* evidence, which means the document *itself* must be produced for the inspection of the Court, except in cases where the document has been destroyed or lost, or is in the possession of the opposite party, or is not

easily moveable, &c., as will be shown under the Maxim *Litera scripta manet.* (*Indian Evidence Act*, Section 65, &c.)

But it must be remembered that the *best evidence* does not mean the *strongest evidence;* as for instance no particular number of witnesses shall in any case be required for the proof of any fact. (*Indian Evidence Act*, Section 134.)

MAXIM 210.

Res inter alios acta alteri nocere non debet (*Co. Litt.*, 132) —*A matter that has taken place between others, ought not to injure one who was no party to it.*

As already observed, no evidence has a claim to be credited unless it be given on oath or affirmation; and unless the party to be affected by it has had an opportunity of cross-examining the witness. When a witness states something which he himself has seen or heard, *directly affecting the parties to a proceeding*, such a statement contains clearly the requisite principles of presumptive truth; he will appear before the Court, and he will be sworn, and submitted to be cross-examined by the party affected. But when a witness offers to repeat what another may have said, his statement affords no reliable information; for that other person when he stated what he is alleged to have stated was not on oath; nor was the party affected by his statement then present. So that he might have spoken falsely, or inaccurately, or hastily, or in joke. And again, it is not improbable that the person who now offers to repeat what another spoke, might have misunderstood, or imperfectly remembered, the words of that other. Hence the rule is that nothing stated by a person can be used as evidence between the contending parties, unless it is delivered upon oath in the presence of those parties, and unless the party to

be affected thereby is allowed the opportunity of cross-examining them.

But there are exceptions to this rule. Statements made by strangers are received in evidence in spite of the absence of the guarantees of oath and cross-examination, whenever it is found that there is some other peculiar guarantee which the law considers as equivalent, when the production of the original evidence itself is rendered impossible by various circumstances.

Consequently, in receiving the statements or declarations of third parties as evidence in any case, the Judge ought to be satisfied on two points: first, that the person who made the original statement or declarations cannot possibly be produced in Court; and secondly, that the statement, though not of course possessing the usual guarantees of subjection to oath and cross-examination, does still contain some principle of presumptive truth. But happily now, the Judge is saved the difficult task of ascertaining in each instance what particular statement is, or is not, entitled to be received in evidence with reference to the said two conditions; for the Indian Evidence Act prescribes rules setting forth a limited number of statements which alone and no other are receivable in evidence. Thus:—

Section 32 provides that statements written or verbal of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an unreasonable amount of delay or expense, are themselves relevant facts in the following cases:—

(1.) When the statement is made by a person, as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death in cases in which the cause of that person's death comes into question; such statements are relevant, whether the person who made them was or was not at the time when they

were made, under expectation of death; and whatever may be the nature of the proceeding in which the cause of his death comes into question. This rule is founded on the supposition that the awful position of a dying person is a sufficient guarantee for the truth of the statement made by such person.

(2.) When the statement was made by such person, (*i. e.*, the person who could not be produced) in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities, or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter, or other document usually dated, written, or signed by him; such statements, &c., are receivable in evidence, because statements, &c., made or written in the *ordinary* course of business, must be presumed to be true as having been made, with every caution and precision, by persons who could have had no known motive to state a falsehood.

(3.) When the statement is against the pecuniary or proprietary interest of the person (*i. e.*, the person who could not be produced) making it, or when if true, it would expose him or would have exposed him to a criminal prosecution, or to a suit for damages, such statement is receivable in evidence. For, in this case, the absence of the usual tests of oath and cross-examination is supplied by the guarantee for veracity arising from the presumption that no one would say or write anything against his own interest, except what he believes to be true.

(4.) When the statement gives the opinion of any such person, (*i. e.*, the person who could not be produced,) as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it

existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom, or matter had arisen,—such statement is receivable in evidence. This is a rule of necessity. These subjects do not generally admit of proof out of the mouth of direct witnesses. It is not likely that any living witness could show a personal acquaintance with the origin of public rights or customs, &c. These are subjects too, upon which a majority of the public must be equally well informed, so that a wrong statement by one of them would be open to a speedy correction. And it is not possible that any account could gain ground against the general sense of the community.

(5 and 6.) When the statement relates to the existence of any relationship by blood, marriage, or adoption between persons as to whose relationship by blood, marriage, or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised, such statement is receivable in evidence. And the rule is the same where the statement relates to the existence of any relationship by blood, marriage, or adoption, between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait, or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised. These are rules of necessity. No relationship can be proved at all, if such evidence be excluded. It is not always possible to prove by living witnesses what relationship an old man aged 60 or 90 bore to a person deceased some scores of years ago. The remarks made with reference to the subject just preceding (Clause 4) apply to the present case likewise.

(7.) When the statement is contained in any deed, will, or other document which relates to any transaction

by which a right or custom was created, claimed, modified, recognised, asserted, or denied, or which was inconsistent with its existence, such statement is receivable in evidence. This rule is founded on the principle given for the reception of a statement under the aforesaid 4th Clause.

And (8.) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question, such statement is relevant. This is founded upon the same principle as the aforesaid 4th Clause, and also upon this additional cause, that proof of statements, feelings, or impressions of a number of persons involves the concurrent testimony of a number of the community; and even if those who made the statements were alive or procurable, each of them can only give his own individual opinion, which would not be public opinion.

Add to the above the provisions contained in Sec. 33 of the Indian Evidence Act, which in itself contains the rules and the reason of the rule on another subject. It runs as follows:—Evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable: provided, that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding. A criminal trial or enquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

On the ground of public policy and convenience, the Indian Evidence Act allows the reception of statements made under special circumstances; for instance, Entries in books of account, regularly kept in the course of business are relevant whenever they refer to a matter into which the Court has to enquire, but such statements shall not alone be sufficient evidence to charge any person with liability. (Sec. 34.) An entry in any public or other official book, register, or record stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact. (Sec. 35.) Statements of facts in issue or relevant facts made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts, or plans, are themselves relevant facts. (Section 36.)

When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it made in a recital contained in any Act of Parliament, or in any Act of the Governor-General of India in Council, or of the Governor in Council of Madras or Bombay, or of the Lieutenant-Governor in Council of Bengal, or in a notification of the Government appearing in the *Gazette of India* or in the Gazette of any Local Government, or in any printed paper purporting to be the *London Gazette* or the Government Gazette of any colony or possession of the Queen, is a relevant fact. (Section 37.)

When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country, and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant. (Section 38.)

In conclusion, the Indian Evidence Act provides in Section 39 that when any statement, of which evidence is given, forms part of a longer statement, or of a conversation, or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers, as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made. (Section 39.)

MAXIMS 211 to 216.

(211.) **Actori incumbit onus probandi.** *(4, Co., 71.)—The burden of proof lies on the plaintiff.*

(212.) **Actori non probante absolvitur reus.** *(Hob., 103.) —The plaintiff failing to prove, the accused is absolved.*

(213.) **Reus exceptio actor est.** *(Dig. Lib., 44.)—A defendant relying on an exception is in the position of a plaintiff.*

(214.) **Affirmanti, non negranti, incumbit probatio.** *(H., 9.) —The burden of proof lies on him who affirms, and not on him who denies.*

(215.) **In genere quicunque aliquid dicit, sive actor, sive reus, necesse est ut probet.** *(Best.)—In general the party averring a particular fact must prove it, whether he is plaintiff or defendant.*

(216.) **Lex neminem cogit ostendere quod nescire praesumitur.** *(Loffl., 569.) The law will not force a man to show a thing which by intendment of law lies not within his knowledge.*

On all matters which are not the subject either of intuitive or sensitive knowledge, which either are not susceptible

of demonstration, or are not demonstrated, and which are not rendered probable by experience or reason, the mind suspends its assent until proof is adduced. The Court, therefore, cannot be in a position to afford redress in any case, and especially in contested cases, until the grounds, upon which the redress is sought, are established, except that the Court will of its own motion take judicial notice of certain matters, as shown elsewhere. Every controversy ultimately resolves itself into this, that certain facts or propositions are asserted by one of the disputant parties, which are denied or at least not admitted by the other. Now, where there are no antecedent grounds for supposing the assertion of the one party more probable than the denial of the other, and the means of proof are equally accessible to both, the party who asserts a fact or proposition must prove his assertion; the burden of proof *(onus probandi,)* lies upon him; and the party who denies that fact or proposition, need not give any reasons or evidence to show the contrary, until his adversary has at least laid some probable grounds for belief of it. (*Best*, Section 266.) For, the man who brings another before a judicial tribunal must rely on the strength of his own right and the clearness of his own proof, but not on the want of right or weakness of proof in his adversary. So the plaintiff is bound in the first instance to show at least a *primâ facie* case, and if he leaves it imperfect the Court will not assist him. But it is the affirmative in *substance* which a party has to make out, but not merely *in form*. Lord Abinger, C. B., observed thus in *Loward* v. *Leggatt*:—"Looking at these things according to common sense, we should consider what is the *substantive* fact to be made out, and on whom it lies to make it out. It is not so much the *form* of the issue which ought to be considered, as the *substance* and *effect* of it. In many cases, a party, by a little difference in the drawing of his pleadings, might make it either affirmative

or negative, as he pleased. The plaintiff here says, 'You did not repair;' he might have said, 'You let the house become dilapidated.' I shall endeavour by my own view to arrive at the substance of the issue, and I think in the present case that the plaintiff's Counsel should begin." The Indian Evidence Act provides that, "Whoever desires any Court to give judgment as to any legal right, or liability, dependent on the existence of facts which he asserts, must prove that those facts exist." (Section. 101.)

Hence it follows that the *onus probandi* sometimes lies upon the defendant also, as where, instead of denying what is alleged against him, he relies on some new matter, which, if true, is an answer to it. In such cases the defendant stands in the plaintiff's shoes, and all the rules laid down for the plaintiff affect equally the defendant with respect to such special pleas advanced by him.

It must be remembered that the circumstances, upon which a party's claim or defence rests, may often include negative averments; *i. e.*, negative in substance, and not merely negative in form, which latter are entirely disregarded in law. In such cases the negative averment must be proved. "The correct rule upon this subject seems to be that in cases where the subject of such averment relates to the defendant, personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecution, but on the contrary the affirmative must be proved by the defendant as a matter of defence. But upon the other hand, if the subject of the averment do not relate personally to the defendant, or be not peculiarly within his knowledge, but either relate peculiarly to the prosecutor, or be peculiarly within his knowledge, or at least be as much within his knowledge as within the knowledge of the defendant, the prosecutor must prove the negative. (*Best.*)

So the Indian Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. (Section 106.)

The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. (Section 103.)

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances. (Section 105.)

So it shall not be necessary to allege in an indictment any circumstances for the purpose of showing that the case does not come, nor shall it be necessary to allege that the case does not come, within any of the general exceptions contained in Chapter IV of the Indian Penal Code, or within the exceptions contained in Sections 136, 300, 323, 324, 325, 326, 375 or 499 of the said Code; but every charge shall be understood to assume the absence of all such circumstances, and it shall not be necessary on the part of the prosecutor to prove at the trial the absence of such circumstances; but the person indicted shall be entitled to give evidence of the existence of any such circumstances, and evidence in disproof thereof may then be given on the part of the prosecutor. (*Criminal Law Amendment Act VIII of* 1862, Section 26.)

On the whole, the sum and substance of the rules as to *onus probandi* is this:—The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. (Sec. 102, *Indian Evidence Act.*)

When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. (Sec. 107.) Provided that when the question is whether a

man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. (Sec. 108.)

When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it. (Sec. 109.)

When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. (Sec. 110.)

Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence. (Sec. 111.)

In the case of *Sivaramyar* v. *Samu Ayer*, the Madras High Court held that in a suit on a bond it is for the plaintiff to prove the amount of the debt, and this will be done sufficiently in the first instance by proof of the execution of the bond. It is for the defendant to prove in answer, if he can, that such amount is less than the sum sued for. (I, *Mad. H. C. R.*, 447.)

In *Rassonada Rayar* v. *Sitharama Pillay*, the Madras High Court laid down that where a plaintiff brings a suit for a declaration of his title as owner, he is bound to establish his title affirmatively. He is in the same position as any other plaintiff, and must make out his case, and the *onus probandi* that he is in possession as owner is upon him. (II, *Mad. H. C. R.*, 171.)

And in a suit for malicious prosecution, the Madras High Court held that it is not necessary to prove that the evidence

of the defendant upon the criminal charge was false. Plaintiff is entitled and bound to show that the prosecution was malicious and without reasonable and probable cause, and if want of reasonable and probable cause be shown, malice may generally be inferred. (*Vengama Naichar* v. *Ragava Charry*; II, *Mad. H. C. R.*, 291.)

MAXIMS 217 to 219.

(217.) Confessio facta in judicio, omni probatione major est. (*Jenk. Cent.*, 102.)—*A confession made in a judicial proceeding is of greater force than all proof.*

(218.) Habemus optimum testem confitentem reum. (*Fost. Cr. L.*, 243.)—*The admission of an accused person is the best evidence.*

(219.) Qui non improbat, approbat. (3, *Inst.*, 27.)—*He who does not deny, admits.*

These Maxims relate to confessions and admissions made in Court and out of Court, and to inferences of admissions drawn from the conduct of the parties.

An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by a party to the suit, or certain others, as will be particularly mentioned hereafter. (*The Indian Evidence Act*, Sec. 17.)

No definition of the word "confession" is given in the Indian Evidence Act. The distinction clearly drawn between an admission and a confession in Taylor's Treatise on the Law of Evidence may be studied with advantage. "In our law," says this author, "the term *admission* is usually applied to civil transactions, and to those matters of fact, in criminal cases, which do not involve criminal intent; the term *confession*, being generally restricted to *acknowledgments of guilt*. This distinction will be better understood by an example. Thus, on the trial of Lord Melville, who was

charged, amongst other things, with criminal application of moneys received from the Exchequer, the admission of his agent and authorised receiver was held sufficient proof of the fact of such agent having received the public money; though, had such admission been tendered in evidence to establish the charge of any misapplication of the money by the noble defendant, it would clearly have been rejected. The law was thus stated by Lord Chancellor Erskine. 'This first step in the proof, (namely, the receipt of the money by the agent,) must advance by evidence applicable alike to civil, as to criminal cases; for, a fact must be established by the same evidence whether it is to be followed by a criminal or civil consequence; but it is a totally different question in the consideration of criminal, as distinguished from civil justice, how the noble person now on trial may be affected by the fact when so established. The receipt by the paymaster would in itself involve him civilly, but could by no possibility convict him of a crime." (*Taylor on Evidence*, Sec. 509.)

Admissions are relevant and may be used as evidence against the person who makes them or his representative in interest. (*Indian Evidence Act*, Sec. 21.) No oath or cross-examination is necessary to render an admission receivable as evidence; the absence of those guarantees for veracity being supplied by the ordinary presumption that no person will deviate from truth in order to injure his own interests in civil cases, and much less so in criminal cases, where his own person, life, and property are at stake. Hence it is that the law attaches very great weight to an admission which is considered to be the best evidence; so much so, that a decree may be passed against the defendant upon his own admission in a civil suit, and a conviction may be recorded against an accused person if he pleads guilty in a criminal case (Sec. 114 of the Code of Civil Procedure; and Sec. 237 of the Criminal Procedure Code), without taking any further evidence whatsoever.

The Indian Evidence Act gives the following rules as to what kind of admissions are receivable, &c. Statements made by a party to the proceedings or his authorised agent; by suitors in a representative character; by persons having proprietary or pecuniary interest in the subject-matter; by persons from whom the parties to the suit have derived their interest; by persons whose position or liability it is necessary to prove against the party to the suit; or by persons expressly referred to by the party to the suit, are relevant, *i. e.*, they are receivable in evidence. But such admissions can only be proved *against* the person who makes them or his representative in interest, but they cannot be proved *by* or *on behalf* of the person who makes them or his representative, except in the following cases; namely, when an admission is of such a nature that if the person making it were dead, it would be relevant as between third persons, or when the admission consists of the existence of any state of mind or body, accompanied by conduct rendering its falsehood improbable; or an admission when it is relevant otherwise than as an admission. Oral admissions as to the contents of a document are not relevant, unless and until it is shown that the party proposing to prove them is entitled to give secondary evidence of the contents of such a document. In civil cases no admission is relevant, if it is made upon a condition that it is not to be used as evidence. (*Indian Evidence Act.*)

A confession made by an accused person is not relevant in a criminal proceeding if it appears to have been caused by an inducement, threat, or promise proceeding from a person in authority, sufficient for supposing that the accused would gain any advantage or avoid any evil of a temporal nature, in reference to the proceedings against him. No confession made to a Police officer shall be proved against the accused person. Nor is a confession made by any person whilst he is in the custody of a Police officer receivable in evidence unless it is made in the immediate presence of a Magistrate·

But so much of a statement or confession made by the accused as relates to the fact thereby discovered, may be proved; and a confession made after the removal of the impression caused by inducement, threat, or promise may be proved. A confession otherwise relevant does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised upon the accused person, or when he was drunk. (*The Indian Evidence Act.*)

It must be remembered that admissions are not conclusive proof of the matters admitted, but they may operate as estoppels. (*Ibid.*)

Admissions arise also from the conduct, silence, or acquiescence of the party. But such presumptions of admissions must be drawn with great caution; for a variety of circumstances, unconnected with the matter in issue, might influence a party to pursue a particular conduct; a prudent man generally prefers silence until he is actually pressed to make a statement; and the circumstances which apparently lead to the presumption of acquiescence may be such as can be explained away in favor of the party concerned. On the subject of acquiescence the following observations occur in Taylor's Treatise on the Law of Evidence:—"Admissions may also be implied from the *acquiescence* of the party. But acquiescence to have the effect of an admission, must exhibit some act of the mind, and amount to voluntary demeanour or conduct of the party. And whether it be acquiescence in the conduct or in the language of others, it must plainly appear that such conduct was fully known, or such language fully understood, by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated. Thus, where a landlord quietly suffers a tenant to

expend money in making alterations and improvements on the premises, it is evidence of his consent to the alterations; though the mere lying by and passively witnessing a breach of covenant for several years, is not such an acquiescence as to amount to a waiver of the forfeiture. Again, if a tenant *personally* receives notice to quit at a particular day, without objection, it is generally an admission that his tenancy expires on that day; but if he cannot read, or even did not read, the notice in the presence of the person serving it upon him, it will be treated as a service not personally served, and will go for nothing. Thus, also, a trader being inquired for, and hearing himself denied, may thereby commit an act of bankruptcy; and, in general, where one knowingly avails himself of another's acts done for his benefit, the jury will be justified in considering such conduct as an admission of his obligation to pay a reasonable compensation." The Indian Evidence Act provides that the conduct of any party, or of any agent to any party to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person, an offence against whom is the subject of any proceeding, is relevant, if such conduct influences, or is influenced, by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of the Act. When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant. (*The Indian Evidence Act.*)

A prisoner may, as mentioned above, be convicted of an offence upon his own confession without any other evidence; but such a course would not be safe in all cases. Instances

are common in which prisoners, under the influence of a morbid sentiment, have confessed crimes which they have not committed, and there are other cases in which the confession seems to have been prompted by the full, but unfounded, belief in the confessing party, that he had committed the crime. It has been observed by Mr. Baron Parke that "too great a weight ought not to be attached to evidence of what a party has been supposed to have said, as it very frequently happens, not only that the witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did." (*Powell on Evidence*, p. 179.)

"Instances are to be found in the judicial histories of most countries, where persons, with the certainty of incurring capital punishment, have acknowledged crimes now generally recognised as impossible. We allude chiefly to the prosecutions for witchcraft and visible communion with evil spirits which in former ages, and especially in the seventeenth century, disgraced the tribunals of these realms. Some of them present the extraordinary spectacle of individuals, not only freely, (so far as the absence of physical torture constitutes freedom) confessing themselves guilty of these imaginary offences, with the minutest details of time and place, but even charging themselves with having, through the demoniacal aid thus avowed, committed repeated murders and other heinous crimes. The cases in Scotland are even more monstrous than those in England; but there is strong reason to believe that in most of them the confession was obtained by torture; and the following sensible solution of the Psychological phenomenon which they all present is given by an eminent writer on the criminal condition of the former country." * * * "All these circumstances duly considered; the present misery, the long confinement; the small hope of acquittal; the risk of a new charge and prosecution; and

the certain loss of all comfort and condition in society; there is not so much reason to wonder at the numerous convictions of witchcraft on the confessions of the party. Add to these motives, though of themselves sufficient, the influence of another as powerful perhaps as any of them, the unsound and crazy state of imagination in many of those unhappy victims themselves. In those times when every person, even the most intelligent, was thoroughly persuaded of the truth of witchcraft, under the possibility of acquiring supernatural powers, it is nowise unlikely that individuals would sometimes be found, who either seeking to indulge malice, or stimulated by curiosity and an irregular imagination, did actually court and solicit a communication with evil spirits, by the means which in those days were reputed to be effectual for such a purpose. And it is possible, that among these there might be some who in the course of a long and constant employment in such a wild pursuit, came at last to be far enough disordered to mistake their own dreams and ravings or hysteric affections for the actual interviews and impressions of Satan." (*Best.*)

The following case is reported as having occurred in India in 1830. Three prisoners were made to confess before the Police to having, by means of sorcery, had forcible connection with the wife of the prosecutor, then in the tenth month of her pregnancy, to having beaten or otherwise ill-treated her, and afterwards taken the child out of her womb and introduced into it, in lieu thereof, the skin of a calf and an earthen pot, in consequence of which she died. These confessions were corroborated by the discovery in the womb of the deceased of an earthen pot and a piece of calf skin; but the prisoners were acquitted, principally on the ground that the earthen pot was of a size that rendered it impossible to credit its introduction during life. (*Madras Foujdary Udalut cases.*)

As a specimen of the confessions of witchcraft in the

seventeenth century, the depositions of two of the Essex witches in 1645 are subjoined, purporting to have been taken before Sir Harbottel Greinston, *Knt. and Baronet*, one of the members of the Hon. the House of Commons, and Sir Thomas Bowes, *Knt.*, another of His Majesty's Justices of the Peace for that county. "The examination of Anne Cate alias Maidenhead, of Much Holland in the county aforesaid at Mannintree, 9th May 1645, saith, "that she hath four familiars which she had from her mother about two and twenty years since, and that the names of the said imps are James Prickeare, Robyn, and Sparrow; and that three of these imps are like mouses, and the fourth like a sparrow: to whomsoever she sent the said imp Sparrow, it killed them presently; and that first of all, she sent one of her three imps like mouses to nip the knee of one Robert Freeman, of Little Clackton in the county of Essex aforesaid, whom the said imp did so lame that he died of that lameness within half a year after: that she sent the said imp Prickeare to kill the daughter of John Robyns, of Much Holland aforesaid, who died accordingly within a short time after; and that she sent her said imp Prickeare to the house of John Tillet, which did suddenly kill the said Tillet: that she sent her said imp Sparrow to kill the child of one George Parby, of Much Holland aforesaid, which child the said imp did presently kill; and that the offence this examinant took against the said George Parby, to kill his said child, was because the wife of the said Parby denied to give this examinant a pint of milk; and that she sent her said imp Sparrow to the house of Samuel Ray, which, in a very short time, did kill the wife of the said Samuel; and that the cause of this examinant's malice against the said woman was because she refused to pay to this examinant two pence which she challenged to be due to her: and that afterwards her said imp Sparrow killed the said child of the said Samuel Ray, and this examinant confesseth, that, as soon as

she had received the said four imps from her said mother, the said imps spake to this examinant and told her she must deny God and Christ, which this examinant did then assent to." *(Best.)*

Certain snake-charmers, by professing themselves able to cure snake-bites, induced several persons to let themselves be bitten by a poisonous snake. From the effect of the bite three of these persons died. It was held by the Calcutta High Court that the offence was murder under Clauses 2 and 3 of Sec. 200 of the Indian Penal Code, unless it could be brought within the 5th exception to that section. If the prisoners, really believing themselves to have the powers they professed to have, induced the deceased to consent to take the risk of death, the offence would be culpable homicide not amounting to murder. (The *Queen* v. *Pemai Fattama and others*, Beng. L. R. App., Criml., p. 25.)

