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to the reasonable intention of the parties that the plaintiff should acquire the full right of ownership over the wall as if it had been built on his own ground.

We must, therefore, refuse to make the declaration prayed for, or grant an injunction against the defendants.

Attorneys for the appellants.—Messrs. *Hore, Conroy and Brown.*
Attorneys for the respondents.—Messrs. *Bomanji and Hormasji.*

FULL BENCH.

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kemball, Mr. Justice West, and Mr. Justice Nánábhái Haridás.

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January 13.

RA'DHA'BA'I AND RA'MCHANDRA KONHER (ORIGINAL DEFENDANTS NOS. 1 AND 4), APPELLANTS, *v.* ANANTRA'V BHAGVANT DESHPA'NDE (ORIGINAL PLAINTIFF), RESPONDENT. *

Vatan—Service vatan—Adverse possession against one holder how far a bar against a succeeding holder—Judgment against one holder how far res judicata against succeeding holder—Alienability of lands when services are abolished—Bombay Act II of 1865—*Bombay Act VII of* 1863.

Held (1). that, in the absence of fraud and collusion, adverse possession for twelve years during the life-time of one holder of service *vatan* lands is a bar to succeeding holders.

(2). In the absence of fraud and collusion, judgment against one holder of service *vatan* lands is *res judicata* as regards a succeeding holder.

(3). Such lands become alienable when the services are abolished, except in cases where there is a concurrent family custom operating similarly to keep the *vatan* estate together. Such a custom may continue and may singly bind the hands of the successive holders of the property after the former restriction has failed or been removed. The abolition of the public duty does not alter the nature of the estate. If the family custom forbids alienation beyond the life-time of the alienor, the custom will operate equally after the patrimony has ceased to be a *vatan*, as before. Where, however, such a concurrent custom does not affect an estate, then when it is freed from its connection with the public office the reason arising from that connection for the preservation of the estate necessarily fails, and the lands become subject to the ordinary law of descent and disposal.

* Second Appeal, No. 49 of 1883.

Per WEST, J.—(1). Lands with respect to which a summary settlement under Bombay Acts II and VII of 1863 has been effected, are wholly exempt from official obligation.

(2). Where service lands, or what were deemed service lands, have been aliened, and at a later period the service has been disclaimed or abolished, this subsequent abolition or discharge renders the title of the alienee in possession undisputable by the alienor's heirs, assuming that there is no special family custom operating apart from the law which preserves service lands for the intended uses. The alienation is, of course, subject to the terms on which family property can usually be alienated.

THIS was a second appeal from the decision of C. F. H. Shaw, District Judge of Belgaum, confirming the decree of Ráv Sáheb Venkatráv Lakshmaya, Second Class Subordinate Judge of Chikodi, and awarding mesne profits from the date of the decree of the Subordinate Judge till execution.

The plaintiff sued for the recovery, with mesne profits, of certain lands from the defendants on the ground that they were the service *vatan* property of the plaintiff's family.

The defendants claimed to be in possession of the lands under a grant to them by the plaintiff's grandfather (Ramrav) in 1838. The plaintiff denied that any such grant was made, and contended further that, even if it was, his grandfather had no authority to make a grant of the family *vatan* beyond his lifetime, which terminated in 1860, and that his (the plaintiff's) father had no authority to allow the lands to continue in defendants' possession. The plaintiff dated his cause of action in the month of February, 1876, the date of his father's death, at which date he alleged he became the exclusive owner of the property.

The defendants 1 and 3 did not appear. Defendants Nos. 2, 4, 5, 6 and 7 relied upon the alleged grant in *inám* from the plaintiff's grandfather Ramráv in 1838. They also pleaded *res judicata* and limitation, and contended that the lands in suit were not service *vatan* lands.