In *Reg.* v. *Maria Giles*, it was held that a person who pretends falsely that he has the power to do something, whether the power be physical, moral, or supernatural, and thereby obtains money or goods, is indictable for false pretences. *(Crown Case reserved, 21st January 1865.)*

MAXIM 220.

Nemo tenetur seipsum accusare. *(Wing. Maxim 486.)—No one is bound to criminate himself.*

Upon this principle no oath is administered to a person accused of any offence, nor is any confession caused by inducement, promise, or threat, nor is any confession made to a Police officer, to be received in evidence. (Vide Maxim relating to Oaths.)

This principle, however, is not extended to witnesses. The character of a witness is always held to be relevant, in order to enable the Court to judge whether his testimony is

reliable or otherwise. Therefore, a witness is bound to answer questions, which tend to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose him to a penalty or forfeiture. But no such answer shall subject the witness to any arrest or prosecution, or be proved against him in any criminal proceeding, except in a prosecution for giving false evidence by such answer. However, for the protection of the witness, it is provided that if the question does not relate to any matter relevant to the proceeding, but simply affects the credit of the witness, such question shall not be asked without reasonable grounds. *(The Indian Evidence Act.)*

MAXIM 221.

Litera scripta manet; vox emissa volat; vox audita perit. —*The written letter remains; words spoken pass away; words heard perish.*

Human memory is after all uncertain and imperfect; and as a rule, men forget most things after the lapse of a certain time; while we are all liable more or less to be influenced in our impressions of circumstances and events by passion, prejudice, or preference. Above all, the supposed period of a generation of the human race is about *thirty* years. It is consequently not safe to rely upon the oral testimony of witnesses for the security of our rights and property, or as a safeguard against disputes which may arise in regard thereto after a long lapse of time. The law keeps the right of action alive for *twelve* years for the recovery of immoveable property, inheritance, &c.; for *thirty* years in cases against pawnees or depositories of moveable property; and for *sixty* years against mortgagees of immoveable property, and so on. This is not all. A dispute may arise after the lapse of a century as in the case of the letting

of lands for ninety-nine years. It has, therefore, become a wise practice to reduce every important contract to writing. A contract thus preserved in writing remains a faithful repository of the final intentions of the parties for any length of time. Documents aged hundreds of years may now be seen so as to be decyphered and understood without much difficulty. This at once demonstrates the truth of the Maxim,—"the written letter remains."

It is interesting to see what the Hindu law says on the subject.—"Even in the space of six months," says Menu, "men forget occurrences; therefore were letters and writings anciently invented by the beneficent Creator." "Whatever contract shall have been concluded by mutual consent, a written memorial of it should be attested." *(Yajnawalkya.)* "In the contract there are two things which give confidence to the lender, a pledge and a surety; and two which afford clear evidence, a writing and attestation." *(Narada.)* With reference to these texts, the commentator Jagannatha Tercapanchánana, observes that these "are ethical precepts; for they exhibit causes of present evil. If, therefore, infringing these rules, a man deliver a loan without a pledge, or writing, or the like, he violates *not* his duty: and if the debt be anyhow proved, the debtor shall be compelled by the king to repay it to his creditor. Hence the practice of advancing loans without pledge or writing, in some instances of extreme confidence. But excessive confidence should be nowhere reposed; for the *Hareevansa* directs, 'Place not confidence in what is unworthy of confidence; not excessive confidence even in what is worthy of confidence:' and the adage expresses, 'mutual mind, mutual wealth.'" (*Cole. Dig.*, Book I, Ch. I, Section II.)

The object with which transactions between man and man are thus reduced to writing, can only be attained by the production of the *original* document itself, whenever a dispute may arise in regard thereto. Neither a copy,

nor parol evidence of the contents of a document, can in itself be any authority for the instrument solemnly entered into by the parties. But the production of the original document itself may become impossible from causes over which the party in question has no control: therefore the law provides that the contents of documents may be proved either by *primary* or by *secondary* evidence, subject to certain conditions. Primary evidence means the production of the document itself for the inspection of the Court. Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it. Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original. Secondary evidence means and includes,—(1) certified copies given under the provisions hereinafter contained; (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies; (3) copies made from or compared with the original; (4) counterparts of documents as against the parties who did not execute them; and (5) oral accounts of the contents of a document given by some person who has himself seen it. *(The Indian Evidence Act.)*

As a rule, documents must be proved by primary evidence. Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—(*a*) when the original is shown to be in the possession of an opposite party, or of any person out of reach of or not subject to the process of the Court, or of any

person legally bound to produce it, and when after the receipt of the notice given to him under Section 66 of the Indian Evidence Act, such person does not produce it; (*b*) where the original is proved to be admitted in writing by the opposite party; (*c*) when the original has been lost or cannot be produced for any other reason not arising from default or neglect; (*d*) when the original is of such a nature as not to be easily moveable; (*e*) when the original is a public document (what is a public document will be hereafter explained); (*f*) when the original is a document of which a certified copy is permitted by law to be given in evidence; and (*g*) when the originals consist of numerous accounts or documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection. *(The Indian Evidence Act.)*

But secondary evidence of the contents of such documents as are referred to in the aforesaid clause (*a*), shall not be given unless the party proposing to give such secondary evidence has previously given to the party, in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case. Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—namely, (1) when the document to be proved is itself a notice; (2) when from the nature of the case, the adverse party must know that he will be required to produce it; (3) when it appears or is provedt hat the adverse party has obtained possession of the original by fraud or force; (4) when the adverse party or his agent has the original in Court; (5) when the adverse party or his agent has admitted the loss of the document; and (6) when the person in possession of the

document is out of reach of, or not subject to, the process of the Court. *(The Indian Evidence Act.)*

When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinafter contained. But there are exceptions to this rule:—1*stly*, when a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed, need not be proved; and 2*ndly*, wills admitted to Probate in British India may be proved by the Probate. *(Ibid.)*

When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms;—Proviso (1.) Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law. Proviso (2.) The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document

Proviso (3.) The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or other disposition of property may be proved. Proviso (4.) The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to law in force for the time being as to the registration of document. Proviso (5.) Any usage or custom by which incidents not expressly mentioned in any contract, are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident be not repugnant to, or inconsistent with, the express terms of the contract. And Proviso (6.) Any fact may be proved which shows in what manner the language of a document is related to existing facts. (*Ibid.*)

All documents are private, except the following which are public documents; viz: documents forming the acts or records of the acts of the Sovereign authority, of official bodies and tribunals, and of public officers, Legislative, Judicial or Executive, whether of Her Majesty's dominions or of a foreign country; and public records kept in British India of private documents. (*Ibid.*)

MAXIM 222.

Cuilibet in sua arte perito est credendum. (*Co. Litt.*, 125.) —*Whoever is skilled in his profession is to be believed.*

It is generally a rule that a witness shall speak to facts within his *own knowledge.* His mere personal opinion is no evidence; for if he is allowed to state his opinion, he will be giving a judgment in the case instead of the Court.

But there are certain peculiar matters which in their very nature involve evidence of opinion, such as the result of the comparison of signatures, &c. There are also other matters in regard to which the Judge cannot himself form a satisfactory opinion, such as points of foreign law, and of a particular science or art. And lastly there are subjects in regard to which no other kind of evidence, except opinion-evidence can be generally useful or procurable, such as general custom or right, &c. Upon this subject the Indian Evidence Act provides as follows :—

When the Court has to form an opinion upon a point of foreign law or of science or art as to identity of handwriting, the opinions upon that point of persons specially skilled in such a foreign law, science, or art, or in questions as to identity of handwriting, are relevant facts. Such persons are called experts.

Facts, not otherwise relevant, are relevant if they support, or are inconsistent with, the opinions of experts, when such opinions are relevant.

When the Court has to form an opinion as to the persons by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person in question that it was or was not written by such person is a relevant fact.

When the Court has to form an opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence if it existed are relevant. The expression 'general custom or right,' includes customs or rights common to any considerable class of persons.

As to the usages and tenets of any body of men or family, the constitution and government of any religious or charitable foundation, or the meaning of words or terms used in particular districts or by particular classes of people, the

opinions of persons having special means of knowledge thereon are relevant facts.

As to the relationship of one person to another, the opinion expressed by conduct of any person who has special means of knowledge of the subject is a relevant fact, but this opinion shall not be sufficient to prove a marriage in proceedings under Indian Divorce Act, or in prosecutions under Secs. 494, 495, 497 and 498 of the Indian Penal Code.

Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant. (*The Indian Evidence Act.*)

MAXIMS 223 and 224.

(223.) **Allegans contraria non est audiendus.** (*Jenk. Cent.*, 16.)—*Contradictory allegations are not to be heard.*

(224.) **Nemo potest mutare consilium suum in alterius injuriam.** (*Broom.*)—*No one is at liberty to change his mind so as to work an injury to others.*

If facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, there would be no end of litigation and confusion. It is wise, therefore, to provide certain means by which a man may be concluded, not from saying the truth, but from saying that that which, by the interrogation of himself or his, has become accredited for truth, is false. And probably no code, however rude, ever existed without some such provision for the security of men acting, as all men must, upon the representations of others. The Courts have been for some time favorable to the utility of the doctrine of estoppel, and hostile to its technicality. Perceiving how essential it is to the quick and easy transaction of business, that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representa-

tions binding in cases where mischief or injustice would be caused by treating their effect as revocable. At the same time, they have been unwilling to allow men to be entrapped by former statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one was ever deceived, or induced to alter his position. Such estoppels are still, as formerly, considered *odious*. (*Best on Evidence*, Sec. 534.)

The Indian Evidence Act defines an estoppel thus :—

When one person has by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

Thus :—A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it. The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title. No tenant of immoveable property, or person claiming through such tenant, shall during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it, nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license. But the acceptor of a bill of exchange may

deny that it was really drawn by the person by whom it purports to have been drawn. And if a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor. (*The Indian Evidence Act.*)

"Estoppels" must not be understood as synonymous with "conclusive evidence;" the former being conclusions drawn by law against parties from particular facts, while by the latter is meant some piece or mass of evidence sufficiently strong to generate a conviction in the mind of a tribunal, or rendered conclusive on a party, either by common or statute law.

In the case of *Siva Row* v. *Jeewano Row and others*, the Madras High Court held that mere statements for the purpose of a particular judicial proceeding can only be conclusive evidence in another proceeding as to such material facts embodied therein as must have been found affirmatively to warrant the judgment of the Court upon the issues joined. They are then conclusive between the same parties, not because they are the statements of those parties, but because for all purposes of present and prospective litigation they must be taken as truth. A brought a pauper suit and virtually denied possession of certain property. B petitioned to dispauper A, alleging that A was possessed of such property. The Court decided that A was in possession, and rejected her prayer to be allowed to sue as a pauper :—

In a subsequent suit brought by A's representative against B's representative for the property, it was held that, even if A's allegation, found to be false, could be treated as an estoppel, B's allegation found to be true would also be an estoppel; and "estoppel against estoppel setteth the matter at large;" but that although A's allegation was receivable evidence against A and her representative, they were not concluded by such allegation and decision thereon. (II, *Mad. H. C. R.*, 31.)

MAXIMS 225 and 226.

(225.) Violenta praesumptio aliquando est plena probatio. (*Co. Litt.*, 6.)—*Violent presumption is sometimes full proof.*

(226.) Stabitur praesumptioni donec probetur in contrarium. (*Co. Litt.*, 373.)—*An act shall stand on presumption until it be proved to the contrary.*

Two classes of presumptions arise from these principles: 1stly, presumptions which afford *conclusive* proof, or *Irrebuttable* presumptions, and 2ndly, presumptions which stand until they are disproved, or *Rebuttable* presumptions; and, 3rdly, we may add another class of presumptions, which may be called *permissive* presumptions; for although such presumptions are not conclusive, and are not even vested with such probative force as to entitle them to stand until they are rebutted, yet such presumptions will have to be necessarily drawn whenever the evidence adduced in the case is circumstantial, and it is in the discretion of the Judge to attach such weight to this class of presumptions as may be justifiable under the circumstances of each case. The Indian Evidence Act applies the following words with reference to these three classes of presumptions,—namely "conclusive proof," "shall presume," and "may presume,"—and attaches a certain amount of probative force to each class; thus;—

First.—"When one fact is declared by the Indian Evidence Act to be *conclusive proof* of another, the Court shall on proof of the one fact, regard the other as proved; and shall *not* allow evidence to be given for the purpose of disproving it.

Secondly.—Whenever it is directed by the Indian Evidence Act that the Court *shall presume* a fact, it shall regard such fact as proved unless and until it is disproved.

And *thirdly*.—Whenever it is directed by the Indian Evidence Act that the Court *may presume* a fact, it may either regard such fact as proved unless and until it is disproved, or may call for proof of it." (Sec. 4.)

When we draw an inference on a relevant point from proof of collateral facts, that is, when we infer unknown facts from known ones, we call this a presumption. The facts from which we draw presumptions must be such as have been proved by good evidence. In order to cut short certain controversies, to insure stability of certain positions, and to secure uniformity in the decisions of all the Courts, it is desirable that the law should appoint certain presumptions as *necessary* to be drawn from proved facts, and vest them with a probative force. The presumptions of the 1st and 2nd classes above noticed are of this kind, and their number is comparatively few ; whereas the number is unlimited as regards the third class of presumptions, with reference to which the Act lays down some examples, and by a general section allows the Court to draw any presumption it thinks proper in its discretion. The following are the presumptions appointed by the Indian Evidence Act under each one of these three classes of presumptions:—

First.—The irrebuttable presumptions are :

(*a*.) The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that person, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten (Sec. 112.)

(*b*.) A notification in the *Gazette of India* that any portion of British territory has been ceded to any native State, Prince, or Ruler, shall be conclusive proof that the valid cession of such territory took place at the date mentioned in such notification. (Sec. 113.)

(*a.*) A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty, or insolvency jurisdiction, which confers upon, or takes away from, any person any legal character; which declares any person to be entitled to any such character; or to be entitled to any specific thing, not as against any specified person, but absolutely, is conclusive proof in regard to the legal character thus conferred, &c. &c. (Sec. 41.)

Secondly.—The *rebuttable* presumptions appointed by the Indian Evidence Act are the following:—

(*a.*) The Court shall presume every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified, by any officer in British India, or by any officer in any native State in alliance with Her Majesty, who is duly authorised thereto by the Governor General in Council, to be genuine: Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer, by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper. (Sec. 79.)

(*b.*) Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the Court shall presume—that the document is genuine; that any statements, as to the circumstances under which it was taken, purporting to be made by the person signing it, are true,

and that such evidence, statement or confession was duly taken. (Sec. 80.)

(*c.*) The Court shall presume the genuineness of every document purporting to be the *London Gazette*, or the *Gazette of India*, or the Government Gazette of any Local Government, or of any colony, dependency, or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody. (Sec. 81.)

(*d.*) When any document is produced to any Court purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims, and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland. (Sec. 82.)

(*e.*) The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate. (Sec. 83.)

(*f.*) The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country, and of every book purporting to contain reports of decisions of the Courts of such country. (Sec. 84.)

(*g.*) The Court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by a notary public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty or of the Government of India, was so *executed* and authenticated. (Sec. 85.)

(*h.*) The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law. (89.)

And *thirdly* as to *Permissive* presumptions, the Indian Evidence Act provides as follows :—

(*a.*) The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India resident in such country to be the manner commonly in use in that country for the certification of copies of judicial records. (Sec. 86.)

(*b.*) The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published. (Sec. 87.)

(*c.*) The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent ; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission. (Sec. 88.)

(*d.*) Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. (Sec. 90.)

(*e.*) And lastly in a general Section (114) the Act provides that the Court may presume the existence of any fact which it thinks likely to have happened; regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

The instances of presumptions of the three different classes, except the very last one contained in Sec. 114, having been duly appointed by the Act, the functions of the Judge are clear enough in regard to them. But with reference to the said last one contained in Sec. 114, it will be seen that it is a general provision with reference to which no definite rule can be laid down. Each case will suggest an inference according to the peculiar circumstances therein involved, as shown in the illustrations given under Sec. 114 of the Indian Evidence Act as follows:—

The Court may presume—

(a.) That a man who is in possession of stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(b.) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(c.) That a bill of exchange, accepted or endorsed, was accepted or endorsed, for good consideration;

(*d.*) That a thing or state of things which has been

shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;

(*e.*) That judicial and official acts have been regularly performed;

(*f.*) That the common course of business has been followed in particular cases;

(*g.*) That evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it;

(*h.*) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavorable to him;

(*i.*) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before them:—

As to illustration (*a.*)—A shopkeeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business;

As to illustration (*b.*)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself:

As to illustration (*b.*)—A crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable:

As to illustration (*c.*)—A, the drawer of a bill of exchange,

was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence:

As to illustration (*d.*)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course:

As to illustration (*e.*)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances:

As to illustration (*f.*)—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances:

As to illustration (*g.*)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family:

As to illustration (*h.*)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked:

As to illustration (*i.*)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

With reference to the illustrations thus given in Sec. 114 of the Indian Evidence Act, "it must be remembered," says Mr. Norton, "that the illustrations are merely a few examples of this class of 'natural' presumptions, and that they do not exclude the other numerous cases in which such presumptions are constantly drawn. The Court *need* not draw the presumption in any particular case. The word used is 'may;' and wherever the infirmative facts proved overbalance the probability that the inference would be a sound and just one, the Court will exercise discretion in electing not to rest upon the presumption. The remarks which follow and apply to the illustrations in the Act are

instances of infirmative facts bearing upon the presumptions to which they severally relate; and these will be stronger or weaker in each particular case."

But all such permissive presumptions ought to be drawn *cautiously*. The following may serve as instances of the dangers of hasty dealing with circumstantial evidence.

(1.) It is said that in a certain case a person was convicted of theft, on the strength of a number of missing articles of silver having been found in a place to which he alone had access, but they were afterwards discovered to have been deposited there by a magpie. A somewhat similar case occurred within my own knowledge. A few years ago I missed a gold chain, which was placed by my servant in a room, to which no strangers had access. Some days afterwards, when all the furniture was removed from the room in order that it may be swept and cleaned as usual, a little rat's hole was found in a corner; and it immediately struck me that my chain might perhaps have been taken away by a rat and deposited in that hole. So I got the hole widened and searched, when sure enough the chain was discovered to my great surprise!

(2.) In a certain case (quoted by Lord Hale) a man was convicted of horse-stealing on the strength of his having been found *on* the animal on the day it was stolen, but whose innocence was afterwards made clear by the confession of the real thief, who acknowledged that on finding himself closely pursued by the officers of Police, he had requested the unfortunate man, *i. e.*, the person convicted of theft, to walk the horse for him, while he turned aside on a necessary occasion, and thus escaped.

(3.) Another remarkable example is related in a report published on the Wilheade Jail at Colombo in Ceylon. A cooly having died a natural death, a wealthy man named Sillapa Chetty and a relative and friend of his, applied fire to the several parts of the body of the deceased; and having

deposited it on the premises of his neighbour and rival in trade, charged him with murder. So the innocent man would have been condemned of the offence, had not the medical man observed the unusual parts burnt, and finally discovered that the injuries had all been inflicted on the body *after death!* The accused was then set at liberty and the accusers were severely punished.

(4.) In another case (quoted by Mr. Best) an uncle happening to correct his niece aged 8 or 9 years for some fault, the latter was overheard to say, "good uncle, kill me not;" after which she was not to be found. The uncle was then taken up, and admonished by the Judge of assizes to produce the child at the next assize. This he could not do; but in order to avert suspicion he dressed up another child, about her age, and resembling her in appearance, and presented her to the Judge as his niece. This deception was, however, detected, and he was convicted and executed for murder. Afterwards, the girl who had only run away to avoid being beaten made her appearance.

(5.) Another case (quoted by Mr. Best) is that of an Innkeeper named Jonathan Bradford, who was convicted and executed for the murder of a guest, who was found in his house robbed and murdered in the middle of the night, his host, the said Bradford, standing with a dark lantern in one hand and a knife in the other, both hands and knife bloody, and exhibiting symptoms of great terror; but it afterwards appeared that the crime had been committed by *another person*, immediately before Bradford came into his guest's room with a similar design; while the blood, on his hands was occasioned by his having, when turning back the deceased's clothes to see if he was really dead, dropped the knife on the bleeding body.

These instances sufficiently illustrate the danger of acting on presumptions without due caution, and of straining presumptions too far. With these general observations with

regard to presumptions, we proceed in the following pages to illustrate some important Maxims on the subject.

MAXIMS 227 to 229.

(227.) Omnia praesumuntur legitime facta donec probetur in contrarium. (*Co. Litt.*, 232.)—*All things are presumed to be legitimately done until the contrary be proved.*

(228.) Omnia praesumuntur rite et solemniter esse acta. (12 *Co.*, 4 *and* 5.)—*All things are presumed to be rightly and solemnly done.*

(229.) In facto quod se habet ad bonum et malum, magis de bono quam de malo lex intendit. (*Manual.*)—*Where a thing may be done in a legal or in an illegal way, the law will presume the former.*

There is a general disposition in Courts of justice to uphold official, judicial, and other acts, rather than to render them inoperative. And with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking, essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others, the assumption solely rests on grounds of public policy. Taking a general view of the subject, the acts or things thus presumed are divisible into three classes: (1.) Where from the existence of a *posterior* act or acts in a supposed chain of events, the existence of *prior* acts in the chain are inferred or assumed; *priora praesumuntur à posterioribus;* as where a prescriptive right or a grant is inferred from modern enjoyment. (2.) Where the existence of *posterior* acts is inferred from that of a *prior* act or acts, *praesumuntur posteriora à prioribus*, as where the sealing

and delivery of a deed purporting to be signed, sealed, and delivered, are inferred on proof of the signing only. This is manifestly the reverse of the former, and, as a general rule, the presumption is much weaker. (3.) Where *intermediate* proceedings are presumed, *probatis extremis, praesumuntur media*, as where in England livery of seisin is presumed on proof of feoffment and twenty years' enjoyment under it, or, where a jury are directed to presume mesne assignments. (*Best, p.* 466.)

On the same principle the facts of a person acting in a public appointment is *primâ facie* evidence of his having been duly authorised to do so; and in the same way presumptions are constantly drawn from the ordinary conduct of mankind, the habits of society, and the usages of trade. Documents are taken to have been made on the date they bear. If letters are put into a post office, and it is proved that they were correctly addressed and duly posted and registered, that is *primâ facie* proof that the addressees received them in due course. (*Civil Pro. Code*, Sec. 66.) The cancelling or taking the seals off a deed or tearing a document in pieces, is *primâ facie* evidence of revocation.

MAXIM 230.

Ex diuturnitate temporis omnia praesumuntur esse solennitur acta. *(Jenk. Cent.,* 185.*)—From lapse of time all things are presumed to have been done properly.*

According to this Maxim the Courts have gone to great lengths in favor of continued and peaceful enjoyment of property, not only in presuming a legal origin for it, but in taking for granted many collateral facts to render complete the title of the possessor. (Vide Maxims relating to Possession and Prescription.)

MAXIMS 231 to 233.

(231.) Injuria non praesumitur. *(Co. Litt., 232.)—Injury is not to be presumed.*

(232.) Odiosa et inhonesta non sunt praesumenda. (10 *Co.*, 66*a.*)—*That which is odious and dishonest is not to be presumed.*

(233.) Fraus est odiosa et non praesumenda. *(Cro. Cor., 550.)—Fraud is hateful and not to be presumed.*

No person shall, in the absence of criminative proof, be supposed to have committed any violation of the criminal law. It is therefore a general rule in criminal cases that the accused must be presumed innocent until proved to be guilty. Nevertheless it is sufficient to prove a *primâ facie* case; for, as has been well remarked, "imperfect proofs from which the accused might clear himself, but does not, become perfect." In drawing an inference on conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him in the absence of explanation. (*Best*, Sec. 346.)

MAXIMS 234 and 235.

(234.) Omnia praesumuntur contra spoliatorem. (*Branch Maxim* 80.)—*All things are presumed against a wrong-doer.*

(235.) Nullus commodum capere potest de injuria sua propria. *(Co. Litt.*, 148.)—*No person shall take advantage of his own wrong.*

The most usual application of this principle is where there

has been forensic malpractice by eulogising, suppressing, defacing, destroying, or fabricating documents or other instruments of evidence, or introducing into legal proceedings any species of the *crimen falsi*. This not only raises a presumption that the documents or evidence thus suppressed, &c., would, if produced, militate against the party thus suppressing, but procures more ready admission to the evidence of the opposite side. (*Best*, Sec. 412.)

The following case will serve forcibly to illustrate the above Maxims. An account of a personal estate having been decreed in equity, the defendant charged the plaintiff with a certain debt as due to the estate. It was proved that the defendant had wrongfully opened a bundle of papers relating to the account which had been sealed up and left in his hands. It further appeared that he had altered and displaced the papers; and it could not be said what papers might not have been abstracted. The Court thereupon disallowed defendant's whole demand against the plaintiff, although the Lord Chancellor declared himself satisfied, as indeed the defendant swore, that all the papers entrusted to the defendant had been produced, the ground of this decision being that "every presumption is made against a wrongdoer. (*Wardour* v. *Beresford, Broom's Maxims*, p. 939.)

In *Arucory* v. *Delamirie* a person in a humble station of life, having found a jewel, took it to the shop of a goldsmith to enquire its value: the jeweller having got the jewel into his possession, under the pretence of weighing it, took out the stones, and on the finder refusing to accept a small sum for it, returned to him the empty socket. An action of trover having been brought to recover damages for the detention of the stones, the jury were directed that unless the defendant produced the jewel, and thereby showed it to be not of the finest water, they should presume the utmost against him, and make the value of the best jewel that

would fit the socket the measure of their damages. (*Best*, 525.)

So it has been provided in the Indian Code of Civil Procedure that if a party to the suit, who shall be ordered to give evidence, or produce a document, shall, without lawful excuse, fail or refuse to comply with such order, the Court may either pass judgment against him or make such order in relation to the suit as the Court may deem proper. (Sec. 170.) The same course is ordered to be adopted in regard to a party, who refuses to answer any material question put to him by the Court. (Sec. 126.)

MAXIM 236.

Lex spectat naturae ordinem.—*The Law regards the order of nature.*

The law presumes all individuals to be possessed of the usual powers and faculties of the human race; such as, common understanding, the power of procreation within the usual age, &c. So idiocy, insanity, impotency, &c., are not presumed.

It is also a general presumption that things once proved to have existed in a particular state are to be understood as continuing in that state, unless the contrary is established. So a debt proved to have once existed is presumed to continue unless payment or other discharge is established. So where a landlord gives a receipt for rent due up to a certain day, all former arrears are presumed to have been paid; for is it not likely that he would take the debt of the longest standing first?

So the death of a person once shown to have been alive is not presumed. The presumption is in favor of the continuance of life. The onus of proving the death lies on the party who asserts it. So where the question is whether a man is alive

or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is upon the person who affirms it. And where the question is whether a man is dead or alive; and it is proved that he has not been heard of for seven years by those who would naturally have heard of him, if he had been alive, the burden of proving that he is alive is on the person who affirms it. (*The Indian Evidence Act.*)

Under the Hindu law the period of absence without tidings, which is accounted sufficient to raise a presumption of the death of the person absent, varies according to the age of the absentee. If he were not above thirty years of age when missing, he is held to be dead if unheard of for twenty years; if between 30 and 60 for fifteen years; and if above 60 for twelve years. (*Str. H. L.*, II, 237. Also see I, 131-166 and 188.)

Under the Mahomedan law, the death of a missing person is to be presumed when that "person would have been ninety years of age at that time if alive. (*Elberling*, Sec. 82.)

"As connected with the subject of the continuance of human life, it remains to notice one which has embarrassed more or less the jurists and lawyers of every country. We allude to those unfortunate cases which have from time to time presented themselves, where several persons, generally of the same family, perished by a common calamity; such as shipwreck, earthquake, conflagration, or battle; and the priority in point of time of the death of one over the rest exercises an influence on the rights of third parties. The civil law and its commentators were considerably occupied with questions of this nature, and seem to have established as a general principle, subject, however, to exceptions that, where the parties thus perishing together were parent and child, the latter, if under the age of puberty, was presumed to have died first; but, if above that age, the rule was reversed:

while in the case of husband and wife, the presumption seems to have been in favor of the survivorship of the husband. The French lawyers also, both ancient and modern, have taken much pains on this subject. All the theories that have been formed respecting it are based on the assumption that the party deemed to have survived was likely, from superior strength, to have struggled longer against death than his companion. Now even assuming that *primâ facie* a male would struggle longer against death than a female, a person of mature age than one under that of puberty, or very far advanced in years, the position is at least no more than a general rule: for, not only in particular instances would the superior strength or health of the party supposed to be the weaker reverse all, but the rules rest on the hypothesis that both parties were in exactly the same situation with reference to the impending danger; whereas it is obvious that their respective situations with reference to it must usually be unascertainable in the fury of a battle or the horrors of an earthquake, or a shipwreck, and the moral condition must not be overlooked; the brave survive the fearful and the nervous. Add to this, that according to some modern physiologists, in certain species of deaths, the strongest perish first. However that may be, in opening the door to this class of questions, the lawyers of Rome and France lost sight of the salutary maxim '*Nemia subtilitas in jure reprobatur.*' The English law has judged more wisely; for notwithstanding some questionable dicta, the true conclusion from the authorities seems to be, that it recognises no *artificial* presumption in cases of this nature; but leaves the real or supposed superior strength of one of the persons perishing by a common calamity to its natural weight, *i. e.*, as a *circumstance* proper to be taken into consideration by a judicial tribunal, but which standing alone is insufficient to shift the burden of proof. When therefore a party, on whom the onus lies of proving the survivorship of one individual

over another, has no evidence beyond the assumption that from age or sex, that individual must be taken to have struggled longer against death than his companion, he cannot succeed. But then, on the other hand, it is not correct to infer from this that the law presumes both to have perished at the same moment;—this would be establishing an artificial presumption against manifest probability. The practical consequence is, however, nearly the same; because, if it cannot be shown which died first, the fact will be treated by the tribunal as a thing unascertainable, so that for all that appears to the contrary both individuals may have died at the same moment. The law, as here stated, *has* been fully established in the case of *Underwood* v. *Wing*, by the Master of the Rolls, Sir John Romilly, whose judgment was affirmed by Lord Chancellor Cranworth, assisted by Wightman, J., and Martin, B., and finally by the House of Lords, under the name of *Wing* v. *Angrave*." (*Best on Evidence*, p. 521.)

The Mahomedan law makes the following provision on the subject. Where, two or more persons meet with a sudden death about the same time, and it is not known which died first, it will be presumed according to one opinion, that the youngest survived longest; but according to the more accurate and prevailing doctrine, it will be presumed that the death of the whole party was simultaneous, and the property left will be distributed among the surviving heirs, as if the intermediate heirs who died at the same time with the original proprietor had never existed. (*Mach. Mah. Law*, Sec. 106.)

The Indian Succession Act provides that if the legatee does not survive the testator, the legacy cannot take effect, and if the testator and the legatee perished in the same shipwreck, and there is no evidence to show which died first, the legacy will lapse. (Sec. 92, Illustration *f*.)

MAXIM 237.

Nemo praesumitur esse immemor suae aeternae salutis; et maxime in articulo mortis. *(6, Co., 76.)—No one is presumed to be forgetful of his own eternal welfare; and more particularly at the moment of death.*

Want of religious belief or irreligious conduct cannot be presumed. So all testimony given on oath or affirmation in a Court of justice is presumed to be true until the contrary appears. (*Best*, Sec. 352.)

On the same principle "dying declarations" are received in evidence, although they are not made on oath, &c. Vide Maxim *Res-inter alios acta.*)

MAXIM 238.

Semper praesumitur pro legitimatione puerorum. *(Co. Litt., 126.)—It is always to be presumed that children are legitimate.*

A child born after wedlock, of which the mother was, even visibly, pregnant at the time of the marriage, is the offspring of the husband. (Vide Maxim relating to *Heirship.*)

The fact that any person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. (*The Indian Evidence Act.*)

MAXIM 239.

Falsus in uno, falsus in omnibus. (*Broom.*)—*False in one particular, false in all.*

As observed elsewhere, the credit due to a witness is founded in the first instance on general experience of human veracity. But "the presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness's testimony cannot be partial or fractional; where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result his testimony is to be credited or rejected. It is scarcely necessary to observe, that this principle does not extend to the total rejection of a witness whose misrepresentation has resulted from mistake or infirmity, and not from design; but though his honesty remain unimpeached, this is a consideration which necessarily affects his character for accuracy. Neither does the principle apply to testimony given in favor of the adversary; such evidence is rather to be considered as truth reluctantly admitted, and divulged only because it was in the power of a corrupt witness to conceal it. Hence it is a general principle, that a jury may believe that which makes against his point who swears, although they do not believe that which makes for it." (*Starkie*, p. 583.)

"The maxim may properly be applied in those cases only where a witness speaks to a fact with reference to which he cannot be presumed liable to mistake; see per Story, J. *The Santissima Trinidad*, 7, Wheaton, (U. S.) R., 338-339." (*Broom's Maxims.*)

"I need hardly say" (observes Mr. J. B. Norton) that this is everywhere a somewhat dangerous Maxim, but especially in India. For if a whole body of testimony were to be rejected because the witness was evidently speaking untruth

in one or more particulars, it is to be feared that witnesses might be dispensed with, * * * * *. The falsehood should be considered in weighing the evidence."

But under the existing state of the law in India, there can be no ground to fear that any dangerous consequences will follow from the application of the Maxim here. The presumption drawn upon the principle of this Maxim is not an irrebuttable one, nor is it one entitled to stand until rebutted; inasmuch as this presumption is not one of those appointed specifically by the Indian Evidence Act as rebuttable and irrebuttable presumptions. The presumption in question therefore falls under the class of permissive presumptions; and as such, who can say that it is dangerous and inapplicable in India? When once a person is known to be a liar, men do generally feel disinclined to place implicit confidence in what he says, not because a person who speaks an untruth on one occasion is not capable of stating the truth on any other occasion whatsoever, but simply because the mind of the public will be so much prejudiced against one that has once uttered a lie, as to refrain from believing his statement as readily as it would otherwise have believed it, and to suspend its assent thereto, until the faithfulness of the statement is ascertained by some extraneous circumstances. On the whole then, we may safely hold that the true meaning of this Maxim is that the testimony of a person who has once spoken an untruth must be received with caution; and that the Court, in its discretion, may or may not draw any such presumption as is suggested by the Maxim in question, according to the peculiar facts in which each case may be involved. (Vide Observations made under the Maxim relating to the Appreciation of Evidence.)

MAXIMS 240 to 243.

(240.) Testimonia ponderanda sunt; non enumeranda. *(Halk. Max., 174.)—Evidence is to be weighed; not enumerated.*

(241.) Testibus deponentibus in pari numero dignioribus est credendum. *(4, Inst., 279.)—Where the number of witnesses is equal on both sides, the more worthy is to be believed.*

(242.) In criminalibus, probationes debent esse luce, clariores. *(3, Inst., 210.)—In criminal cases the proofs must be clearer than light.*

(243.) In dubio prodote, libertate, innocentia, possessore, debitore, reo, respondendem est.—*When the facts are doubtful presumptions will be in favor of dower, liberty, innocence, possession, the debtor, and the criminal at the bar.*

These Maxims relate to the appreciation of evidence. As we have seen when discussing preceding Maxims, a relevant fact may be one of so much notoriety that the Court will take judicial notice of it; or a relevant fact may be admitted by the parties. In either of these cases, of course, no evidence of the existence of the relevant fact would be given. In those cases in which evidence has to be given, that evidence may be either oral or documentary. If it be oral evidence, it may in all cases be *direct*, and if documentary, the document must be proved by primary evidence, *i. e.*, the original document itself or its counterpart, &c., unless the production of primary evidence is shown to be impossible, in which case the fact may be proved by secondary evidence, that is, a copy, &c.

Having received the evidence upon the foregoing principles, it is the duty of the Judge, or the jury as the case

may be, to determine the questions of fact that have to be determined by drawing inferences, (1) from the evidence given to the facts alleged to exist; (2) from facts proved to facts not proved; (3) from the absence of evidence which might have been given; (4) from the admission and conduct of the parties; and (5) generally from the circumstances of the case. *(Mr. Stephen's Speech.)*

The evidence is to be weighed and not numbered. No particular number of witnesses shall in any case be required for the proof of any fact. *(Indian Evidence Act,* Section 34.) The requiring of a plurality of witnesses clearly imposes an obstacle in the administration of justice, specially where the act to be proved is of a casual nature; above all where, being in violation of law, as much clandestinity as possible would be observed, it ought not to be required without strong and just reason. *(Best on Evidence,* Section 598.)

The testimony of an infamous witness is not to be rejected on that account. Even an accomplice is a competent witness against an accused person. *(Indian Evidence Act,* Section 133.) A witness of depraved and abandoned character may not be unworthy of credit where it appears that there is not the slightest motive or inducement for mis-representation; for there is a natural tendency to declare the truth, which is never wholly eradicated, even from the most vicious minds, and the danger of detection and the risk of temporal punishment, may operate as restraints upon the most unprincipled, even where motives for veracity of a higher nature are wanting. But the circumstance of a witness being of suspicious nature is one of the deepest moment in weighing the amount of credit due to him. *(Starkie on Evidence,* p. 821.)

As to the discrepancies in evidence, Mr. Norton observes that "it may happen that they occur in such material portions of the evidence; are so glaring and so utterly irreconcileable with the truth of the rest of the case or of the

story of the particular witness, as to afford just ground for the rejection of the whole of a particular witness' evidence. But then, says Mr. Paley, it is a rash and unphilosophical conduct of the understanding to reject the substance of a story by reason of some diversity in the circumstances with which it is related. The usual character of human testimony is substantial truth under circumstantial variety. This is what the daily experience of Courts of justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick apparent or real inconsistencies between them. Therefore the acute and practiced Judge will generally be able to sift the wheat from the chaff, to separate the true from the false; and if after this has been done, there remains a residuum of credible testimony, he should thereon found the judgment."

In determining the credit due to witnesses the Judge should have regard to the following considerations. Their integrity; their ability; their number and consistency with each other; the conformity of their testimony with collateral circumstances. The manner or demeanour of a witness is ever to be closely watched. The external securities for veracity are thus classified by Bentham:—1st, the fear of punishment; 2nd, the obligation of an oath; 3rd, the fear of shame and infamy; 4th, interrogation; 5th, the reception of testimony in a written form; 6th, the notation, *i. e.*, making the written evidence a solemn record; 7th, publicity; 8th, counter-evidence; and 9th, investigation, by which is meant the discovery of one piece of evidence through means of another, or of information not strictly evidence. (*Norton.*)

The sanctions of oath and cross-examination are the principal guarantees of veracity, without which, as has been elsewhere shown, no oral evidence is admissible.

In regard to circumstantial or presumptive evidence, Mr.

Best writes as follows:—The elements, or links, which compose a chain of presumptive proof are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the *number, weight, independence,* and *consistency* of those elementary circumstances. A number of circumstances each individually very slight may so tally and confirm each other as to leave no room for doubt of the fact which they tend to establish. * * * * * * Not to speak of a greater number; even two articles of circumstantial evidence, though each taken by itself weigh but as a feather,—join them together, you will find them pressing on a delinquent with the weight of millstone. Thus, on an indictment for uttering a bank note, knowing it to be counterfeit, proof that the accused uttered a counterfeit note amounts to nothing, or next to nothing; any person might innocently have in possession, and offer in payment, a counterfeit note: but suppose further proof is adduced, that, shortly before the transaction in question, he had in another place, and to another person, offered another counterfeit note of the same manufacture, the presumption of guilty knowledge becomes strong. If, however, all the circumstances proved arise from one source, they are not *independent* of each other, and an increase in the number of the circumstances will not in such a case increase the probability of the hypothesis. It is of the utmost importance to bear in mind, that, when a number of *independent* circumstances point to the same conclusion, the probability of the justness of that conclusion is not the *sum* of the simple probabilities of those circumstances, but is the compound result of them. Lastly the circumstances composing the chain must all be *consistent* with each other,—a principle sufficiently obvious in itself. (*Best.*)

In drawing conclusions, says Mr. Norton, from the facts before him "the Judge has two points as to which to be on

his guard. First he must be careful that he does not fall into error in the purely ratiocinative part of the process: that is to say, that his arguments are legitimate in form. That he is not the victim of any fallacy in reasoning; and here he can protect himself by a study of formal logic, even the formal logic of the schools. A very slight acquaintance with the pages of Whately will enable him to examine every inference which he draws from any fact or set of facts, and to ascertain that no error in form at any rate has crept into his decision unawares. And this is an important element in a judgment, for it may vitiate the whole. This learning must always be necessary for a Judge, or at least highly beneficial, in order to enable him to set a guard upon the imperfections of his own mind: still more must it be so, to enable him to weigh between the nice balanced and conflicting argument of the advocates before him. I do not mean to say that they will purposely seek to mislead, but the Judge will be safest who is best armed. The formal fallacies to which reasoning is liable will be found admirably laid bare in Whately's Logic."

"And the Court will frequently have to make an election between conflicting presumptions. The same fact when considered in different points of view may form the basis of opposite inferences. It becomes therefore necessary to determine the relative weight due to the conflicting presumptions. Special presumptions should take precedence of general ones; thus the presumption that every man is innocent of crime is general, and must, therefore, be set aside when the special presumption of his guilt arises from the facts proved. So presumptions derived from the course of nature are stronger than casual ones, thus the presumption of a prisoner's guilt arising casually from the evidence of witnesses that they saw him carry a certain log of wood, is weakened by the presumption arising from the course of nature, that the prisoner, known

to be an old and infirm person, could not possibly carry the log which was so weighty that some half dozen able-bodied men could find difficult to move."

And in conclusion it must be observed that a conclusion should be arrived at after taking into consideration the whole of the evidence adduced in the case by both the contending parties. In *Srimati Debi* v. *Madan Mohun Sing*, it was contended that the burden of proof lay entirely on plaintiff, and it was superfluous to look at the evidence adduced by the defendant, until the plaintiff had made out a complete case. But the Calcutta High Court held that this contention was wrong; and one of the Hon'ble Judges observed :—" The plaintiff and defendant both adduce evidence; and the Judge examines, tests, and contrasts the evidence given by either party, and then comes to a result in favor of the plaintiff. If this is not what is the duty of a Judge in every case, I don't know what is. I think it was the bounden duty of the Judge to consider the evidence on both sides as a whole, and that the mode of dealing with the case suggested by the appellant, by which the Judge is to break up the evidence into parts, and consider separately what inference is to be drawn from each, guided by some supposed rules of presumption; and that he is to march thus from presumption to presumption, until he arrives at a final presumption in favor of one side or the other, is a sort of proceeding which the law never recognised, and would infallibly lead to the most unfortunate results." (*Beng. L. R. App., Civil*, II, 328.)

Once for all it must be remembered that there is a strong and marked difference as to the amount of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is sufficient basis of decision; but in the latter, specially where the offence charged amounts to treason or felony, a much higher degree of assurance is required. The

serious consequences of erroneous condemnation both to the accused and society, the immeasurably greater evils which flow from it than from an erroneous acquittal, have induced the laws of every wise and civilised nation to lay down the principle, though often lost sight of in practice, that the persuasion of guilt ought to amount to a moral certainty; or, as an eminent Judge expressed it, "such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt." (*Best on Evidence*, Sec. 95.)

For, since mathematical or demonstrative certainty is unattainable in any of the affairs of daily life, Courts of justice, like individuals, are compelled to be satisfied with that inferior kind of evidence which is called *moral*. All moral science of which the law is the practical expression, consists intrinsically of enquiry and investigation which are infinite by nature, but finite by necessity; and in the administration of justice, the exigencies of public and private business require that this limit should be neither recondite nor fanciful, but well defined, according to the maxims and experience of common sense. Therefore, *moral probability*, or, as it is erroneously termed moral certainty, is the highest degree of proof to which the science of legal experience aspires. In this subject, the analogy between ethics or moral philosophy and the English law of evidence is complete. As in ethics and in all purely transcendental enquiries which seek for knowledge beyond the limits of the senses, the logical result is seldom more than a slight elevation or depression of one or two or more sets of competitive probabilities; so moral philosophy, when applied to the daily business of life, and made a standard and test of the existence or non-existence of uncertain and disputable facts, gives, as to the result, only a greater or less amount of versimilitude, or probability. The region of evidence lies therefore exclusively between *moral certainty*

on the one hand, as its most perfect extreme, and *moral possibility*, on the other as its most imperfect extreme. It does not look more than the first and it will not act on less than the last. (*Powell on Evidence*, p. 1.)

Under the Indian Evidence Act, a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. And a fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

MAXIMS 244 and 245.

(244.) Benignae faciendae sunt interpretationes, propter simplicitatem laicorum, ut res magis valeat quam pereat; et verba intentioni, non e contra, debent inservire. (*Co. Litt.*, 36*a*.)—*Liberal constructions (of written documents) are to be made, because of the simplicity of the laity (non-professional,) in order that the thing should prevail rather than perish; and words should be made subservient, not contrary, to the intention.*

(245.) Qui haeret litera haeret in cortice. (*Co. Litt.*, 289.) —*He who sticks to the letter, sticks to the bark; or, he who considers the letter merely, (of an instrument,) cannot comprehend its meaning.*

These are the principal rules of construction, and are applicable to the interpretation of contracts as well as statutes. There are other Maxims on the subject as illustrated in

the following pages; but they are only intended to help the Judge in giving full effect to the principles enunciated in the Maxims placed at the head of these observations.

The construction must be favorable, and as near the mind and apparent intent of the parties as the rules of law will permit; and, as observed by Lord Hale, the Judges ought to be curious and subtile to invent reasons and means to make acts effectual according to the just intent of the parties; they will not, therefore, cavil about the propriety of words where the intent of the parties appear; but will rather apply the words to fulfil the intent, than destroy the intent by reason of the insufficiency of the words. (*Broom.*)

The Judges ought at the same time to remember that their office is *jus dicere* and not *jus dare*; to interpret law and not to make law. (*Lord Bacon's Essay on Judicature.*)

The golden rule by which Judges are to be guided in the construction of Acts of Parliament has been frequently thus stated, that they ought "to look at the precise words of the statute and construe them in their ordinary sense only, if such construction would not lead to any absurdity or manifest injustice; but if it would, then they ought so to vary and modify the words used as to avoid that which it certainly could not have been the intention of the legislature should be done." The "golden rule," however, thus worded, must certainly be applied with much caution. "If," remarked the late Chief Justice Jerves, "the precise words used are plain and unambiguous in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning. (*Broom's Maxims.*)

A remedial statute, therefore, should be liberally construed, so as to include cases which are within the mischief which the statute was intended to remedy; whilst on the other hand, when the intention of the legislature is doubtful, the inclination of the Court will always be against that construction which imposes a burthen, tax, or duty, on the subject. It has been designated as a "great rule" in the construction of fiscal laws, "that they are not to be extended by any labored construction, but that you must adhere to the strict rule of interpretation; and, if a person who is subjected to a duty in a particular character, the duty no longer attaches upon him, and cannot be levied." A penalty, moreover, must be imposed by clear words. The words of a penal statute should be restrained for the benefit of him against whom the penalty is inflicted. "Acts of Parliament, imposing stamp duties ought to be construed according to the plain and ordinary meaning of the words used." (*Lord Foley* v. *Commissioners of Inland Revenue*, *L. R.*, 3, *Ex.*, 268.) If a statute imposing a toll contain also exemptions from it in favor of the Crown and of the public, any clause so exempting from toll is "to have a fair, reasonable, and not strict construction." (Per *Byles*, J., *Toomer* v. *Reeves*, *L. R.*, 3 c., p. 66.)