Bhagvant Rámráv, father of the present plaintiff, had brought a suit in 1860-61 in the Mámlatdár's Court to oust Konherráv Bápu Sáheb, the father of the first defendant, from the identical lands in suit, but had failed both in the Court of the Mámlatdár and in that of the Collector. Twelve years after this, Bhagvant

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instituted another suit, (No. 1944 of 1873,) in the Court of the Subordinate Judge at Chikodi for the recovery of these same lands, but failed, on the ground that the suit was barred by the law of limitation. This decree was confirmed in appeal, and, though there was no issue before the Court as regards the genuineness of the deed of gift or grant set up by the defendants, the Court in its judgment said that it saw "no reason to doubt the deed of gift".

Six years after that suit the present suit was instituted by the present plaintiff for the recovery of the same lands.

The Subordinate Judge held that "the question, whether the *inámpatra* was or was not genuine, was before the Civil Court in original Suit No. 1944 of 1873, and though the original Court did not decide the same, the Appellate Court did, and found the *inámpatra* to be genuine, and, therefore, that question cannot again be re-opened here, and the fact that the lands must have been granted as *inám* is supported by the long possession of them by the defendants." He also said: "His [defendant's] pleader admits that the lands were formerly service *inám;* but as no service is now rendered to the owner on account of them, and as *judi* is paid thereon like any other ordinary *inám* lands under the Summary Settlement Act No. II of 1863, he contends that the lands have lost the character as 'service'; but I consider they have not lost that character simply by reason of the levy of the *judi* thereon * * * as by the payment of his *judi* [instead of the personal service which they were required to do before] the owners of service lands must be considered as still rendering service." The Subordinate Judge further determined that the plaintiff's suit was not barred by limitation, holding: "There is no doubt about the defendants having had possession of the lands in question for about forty years, and in ordinary cases this long enjoyment would not only have barred any suit to recover the lands, but would have extinguished all rights of the owners in the same; but where the lands are service-*vatan* this rule does not operate, as it has been held by the Bombay High Court that in such cases each individual owner acquires a fresh

cause of action on the death of the previous owner. In this case, therefore, the lands being service *vatan*, the time for suing for possession (twelve years) runs against the present plaintiff from the date of his father's death", *i.e.*, from 1876.

On the point of *res judicata* the Subordinate Judge found that the present suit was not barred by the previous suit, No. 1944 of 1873, "because the cause of action that accrued to plaintiff was a fresh one, and not the same that was inquired into and determined in the previous suit instituted by his father. If the bar of limitation does not apply, the bar of *res judicata* would also not apply."

He, therefore, awarded the possession of the lands to the plaintiff, holding "there is not the slightest doubt about the *inám* having been granted in 1838, and not in 1823. If it was granted in 1823 then the plaintiff could not have recovered them, as the same would then be a transaction which occurred before the Regulation XVI of 1827, which prohibited the *vatándárs* from alienating their service lands, came into force; but that Regulation came into force in the village of Chándur, where these lands are situate, in 1830 under Act VII of 1830, and the lands being granted in *inám* in 1838—*i.e.*, after the Regulation came into force—the plaintiff is entitled to recover the same, as under the said Regulation XVI of 1827, sec. 20 (now repealed by Bombay Act III of 1874), his ancestor had no power to grant the same as *inám* beyond his own life."

Upon appeal the District Judge considered the finding on the genuineness of the deed of grant set up by the defendants unsatisfactory, and sent an issue for trial on that point. The Subordinate Judge returned a finding against its genuineness.

The District Judge confirmed the decree for the plaintiff, and awarded also mesne profits, holding "though the Court does not altogether follow the Subordinate Judge in his allegations of fraud, still it has no doubt the grant of land is not as early as 1823-24, nor prior to 1837-38. Consequently, the plaintiff must obtain a decree."

Against this decree a second appeal was preferred to the High Court by the defendants.

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Inverarity (with him *Ghanasham Nilkanth*) appeared for the appellants (defendants).

Farran, Acting Advocate General (with him *Mánekshâh Jehángirsháh*) appeared for the respondents (plaintiffs).