To the foregoing Maxims is referable the doctrine of Cyprés. According to this doctrine, which proceeds upon the principle of carrying into effect as far and as nearly as possible the intention of the testator, if there be a general and also a particular intention apparent on the will, and the particular intention cannot take effect, the words shall be so construed as to give effect to the general intention. The doctrine of Cyprès though fully recognised at law is, however, carried into more efficient practical operation by Courts of Equity, as in the case of a condition precedent annexed to a legacy, with which a literal compliance becomes impossible from unavoidable circumstances, and without any default of

the legatee, or where a bequest is made for charitable purposes with which a literal compliance becomes inexpedient or impracticable,—in such cases a Court of Equity will apply the doctrine of Cyprés, and will endeavour substantially, and as nearly as possible, to carry into effect the intention of the testator. (*Broom's Maxims.*)

MAXIM 246.

Exempla illustrant, non restringunt, legem. (*Co. Litt.*, 240.)—*Examples illustrate, not restrain the law.*

The object of Illustrations is, as their name indicates, to illustrate. They are not intended to supply any omission in the written law or to put a strain on it. They make nothing law which would not be law without them. They illustrate the law; and as they do this with full Legislative authority, they have all the force of law: but the whole law so illustrated by them, must be considered to be contained in the definitions and enacting clauses of the Code. It has been objected, that if the case given by way of illustration borders upon the verge of the law, or does not fall clearly within its terms, it either renders the law doubtful, or the example itself constitutes the law; that there may possibly arise two definitions of the same thing; and that inductions and analogies may be drawn from the Illustrations, which seem inconsistent with the text of the law. If some latent inconsistency should thus be discovered between the definitions and the illustrations of the Code, it must be borne in mind, that, although the illustrations are acts of interpretation by Legislative authority in those precise circumstances which constitute the examples, they cannot be used to alter the law which they are intended to interpret. The Legislative, like judicial, interpretation may be deceptive, and under the guise of

expounding the text of the law, may really add to or alter it; but the illustrations must in no case be used to contradict by inference or otherwise the text of the Code. They have the force of a declaratory law in the very cases supposed; if the example given falls clearly within the terms of the law, the illustration is but a needless repetition of what the law has already explicitly enacted; if the illustrations are, as it seems they ought to be, cases on the verge of the law, they resemble so many boundary marks to define distinctly the limits of the law in the precise cases put; and by inference in all other cases more unequivocally within the scope of the law. They have no force to contradict or to add to the text of the law." (*Morgan and Mac.'s Commentary on the I. P. C.*)

We may here conveniently consider the use and effect of other subjects, such as the title, preamble, &c., of enactments.

The title of a statute is certainly no part of the law, and in strictness ought not to be taken into consideration. (*Salkeld* v. *Johnson*; *Broom's Maxims*, p. 573,(*b.*) But it has nevertheless been occasionally looked at for the purpose of ascertaining the general object of the Act. (*Morris* v. *Mellin*. *Maxim Mag. Guide*, p. 140.)

The heading of a portion of a statute may be referred to, to determine the sense of any doubtful expression in a section ranged under it. (*Broom's Maxims*, p. 573.)

The marginal note to a section of a statute in the copy printed by the Queen's printer forms no part of the statute itself, and does not bind as explaining or construing the section. (*Broom's Maxims*, 573.)

As to the preamble, the Madras High Court made the following observation in *Chinna Ayer* v. *Mohamed Fakroddeen*:—"Mr. Justice Coleridge, whose main object was derived from the restricted preamble, says:—'But although I think the preamble thus clear and pointed, and therefore

attach much weight to the inference to be drawn from it, yet I admit that, if the enacting words can be shown to go beyond, and to embrace any other case within, the mischief sought to be remedied, effect must be given to them.' And Mr. Justice Williams, on the other side of the main question says:—'That the preamble may well be resorted to for assistance in the exposition of doubtful words in the enacting clause must of course be conceded. But that the enacting clause may be carried beyond the preamble, if words be found in the former strong enough for the purpose, I shall assume to be equally undisputed.' And the Chief Baron, in the elabarate judgment of the whole Court of Exchequer in *Salkeld* v. *Johnson*, says :—'But the preamble is undoubtedly a part of the act and may be used to explain it, and is, as Lord Coke says, 'a key to open the meaning of the makers of the Act and the mischiefs it was intended to remedy; but on the other hand, although it may explain, it cannot control the enacting part, which may and often does go beyond the preamble.' It is not to be denied that very loose language has often been used as to controlling the enacting clauses by the preamble; but the exact effect to be given to it is stated in the passage above quoted from Williams, J., which appears to us to be consistent with reason as well as in accordance with the English authorities." (II, *Mad. H. C. R.*, 224.)

In conclusion the provisions of the general clauses of Acts I of 1868 of the Government of India and I of 1867 of the Government of Madras, ought to be ever borne in mind in construing Legislative enactments; containing as they do the interpretation of different words and other necessary rules on the subject.

MAXIMS 247 to 249.

(247.) Ex antecedentibus et consequentibus fit optim interpretatio. (2, *Inst.*, 173.)—*From that which goes before, and from that which follows, is derived the best interpretation.*

(248.) Optimus interpretandi modus est sic leges interpretare ut leges legibus concordant. (8, *Co.*, 169.)—*The best mode of interpretation is so to interpret laws that the laws may accord with the laws.*

(249.) Noscitus a sociis. (3, *T. R.*, 87.)—*The meaning of a word may be ascertained by reference to those associated with it.*

The construction must be made upon the entire instrument, and not merely upon the disjoined parts. Thus, in the case of a bond with a condition, the latter must be read and taken into consideration in order to correct and explain the obligatory part of the instrument. (*Broom's Maxims.*) In construing a statute, the intention of the lawgiver and the meaning of the law, are to be ascertained by viewing the whole and every part of the Act. One part of the statute must be construed by another that the whole may, if possible, stand. (*Fitzroy's case*); and if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. (*Broom's Maxims.*)

And so the meaning of any clause in a Will is to be collected from the entire instrument; and all its parts are to be construed with reference to each other ; and for this purpose a Codicil is to be construed as a part of the Will. (*Indian Succession Act*, Sec. 69.)

If the same words occur in different parts of the same document, they must be taken to have been used everywhere in the same sense, unless there appear an intention to the contrary. (*Ibid*, Sec. 93.)

MAXIM 250.

Ad proximum antecedens fiat relatio, nisi impediatur sententia. (*Jenk. Cent.*, 180.)—*The antecedent has relation to that which next follows, unless thereby the meaning of the sentence is destroyed.*

Relative words must ordinarily be referred to the next antecedent where the intent upon the whole deed or instrument does not appear to the contrary, and where the matter itself does not hinder it. There are, however, cases in which the context may require a deviation from this rule. A testator devised the whole of his *property* situated in P, and also his farm called S, to his adopted child M. He left to his nephew, W, all his other lands situated in H and M; and the Will contained this subsequent clause:—"And should M have lawful issue, *the said property* to be equally divided between her lawful issue." It was held, that these words, "the said property," did not comprise the lands in H and M devised to the nephew, although it was argued that they must, according to the true grammatical construction of the Will, either comprise *all* the property before spoken of, or must refer to the next antecedent. (*Broom's Maxims.*)

MAXIM 251.

Cum duo inter se pugnantia reperiuntur in testamento ultimum ratum est. (*Co. Litt.*, 112.)—*Where two clauses in a Will are repugnant one to the other, the last in order shall prevail.*

This occurs where the testator by the first clause of his Will leaves his estate of Ramnagar to A; and by the last clause of his Will leaves it to B, and not to A; or where a

man at the commencement of the Will gives his house to A, and at the close of it directs that his house should be sold and the proceeds invested for the benefit of B. In such cases the rule is that where two clauses or gifts in a Will are irreconcileable, so that they cannot possibly stand together, the last shall prevail; (*The Indian Evidence Act*, Sec. 75,) and this is on the theory that the testator may have changed his mind. Of course this rule will be availed of, only on the failure of every attempt to give the whole Will such a construction as will render every part of it effectual.

MAXIMS 252 and 253.

(252.) Copulatio verborum indicat acceptationem in eodem sensu. (*Bac.*, IV, 26.)—*The coupling of words shows that they are to be taken in the same sense.*

(253.) In disjunctivis sufficit alteram partem esse veram. (*Wing.*, 13.)—*In disjunctives it suffices if either part be true.*

Where a condition inserted in a deed consists of two parts in the conjunctive, both must be performed; but otherwise, where the condition is disjunctive: and where a condition or limitation is both in the conjunctive and disjunctive, the latter shall be taken to refer to the whole; as if a lease be made to husband *and* wife for twenty-one years, "if the husband *and* wife or any children between them shall so long live," and the wife dies without issue, the lease nevertheless, shall continue during the life of the husband, because the above condition shall be construed throughout in the disjunctive. (*Burgess* v. *Brocher*, *Broom's Maxims.*)

MAXIM 254.

Mala grammatica non vitiat chartum. Sed in expositione instrumentorum mala grammatica quoad fieri possit evitanda est. (6, *Co.*, 39.)—*Bad grammar does not vitiate a contract. But in exposition of instruments, bad grammar, so far as it can be done, is to be avoided.*

The grammatical construction is not always, in the judgment of law, to be followed; and neither false English nor bad Latin will make void a deed when the meaning of the party is apparent. Where, however, a proviso in a document was altogether ungrammatical and insensible, the Court declared that they did not consider themselves bound to find out a meaning for it. (*Osborn's* case; and *Doe* and *Wyndham* v. *Carew*; *Broom's Maxims.*)

MAXIMS 255 and 256.

(255.) Falsa demonstratio non nocet. (6, *T. R.*, 676.) *A false description does not vitiate a document.*

(256.) Praesentia corporis tollit errorem nominis; et veritas nominis tollit errorem demonstrationis. (*Bac. Maxims.*)—*The presence of the body cures error in the name; the truth of the name cures error of description.*

As soon as there is adequate and sufficient definition, with convenient certainty, of what is intended to pass by the particular instrument, a subsequent erroneous addition will not vitiate it. (Per *Parke*, B., *Llewellyn* v. *Earl of Jersey.*) Lord Bacon says, "If I give a horse to J. D. when present, and say to him, 'J. S.' take this; it is a good gift notwithstanding I call him by wrong name." So if I say to a man, "Here, I give you my ring with the ruby, and deliver the ring set with a diamond and not a ruby, yet this is a good gift."

In *Reg.* v. *Miller*, (27, L. J. M. C., 121,) the name of A, a juror on the panel, was called, and B another juror on the same pannel appeared, and by mistake answered to the name of A, and was sworn as a juror, and acted as such. The conviction which ensued in the case was sought to be set aside; but the request was not granted, one of the learned Judges making the following observations:—

"The mistake is not a mistake of the man, but only of his name. The very man who, having been duly summoned, and being duly qualified, looked upon the prisoner, and was corporeally presented and shown to the prisoner for challenge, was sworn, and acted as a juryman. At bottom the objection is but this, that the officer of the Court, the juryman being present, called and addressed him by a wrong name. Now, it is an old and rational Maxim of law, that where the parties to a transaction, or the subject of a transaction, are either of them actually and corporeally present, the calling of either by a wrong name is immaterial. *Praesentia corporis tollit errorem nominis.* Lord Bacon in his Maxims, fully explains and copiously illustrates this rule of law and good sense, and shows how it applies not only to persons, but to things. In this case as soon as the prisoner omitted the challenge, and thereby in effect said, 'I do not object to the juryman there standing,' there arose a compact between the Crown and the prisoner that the individual juryman there standing, corporeally present, should try the case. It matters not, therefore, that some of the accidents of that individual, such as his name, his address, his occupation, should have been mistaken." (*Broom's Maxims.*)

Where the words used in the Will to designate or describe a legatee or a class of legatees, sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect. A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by

the name. And so, if the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the Will, but some parts of the description do not apply such parts of the description shall be rejected as erroneous, and the bequest shall take effect. (Secs. 63, 65 and 66, *Indian Suc. Act.*)

MAXIM 257.

Generalis clausula non porrigitur ad ea quae antea specialiter sunt comprehensa. (8, *Co.*, 154.)—*A general clause does not extend to those things which are before specially provided for.*

A special law derogates from a general law. A good illustration of this Maxim will be found in the Proceedings of the Madras High Court, dated 4th June 1872, where it was held that the jurisdiction conferred on Magistrates in the Madras Presidency by the Madras Act III of 1865, was not ousted by the Schedule to the Code of Criminal Procedure. The Court observed as follows:—"Madras Act III of 1865 is an Act which confers on Magistrates in the Madras Presidency jurisdiction to the extent of their ordinary powers, in respect of offences created by special and local laws in force in the said Presidency. '*Generi per speciem derogatur*' is peculiarly true of the construction of statutes. A law dealing with a specific matter, and giving jurisdiction over that matter, cannot be repealed by general provision such as that contained in the schedule. The proceedings of the Sub-Magistrate were therefore legal and there is no necessity for the interference of the High Court." (VII, *M. H. C. R.*, App., p. vi.)

MAXIM 258.

Leges posteriores priores contrarias abrogant. (1, *Co.*, 25.)—*Later laws abrogate prior contrary laws.*

In *Green* v. *Jenkins*, Lord Campbell, C. J., said that there may certainly be an implied as well as an express repeal of existing laws by new laws; but that is where the new and the old laws are conflicting and cannot stand together. But if there is no express repeal, and the old and the new laws may both be operative, the old remain in force. So in *Sabapathy Moodelliar* v. *Narrainsawmy Moodelliar*, the Madras High Court held that a special enactment is not impliedly repealed by a subsequent affirmative general enactment, if the two are not so repugnant as to be incapable of standing together. (I, *Mad. H. C. R.*, 115.)

And in *Mahomed Abdul Vahab Sahib* v. *Ramasawmy Ayengar*, the Madras High Court held that the rule of construction "*leges posteriores priores contrarias abrogant*" is no doubt applicable to a new affirmative enactment, but has application only when there is such complete contrariety or repugnancy between it and a prior enactment as makes it certain that the Legislature could not have intended the latter to stand. When there is an admissible construction by which both enactments can reasonably have operated together, that construction must be adopted. This is a well settled rule; and the instance of its application most apposite to the present case is that of a special and particular enactment and a subsequent general enactment relating to the same subject but without negative terms. It has been more than once laid down that in such a case the special enactment is not repealed. (IV, *Mad. H. C. R.*, 279.)

MAXIM 259.

Verba generalia restringuntur ad habilitatem rei vel aptitudinem personae. (*Bac. Max.*)—*General words are restrained according to the nature of things or of the person.*

All words whether they be in deeds or statutes, or otherwise, if they be general, and not express and precise, shall be restrained into the fitness of the matter and the person. So if I grant to J. S. an annuity of 100 Rupees a year on account of the past and future *counsel*; and if J. S. be a physician, this shall be understood of his advice in physic; and if he be a lawyer, of his counsel in legal matters; and so on.

So if a deed relates to a particular subject only, general words in it shall be confined to that subject. If a document be executed to an agent authorising him to conduct business for him in the sale and purchase of indigo, any general words therein occurring such as, "I shall be bound by everything you may do in the matter of trade," should be confined to the transactions in respect to indigo only.

Generally, in a document, the preamble usually recites what it is which the grantor intends to do; and this, like the preamble to an act of legislature, is the key to what comes afterwards. It is very common, moreover, to put in a sweeping clause, the use and object of which are to guard against any accidental omission; but in such cases, it is meant to refer to things of the same nature and description with those which have been already mentioned; and such general words are not to be allowed to extend further than were clearly intended by the parties. (Per *Lord Mansfield*, C. J., in *Moore* v. *Magrath*; *Broom's Maxims.*)

In *Sausone Ezekiel Judah* v. *Addi Rajah Queen Bibi*, the Madras High Court held that in construing Powers of

Attorney, the special purpose for which the power is given is first to be regarded, and the most general words following the declaration of that special purpose will be construed to be merely all such powers as are needed for its effectuation. Where the owner of a ship, by power of attorney, constituted the master his agent and authorised him to raise or borrow upon the ship's papers such sums of money as he deemed necessary for the repair of the ship, "and to act in the premises as fully and effectually to all intents and purposes as I might or could do if personally present," in a suit for the amount of mortgage bond upon the ship executed by the master, it was held that the master had no authority to sell or mortgage the ship. (II, *Mad. H. C. R.*, 177.)

The Indian Succession Act has the following provision on the subject:—General words may be understood in a restricted sense, where it may be collected from the Will that the testator meant to use them in a restricted sense; and words may be understood in a wider sense than that which they usually bear, when it may be collected from the other words of the Will that the testator meant to use them in such wider sense. Thus a testator gives to A "his farm in the occupation of B;" and to C "all his marsh lands in L." Part of the farm in the occupation of B consists of marsh lands in L, and the testator has also other marsh lands in L. The general words, "all his marsh lands in L," are restricted by the gift to A. So that A takes the whole of the farm in the occupation of B, including that portion of the farm which consists of marsh lands in L.

The testator (a sailor on ship-board) bequeathed to his mother his gold ring, buttons, and chest of clothes; and to his friend A (a ship mate) his red box, clasp knife, and all things not before bequeathed. The testator's share in a house does not pass to A under this bequest. And A by his Will, bequeathed to B all his household furniture, plate, linen, books, pictures and all other goods of whatever kinds;

and afterwards bequeathed to B a specified part of his property. Under the first bequest, B is entitled only to such articles of the testator's as are of the same nature with the articles therein enumerated.

MAXIM 260.

Expressio unius personae vel rei, est exclusio alterius. (*Co. Litt.*, 210.)—*The express mention of one person or thing is the exclusion of another.*

Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by implications; the presumption being that, having expressed *some*, they have expressed *all* the conditions by which they intend to be bound under that instrument. (*Broom's Maxims.*)

On the mortgage of dwelling houses, foundries, and other premises, "together with all grates, boilers, bills, and other fixtures in and about the said two dwelling houses, and the brewhouses thereunto belonging," it was held that although without these words, the fixtures in the foundries would have passed, yet by them, the fixtures intended to pass were confined to those in the dwelling houses and brewhouses. (*Hare* v. *Horton; Broom's Maxims.*) So where certain specific things are taxed, it seems probable that it was intended to exclude everything else, even of a similar nature, and *a fortiori*, all things different in *genus* and *description* from those which are enumerated. (*Broom's Maxims.*)

This Maxim applies also to cases of warrants in sales.

MAXIM 261.

Verba illata in esse videntur. (*Co. Litt.*, 359.)—*Words referred to are to be considered as incorporated.*

If a person sells all the articles mentioned in the schedule annexed, the schedule must be held to form a part of the contract itself; for the document would be insensible and inoperative without the schedule. And so by referring to one document signed by the party to another document, the person so signing does, in effect, sign also the document containing the terms of the one referred to. (Per *Crampton*, J., *Fitizmaurice* v. *Bayley*; *Broom's Maxims.*)

This rule will have extensive application in the construction of Acts of Legislature, with reference to exceptions and provisions contained therein.

Logically speaking, an *exception* ought to be of that which would otherwise be included in the category from which it is excepted, but there are a great many examples to the contrary. (Per *Lord Campbell*, in *Gurly* v. *Gurly*, 8 Cl. and Fin., 764.)

The office of a *proviso* in an Act is either to exempt something from an enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its operation. (Per *Story*, J., 15, *Peters*, R., 445.)

MAXIM 262.

Verba chartarum fortius accipiuntur contra proferentem. (*Co. Litt.*; 36.)—*The words of deeds are to be taken most strongly against him who uses them.*

The prevailing rule, says Mr. Broom, is that the words of a contract must be construed most strongly against the con-

tractor; a rule which, however, ought to be applied where other rules of construction fail. As observed by Sir W. Blackstone, the principle of self-preservation will make men sufficiently careful not to prejudice their own interest by the too extensive meaning of their words, and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them. So, if a carrier gives two different notices limiting his responsibility in case of loss, he will be bound by that which is least beneficial to himself. And if a person having an absolute interest in a property, leases certain land for life generally, without specifying whose life, this shall be construed to mean a lease for the life of the grantee, because an estate for a man's own life is higher than the life of the grantor: (*Menu* v. *Baker*.) But this principle does not hold good so as to work a wrong to third parties. So, where a person who has only a life-interest in the property, makes a lease for life generally, this shall be taken to mean a lease for the life of the lessor; because if the lease were to stand beyond the life of the lessor, the interests of a third party, *i. e.*, the reversioner, would be injured. Here the Maxim, that no one can have more privileges than the person from whomsoever he derived his title, also applies; for a person having himself a life-interest cannot create any lease or other interest beyond his life. (*Broom*.)

Further it is established on the best authority, that in construing grants from the Crown, a different rule of construction prevails from that by which grants from one subject to another are to be construed. In a grant from one subject to another, every intendment is to be made against the grantor, and in favor of the grantee, in order to give full effect to the grant. But in grants from the Crown an opposite rule of construction prevails. Nothing passes except that which is expressed, or which is matter

of necessary and unavoidable intendment, in order to give effect to the plain and undoubted intention of the grant. And in no species of grant, does this rule of construction more especially obtain than in grants which emanate from, and operate in derogation of, the prerogative of the Crown; *ex. gr.* where a monopoly is granted. *Feather* v. *Reg.* (*Broom's Maxims.*)

MAXIM 263.

Contemporanea expositio est optima et fortissima in lege. (2, *Inst.*, 11.)—*A contemporaneous exposition is the best and strongest in law.*

Where the words of the instrument are ambiguous, the Court will call in aid the acts done under it as a clue to the intention; contemporaneous usage being a strong ground for the interpretation of doubtful words or expressions. Upon this principle depends the great authority, which in construing a statute, is attributed to the construction put upon it by Judges who lived at the time when the statute was made or soon *after*, as being best able to determine the intention of the Legislature, not only by the ordinary rules of construction, but especially from knowing the circumstances to which it had relation.

MAXIM 264.

Benedicta est expositio quando res redimitur a destructione. (4, *Co.*, 25.)—*Blessed is the exposition by which anything is saved from destruction.*

Where a clause is susceptible of two meanings, according to one of which it has effect, and according to the other it can have none, the former is to be preferred. And no part of a will is to be rejected as destitute of meaning, if it is

possible to put a reasonable construction upon it. (Secs. 71 and 72, *Indian Succession Act.*)

All contracts should, if possible, be construed with reference to the said principle. (Per *Byles, Vestry of Shoreditch* v. *Hughes.*) If a plea admits of two constructions, one of which gives a sensible effect to the whole, and the other makes a portion of it idle and insensible, the Court is bound to adopt the former construction. (Per *Williams*, J., *Peter* v. *Daniel; Broom.*)

MAXIMS 265 to 267.

(265.) Ignorantia juris non excusat. (1, *Co.*, 177.)—*Ignorance of law does not excuse.*

(266.) Ignorantia juris, quod quisque scire tenetur, neminem excusat. (*Bl. Com.*)—*Ignorance of the law which every one is bound to know does not excuse.*

(267.) Lex succurrit ignoranti. (*Jenk. Cent.*, 15.)—*The law assists the ignorant.*

The law is administered upon the principle that every one must be taken conclusively to know it without proof that he does know it. (Per *Tindal*, C. J., in his judgment in *McNaughten's case.*) And this rule holds good as regards all subjects, even foreigners within the realm, for the law speaks to all *uno ore.* (*Broom's Com.*, p. 832.)

At the first blush it would appear monstrous and unjust to hold that a person, who is avowedly ignorant of law should suffer the consequences of his not having acted in conformity therewith. But in order to understand the principle of the abovementioned Maxims fully, we should understand the real meaning of the word "ignorance," as used therein. "Ignorance" of law is defined to be that "wilful ignorance, which neglects or refuses to be informed."

(*Wharton's Maxims.*) Reading the foregoing Maxims with the light of this definition, we readily see that the rule that ignorance of law does not excuse is really wholesome, affecting, as it does, only those who are naturally capable of studying and understanding the law, if so disposed to do; but who nevertheless neglect or refuse to study and understand it. If such persons fail to make themselves acquainted with the law which they are bound to obey, it is their fault; and they cannot but suffer the consequences. Moreover no Judge will be in a position to know which of the parties does really understand the law and which does not; so that every offender might plead ignorance of law and avoid the consequences of his having violated it, had it not been for the rule under consideration.

We should remember that the rule that ignorance of law does not excuse, applies only to those laws which every one is *bound* to know. So that, in regard to laws which people are not bound to know, the law does certainly assist them, for we cannot find fault with persons for not knowing what they are not bound to know. It is settled that every one is bound to know that law which lays down a rule of conduct, mandatory or prohibitory, such as, the Penal Code, Laws of Contract, Limitation, Registration, Stamps, &c.; but not the Law of Procedure which is for the guidance of courts; so that when a defendant fails to set up the plea of limitation in bar of a suit, the court is bound to take notice of the bar, if it appears on the face of the plaint or record, (*The Indian Lim. Act,*) and thus help the party who is ignorant of the law of *procedure;* but no plaintiff will be assisted if he fails to institute his suit within the period prescribed by the law of limitation.

It should not be forgotten that it is only *wilful or voluntary ignorance* which the law does not excuse. It follows, therefore, that the law will assist the ignorant, if the ignorance is *involuntary,* which means the ignorance which

some people have by the hand of God; as for instance the ignorance of immature age and insanity.

Under the Indian Penal Code, nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law, in good faith, believes himself to be, bound by law to do it. (S. 76.) And nothing is an offence which is done by any person, who is justified by law, or who by reason of a mistake of fact, and not by reason of a mistake of law, in good faith, believes himself to be justified by law in doing it. (S. 79).

Under the Indian Contract Act, a contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to law *not* in force in British India has the same effect as a mistake of fact. (S. 21.)

(Note, a mistake of fact forms the subject of the following Maxim).

It must be added here that the Maxim "Ignorance of law does not excuse," applies only where persons seek to exempt themselves from the consequences of their acts, as for example from punishment for criminal offence, or damage for a breach of contract; and where the question at issue is a pure question of law. Mr. Bishop remarks upon the point as follows:—"In civil cases it would seem that if law and fact are blended as a mixed question, or if one's ignorance of fact is produced by ignorance of law, the whole may be regarded as ignorance of fact, of which the party is at liberty to take advantage. So, in criminal jurisprudence, if the guilt or innocence of the prisoner depends on the fact, to be found by the jury, of his having been or not, when he did the act, in some precise mental condition, which mental condition is the gist of the offence, the jury, in determining this question of mental condition, may take into consideration his ignorance or misinformation in a matter of law. Thus, to constitute larceny, there must be

an intent to steal, which involves the knowledge that the property taken belongs not to the taker. Yet, if all the facts concerning the title are known to the accused, and so the question is merely one of law whether the property is his or not, still he may show, and the showing will be a defence to him against the criminal process, that he honestly believed it his, through a misapprehension of law. A mere pretence of claim set up by one, who does not himself believe it to be valid, does not prevent the act of taking from being larceny." (*Mayne's Indian Penal Code.*)

Further, the plea that an offender has mistaken the law might, if proved, operate much in mitigation of punishment. (*Broom's Com.*, p. 831.)

Where, however, a defendant was indicted for maliciously shooting at A. B. upon the high seas, and the offence was perpetrated within a few weeks after the Stat. 39, Geo. 3, c. 37, was passed, and before notice of it could have reached the place where the offence was committed, the Judges held that as he could not have been tried before that Act passed, and as he could not have heard of it, he ought to be *pardoned.* (*Archbold's Criminal Cases*, p. 20); but he was not held entitled to an *acquittal.*

In *Jivani Bhoi* v. *Jivu Bai*, the Civil Judge decided that the adoption of plaintiff's husband by one *Kristna Row* was *invalid* according to the Hindu law ; and that, therefore, the devise of property by *Kristna Row* in favor of plaintiff's husband having been made *as adopted son*, was likewise invalid. The High Court, reversing the said decision, held that as the language of the testator sufficiently indicated the person who was to be the object of his bounty, the person so indicated was entitled to his property, although the testator conceived him to possess a character which in point of law cannot be sustained. (III, *M. H. C. R.*, p. 462).

In *Abhachari* v. *Ramachendriah*, the Madras High Court

passed the following judgment:—"This is not a case of the donee seeking to enforce a contract; it is one of the donor seeking the cancellation of his own voluntary deed. Nothing is clearer than the position that by Hindu as by English law, any man may make a gift of any of his property binding as against himself. The jurisdiction of a Court of Equity to set aside deeds is most beneficial. It is, however, to be exercised on certain principles now perfectly well established. Moreover, even where the deed is voidable on the ground of fraud, accident, or mistake, it is always a question for the discretion of the Court whether cancellation and delivery ought to be ordered. Here a man seeks to set aside his own deed, on the ground that he made a mistake in supposing that the defendant could perform his funeral rights, and on the ground that certain things which cannot possibly be construed as conditions precedent, have not been done by the defendant. It is quite clear from his own language that the plaintiff was well aware that he was not and could not be adopting a son. He says that he will consider defendant a *manasaputra*. In modern times, the Courts of Equity have strongly inclined against remedying mere mistakes of law, but, without saying that in no case can an equitable remedy be given, it is quite clear that this is not a case for the exercise of such a discretion. The case is simply one of the plaintiff choosing to alter his mind: he has shown no equity whatever; and, without giving any opinion whatever as to the validity or effect of the deed, it is quite clear that the decrees setting it aside must be reversed with costs." (I, *M. H. C. R.*, 395).

MAXIM 268.

Ignorantia facti excusat. (1, *Co.*, 177.)—*Ignorance of fact excuses.*)

The ignorance of fact contemplated in this Maxim is (as defined in Wharton's Maxims) "that state of mind in a person, which, upon reflection, supposes a certain fact or state of things to exist, which does not in truth so exist." In such cases the law excuses the person acting under such mistake. Under the Indian Penal Code nothing is an offence which is done by a person, who, by reason of a mistake of fact, in good faith believes himself to be bound or justified by law to do it. (Secs. 76 to 79.)

Mistake will be no justification, unless it is a mistake of fact, and not invariably then. The criterion is to enquire, whether, assuming the fact to be as it was erroneously supposed to be, the act done in consequence was lawful. A man, who shoots an inmate of the house, who comes into his room at night, supposing him to be a burglar, would be justified, because if his supposition were correct, he would have authority under Sec. 103 of the Indian Penal Code to kill the offender. But if he fired out of his window by day at the same person, supposing that he was trespassing upon his paddy-field, this would not be justifiable, for an actual trespasser could not lawfully be so assailed. Under S. 52, the mistake must be one in consequence of which the party "in good faith believes himself to be justified by law in doing" the act. Good faith is defined by S. 52, as involving due care and attention. It cannot be supposed "that if a man merely dreamt of a certain state of facts, without any ground for his impression and acted upon it, it would be sufficient. Some facts must exist which might give rise to an honest belief on his part that such a state of facts existed as would have justified his actions." (Per

Keating, J., *Leeté* v. *Hart*, 3, L. R. C. P., 325; *Mayne's Penal Code.*)

Under the Indian Contract Act, where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not deemed a mistake as to a matter of fact. (S. 20.) But a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact, (S. 23); but free consent is one of the essentials of a contract; consent is not free if it is caused by misrepresentation (S. 14); misrepresentation means and includes causing, however innocently, a party to an agreement to *make a mistake* as to the substance of the thing which is the subject of the agreement. (S. 18).

In *Soobramania Telaver* v. *Sokka Telaver*, the facts were that plaintiff's father, a member of an undivided Hindu family, signed an agreement by which he agreed to accept a provision in satisfaction of his claim for maintenance. The agreement was signed by reason of a mistaken belief entertained by the plaintiff's father and the other members of the family that there existed an established custom in the family which rendered the property indivisible. Subsequently the plaintiff sued for partition of the family property liable to partition; and the Madras High Court held that the agreement having been come to under a mutual mistake, it was no bar to the plaintiff maintaining the suit; for it would not have prejudiced the right of the plaintiff's father if he had chosen to insist upon a partition." (V, *Mad. H. C. R.*, 437.)

MAXIM 269.

Quod fieri non debet factum valet. *(Broom.)—What ought not to be done, yet being done, shall be valid.*

Some few cases do occur where an act done contrary to the express direction or established practice of the law, will not be found to invalidate the subsequent proceedings.

The above Maxim will in general be found strictly to apply wherever a *form* or proceeding has been omitted which ought to have been observed, but of which the omission is *ex post facto* immaterial. This Maxim is to be applied with great caution: an undue application of the same will result in putting an end to all law, and in superseding every doctrine, and in legalizing every act. In applying this Maxim, too, to any particular case, we should make a distinction between circumstances which are of the *essence* of a thing required to be done, and circumstances which are merely *directory.*

In those cases where a man has no title to convey, or where his right is restricted, the rule of *factum valet* does not apply. This rule will not give a good title to a person, to whom another conveys more than he has a legal title to convey. If a man's right is *not* restricted, *factum valet* applies. His act is valid if he has title, although he may be guilty of an immoral act in doing what he has a legal right to do. But if his rights be restricted, the rule *factum valet* does not enable him to go beyond restriction. (*Mangala Debe* v. *Denatha Bose, Beng. L. R.*, IV, 72.)

It has been held in the case of an adoption by a Hindu that with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply, they are *directory* only; and an adoption of either, however, blameable in the giver, will be good, nevertheless to every

legal purpose, according to the maxim of the civil law prevailing in no code more than in that of the Hindus, *factum valet, quod fieri non debet.* (*Sir T. Str. Hind. Law*, I, 87; and *Chinna Gandan* v. *Kumara Gandan*, I, *Mad. H. C. R.*, 54.)

MAXIMS 270 to 273.

(270.) Volenti non fit injuria. (*Wing. Max.*, 482.)—*That to which a man consents cannot be considered an injury.*

(271.) Consensum tollit errorem. (*Co. Litt.*, 126.)—*Consent takes away error.*

(272.) Non videtur consensus retinuisse si quis ex praescripto minantis aliquid immutavit. (*Bac. Max.*)—*Where a person has made any change from the terms of the party threatening him, he is not considered as having retained his consent.*

(273.) Non videntur qui errant consentire. (*Dig.*, 50, &c.)—*They who mistake are not supposed to consent.*

When a man suffers an injury which, if he wanted, he might have prevented, but which he does not prevent, or in which he acquiesces, he will not be allowed to complain of that injury. The doctrine of Estoppels is referrable to this Maxim equally with the Maxim No. 224, which see. Accordingly, if a man pays a debt, and afterwards comes to understand that he need not have paid it, as its recovery had been barred by the statute of limitation, he will not be allowed to recover it back; but money paid under threats of personal violence, duress, or illegal restraint of liberty, may be so recovered. Where a person, having been duly informed that there were spring-guns in the wood, did still take upon himself to go into the wood, knowing that he was in hazard of meeting with the injury which the guns

are calculated to produce, it was held that he did so at his own peril, and must take the consequence of his own act. (Per *Bayley*, J., in *Ildott* v. *Wilkes*.)

In *Arunachella Pillay* v. *Appoo Pillay*, plaintiff owed defendant a judgment debt. He paid the debt; but not through the Court. Defendant then fraudulently applied to the Court to execute the decree, and the Court being debarred by Sec. 206 of the Code of Civil Procedure from recognizing payments made otherwise than through it, executed the decree, by making the plaintiff pay again the sum decreed. Plaintiff then brought a suit to recover the amount overpaid. The majority of the High Court of Madras held that such suit was not maintainable. The following was the opinion of Mr. Justice Holloway in the case :—"The question is whether a sum of money, paid by a judgment-debtor out of Court to a judgment-creditor, can be recovered, when the creditor has fraudulently levied the sum a second time through the process of the Court, which, by Sec. 206 was forbidden to notice the payment not certified to it by the decree-holder. The very statement of such a case naturally leads to a strong desire to remedy such injustice, if such remedy is not forbidden by the law itself. The original payment and receipt were perfectly rightful. An action, therefore, could not lie as on a payment of money not owing *(condictio indebiti.)* It was the second demand which was wrongful, the one which the Court enforced, not the first; and the action is, therefore, in truth and fact, for the recovery of the sum exacted by the process of the Court, and not for the sum originally paid. The case, therefore, has at the first blush, a strong resemblance to *Marriot* v. *Hampton*. It is money paid under the compulsion of legal process of which the recovery is sought. In *Marriot* v. *Hampton* it was so paid under compulsion, because the plaintiff had lost his receipt. Here it is because the Court which tried the case (for, under Sec. 11 of Act

narrows its power of receiving and entertaining suits. Each provision must be referred to its proper head." (III, *Mad. H. C. R.*, 189.)

Under the Indian Contract Act, two or more persons are said to consent when they agree upon the same thing in the same sense. Consent is to be free where it is not caused by coercion, undue influence, fraud, misrepresentation, or mistake, subject to certain qualifications as explained under the Maxim relating to ignorance.

The Indian Penal Code provides that a consent is not such consent as is intended by any section of that Code, if the consent is by a person under fear of injury or under a misconception of fact, and if the person doing the act knows or has reason to believe that the consent was given in consequence of such fear or misconception; or if the consent is given by a person, who from unsoundness of mind or intoxication is unable to understand the nature and consequence of that to which he gives his consent; or, unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age. And the Code justifies acts, not intended and not known to be likely to cause death or grevious hurt, done by consent, (*i. e.*, of course a consent not caused by compulsion, &c., as above explained); acts not intended to cause death, done by consent in good faith for the benefit of a person; acts done in good faith for the benefit of a child or person of unsound mind, by or by the consent of a guardian, &c. (Vide Sections 87 to 92; 300 and 492, *I. P. C.*)

MAXIM 274.

Quod semel placuit in electione, amplius displicere non potest. *(Co. Litt.,* 146.*)—Where a selection is once made, it cannot be disapproved any longer.*

Where a contract provides for an election, and the party makes such election, he is in the same position as if he had originally contracted to do the act, which he had elected to do; the rule being that if a man once determines his election, it shall be determined for ever. In order that a person who is put to his election should be concluded by it, two things are necessary; first, a full knowledge of the nature of the inconsistent rights and of the necessity of electing between them; second, an intention to elect manifested either expressly or by acts which imply choice and acquiescence. *(Broom's Maxims.)*

The rules of election under the Indian Succession Act are given in the Sections 167 to 177; and those under the Indian Contract Act in Section 196; which see. In *Kalee Doss Ghose* v. *Laul Mohen Ghose*, where a creditor sued upon a bond, and got a decree declaring his debt leviable from certain landed property, on which the bond gave him a mortgage lien as well as from any other property found in possession of the debtor; but he having elected to satisfy his mortgage lien and procured the sale of the landed property subject to that lien, it was held by the Calcutta High Court that he was bound to recoup himself from the mortgage property, and that he could not get any part of the surplus sale proceeds, unless it were shown that the mortgaged land had not produced enough to satisfy his claim. *(C. W. R.,* XVI, p. 306.)

MAXIM 275.

Lata culpa dolo aequiparatur. *(Manuàl.)—Gross negligence is tantamount to fraud.*

Negligence is defined to be the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do; negligence being moreover not absolute or intrinsic, but always relative to some circumstances of time, place, and person. *(Broom's Maxims.)*

What is diligence is more a matter of fact than of law; and in different countries the standard is necessarily variable with respect to the facts, although it may be uniform with respect to the principle. It has to be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers, as well as the institutions peculiar to the age. The same precautions may not be needed in a quiet country-place as in a crowded city or during a period of lawlessness. So the usual practice of the place or business may indicate the caution usually found to be and considered necessary. So the nature and value of the objects of the bailment affect the liability; a man would not be expected to take the same care of a bale of cotton as of a box of diamonds or other jewelry. *(Collett on Torts.)*

But the degree of negligence inducing liability varies with the kind of bailment. There have been said to be three degrees of diligence, namely, exact, ordinary, and slight. So there are said to be three degrees of negligence, namely, gross, ordinary, and slight. *Ordinary* diligence is the use of such precautions only as persons of average prudence would employ, having respect to the time, place, and object of the care. But the omission of such ordinary precautions will not be ordinary, but would rather be *gross*

negligence. The use of every possible precaution, or of more than the ordinary precautions, is *exact* diligence, and the omission of such diligence is *slight* negligence. But there has been much discussion, and some confusion, in attempting to define these terms; the omission of ordinary precaution seems to be, not ordinary but gross negligence; but perhaps the matter may be simplified either by striking out the middle term, ordinary negligence and classing negligence as either slight or gross; or, what comes to the same thing, by treating ordinary diligence and ordinary negligence as positive and negative expressions of the same idea; ordinary diligence being the use of ordinary caution, and ordinary negligence the absence of unusual care. (*Collett on Torts*, Secs. 272 and 273.)

The Indian Contract Act makes the following provisions as to the degree of care to be taken by a bailor. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed. (Section 150.) The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken that amount of care.

The Indian Penal Code makes it an offence to do certain things in a negligent manner, such as, negligent driving, riding, &c.

The following Acts may be consulted on the subject: The Indian Railway Act (XVIII of 1854); the Common Carriers Act (III of 1868); the Cattle Trespass Act (I of 1871;) and also Acts XII and XIII which provide compensation to relatives in case of deaths caused by negligence, &c.

In *Radha Kristna* (defendant) v. *W. C. O'Flanerts*, the plaintiff hired a thatched bungalow of the defendant, entered into possession, and living in it sometime, lit a fire

in the fire-place in one of the rooms. The chimney took fire and plaintiff's furniture was destroyed. He subsequently ascertained that the chimney had been thatched over, of which he had been all along ignorant. The Calcutta High Court held that defendant was liable in damages for the loss sustained by the plaintiff. The defendant should not have neglected to give the plaintiff notice of the defective construction of the chimney. The plaintiff had a right to assume that it was properly built. *(Beng. L. R., App., Civil,* III, 277.)

In *Nicholson* v. *The Lancashire and Yorkshire Railway Company,* (34, L. J.(N. S.) Exch. 84,) Pollock, C. B., delivered the following judgment :—" The accident appears to have happened by reason of the train by which the plaintiff arrived at the station being of greater length than the platform on which the passengers had to alight, in consequence of which the ordinary way across the line for the purpose of getting at the opposite platform and the place of exit from the station was impeded and stopped up by the train; and it appears that the train remained as long as ten minutes or a quarter of an hour. This had happened before, and the passengers, therefore, had acquired the habit of passing along the line so as to reach the opposite platform by going round the end of the train, and then crossing; and some evidence was given that when the passengers, on this occasion, were at the end of the platform on which they alighted from the train where the tickets were taken, they were told to "go on," and certainly there was no other way of going on except by going alongside and round the end of the train. Under these circumstances, we are all of opinion that there was some evidence of negligence to go to the jury. There was no light; there was a hamper put down, which the plaintiff stumbled over, and he received considerable damage. It appears to us sufficient to say that if on the arrival of a train there is an obstacle to the passengers

getting at the place of exit from the station, which remains there for ten minutes or quarter of an hour, there is some evidence of negligence: certainly a passenger should be able to get away in much less time than a quarter of an hour after the arrival of the train by which he came; and if that be so, the denfendants must be responsible for any mischief that arose in this case, unless the jury thought that the accident was entirely attributable to the negligence of the plaintiff. Under these circumstances we are of opinion that it is impossible to say that there was not some evidence of negligence. The rule, therefore, to enter a non-suit will be discharged and the verdict must stand." *(34, L. J. Ex., 84.)*

In *Swami Naidu* v. *Subramania Moodelli*, the Madras High Court held that to sustain an action for negligence, there must be an obligation on the part of the defendant to use care, and a breach of that obligation to the plaintiffs' injury. (II, *M. H. C. R.*, 158.)

In the *Madras Railway Company* v. *The Zamindar of Kavatinuggur*, the suit was for damages sustained by plaintiffs by reason of injuries caused to a line of Railway, the property of plaintiffs, by the bursting of defendant's tanks. Negligence, on the part of the defendant, was not alleged in the plaint. Upon the findings,—(1) That the tanks were existent before living memory; (2) That they were breached by an extraordinary flood; (3) That they were tanks constructed in the ordinary manner with escapements sufficient for all ordinary floods and such as are universally employed; (4) That they were absolutely necessary to human existence, so far as it depends upon agriculture; (5) That the Railway was contructed with a full knowledge of their existence; the Madras High Court held that the suit was rightly dismissed. (IV, *M. H. C. R.*, 180.)

In a case referred to the High Court of Madras, the defendant was convicted under Section 338 of the Indian

Penal Code of causing grievous hurt. The evidence showed that the defendant was being driven in a carriage to her house through the streets of the town between the hours of 7 and 8 P. M.; that the carriage was being driven at an ordinary pace and in the middle of the road; that the night was dark and the carriage without lamps, but that the horse-keeper and coachman were shouting out to warn passengers; that the defendant's carriage came into contact with the complainant's father, an old deaf man; and that complainant's father was thereupon knocked down, run over, and killed. It was held that the question for the Court was whether there was any evidence that the death of the deceased was induced by an act negligently and rashly directed by the accused, and that there was no such evidence. The conviciton was accordingly quashed. (VI, *M. H. C. R., App.*, p. xxxii.)

In the case of *Nidamarti Nagabhooshanam*, the High Court of Madras thus defined the words "Culpable rashness" and "Culpable negligence." They observed that, "Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. *(Luxuria.)* Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had, he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection." (VII, *M. H. C. R.*, 119.)

For further instances of negligence and for contributory negligence. Vide Maxim 101, &c.

MAXIMS 276 to 278.

(276.) Fraus omnia vitiat et corrumpit.—*Fraud vitiates and corrupts everything.*

(277.) Dolus circuitu non purgatur. *(Bac. Max.)*—*Fraud is not purged by circuity.*

(278.) Non decipitur qui scit se decipi. (5, *Co.*, 60.)—*He is not deceived who knows himself to be deceived.*

There are different kinds of fraud:—"*First*, Fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition; which is the plainest case. *Secondly*, it may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other; which are inequitable and unconscientious bargains, and of such even the Common Law has taken notice. *Thirdly*, Fraud, which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that it must be proved, not presumed. But it is wisely established in the Court of Chancery, to prevent taking surreptitious advantage of the weakness or necessity of another, that knowingly to do is equally against conscience, as to take advantage of his ignorance. *Fourthly*, Fraud, which may be collected and inferred, in the consideration of a Court of Equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons, not parties to the fraudulent agreement. *Fifthly*, Fraud in what are called catching bargains with heirs, reversioners, or expectants in the life of the parents, which indeed seems to fall under one or more of the preceding heads." (Per *Lord Hardwicke* in *Chesterfield* v. *Jansen*; I, Tud. and Wh. L. C., 428.)

Mr. Broom divides fraud into *Legal* and *Moral* and

explains the distinction as follows:—"I would, however, first observe that a distinction undeniably exists between moral and legal fraud; that there are many kinds of moral fraud which clearly could not be made available, either as ground of action, or by way of defence before a Court of law. Thus a vendor is entitled to sell for the best price he can get, and is not in any way liable at law for a simple commendation of his own goods, however worthless they may be, provided he has not made any false statement as to their quality or condition, nor asserted anything respecting them which may amount to a warranty in legal contemplation. It has even been held that the vendor of a chattel, in which there is a patent defect which greatly diminishes its value, will not incur liability by silence with regard to it; and if A treats with B for the purchase of an estate knowing that there is a valuable mine under it, and B makes no inquiry, there is authority to show that A is not bound either at law or in equity to give information as to the existence of the mine. Now, in any of the cases here suggested, although the moralist might possibly condemn, our law would decline to give redress. *Non omne quod licet honestum est.* As on the one hand, there may thus be an intention to mislead or even an attempt to induce a person unknowingly to sacrifice his own interest, without fraud in law; so, on the other hand, legal fraud may exist, without any serious amount of moral turpitude. 'The cases,' says *Parke*, B., in *Murray* v. *Mann*, 'show a distinction between legal and moral fraud. For instance, where a person purports to accept a bill of exchange by procuration, when in fact he has no such authority, that has been held a legal fraud, rendering the party liable to an action of deceit,' although the jury negatived the existence of fraud."