The case was argued on 23rd April, 1884, before a Division Bench consisting of Sargent, C. J., and Mr. Justice Nánábhái Haridás, who referred the following questions for the decision of the Full Bench:—

1. Whether adverse possession for twelve years during the life-time of one holder is a bar to succeeding holders ?

2. Whether a judgment against one is *res judicata* as regards a succeeding holder ?

3. Whether lands become alienable when the services are abolished ?

The same counsel argued the case again before the Full Bench on the 1st July, 1884.

Inverarity for the appellants (defendants).—The first question referred to the Full Bench is put on the hypothesis that the subject-matter of the suit is a service *vatan*. With regard to it, I propose to divide my argument into two parts—(1) whether adverse possession against an intermediate holder, not the alienor, bars succeeding holders ? and (2) whether adverse possession partly against the alienor and partly against an intermediate holder bars succeeding holders ? It has been held that adverse possession for twelve years against an intermediate holder, not the alienor, bars succeeding holders—*Bábáji* v. *Nána*[1]; *Shankarráv* v. *Venkatráv*[2]. The case of *Kuria* v. *Gururáv*[3] is a decision to the contrary, but the facts as given in the report are not such as to make it a binding decision. It does not appear how much of the adverse possession was within the life-time of the alienor and how much after him. This is pointed out in the case of *Bábáji* v. *Nana*[4]

The case of a temple endowment is not on all fours with that

(1) I. L. R., 1 Bom., 535.

(2) Printed Judgments for 1882, p. 212.

(3) 9 Bom. H. C. Rep., 282.

(4) I. L. R., 1 Bom., 535.

of a *vatan*, and the case of *Trimbak Báwa* v. *Náráyan Báwa* (1) is not consistent with the case of *Manchárám* v. *Pránshankar* (2).

Prior to Regulation XVI of 1827 service *vatan* was private property subject to certain obligations attached to the holding of the land. The holder was absolute owner; otherwise there would have been no need for legislation. It was not a succession of life-estates. The Regulation of 1827 did not alter the *tenure* of the estate; it merely imposed certain restrictions on the holder. The position of a holder prior to the legislation of 1827 is given in the case of *Krishnáráv Ganesh* v. *Rangráv* (3). The right of permanent alienation is inconsistent with life-estates (4). The phraseology of Regulation XVI of 1827 is not that of declaring, but that of limiting the tenure. Service *vatans* are frequently partitioned subject to the Collector's power to fix emoluments for officiators under section 24 of Bombay Act III of 1874. This is against the idea of life-estates. The succession of a son to his father in respect of *vatan* is primarily that of a son to *his father's property*—*Giriápá* v. *Jakaná* (5).

[WEST, J., referred to *Forbes* v. *Meer Mahomed Tuquee* (6).]

This case shows that you can in certain cases presume alienability. In the present case no one, not even the Collector, has interfered with our possession since 1828. The Collector has not set apart any emoluments under section 23 of Bombay Act III of 1874. We are defendants in possession for the last forty years, and plaintiff must show the nature of the *vatan*.

There are numerous instances of partition of *vatans*—*Kadápa* v. *Adráshyápa* (7); *Adrisháppa* v. *Gurushidappa* (8). The *onus* of proving impartibility is upon him who sets it up—*Adrisháppa* v. *Gurushidappa* (9). The remarks of the Privy Council in the above case show that the land remains liable to service should service be demanded; the performance of duties being merely an obligation annexed to the estate (10).

(1) I. L. R., 7 Bom., 188.
(2) I. L. R., 6 Bom., 298.
(3) 4 Bom. H. C. Rep., A. C. J., 1.
(4) West & Bühler's Hindu Law (3rd ed.), p. 845.
(5) 12 Bom. H. C. Rep., A. C. J., 172.
(6) 13 Moo. Ind. Ap., p. 464.
(7) Printed Judgments for 1875, p. 182.
(8) L. R., 7 I. A., p. 162.
(9) I. L. R., 4 Bom., O. C. J., 494, 502. S. C. L. R., 7 I. A., p. 162.
(10) L. R., 7 Ex., 161.