But the Indian Contract Act makes no division of fraud. It provides in general terms, that fraud means and includes any of the following acts committed by a party to a con-

tract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—namely, (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) The active concealment of a fact by one having knowledge or belief of the fact; (3) A promise made without any intention of performing it; (4) Any other act fitted to deceive; and (5) Any such act or omission as the law declares to be fraudulent. But mere silence as to facts, likely to affect the willingness of a person to enter into a contract, is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence, to speak, or unless his silence is in itself equivalent to speech. Misrepresentation means and includes; (1) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true though he believes it to be true; (2) Any breach of duty, which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him; and (3) Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing, which is the subject of the agreement. If the consent to an agreement is caused (*inter alia*) by fraud or misrepresentation, the agreement is a contract *voidable* at the option of the person whose consent was so caused. But if such consent was caused by misrepresentation, or by silence, fraudulent within the meaning of the Indian Contract Act as above defined, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discerning the truth with ordinary diligence. (*The Indian Contract Act.*)

Not only are ordinary contracts voidable on the score of fraud, but even documents duly registered under the Indian Registration Act may be rendered void if they are proved

to have been obtained by fraud. (*Sreenath Buttacharry* v. *Ramcomul Gangooly.* Privy Council Judgts, Suthd. Edn., p. 60; and *G. Narasimah* v. *R. Ganappah,* III, *Mad. H. C. R.*, p. 270.)

So the solemn judgment of a competent Court may be set aside on proof that it was obtained by fraud or collision. (Section 44, *Indian Evidence Act.)*

Then according to the Indian Penal Code a person is said to do a thing fraudulently, if he does that thing with intent to defraud, but not otherwise (Section 25); and certain fraudulent acts, such as, fraudulent removal or concealment of property to prevent its seizure as a forfeiture or in execution of a decree; fraudulent claim to property; fraudulently suffering a decree for a sum not due, &c., are declared to be offences. (Section 206, &c.)

It must be remembered that the law looks to the beginning of a transaction, and if that be corrupt, no subsequent act will make it honest. If a person obtains property by means of an offence or fraud, and then sells or pledges it to an innocent person, the sale or pledge will be invalid, notwithstanding that the latter might have acted in good faith, and under circumstances which are not such as to raise a reasonable presumption that the former was acting improperly; because the original fraud infects all the subsequent transactions. *(Indian Contract Act,* Sections 108 and 178.)

Then we ought not to lose sight of the Maxim that "he is not deceived who knows himself to be deceived." In *Reg.* v. *Mills,* the prisoner knowingly overstated the amount of work he had done, with a view to get more than his proper amount of wages. The prosecutor paid him the money, *knowing* his statement to be false. On appeal, Cockburn, C. J., said; "This conviction cannot be supported. Here the prosecutor knew that the pretence was false. The question in this case is, what was the motive operating on the mind of the prosecutor to induce

him to make this payment? If it is a belief in the prisoner's false statement, the offence of obtaining money under false pretences is made out; but it is not so, if, as in this case, the motive be a mere desire to entrap the prisoner without such belief." (26, *L. J. M. C.*, 79.)

It is a truth confirmed by all experience that, in great majority of cases, fraud is not capable of being established by positive and express proofs. It is by its very nature secret in its movements; and if those whose business it is to investigate questions of fraud were to insist upon direct proof in every case, the ends of justice would be constantly, if not invariably, defeated. In the generality of cases, circumstantial evidence is the only resource in dealing with questions of fraud; and if the evidence is sufficient to overcome the natural presumption of honesty and fair dealing, and to satisfy a reasonable mind of the existence of fraud by raising a counter-presumption, there is no reason whatever why we should not act upon it. (*Beng. Law Rep., App., Civil*, III, 111.)

MAXIMS 279 and 280.

(279.) Quod necessitas cogit, defendit. *(H. H. P. C., 54.) — What necessity forces, it justifies.*

(280.) Necessitas inducit privilegium quoad jura privata. *(Bac. Max.)—With respect to private rights necessity privileges a person acting under its influence.*

As observed by Mr. Broom, necessity may be considered under the following heads: 1, necessity of self-preservation; 2, necessity of obedience; 3, necessity arising from the act of God; and 4, necessity arising from the act of a stranger.

The necessity of self-preservation and the necessity of obedience are respectively discussed under Maxims relating to self-defence and to persons acting under the orders of their superiors.

The necessity arising from the act of God justifies the acts of insanes, lunatics, infants, who, subject to certain qualifications, are excused from civil and criminal liability; and this protection extends also to acts caused by misfortune or accident, as explained under the Maxims relating to minors, insanes, and accidents.

And as to the necessity arising from the act of strangers:—"This necessity, as regards the mind of man and his acts under its influence, is where a man is compelled to do that which otherwise he would not consent to; where he is compelled to do what his intention rejects." *(Wharton.)*

When consent to an agreement is caused by, *inter alia*, coercion or undue influence, the agreement is voidable at the option of the party whose consent was so caused. (S. 19, *Indian Con. Act.*) Coercion is the committing or threatening to commit any act forbidden by the Indian Penal Code, or the unlawful detaining or threatening to detain any property to the prejudice of any person whatsoever, with the intention of causing any person to enter into an agreement. (S. 15, *Indian Con. Act.*) Undue influence is said to be employed, (1) When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining an advantage over the other, which but for such confidence or other he could not have obtained; and (2) When a person whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that, to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion. (S. 16, *Indian Con. Act.*)

In criminal cases the following rule is laid down:—Except murder and offences against the State punishable with death, nothing is an offence which is done by a person, who is compelled to do it, by threats, which at the time of

doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence; provided the person doing the act, did not of his own accord or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such restraint. Thus:—a person who of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exemption, on the ground of his having been compelled by his associates to do anything that is an offence by law. But a person seized by a gang of dacoits and forced by threat of instant death to do a thing which is an offence by law, for example, a smith compelled to take his tools and to force open the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of the section. (S. 94, *Indian Penal Code.*)

MAXIMS 281 to 283.

(281.) Incerta pro nullis habentur. *(Dav., 33.)—Things uncertain are reckoned as nothing.*

(282.) Certum est quod certum reddi potest. *(9, Co., 47.)—That is certain which can be rendered certain.*

(283.) Ambiguitas verborum latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur. *(Bac Max.)—Latent ambiguity of words may be supplied by proof; for any ambiguity arising in respect of a fact is removed by proof of the fact.*

Contracts are void for uncertainty; for they cannot possibly be enforced, as where A agrees to sell a hundred tons of oil, without specifying the kind of oil. But if the uncertainty can be made certain, then the objection does

not prevail. Thus where, in a deed of contract for the sale of land, no particulars whatever are mentioned to show its extent, locality, &c.; but it is set forth therein that the land in question is that which had been previously mortgaged: in such a case, although the contract would be uncertain on the face of it, yet it is possible to make it certain by referring to the old mortgage deed, and the said bond would, therefore, be referred to. The Indian Contract Act provides that agreements, the meaning of which is not certain, or capable of being made certain, are void. (*Indian Contract Act.*)

But in cases where uncertainty in a written instrument is attempted to be made certain by oral testimony, the following rules are to be borne in mind:—(1) When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects. Thus, A agrees in writing to sell a horse to B for Rs. 1,000, or Rs. 1,500, evidence cannot be given to show which price was to be given. A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled. And when the language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts. Thus A sells B by deed a piece of land situated in Rampoor measuring 100 acres. Evidence cannot be given of the fact that the land meant to be sold was one situated in Jubbulpore measuring 50 acres only. (*The Indian Evidence Act.*)

It will be thus seen that no extraneous evidence is admissible with reference to what is plainly expressed in a document, or with reference to which the document is decidedly defective, for in either case new matter will have to be introduced, which is not in the document; and if this be allowed there is no use of a document at all.

So the rule is that the oral evidence to be adduced in relation to documents, must be such as simply to help the Court to understand that which is in the document itself; for it is the duty of the Court to collect the intention of the parties from the documents itself. So "when the language used in a document is plain in itself, but unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense. (S. 95, *Ind. Evid. Act.*) Thus A makes a gift of his horse to B; A has two horses. Evidence may be received to show which of the two was meant. (Vide also Secs. 96, 97, 98, 99, and 100 of the *Indian Evidence Act.*

A Will or bequest not expressive of any definite intention is void for uncertainty; so if a testator says, "I bequeath to A the goods mentioned in the schedule; and no schedule is found; or if he says, I bequeath money, wheat, or the like, without saying how much, the bequest is void. Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context; as where a testator gives a legacy of "five hundred" to A; and a legacy of five hundred rupees to B, A shall take a legacy of five hundred rupees. So where words of a Will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended; as where a man having two cousins of the name of Mary, bequeaths a sum of money to "my cousin Mary." But where there is an ambiguity or deficiency on the face of the Will, no extrinsic evidence as to the intentions of the testator shall be received; as where a person bequeaths some property to ————, leaving blank for the name of the legatee. (*The Indian Succession Act.*)

MAXIM 284.

Lex non cogit ad impossibilia. (*Hob.*, 96.)—*The law does not enforce impossibilities.*

An agreement to do an act impossible in itself is void. And a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promiser could not prevent, unlawful, becomes void, when the act becomes impossible or unlawful. Where one person has promised to do something, which he knew or with reasonable diligence might have known, and which the promisee did not know, to be impossible or unlawful, such promiser must make compensation to such promisee for any loss which such promisee sustains through non-performance of the promise. So, contingent agreements to do, or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known, or not, to the parties to the agreement at the time when it is made. Thus where A agrees to pay B 1,000 Rs. if two straight lines should enclose a space, the agreement is void. So where A agrees to pay B 1,000 Rs. if B will marry A's daughter C, C being dead at the time of the agreement, the agreement is void. (*The Indian Contract Act.*)

So, the law does not insist upon the appearance of a witness whose attendance cannot possibly be procured. It is laid down in the Indian Evidence Act, 1872, that the statements, written or oral, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose evidence cannot be procured without an unreasonable amount of delay or expense, are received in evidence in certain cases. (Vide Maxims under the head of Evidence.)

When the evidence of a witness is required who is resident at some place distant more than a hundred miles from

the place where the Court is held, or who is unable from sickness or infirmity to attend before the Court to be personally examined, or is a person exempted by reason of rank or sex from personal appearance in Court, the Court may, of its own motion, or on the application of any of the parties to the suit, or on the representation of the witness, order a commission to issue for the examination of such witness on interrogatories or otherwise. (*Civil Pro. Code*, Sec. 175.) Somewhat similar provisions have been made in Sec. 330 of the Code of Criminal Procedure.

In weighing testimony of any kind the impossibility or improbability of the matter related must never be lost sight of. Where a supposed fact is repugnant to the laws of nature, assumed for this purpose to be fixed and immutable, no amount of evidence should induce us to believe it. (*Best on Evidence*, Sec. 24.)

So we should guard against receiving confessions of impossible things or offences. Instances are to be found in the judicial histories of most countries, where persons have acknowledged crimes now generally recognised as impossible, as in the case of prosecutions for witchcraft, visible communion with evil spirits, &c. (*Best's Evidence*, Sec. 572.) Vide Maxim relating to Confessions for further particulars.

MAXIM 285.

Actus Dei nemini facit injuriam. *(5, Co., 87.)—The act of God does no one injury (no actionable wrong arises out of an act of God.)*

The act of God signifies in legal phraseology any inevitable accident occurring without the intervention of man, and may indeed be considered to mean something in opposition to the act of man; as storms, tempests, lightning, &c. It

would be unreasonable that those things which are inevitable by the act of God, which no industry can avoid, nor policy can prevent, should be construed to the prejudice of any person in whom there has been no laches. (*Broom's Maxims*; Secs. 151 and1 52 of the *Indian Contract Act*; and *Common Carriers' Act* III of 1865.) But if there be any special agreement to the contrary, the party would be liable at all events, for custom and agreement overrule the law, in some respects. (Vide *Maxims on Contract.*)

Under the Indian Penal Code, nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act, in a lawful manner by lawful means, and with proper care and caution. (Sec. 80.)

MAXIMS 286 and 287.

(286.) Qui peccat ebrius, luat sobrius. (*Cary's Rep.*, 133.)—*Let him who sins when drunk be punished when sober.*

(287.) Omne crimen ebrietas et incendit et detegit. (*Co. Litt.*, 247.)—*Drunkenness incites and brings to light all crimes.*

The immunity which the law allows to persons mentally affected, is not extended to one who commits an offence whilst in a state of drunkenness. The law on this subject is thus laid in the Indian Penal Code. "Nothing is an offence which is done by a person who at the time of doing it is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law, provided that the thing which intoxicated him was administered to him without his knowledge or against his will. (Sec. 85.) In cases where an act done is not offence unless done with a particular knowledge or intent, a person

who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will. (Sec. 86.)

The law, as to the civil liability of a drunken man is, according to the Indian Contract Act, that a man who is so drunk that he cannot understand the terms of a contract, or form a rational judgment of it as to its effects on his interests, *cannot* contract whilst such drunkenness last. (Sec. 12.)

In cases of tort, the rule laid down as regards criminal cases may, it is submitted be made applicable *mutatis mutandis*.

MAXIM 288.

Quam longum debet esse rationabile tempus, non definitur in lege; sed pendet ex discretione justiciariorum. (*Co. Litt.*, 56.)—*How long reasonable time ought to be is not defined by law, but depends upon the discretion of the Judge.*

When there is no time specified for the performance of a contract, it must be performed within a reasonable time. What is a reasonable time is in each particular case a question of fact. (Sec. 46, *Ind. Evd. Act.*)

When the word year or month is used in the Indian Penal Code, it is to be understood that the year or month is to be reckoned according to the English Calendar. (Sec. 49, *I. P. C.*)

All instruments shall, for the purpose of the Limitation Act, be deemed to be made with reference to the Gregorian Calendar. (*Ind. Lim. Act* IX of 1871.) In computing the period of limitation prescribed for any suit, the day on which the right to sue accrued shall be excluded. (*Ibid.*, Sec. 13.)

When time *from*, or *after*, or within a certain time of a particular period, is allowed *to do any act*, the first day is reckoned exclusively. When time is to be computed *from* or *after* or within a certain time of an *act done*, the day on which the act was done is in general to be reckoned exclusively. When an act is required to be done in so many days *at least* before a given event, the time must be reckoned excluding *both* the day of the act and the day of the event. When a statute enacts that not *less than* so many days shall intervene between the teste and the return of a writ, both the day of the teste and the day of the return are to be reckoned exclusively. As a general rule when a party has *until* a particular day to do an act, such day is to be included. So, if a party is not to do an act until after the expiration of a certain time from an act done, both the day on which the act was done and the day on which the act is to be done are reckoned exclusively. Where an act is ordered to be done *forthwith*, it means that an act is to be done within a reasonable time. But the word "immediately" must receive a stricter construction than forthwith. (Max. *Mag. Guide*, p. 181.)

What may be "sufficient" time in a particular case can only be determined by considering the peculiar circumstances of the case. (III, *Mad. H. C. R.*, 167.)

MAXIMS 289 to 291.

(289.) Mora reprobatur in lege. (*Manual.*)—*Delay is reprobated in law.*

(290.) Veritas nimium altercando amittitur. (*Hob.*, 334.)—*By too much altercation truth is lost.*

(291.) Festinatio justitiae est noverca infortunii. (*Hob.* 97.)—*Hasty justice is the step-mother of misfortune.*

Delays in law, that is of course, unnecessary delays, ought

to be avoided. The evil of deferring a decision was amply illustrated in the Court of Chancery during Lord Eldon's long incumbency of office. "The doubts of twenty years' duration were simply ruin to suitors; and the Judge may be certain that the habit of procrastination is one of very quiet growth. The longer the task of deliberation is deferred, the greater the distaste to enter upon the subject, and it cannot be too constantly borne in mind that it is only the time actually consumed in the operation of deliberation, whether that consists of hours, days, or weeks, which the Judge can justify to his own conscience. The rest of the period between the termination of the hearing and the delivery of judgment is mere waste." But "that which is done with thought, writes the historian Mill, is that which is done deliberately. That which is done without thought is that which is done precipitately. It is of no consequence how long a thing remains undone, provided thought all the while never applied to it." (*Norton's Topics of Juris.*, p. 92.)

The law detests delay so much, that it disregards even the primary rule of evidence in case of an absent witness. So, if the attendance of a witness cannot be procured without an amount of delay, which appears to the Court unreasonable, the Court need not wait for the witness; but the statements oral or written made by him out of Court may be received under certain circumstances. (Sec. 32, *Ind. Evid. Act.*) So, no suits can be entertained after a certain amount of delay, the periods of which, as applicable to suits of different kinds, are prescribed in the Limitation Act.

But with all this, it must be well remembered that nothing seems to be more condemnable than *hasty* justice.

MAXIMS 292 and 293.

(292.) De minimis non curat lex. (*Cro. Eliz.*, 353.)—*The law pays no regard to trifling matters.*

(293.) Fractionem diei non recipit lex. *(Leofft.*, 572.)—*The law does not notice the fractions of day.*

The law pays no regard to trifling matters, subtleties, or fractions of a day. No civil action will lie for any slight injury. A man cannot occupy a dwelling and consume fuel in it for domestic purposes, without its in some degree impairing the purity of the air; and he cannot erect a building or plant a tree near the house of another, without in some degree diminishing the quantity of light he enjoys, or without putting him to slight inconvenience of some kind or other. But such small interruptions give no right of action; for they are necessary incidents to common enjoyment by all. (*Broom's Maxims.*) But it must be observed that for an injury to *real property, incorporeal,* an action may be supported, although the injury consists merely in the act of walking over it, and no damage is done to the soil or anything. *(Collett on Torts,* S. 159.)

Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm. *(S. 95, I. P. Code.)* The original framers of the Indian Penal Code make the following observations on the subject:—"As our definitions are framed, it is theft to dip a pen in another man's ink, mischief to crumble one of his wafers, an assault to cover him with a cloud of dust by riding past him, and hurt to incommode him by pressing against him in getting into a carriage. There are innumerable acts, without performing which, men cannot live

together in society, acts which all men constantly do and suffer in turn, and which it is desirable they should do and suffer in turn, yet which differ only in degree from crimes. That these acts ought not to be treated as crimes is evident, and we think far better expressly to except them from the penal clauses of the Code than to leave it to the Judges to except them in practice." *(Mayne's Indian Penal Code*, p. 72.*)*

The Courts should discourage subtleties in pleadings and strained constructions of statutes or documents, and should disregard the broken periods of a day.

No appeals are allowed to be made against decrees in small causes, or against sentences in cases of persons tried for minor offences; nor is any judgment to be set aside for want of trifling formalities. (*Civil and Criminal Pro. Codes, and Indian Evid. Act*, S. 167.)

Courts, however, will take notice of the fraction of a day, if it be necessary for the purpose of justice between subject and subject. Thus, they will notice the hour when a party filed a bill, or delivered a declaration, or the Sheriff seized goods. But they will not notice fractions of a day as regards judicial proceedings, such as passing judgment or issuing execution, which are conclusively regarded as done on the first instant of the day. (*Edwards* v. *Reg.*; *Thomas* v. *Desanges*; *Shelly's case, &c.*, cited in Max. *Mag. Guide*, p. 182.)

In computing the age of a person, the day of his birth is included. Thus if he were born on the 16th of January 1848 he would attain his majority (18th year) on the 15th January 1866; and as the law does not recognize fractions of a day, the age would be attained at the first instant of the latter day. (*Stokes' Succession Act.*)

MAXIMS 294 to 296.

(294.) Resjudicata pro veritate accipitur. (*Co. Litt.*, 103.)—*A thing adjudicated is accepted as truth.*

(295.) Judiciis posterioribus fides est adhibenda. (*Manual.*)—*Credit is to be given to the latest decisions.*

(296.) Res inter alios judicata nullum inter alios prejudicium facet. (*Manual.*)—*Matters decided between third parties do not affect any but themselves.*

In order to have any effect the judgment should have been passed by a Court of competent jurisdiction. It should be expressed in the clearest and most precise language. It must show that the investigation has been complete as to jurisdiction, merits of the suit, &c. Reasons for finding upon each point in issue must be fully recorded. And in a word the judgment must be complete in itself. The decision must be founded on intelligible principles, and is not to be a mere conjecture, or a compromise to escape from difficulty; and it should not contain any merely speculative, or extra-judicial opinion.

The judgment should be according to the pleadings and evidence. And no decision should be passed on a plea which is not raised in the case. But the Court ought to decide according to its own knowledge of the law, though the points of the law may not be urged by the parties.

The judgment should be confined to the rights of the parties to the suit; and define what it awards, and to what extent each party is liable; not adjudicate on the rights of strangers.

No judgment shall award things not sought for; nor reject a claim in entirety because a part is bad. A claim made on one title must not be affirmed on a wholly different title. Decisions ought not to direct anything impossible, nor anything requiring a re-trial of the same question.

The Indian Evidence Act has set at rest the vexed question as to the effect of *res judicata* in British India. The Evidence Act holds that a judgment is *conclusive* only when it is passed by a competent Court in the exercise of probate, matrimonial, admiralty, or insolvency jurisdiction in certain matters. It holds a judgment to be relevant, (*i. e.*, simply admissible in evidence like any other piece of evidence) in three other cases :—1st, as against the same parties, when the judgment bars a second trial; 2ndly, as against third parties, when the judgment relates to matters of a public nature; and 3rdly, as against any person, when the mere existence of a judgment is a point for enquiry. The following are the sections of the Evidence Act on the subject.

Sec. 40.—The existence of any judgment, order, or decree, which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial.

Sec. 41.—A final judgment, order, or decree of a competent Court, in the exercise of a probate, matrimonial, admiralty, or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant. Such judgment, order, or decree is conclusive proof, that any legal character which it confers accrued at the time when such judgment, order, or decree came into operation; that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order, or decree declares it to have accrued to that person; that any legal character which it takes away from any such person ceased

at the time from which such judgment, order, or decree declared that it has ceased or should cease; and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order, or decree declares that it had been or should be his property.

Sec. 42.—Judgments, orders, or decrees, other than those mentioned in Section 41, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders, or decrees are not conclusive proof of that which they state.

Sec. 43.—Judgments, orders or decrees, other than those mentioned in Sections 41 and 42, are irrelevant, unless the existence of such judgment, order, or decree, is a fact in issue, or is relevant under some other proviso of this Act.

But it must be remembered that fraud vitiates everything. And under Sec. 44 of the Indian Evidence Act, a judgment may be set aside on proof of fraud.

MAXIMS 297 and 298.

(297.) Executio juris non habet injuriam. (2, *Inst.*, 482.)—*The execution of the process of the law does no injury.*

(298.) Quo praegnantis mulieris damnatae poena differatur, quod ad pariat. (*Manual.*)—*The punishment of a condemned woman when pregnant must be deferred until she be delivered.*

These Maxims require that the processes of execution should be executed fairly and justly; and not be made the means of oppression and injustice, either to the defendant, as by placing him in unnecessary restraint, &c., &c., or to the plaintiff, as by allowing defendants the opportunity of

decamping or otherwise evading the execution of the judgment.

So, no sentence of whipping can be carried into execution unless the offender is in a fit state of health to undergo the punishment, nor can such sentence be executed by instalments. (*Criml. Pro. Code.*, Sec. 312.) In the case of a juvenile offender the punishment shall be inflicted, in the way of school discipline, with a light rattan. No female shall be punished with whipping at all. And if a woman sentenced to death be found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may commute the sentence. (*Crim. Pro. Code and Whipping Act.*)

MAXIMS 299 and 300.

(299.) **Parum est latum esse sententiam nisi mandetur executioni.** (*Co. Litt.*, 289.)—*It is not enough that sentence be given unless it be carried out into execution.*

(300.) **Executio est finis et fructus legis.** (*Co. Litt.*, 289.) —*Execution is the end and fruit of the law.*

These Maxims declare the necessity of enforcing judgments without any unavoidable delay. The Civil and Criminal Procedure Codes contain several provisions for effecting this purpose.

In civil matters no suit can fairly be considered as having been disposed of, until the decree therein passed has been wholly executed. If a plaint is a complaint of injury, with the addition of a prayer for redress, a judgment for plaintiff is nothing more than a declaration of the justness of that complaint, and an order that the plaintiff is entitled to the redress sought for; so that mere judgment does not generally satisfy the plaintiff; and nothing short of execution of that judgment can afford substantial redress.