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I don't contend that adverse possession will run against a succeeding holder during the life-time of the alienor. As against him it will run only from the death of the alienor—*Rávlojiráv* v. *Balvantráv*(1). See also the case of *Jagjivandás* v. *Imdád Ali*(2).

But I contend that adverse possession for twelve years against an intermediate holder other than the alienor, as in the present case, bars succeeding holders.

With regard to the second point of reference. This involves the same considerations as the first point. If the holders of the property have a succession of life-estates only, *viz.*, if B., a subsequent holder, does not claim through A., a prior holder—in other words, if it is not the same estate—a judgment against A. will not be *res judicata* against B.; but if it is the same estate it will be *res judicata*. I contend that the holder of the *vatan* represents the estate fully, and binds the estate—*Bábáji* v. *Nána*(3), so that any judgment against him in respect of the estate will be *res judicata* against the succeeding holder—*Ahmedbhoy* v. *Vulleebhoy*(4).

With regard to the third point of reference, the reported authorities are *Jagjivandás* v. *Imdád Ali*(5); *Makandás* v. *Shankardás*(6). The estate can be alienated when the service is dispensed with, notwithstanding that there is no alteration of tenure. However, the question does not arise in the present case, as the alienation was after the Regulation of 1827.

Farran (Acting Advocate General) for respondents (plaintiffs).—The state of the law before 1827 is not of importance. Westropp, C. J., in the case of *Krishnáráv Ganesh* v. *Rangráv*(7), in which he held *vatan* to be alienable, meant that the alienees occupied the same position as the alienors, *viz.*, subject to service. We must consider the terms of the Regulation of 1827. The exact terms of the *sanad* are not forthcoming. The present case should, therefore, be decided upon the terms of the Regulation itself as interpreted by reported decisions. The above case shows that a *vatandár* could

(1) I. L. R., 5 Bom., 437.
(2) I. L. R., 6 Bom., 211.
(3) I. L. R., 1 Bom., 535.
(4) I. L. R., 6 Bom., 703.
(5) I. L. R., 6 Bom., 211.
(6) 12 Bom. H. C. Rep., A. C. J., 241.
(7) 4 Bom. H. C. Rep., A. C. J., 1.

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alienate for his life-time, and in that case the Collector could not come in and set aside the alienation. Each occupant held the land as directed by the Regulation, each succeeding holder having the power to set aside the acts of his predecessor and taking the estate free from incumbrance.—*Lukshuman* v. *Ladooba*(1). The object seems to be that the land should be forthcoming for the office. Each holder is a tenant for life. *Jewun Doss* v. *Shah Kubeer-ood-deen*(2) was the case of a Mahomedan endowment. The plaintiff was in this case held not to be the representative of his father in respect of *wakf* property.

[SARGENT, C. J.—Your contention is that the land is annexed to the office. It is in the enjoyment of the holder of the office for the time being. The land is granted, you say, to the office, and not to the person, so that the officer has not the hereditary fee simple.]

The cases of *Rávlojiráv* v. *Balvantráv*(3) and *Makandás* v. *Shankardas*(4) support my contention.

[WEST, J., referred to the case of *The Mayor of Brighton* v. *The Guardians of the Poor of Brighton*(5) as showing that adverse possession could be had in respect of property notwithstanding the prohibition by statute against alienation.]

Section 9 of Act XI of 1843 provides for the confiscation of *vatans* under certain circumstances. This shows that the *vatan* is not private property notwithstanding that section 13 provides for the participation of surplus profits by co-sharers. Act III of 1874 is somewhat stronger. I contend that the Legislature has declared *vatans* to be estates annexed to the office.

Courts of justice in order to give effect to the intention of the Legislature have held that each successive holder of office was entitled to refuse to recognize any alienation of the *vatan* by the preceding holder.