In *Rajah Mohesh Narrainsing* v. *Kishramnad Misser*,

the Lords of the Privy Council declared it to be contrary to general principles, and a senseless addition to all the vexatious delay in the course of the procedure, to hold, when for any reason, satisfactory or not, the execution of a final decree in a suit fails, or is set aside, that the proceedings as regards that execution are to be taken off the file, that the whole suit is discontinued thereby, and that the further proceedings for the same purpose are to be considered as taken in a new suit. (*Suth. P. C. Judgts.*, p. 488.) In *Gour Mohan Bandopadhya* v. *Tarakana Bandopadhya*, the Calcutta High Court strongly condemned the practice of striking off execution cases from the file in order to clear it, and enable judicial officers to make their quarterly returns; such course being productive of the greatest hardships and injustice to suitors. (*Beng. L. R.*, III, *App.*, p. 17.)

In criminal cases, the sentence is carried into effect forthwith as a matter of course. But in civil cases, where it is always optional with a successful party to get the decree executed or not, the application for execution must be preferred, if the decree be that of a Court not constituted by Royal Charter, within three years from the date of the final decree or from the date of the last application, &c., &c. The period is however extended to six years in cases where a certified copy of the decree has been registered under the Indian Registration Act. Where the decree is one passed by the High Court in its ordinary civil jurisdiction, the period within which application for execution may be made is twelve years. (*The Indian Limitation Act*, 2nd Schedule, 3rd Dn.) And in criminal cases the fine inflicted should be levied within six years after the passing of the sentence, &c., &c. *I. P. C.*, Section 70.) It must be borne in mind that the imprisonment which is imposed on the prisoner in default of payment of fine, is intended as a punishment for non-payment, but not as a satisfaction and discharge of the amount due.

Execution cannot be obtained on a merely declaratory decree. (I, *Mad. H. C. R.*, 184.)

The Court will not be deterred from making a decree by the difficulties to be expected in carrying it out. (I, *Mad. H. C. R.*, 415.)

Above all, it must be remembered that whatever may be the nature of the proceedings held before a judicial tribunal, the object aimed at is the attainment of some particular end, such as the establishment of any rights, interests, or privileges; the restitution of any property, moveable or immoveable; the punishment of offenders; and generally the administration of substantial justice as between man and man; and hence, it is considered not inappropriate to conclude our collection of Legal Maxims with the most wholesome Maxim—

"EXECUTION IS THE END AND FRUIT OF THE LAW."

INDEX.

A

Page.

ABATEMENT, of Civil Actions 228
Rule under Act XII of 1855 289
Of Criminal Prosecutions 293
ABETTORS of offences 303
ACCESSION, is one of the modes of acquiring property 126
Whatever lies upon, above, or below a person's land, belongs to that person 126
As also whatever is affixed to or planted on his land ... 126
Products or rent land, &c. 127
Offspring of animals 127
Alluvial lands, gained from sea or river 127
Exception where there is a special agreement to the contrary 127
And where the owner of the property is guilty of fraud ... 127
Rule under Act XI of 1855 129
ACCIDENTS, inevitable, what are, ... 473
Justify offences 474
And civil liability 474
Unless there is a special agreement to the contrary ... 474
ACCOMPLICE, is a competent witness 355
ACCUSED PERSON, is not a competent witness in his own case ... 357
ACQUIESCENCE, the equitable doctrine of, does not apply to suits governed by Statute of Limitations 333
Gives rise to admissions 381
Such presumptions of admissions to be drawn with caution 381
ACQUISITION of property—
By Occupation 114
„ Accession 126
„ Possession 131
„ Prescription 136
„ Succession 139
„ Reversion 156
„ Testament 157
„ Renunciation 164
„ Alienation 167
„ Treasure trove 175
„ Escheat 178
(Vide those respective heads for particulars.)

Page.

ACTS OF GOD (See Accidents) 473

ACTS OF LEGISLATURE OF THE GOVERNMENT OF INDIA.

1839 XXXII (Loans) 213
1840 VI (Bills of Exchange) 212
1843 V (Slavery) 143
1846 I (Pleaders) 85
1847 XX (Copyright) 122
1850 IX (Small Cause Courts) 12
XVIII (Judicial Officers) 67
XIX (Apprentices) 109
XXI (Converts) 143, 148
1853 VI (Hire) 213
1854 XVIII (Railways) 93, 459
1855 XI (Mesne profits) 129
XII (Wrongs Civil) 459
XIII (Wrongs Criminal) 197, 459
XXVIII (Loans) 213
1856 XV (Marriage) 98
1857 XI (Offences) 51
XXV (Army) 51
1858 I (Irrigation) 73
1859 VIII (Civil Procedure Code) 89, 91, 125, 272, 282, 289, 325, 328, 333, 334, 335, 336, 359, 379, 453, 468, 469
X (Rent)... ... ... 213, 236
XIV (Possession) 135, 187, 325, 326
XV (Invention) 123, 207
XVIII (Stamp Act) 22
1860 XLV (The Indian Penal Code) 9, 24, 25, 65, 66, 67, 69, 102, 109, 166, 177, 201, 202, 257, 289 to 324, 353, 364, 446, 449, 456, 469, 474, 478
1861 XXIII (Civil Procedure Amendment) ... 282, 326, 454
1862 XVIII (Criminal Law Amendment) 376
1863 XIV (Rent) 213
XXIII (Waste Land) 117
1864 VI (Whipping) 109, 483
XXI (Police) 201
1865 X (The Indian Succession Act) 103, 142, 148, 149, 157, 160, 161, 166, 175, 178, 433, 436, 439, 444, 471, 479
XIII (High Court) 77
XV (Marriage) 98
XX (Pleaders) 85
XXI (Parsee Succession) 142
1866 V (Bills of Exchange) 212

Page.

ACTS OF LEGISLATURE OF THE GOVERNMENT OF INDIA.—*continued.*

1866 XII (Irrigation) 93
XXI (Marriage) 98
1868 III (Carriers) 459
XIX (Hire) 213
XXVIII (Rent) 213
1869 XVIII (General Stamps) 22, 163
1870 X (Land acquisition) 93
XXVII (Penal Code Amendment) 290
1871 I (Cattle trespass) 459
VI (Civil Courts) 10, 12, 14, 27
VIII (Registration) 125, 126
IX (Limitation) 23, 58, 130, 177, 187, 332
XXIII (Revenue Pension) 31, 56
1872 I (The Indian Evidence Act) 86, 135, 151, 230, 235, 236, 354 to 425, 471, 472, 475, 479
III (Marriage) 98
IV (Civil Courts) 12, 14, 27, 38
VII (Criminal Courts) 10, 12, 14, 27
IX (The Indian Contract Act) 21,166,176,206,212,214,215 216,218,219,223,225,226,227,228,229,230,231,232,235,244,245, 247,250,251,254,257,332,446,450,456,464,465,470,472,474,475,
X (The Code of Criminal Procedure) 46, 65, 70, 79, 88, 136, 324, 328, 329, 335, 359, 379, 473, 479, 483
XI Extradition 25
XV (Marriage) 96, 98
1873 III (Civil Courts) 10, 12, 24, 38
(Oaths Act) 352, 353

ACTS OF THE LEGISLATURE OF THE GOVERNMENT OF MADRAS.

1862 IV (Revenue Pensions) 31
1864 II (Land Revenue) 51, 90
1865 III (Criminal Courts) 436
VIII (Rent) 213
X (Municipality) 122
1867 VIII (Police) 59
IX (Municipality) 122

ACTS OF THE LEGISLATIVE COUNCIL OF BENGAL.

1862 VI (Hire) 213
1863 VI (Municipal) 59
1865 VIII (Hire) 213
IX (Municipal) 59
1866 IV (Police) 59
1867 IV (Hire) 213

Page.

ACTS OF THE LEGISLATIVE COUNCIL OF BOMBAY.
1865 II (Conservancy) 59
ACTIONS, (Vide wrongs civil.)
ADMISSIONS, (Vide Acquiescence and Evidence.)
ADOPTION, of a son by a Hindu... 151
A religious necessity 151
Requisites of 152
Under the Roman law 152
Under the Mahomedan law 152
ADVOCATES, a party may appear by 80
Privileges and responsibilities of, in general 81
Extra privileges of Barristers, whose employment is honorary 83
Duties of an Attorney 84
———of a Vakeel (Pleader) 84
Liable to be reported to the High Court for certain conduct 86
Are bound to prevent litigation 271
Communications to, are privileged 85
Except those made in furtherance of an illegal purpose, &c., &c. 356
The above rules apply to interpreters, clerks or servants of advocates 356
Comments made by advocates privileged ... 86, 280
ADULTERY, an offence in India 97
Marriage with an adulterous woman 98
AFFIRMATION, (See oath.)
AGE, (See minority.)
As Civil and Criminal liability 110, 213, 311
How computed 479
AGENT AND PRINCIPAL.
How is an agent appointed 253
A minor or insane cannot employ an agent 253
No consideration necessary to create agency 253
An agent cannot delegate his duty to another—Proviso 253, 254
How is agency terminated 254
Duty of an agent 254, 260
Responsibility of principal and agent to each other ... 254
Agent is not responsible to third parties 254
Unless he is acting for a principal resident abroad ... 254
Or unless he does not disclose the principal's name ... 254
In civil cases, principal is liable for his agent's acts 190 & 255
Otherwise in criminal cases 256
Special exceptions as to offences in Section 154 and 156 Indian Penal Code 257
Government agents liability of 54, 55

Page.

AIR, property in 120
Necessary in a house 180–82
ALIENATION, power of 167
By a Hindoo having issue 169
„ „ no issue 169
„ coparcener 169
„ wife 171
„ widow 171
By Zemindars 173
Others 174
Under the Mahomedan law 174
Under the Indian Succession Act 175
Perpetuity 176
ALLEGIANCE, due to the Sovereign ... ... 46 & 297
ALLEGATIONS, contrary, (See evidence, estoppels.)
ALLUVIAN—
What is an———, ... 126 & 129
Rule as to land added by a river 129
———as to an island formed in the sea 130
AMERICANS, Succession 142
Testament 159
AMBIGUITY, (See certainty.)
ANIMALS, property in ... ... 118—191
APPEAL to Her Majesty in Civil Cases 47
„ in Criminal Cases 47
APPRECIATION of evidence, (see evidence.)
APPRENTICE is liable to moderate chastisement at the hands of his master 109
APPROPRIATION of payments 227
ARMY, offences against... 298
ARREST, (see Execution, Sunday.)
ASSESSORS, (see Jury.)
ASSIGNMENT, an assignor grants all that is necessary for the enjoyment of the thing granted 259
An assignee enjoys the benefit and bears the burden ... 261
ATTACHMENT, (see Execution, Sunday.)
ATTEMPTS defined 305
No one deserves punishment for a thought 305
ATTORNEY, (see Advocates.)
AUTREFOIS ACQUIT, effect of 324
AUTREFOIS CONVICT, effect of 324

Page.

B

BAILMENT, different kinds of 248
BAILORS bound to disclose faults to bailees 249
Degree of care to be taken by bailor 249
BANKRUPT, contract by 215
BARRISTER. (see Advocate.)
BASTARD, (see Succession.)
BEST EVIDENCE, (See Evidence.)
BEQUEST, (see Testament.)
BIGAMY an offence 99--300
Except in the case of Hindoo and Mahomedan males ... 101
BILL OF EXCHANGE 212
BIRTHRIGHTS (or natural rights) of man 212
Natural liberty defined... 87
The right of personal security 11
——— of personal liberty 11
——— of private property 11
The State is bound to protect people in the exercise of natural rights 87
Except when they militate against public good 87
BONA FIDES, definition of ... ... 66—309
Protection given to Judges and Magistrates acting bonâ fide ... ... 65—279
And to persons doing any act bonâ fide, under certain circumstances ... ... 310—278
BUDDHIST Succession 143
Testament 159
BUILDING on another's land, consequences of 179
BURDEN OF PROOF, (see Evidence.)
BUYER AND SELLER, (see Sale.)

C

CAPACITY TO CONTRACT, (see Contract.)
CARRIER, (see Bailment—Accident.)
CASTE, (see Hindu Law.)
CAUSE OF ACTION, defined 275
Remote, not noticed 278
CERTAINTY, want of, avoids a contract 469
That is certain which can be made certain 469
Latent ambiguity may be supplied by oral proof... ... 471
CHAMPERTY, and maintenance, defined 219
Suit regarding—not maintainable, (see Contract.) 219
CHRISTIANS, marriage, &c. ... ... 96—98

Page.

CHILD AND PARENTS, (see Parent.)
CIRCUMSTANTIAL EVIDENCE, (see Evidence, Presumptions.)
CLUB, suits by an excommunicated member of, ... 282
CODICIL, (see Testament.)
COERCION, (see Contract.)
COIN, offences regarding 298
COLLATERAL FACT, (see Evidence.)
COLLECTOR, acting judicially, protection to (vide Judges.) ... 65
acting as agents of the State, liability of... ... ...54, 55
COMMERCE, (vide Trade.)
COMMON right of 121
COMMON SENSE, fallacy of the argument of— 1, 2
COMPULSION, (see Contract.)
CONCUBINAGE, is not marriage 95
marriage of women living in, ... 98
CONDITION, precedent 226
CONFESSION, (see Evidence.)
CONJUGAL RIGHTS, (see Marriage.)
CONSENT, takes away error 452
i. e., free consent, and not that made by mistake or compulsion 452
free consent defined 456
effect of, in criminal cases 456
CONSEQUENCE of a consequence does not exist, ... 278
CONSIDERATION, (see Contracts.)
CONSTABLES not liable for acts done under a warrant, &c. ... 279
CONSTRUCTION of laws and contracts, is one of the duties of the Judge and not the Jury 78
But Judge's duty is only to interpret and not make Laws ... 426
Should be liberal and subservient to the intention... ... 425
Effect of examples—illustrations 428
Titles of statutes 429
Headings 429
Marginal notes 429
Preamble 429
Construction from that which goes before and after ... 431
Laws should accord with laws 431
Antecendent has relation to the following 432
Two contradictory clauses 432
Coupling of words 433
Disjunctives 433
Bad grammar... 434
False description 434

Page.
General and special clauses 436
Later laws 437
General words 438
Expression and omission 440
Words referred to, ... 441
Words taken most strongly against persons using them ... 441
Contemporaneous exposition 443
Best interpretation 443
CONTEMPTS OF COURTS, ... 75, 298
CONTRACTS—principles and definition of, ... 208
Hindu and Mahomedan laws 210
Intention 210
Capacity of persons to contract,
Minors 213, 214
Insanes 213–215
Females 215
Outlaws 216
Bankrupts—insolvents 216
Consideration,
Want of 216
Illicit, or illegal, or fraudulent, ... 216
Maintenance and champerty 219
Uncertainty, (see Certainty.) 225
Coercion and threat 226
Condition precedent 229
Ratification 228
Revocation 230
Appropriation of payments, ... 227
Bills of exchange 212
Hire of lands 213
Loans and interest 213
☞ Vide also *Agency, Assignment, Bailment, Guarantee, Partnership, Sale, Warranty, Pledges, Mortgages, Hypothecation.*
Agreement overcomes law 262
Proviso 262
Watch word to contracting parties 263
CONTRACT, FOREIGN, (vide *Lex fori—Lex loci.*) 18
CONTRIBUTORY NEGLIGENCE, (vide Negligence.)
COPARCENERS, (see Alienation—Hindu Law.)
COPYRIGHT, what is, ... 122
How acquired— 122
CORONATION OATH, (see Sovereign.)
COUNSEL, (see Advocates.)

Page.

COURT, (see Judges.)
COURTESY, want of, not actionable, ... 283
CRIMES, (see Offences.)
CRIMINAL INTENTION, (see Offences.)
CROSS-EXAMINATION, (see Evidence.)
CROWN, (see Sovereign.)
CUSTOM, the force of 34
Requisites of 34
How proved 34
How is mercantile custom proved 38
CYPRES, doctrine of 427

DAMAGES, without injury 287
Injury without damages 278
Remote 278
DANGEROUS, places, instruments, machinery, animals, } vide enjoyment of property.
DEATH opens out succession 143
when presumed ... ... 376—411
of several persons, in the same calamity, effect of ... 412
DECLARATORY SUIT, (vide Wrongs Civil.)
DECREE, (vide Judgement—Execution.)
DEFAMATION 301
DELAY, reprobated in law 476
Hasty justice, is equally condemnable ... ... 471—477
DELEGATES, (see Agents.)
DELIGHT, mere matters of, not actionable 180
DESCENT, (see Succession, Heirship.)
DIES NON, (see Sunday.)
DILIGENCE defined 458
DISCRETION, defined 70
DISTRESS, (see Process—Execution.)
DIVORCE, rules of 97
DOCUMENTS, (vide Evidence.)
DRISTIBANDAKA MORTGAGE, effect of 257
DRUNKENNESS, effect of 474
In Civil cases 475
In Criminal cases 474
DURESS, (vide Contract.)
DYING DECLARATIONS, (see Evidence.)

Page.

E

EASEMENT 138
EAST INDIANS, succession 142
Testament 159
EJECTMENT, right of a party in possession 135
ELECTION (see Selection.)
ENJOYMENT of property,
One can enjoy his property in any way he likes &c. ... 179
But not so as to injure others 179
But trifling inconveniences to others are not regarded..179, 194, 195
Of habitation (see House, Air and Light.)
Of water course 183
Of way, &c. 182
Nuisances 188
Negligent use of one's property,... 189
Omission to fence a well 189
to guard dangerous places 189
instruments 190
machinery 190
animals 191
Prospect, enjoyment of 194
Windows 194
Privacy, disturbance of 196
Accidents in enjoying property 202
Criminal liability in enjoyment of property 200
EQUITY, what is, ... 31
Principal rules of 31
ESCHEAT, under different laws 178
ESTOPPELS (vide Evidence.)
EUROPEANS, domicilled in India, succession 142
Testament 158
EVIDENCE, Truth 339
Force of evidence rests on the presumption that man speaks truth 349
Guarantees of truth, ... 351
Popular (or moral) guarantee 351
Obligatory guarantee... 352
Penal guarantee 354
Oath (or affirmation) necessity and use of 352
Cross-examination, necessity and use of... 351
Faculty of proof not to be narrowed 354
Competent witnesses 354

Page.
Minors 354
Insanes 354
Dumb persons... 355
Parties in Civil cases 355
Husband or wife of parties in Civil and Criminal cases ... 355
An accomplice... 355
The Sovereign cannot be called as a witness 355
Judges and Magistrates, under certain circumstances ... 355
Police officers ditto ditto ... 356
Advocates ditto ditto ... 356
State papers 356
Communications made during marriage 356
Indecent or offensive matter 356
Prisoner is not a competent witness in his own case ... 357
Protection of witnesses from arrest when appearing to give evidence 358
Judicial notice—
Courts bound to take judicial notice of certain matters ... 359
Relevant matter, Fact in issue 361
Collateral facts 362
Character of witnesses, motive, &c., &c. 363
Best evidence, Primary evidence 366
Secondary evidence 366
Does not mean the strongest evidence... 366
Res-inter alios acta 367
Dying declarations 368
Statements made in the course of business 369
against interest 369
as to public right or custom... 369
as to relationship 370
public opinion 371
Depositions taken in a former proceeding 371
Entries in books regularly kept 372
Do. in official books 372
Foreign law 372
Burden of proof,
Lies on plaintiff generally 373
On the party affirming 374
i. e., affirmative in substance 374
On defendant making a special plea 375
When is a negative to be proved 375
In criminal cases 376

Page.

General rule... 376
As to death... 377
good faith 377
Other matters 377
Admission, defined 378
effect of 379
made by a party 380
agent 380
representatives 380
other persons 380
can only be proved *against* the party making them ... 280
exception 380
oral—as to contents of a document 380
made conditionally in Civil cases 380
arising from conduct or acquiescence 381
not conclusive 381
Confession, defined 378
effect of 379
made under the influence of threat, &c., &c. 380
False, instances of 383
Witchcraft 383
Caution in acting upon, ... 382
No one is bound to criminate himself 386
proviso, in the case of witnesses 386
Documents, force of documentary evidence 387
Public and private... 392
Primary evidence 388
When is secondary evidence adducible... 389
Notice to produce 390
Oral evidence with reference to 391
Construction of (vide Construction.)
Opinion evidence, when allowed 392
Experts 393
Estoppels,—defined 394
Principles of 395
are not conclusive proof 396
Presumptions,
Irrebuttable (conclusive proof) 397
That a child born during marriage is legitimate ... 398
As to cession of territory 398
As to judgments in probate, &c., jurisdiction ... 399
Rebuttable (shall presume) 397
As to genuineness of certified copies 399

Page.
As to record of evidence 399
As to Gazettes 400
As to documents admissible in England without proof of seal &c. 400
As to maps or plans made by order of Government ... 400
As to powers of attorney 401
As to due execution of documents not produced ... 401
Permissive, (may presume) 397
As to copies of foreign record 401
As to books and maps 401
As to photographs, machine copies and telegraphic messages 401
As to documents thirty years old 402
As to other presumptions generally drawn from evidence 402
Danger of hasty presumptions 405
All things are presumed to have been done legitimately, rightly, and solemnly.. 407
Ditto from lapse of time 408
Injury is not presumed 409
Dishonesty do. 409
Fraud do. 409
All things presumed against wrong-doers 409
No person shall take advantage of his own wrong ... 409
Law regards the order of nature 411
None is presumed to be forgetful of his eternal welfare 415
Children presumed to be legitimate 415
False in one particular false in all 416
Appreciation of evidence,
Principles of 418
Testimony is to be weighed and not numbered ... 418
In Criminal cases 423
Discrepancies in evidence 419
Circumstantial or presumptive evidence 420
Conflicting presumptions... 422
Mathematical or demonstrative certainty ... 424
Moral certainty 424
probability 424
possibility 425
False evidence, giving of an offence 353
Laws applicable to evidence 359
Excuses for the commission of offences (see Offences,)

Page

EXECUTION of processes in houses, how made, (vide Houses) ... 88
Breaking open locks, &c. 89
In Zenanas 90
Of decree or sentence, should be conducted without injury to any one 482
Unhealthy persons not to be whipped 483
Nor females 483
Juveniles to be lightly dealt with 483
Sentence of a pregnant woman who is condemned, should be postponed 483
Decree or sentence shall be executed without delay ... 483
Limitation in Civil cases 483
Delay condemned 483
Execution on a Sunday... 337
Execution is the end and fruit of law 485
EXHIBITS (see Evidence, Documents.)
EXPECTANT HEIR, contract with 266
EXPERTS (see Evidence.)

F

FACT, ... 451
Ignorance of, ... 449
FACULTY OF PROOF, (see Evidence.)
FALSE EVIDENCE, giving of, an offence 299
FELONY, (see Offences.)
FIDUCIARY RELATION, contracts by persons in, ... 263
FIXTURES, what are, ... 126
FOREIGN LAW, (vide Lex loci—lex fori.)
Opinion on a point of, ... 26
Evidence as to, ... 393
FORGERY 300
FOUND GOODS, property in 176, 177
FRACTIONS OF A DAY, not noticed 479
Exception 479
FRAUD, Defined 464
Different kinds of 463
Legal and moral 463
Vitiates everything 463
contracts 465
registered Documents 465
Judgments 466
How proved 467
Not purged by circuity... ... ... 463—466

Page.

G

GOOD FAITH, (see Bonâ fide.)
GOSHA FEMALES, contracts with, ... 264
GOVERNORS, offences against, ... 298
GOVERNMENT, policy adopted by, in the administration of justice in
British India 15
Suits against, ... 55
(See Sovereign.)
GOVERNMENT OFFICERS, liability of 55
GRATUITOUS undertaking, effect of 217
GRANT, (see Assignment.)
GUARANTEE, (see Contracts.)
GUARANTEES OF VERACITY, (see Evidence.)
GUARDIAN, (see Minor and Guardian.)

H

HABITATION, (see House.)
HASTY JUSTICE condemned 476
Unnecessary delay is equally blamed 476
HEARSAY, (see Evidence.)
HEIRSHIP, (see Succession.)
HIGH SEAS, offences committed upon, ... 26
HEIRS, ... 139
Legitimate and illegitimate 149
Adopted sons 151
Expectant 266
HINDU LAW, sources of... 12
Preserved to Hindus in cases of religion, caste, succession, &c.... .. .. 12—15
Religion is the basis of... ... ... 5—7
Allows the continuance of the law of the conquered country.. 7
Recognises customs 34
King, how made 40
Is perpetual 45
Kingdom indivisible 48
Rule where rights of the King and subjects conflict ... 50
Duty of a Judge 63
System of Jury 77
Marriage ... ... 96, 97, 100—143
Adultery 97
Divorce 97
Suttee ... ... 143—302
Husband and wife 102

	Page.
Condition of females	105
Minor and guardians	110
Property, origin of	115
Accession	127
Possession	134
Prescription	134
Succession	143
Escheat	146—178
Illegitimate issue	150
Adoption	151
Posthumous child	153
Right acquired by birth	154
Heir does not succeed to penalty	155
Reversion	157
Testament	159
Renunciation	164
Alienation by males and females	165
Commerce	208
Restraint of trade	204
Contracts	212
Minority	214
Married woman	216
Consideration	217
Coercion	217
Caveat emptor	245
Guarantee	258
Care necessary in contracts with Hindu females	264
Converts	143
Maxims definition of	1

HIRE OF LANDS, &c.

(Vide Accession.)

HOMICIDE	300
HOUSE, every man's house is his own castle	87
Exceptions,—where a house is recovered in judgment ...	89
when a process is issued at the suit of a King	89
In some other cases	91
One's house is no refuge for another	91
Four things desired in a house	180
viz:—1, Habitation of man, 2, Wholesome air, 3, Wholesome light, 4, Matters of delight.	180

Page.
Any injury to Nos. 1, 2 and 3 is actionable 181
But not the injury done in respect to No. 4, (Matters of delight) 181
(See Enjoyment of Property.)
HUSBAND AND WIFE, are considered one in law 102
Wife may have property of her own 102
Under the Indian Succession Act 103
Hindu law 103
Mahomedan law 103
Inherit each other's property 103
Control of husband over wife's person 104
Chastisement 105
Hindu wife, condition of, ... 105
Suits for the restitution of conjugal rights 107
Mutual fidelity essential between 107
Competent witnesses for or against each other 355
HYPOTHECATION 251

I

IGNORANCE of law does not excuse 444
i. e., voluntary ignorance 445
And of law which all are bound to know 445
And not mere procedure 445
The rule does not apply where ignorance is involuntary, (minors and insane) 446
Or where one does not seek to avoid consequences of his act 446
May be taken into consideration in mitigating a punishment 447
IGNORANCE of fact excuses 449
What is, ... 449
Criterion of 449
Effect of ignorance on both sides 450
ILLEGAL consideration, (see Contract.)
ILLEGITIMATE issue, (see Heirs, Succession.)
ILLUSTRATIONS, use of 428
IMPOSSIBILITY, effect of... 472
INEVITABLE accident, (see Accident.)
INFANT, (see Minor, Offences and Contracts.)
INHERITANCE, (see Succession.)
INJURY, one does not excuse another 179
No action for a slight injury 179, 194
No Criminal prosecution for do. 478
INSANITY, (see Contracts, Offences and Evidence.)
INSOLVENTS, (see Contracts.)

Page.

INSTRUMENTS, dangerous 189
Written, (vide Evidence.)
INTESTATE, (see Succession.)
INTENTION, essential to a contract 210
Criminal, necessary to constitute an offence generally ... 306
What is criminal intention and a malicious intention ... 307
INTEREST 213
INTERPRETATION, (see Construction.)

J

JEWS, Testament 159
JUDGE, must administer the law 14
Should interpret and not make the laws ... ... 17—426
Qualifications, purity and duty of 62
Cannot award more than asked 63
Should decide according to pleadings and evidence ... 64
And not on his personal knowledge of facts 72
Cannot punish injury done to himself 74
Except in the case of contempts of Court 75
Not liable for the consequences of his decisions 17
Protected from civil and criminal processes 65
Bonâ fides of 65
Discretion of 70
Judge's functions as distinguished from the Juror's ... 77
Bound to prevent litigation 270
Privilege of, in making comments 282
of, as a witness 355
Procrastination as well as precipitancy, condemned 62—476
JUDGE'S subordinates and others obeying him 580
Protection given to, ... 75
JUDICIAL ACT, what is, as distinguished from ministerial act ... 329
JUDGMENT, must be founded on intelligent principles 480
Complete in itself 480
Confined to the rights of parties 480
And to what is asked for 480
☞ Vide *Judge*.
Is conclusive in probate, matrimonial, admiralty and insolvency jurisdictions 481
Is relevent, as between the parties to bar 2nd trial ... 481
As against strangers in matters of a public nature ... 481
And as against any person to prove the mere existence of judgment 481
Judgment set aside for fraud 482

Page.

JURISDICTION, a good Judge will extend 327
But not so as to exceed the limits assigned by law ... 327
JURY, Origin of the system of 77
Functions of ... ... 77—357
JUSTICE, (vide Judges.)
Offences against 298
Preventive, is preferred 317

K

KING, (vide Sovereign.)
KINGDOM, not devisable (see Sovereign).

L

LAND, defined 127
Property, in 126
LANDLORD AND TENANT 191
LATCHES, doctrine of, ... 333
LATENT AMBIGUITY, (vide Certainty.)
LAW, necessity for studying, ... 1
And moral, line of demarcation between, ... 6
Definition of 6
Sources of 12
Regulation law 12
Hindu law 12
Mahomedan law 13
Should be administered by the Judge and not by the Sovereign 14
Ought not to have retrospective effect 27
Effect of a new adjudication on law 29
Reason of, ... 30
Of defendant, when applied 27
Of the conquered nation ... ...7— 8
☞ Vide *Lex fori*, *Lex loci.*
LEASE, permanent 173
LEGAL INJURY, what is, ... 278
LEGITIMATE ISSUE, (see Heirs and Succession.)
LETTERS PATENT, cited in this book
of 1774 ... ...9—12
1800 ... ...9—12
1823 9
1862 9
1865 ... ...9—47
☞ Vide Acts, Regulations and Statutes.

Page.

LEX FORI, governs the procedure, evidence, limitation, &c. ... 22
LEX LOCI, governs contracts, as to their validity, except where they are immoral, &c. 18, 19
As to capacity of persons 19
As to form of a contract 21
Construction of ditto 22
Discharge of ditto 22
In criminal cases 24
LIBERTY, (see Birth-right, House.)
Slavery abolished 148
LIGHT, property in, ... 114
Necessary in a house 180,182
LIMITATION, of actions, in general 331
Sovereign not restricted to, ... 75
LIS PENDENS, doctrine of, ... 335
LITIGATION, not to be engaged in, unless justice is not had at home.. 270
There should be an end of 270
Evils of 270
LOANS 213
LUNATICS, (see Insanes, &c.)

M

MACHINERY, dangerous 189
MAGISTRATE, (vide Judge.)
MAHOMEDAN LAW, Religion is the basis of 6
Sources of 13
Preserved to Mahomedans in some cases ... ...9—27
Is the law in conquered nations 7
Idea of Sovereignty under 41
Marriage 96
Adultery 97
Divorce 97
Bigamy 101
Husband and wife 103
Minor and guardian 110
Property, origin of, ... 115
Accession 127
Possession 134
Succession, rules of, ... 143
Illegitimate issue 150
Adoption 152
Posthumous child 153
Reversion 157

Page.
Testament 163
Renunciation 166
Alienation 174
Escheat 178
Contracts 212
Minors and insanes 214
Pre-emption 246
Gosha females... 264
MAINTENANCE AND CHAMPERTY 219
MALICE, defined 307
Malice in law 307
Malice in fact... 308
How proved 308
MARGINAL NOTES 429
MARRIAGE, beneficial effects of, in general 95
Of Christians 96
Of Mahomedans 96
Of Hindus 97
Re-marriage of widows 97
Of females living in concubinage 98
Bigamy, evil effects of. 99
among Christians 100
Hindus 100
Mahomedans 101
Laws affecting marriages in India 98
MARRIED WOMEN, (see Contract.)
MASTER AND SERVANT, (see Agents.)
MAXIM, dignity and authority of 1
Definition of, by a Sanscrit author 1
MAYHEM, (*i. e.*, maiming or wounding) 300
MERCANTILE CUSTOM, (see Custom.)
MINERALS, property in, ... 127
MINISTERIAL ACT, what is, ... 329
MINORITY,
Principles governing the subject of 110
Period of, under different laws 110
Renders a contract voidable 214
Exonerates one from criminal liability under certain age. 29—311
Does not make a witness incompetent 354
MINOR AND GUARDIAN,
Who are guardians under different laws 112
Privilege of a minor 113
Responsibility of a guardian 113

Page.

MISFORTUNE, (see Accident.)

MISDEMEANOR, (see Offences.)

MISTAKE, (see Ignorance.)

MONEY PAID, how appropriated 227

MONOPOLY, (see Trade.)

MORALITY AND LAW, line of demarcation between, ... 6

MORTGAGES, Equity of redemption 252

Foreclosure 252

Repurchase 252

MURDER 300

N

NATIVE CHRISTIANS.

Marriage 98

Succession 142

Testament 159

NATURE, offences against 296

NATURAL RIGHTS, (see Birth-rights.)

NAVY, offences regarding 298

NECESSITY, of self-defence, (vide Self-defence.)

of obedience 467

from acts of God 467

from acts of strangers, *i. e.*, compulsion, effect of in Civil cases 468

in Criminal cases ... 468

NECESSARIES, supplied to persons incompetent to contract, ... 216

NEGATIVE, (see Evidence.)

NEGLIGENCE, defined 458

Diligence defined, ... 458

Degree of, inducing liability 458

In the use of one's own property 189

In the case of a bailee 459

In Criminal cases ... ... 200 & 459

Culpable negligence and rashness, distinguished 462

Contributory negligence ... ... 193 & 462

NOTICE, to produce documents, (see Evidence.)

NUDE CONTRACT, (see Contract.)

NUISANCES, Public and private 188, 200, 292

Civil actions for 291

Criminal prosecutions for 291

Page.

O

OATH, (see Evidence.)

OBLIGATION, (see Contract.)
to speak truth... 352

OBLIGATORY GUARANTEE 352

OCCUPATION, one of the modes of acquiring property 115
Rule of priority 115

OFFENCES, definition of 289
are extinguished by death of offenders ... ... 289 & 293
How distinguished from Civil wrongs 289, 294
Under local and special laws 295
Under the Indian Penal Code 294
Against religion 294
nature 295
Sovereign 297
Judges, &c. 298
public 299
individuals 300
one's ownself and property 301
Abetments 303
Attempts 305
Excuses for the commission of, ... 294
Want of criminal intention 306
Infancy 311
Insanity 311
Misfortune and accident 473
Drunkenness 474
Ignorance of law and fact ... ... 444—449
Necessity, compulsion 467
Self-defence 315
Consent 452
Slight harm 478

OFFENCES committed in a foreign country 24, 25

OFFENSIVE TRADE 188

OFFSPRING of animals, property in, ... 126

ONUS PROBANDI, (see Evidence.)

OPINION EVIDENCE, (see Evidence.)

Page.

P

PAGODA, managers of, alienation by 267
PARDON,
The Sovereign's prerogative to grant 46
The power of Government to grant 46, 324
PARENT AND CHILD, respective privileges and duty of, ... 108
Parent's power to chastise children 109
PARSEE MARRIAGE 98
Successions 142
Testament 158
PARTNERSHIP, how constituted 231
How dissolved 232
Privileges and duty of partners 232
PARTY to a case, is a competent witness 355
But a prisoner cannot testify 357
Husband or wife of a party in a Civil or Criminal case is a competent witness 355
PATENTS, how acquired ... ... 122—207
PAYMENTS MADE, how appropriated 227
PAWN, (see Pledge.)
PENAL CODE, The Indian, (vide Acts.)
PERJURY 299
PERSON, offences against 300
PLACE OF TRIAL 334
PLEADER, (see Advocates.)
PLEDGE 250
POLICY, PUBLIC, contracts against 275
POLYGAMY, (see Marriage.)
POSSESSION 131
Under different laws 136
How different things passed 132
POSTHUMOUS CHILD, rights of 153
PRACTICE, of the Court 326
PREAMBLE, how far used in construction 429
PRECEDENTS, use and force of 39
care to be taken in following 40
PREROGATIVE, (see Sovereign.)
PRESCRIPTION, what is 136
how obtained 136
PRESUMPTIONS, (see Evidence.)
PREVENTIVE JUSTICE, is preferrable 317
PRIMARY EVIDENCE, (see Evidence.)

Page.

PRINCIPAL AND AGENT, (see Agent.)
and surety 257
PRIORITY, rules of ... ... 114—123
Legal estate 123
Equitable estate 123
In the discharge of debts 124
PRISONER, not a competent witness 357
PROCEDURE, Act of Court 325
Practice of Court 326
(Vide Jurisdiction, Limitation, &c.)
PROCESS, (see Execution.)
PROCLAMATION, Her Majesty's, on the assumption of the direct government of British India 42
PROPERTY, mode of acquiring, (vide Acquisition of Property.)
Definition of 115
Origin of 115
Immoveable 115
Moveable 117
In animals 118
In light 120
air 120
water 120
wells 121
public streets 122
right of common 121
copyrights 122
Patents 122
offences against 300
PROSPECT, ... 195
PUBLIC GOOD, regard should be had to, in all laws 93
to be secured though at the expense of private interests ... 93
peace, health, and morals, offences against 299
servants, justice, &c., do. 299
revenue, suits affecting 55
policy, contracts against 275
PUNISHMENT, principles, and measure of ... ... 316—319
Final cause of punishment 318
Death, transportation, &c. 322
Restitution of stolen property 324
Pardon 324
No one should be punished twice for the same offence ... 324
PURCHASE, (see Sale.)

Page.

Q

QUEEN, (vide Sovereign.)
QUEEN'S PROCLAMATION, (see Proclamation.)

RAILWAY ACT ... ... 93—459
negligence of Railway servants 460
RAJ, impartiable, ... 48
(see Sovereign.)
RATIFICATION, (see Contracts.)
REASONABLE TIME, (see Time.)
REGISTRATION, affects the rules of priority in some cases 125
REGULATIONS,
Bengal 1793, III, (Courts.) 15
IV, (Courts.) 12
1795, LI, (Rent.) 213
1803, I, (Sources of law.) 213
XXX, (Rent.) 213
XXXIV, (Mortgages.) 213
1727, V, (Revenue.) 176
Madras 1802, III, (Courts.) 12
XVII, (Registration.) 251
XXV, (Revenue.) ... ... 173—174
1816, XIV, (Pleaders.) 84
1829, V, (Inheritance.) 161
1830, I, (Suttee.) 143
1831, VI, (Inams.) 56
1832, XI, (Treasure trove.) 176
Bombay 1827, IV, (Sources of law.) 12
V, (Loans, &c.) 213
(See Acts, Letters Patent and Statutes.)
RELEASE, (see Contract.)
RELIGION, is the basis of law 5
of the conquered nation 7
usages connected with, ... 8
suits respecting ... ... 12—284
RELEVANCY, (see Evidence.)
REMEDY, (see Wrongs, Civil.)
REMOTENESS, (see Damages.)
RENUNCIATION, one can renounce a claim, introduced for himself ... 164
RES-INTER ALIOS ACTA, (see Evidence.)
RES JUDICATA, (see Judgments.)

Page.
RESTITUTION of stolen property 324
RESTRAINT OF TRADE, (see Trade.)
REVENUE, public, suits affecting 55
principles upon which the revenue and taxes are levied ... 93
Irrigation Act 93
Railway Act 93
Land Acquisition Act 93
Waste lands 117
Roads 93
Monopoly of trade 205
Salt and opium 208
Rent recovery 213
REVERSION, under different laws 157
REVOCATION, (see Contracts.)
RIGHT, where there is a right, there is the remedy 272
of action defined 273
Bare declaration of, suit for 274
Acquired by birth among Hindus generally 154

S

SALE AND PURCHASE.
Care necessary in selling and buying 233
As between seller and buyer 235
As between buyer and third party 236
As between seller and buyer again 239
Special rules as to goods 244
Hindu law 246
Mahomedan law 246
SAMAJ, suit by an excommunicated member of 282
SCHOOLMASTER AND PUPILS 109
SECONDARY EVIDENCE, (see Evidence.)
SELECTION, effect of 457
SELF, offences against one's ownself and property 301
SELF-DEFENCE, right of 315
in what cases exists 315
Limits to the exercise of 316
(See Necessity from acts of Strangers.)
SELLER, (see Sale.)
SENTENCE, (see Judgment—Execution.)
SLAVERY abolished 143
SLIGHT HARM gives no cause to Civil or Criminal action 478
SOVEREIGN is under no man 40

	Page.
SOVEREIGN is subject to God and laws	40
Coronation oath of	41
Proclamation of, in British India	42
Style and designation of	45
Never dies	45
Is the guardian of commonwealth	46
All subjects are servants of	46
Prerogative of, in pardoning offenders	46
Appeal to, in Civil cases	47
in Criminal cases	47
Kingdom of, is not divisible	47
Descent of crown	47
Rights of, preferable to those of subjects	50
Can do no wrong	52
How are grievances committed by, redressed, ...	52
Shall not administer the law in person	14
Cannot confer favor on one subject to the injury of another.	57
No time runs against	57
Is not bound by any statute unless so specified therein ...	59
Exception	61
No processes served in the presence or palace of	61
Offences against	297
Cannot be called as a witness	355
☞ Vide State.	
STATE, Acts of the Municipal Courts have no jurisdiction over	55—275
nor in matters affecting public revenue	55
Secretary of, suit against	56
Suit against Government and Government servants ...	54
Prisoners, special law regarding...	55
Papers privileged, (see Evidence.)	
Offences against	297
STATUTES cited in this book,	
21 Geo. III, c. 70	9, 12, 27
33 Geo. III, c. 13	29
37 Geo. III, c. 142	9, 12, 27
12 & 13 Will. III, c. 2	41
11 & 12 Vic. c. 21	51
22 Vic. c. 20	359
24 Vic. c. 11	359
24 & 25 Vic. c. 62	12
31 & 32 Vic. c. 37	359
33 & 34 Vic. c. 52	25
(Vide Acts, Regulations and Letters Patent.)	

Page.
STREETS, public, property in 121
SUBORDINATES acting under the orders of superiors 468
SUBTLETIES in pleadings 478
No action for slight injury 478
Nor Criminal prosecution for slight harm 478
Fractions of a day 479
SUCCESSION, principles of 139
Under the Hindu law 143
Mahomedan law 147
Indian Succession Act 148
Heirs, different grades of 149
Legitimate and illegitimate 149
Adopted sons 151
Child in the womb; posthumous child 153
No one is heir of the living 154
Heir succeeds to restitution and not to penalty 155
Suit for 274
SURETY, (see Guarantee.)
SUICIDE, evils of 302
an attempt to commit, is an offence 302
SUITS, (see Wrongs, Civil.)
SUNDAY, Courts do not sit on 337
Contracts effected on, valid in India 338
Arrest on, in Criminal cases valid, ... 338
in Civil cases in the Mofussil 338
Should be avoided in computation of any period, if it falls on the last day 339
SUTTEE, prohibited, ... 143—302

T

TARWARD, contract with 267
TAXES, (see Revenue.)
TENANT, (see Landlord.)
TESTAMENT, origin and effect of 157
Codicil 157
Under the Hindu law 160
Mahomedan law 163
Indian Succession Act 158
Suit for testamentary succession 274
TESTIMONY, (see Evidence.)
THEFT 301
THOUGHT, mere, not punishable 305
THREAT, (see Coercion.)

Page.

TIME, what is reasonable 475
Computation of 475
Meaning of the term "from and after" 476
"within a certain time" 476
"At least before" 476
"not less than" 476
"Until" 476
"forthwith" 476
"Immediately" 476
"Sufficient time" 476
Age how computed 479
When is Sunday excluded in the computation of — ... 339
TORTS, what are 273
action for, ... 273
(See Enjoyment of Property and Wrongs Civil.)
TRADE, what is, ... 203
Restraint of, not sanctioned, ... 204—218
when allowed 204
Monopoly, forbidden, ... 207
when allowed... 207
TREASON 297
TREASURE TROVE 175
TREES, property in 127
TRESPASS 301
TRIAL, place of 333
Both parties to be heard 334
TRIFLING INCONVENIENCES, not actionable 478
TRUSTEE, (see Bailment.)
TRUTH, It is the natural propensity of man to speak truth ... 339
That propensity is common to all 346
Veracity of the Hindus 347
The force of evidence rests on the presumption that man speaks truth 349
Guarantees of (see Evidence.)

UNCERTAINTY, (see Certainty.)
USAGE, (see Custom.)

V

VAKEEL, (see Advocates.)
VENDOR AND VENDEE, (see Seller and Purchaser.)
VENUE 334

Page.

VERDICT, (see Judgment.)
VERACITY, (see Truth.)

W

WAR, waging war against the State, &c. 297
WARRANTY, simple commendation does not imply a warranty ... 246
When is warranty implied 247
Effect of a breach of 248
WATER, property in 120
WATERCOURSE, property in 183
Surface water 183
Artificial water course 184
Subterraneous water 184
Water not running in a defined course 185
WAY, right of 182
WEIGHTS AND MEASURES, offences against 299
WELLS, property in, &c. 126
Fencing 189
WIDOW, Hindu, (see Contract, Alienation.)
WIFE, (see ditto and Husband and Wife.)
WILLS, (see Testament.)
WINDOWS, (see Light.)
WITCHCRAFT, false confessions 383
Instances of 383
WITNESSES, (see Evidence.)
WOMAN, Hindu, condition of 105
(See Marriage, Husband and Wife, &c.)
WOMB, child in the 153
A condemned pregnant woman 483
WORSHIP, religious, dissolution or disturbance of, is an offence ... 295
WRITINGS (see Evidence.)
WRONGS, civil, how distinguished from offences 290
Where there is a wrong there is a remedy 272
Actions maintainable on contracts 273
for Torts 273
for conjugal rights 274
regarding testamentary and intestate succession ... 274
And for a bare declaration of right 274
Exceptions to the said general rule 275
as to suits regarding acts of the State ... 55—275
for purely religious matters 275—284
for matters which are against public policy, 275
morality, decency, &c. 287

Page.

Cause of action defined... 275
What is a legal injury 278
Remote cause ... ... 278—281
Consequence of a consequence 278
Loss without a remedy 278
No suit will generally lie against a constable for acts done in execution of his duty... ... ... 279—281
against persons making a communication, bonâ fide 279
against a witness giving evidence in a court of justice 280
against advocates for making comments in conducting a case 280
against judicial officers passing remarks &c., in a case 280
against a schoolmaster, &c., correcting his pupil ... 281
Nor for public nuisances 281
for a school set up against one's interest 280
for re-admission into a Samaj 282
into a caste... 282
into a club 282
for exacting a mere courtesy 283
for a monopoly 283
of selling flowers 284
of practising midwifery 284
of shaving 284
Actions for wrongs committed by servants or agents ... 190

Y

YEAR, how computed 475

Z

ZAMINDARY, division of 48
Minority 113
Alienation 173

ZENANA, execution of process in a 90
Gosha females, contract with 264



ERRATA.

Page.	*For*	*Read*
52	Maxim 29.....Peccaer.....	.....Peccare.
213	Line 20.....of 1863.....	.....of 1803.
329	Line 4.....Civil.....	.....Criminal.
376	3rd para .....Act VIII	.....Act XVIII.
431	Maxim 247.....Optim.....	.....Optima.
433	Line 6.....Indian Evidence Act...	Indian Succn. Act.
459	Line 5 from the bottom....	After Acts XII & XIII add "of 1855."
91	At the end of the page....	Add "vide also Maxim on self defence."