The next point is limitation. This suit is not barred. It is unnecessary to determine under which Limitation Act the present suit comes. The alienation, we say, was made in1838 by Rámráv,

(1) 8 Har. S. D. A., 56.
(2) 2 Moo. Ind. Ap., p. 390.
(3) I. L. R., 5 Bom., 437.
(4) 12 Bom. H. C. Rep., A C. J., 241.
(5) L. R., 5 C. P. D., 368.

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e grandfather of the present plaintiff. Rámráv died in 1860. In 1861 his son Bhagvantráv brought a suit in the Mámlatdár's Court. He failed in that suit in 1861. In 1873 he sued in the Civil Court. In 1875 the suit was decided against him. He died in 1876, whereupon the present plaintiff succeeded. As against him, limitation began to run from that time. The suit was not barred under the Limitation Act XIV of 1859. By section 17 of that Act the provisions thereof do not apply to public property or right. I contend a *vatan* is public property. There is no specific provision in that Act in respect of a cause of action by a remainder-man. Under article 141 of the second schedule of Act IX of 1871 limitation as against a remainder-man is twelve years from the time when his estate falls into possession,—that is to say, when he succeeds to the office *vatan*. I contend that each successive holder is in the position of a remainder-man. The Limitation Act XV of 1877 is similar: see article 140, Schedule II. The English Prescription Act 2 and 3 Wil. IV, c. 71, prescribes twenty years after accrual of right of entry.

I, therefore, ask the Court to hold (1) that *vatan* is public property assigned to successive officers for remuneration; (2) that each successive holder in order to protect the property takes the property free from incumbrance; and (3) that the question of public right arises only when the property leaves the family. If this view be correct, then on the second point of reference judgment recovered against a preceding holder cannot bind the succeeding holder. With regard to the case of *Bábáji* v. *Nána*[1], where the position of a holder of a *vatan* is compared to a widow's estate, I submit the analogy is defective. Firstly, widows have power of alienation for certain purposes, whereas voluntary alienation by a *vatandár* is not good for any purpose.

[WEST, J.—A *vatandár* can alienate during his life-time.]

But so far only the analogy can extend. The analogy cannot apply any further, because there is the statutory prohibition against alienation. Secondly, the analogy is a mere *obiter dictum*. The alienation was in that case within the family. Westropp, C. J., did not consider how the public would be affected. In the

(1) I. L. R., 1 Bom., 535.

case of an alienation by a widow it is only the family that is concerned, and not the public, as in this case. A more analogous case is that of a temple endowment—*Trimbak Báwa* v. *Náráyan Báwa*[1].

On the third point of reference I rely on *Jagjivandás* v. *Imdád Ali*[2]. The other side has not endeavoured to controvert the authority, but the point does not arise in this case. The alienation was long before Bombay Act III of 1874, and the Act does not profess to validate illegal alienations.

Inverarity in reply.—The argument that *vatan* is public property is not supported by any authority, and is opposed to decisions of the Courts, which hold alienations valid during the life-time of the alienor. The argument is based on section 9 of Act XI of 1843, but the provisions of that section apply only in cases of fraud, or malversation, or criminal offence. The power of confiscation being given makes it no more public property than the property of a person who is convicted of an offence under the Indian Penal Code for which his property is liable to forfeiture. Likewise, if *vatan* is public property intended for the use of the office-holder, other members of the family would not have any right to share in it. Further, section 20 of Regulation XVI of 1827 does not apply to lands. It is only allowances that are prohibited from alienation. Mr. Farran has not dealt with the question of the nature of the tenure, *viz.*, the real nature of the *vatan* prior to any legislation. The Legislature did not alter the nature of the *vatans*. It only imposed certain restrictions on dealing with them.

[WEST, J., referred to West and Bühler (3rd ed.,) p. 742.]

That is not consistent with the practice of partitioning *vatans*, and the decisions by which such partition have been allowed.

I, therefore, ask the Court to decide the first and second points in favour of my client. The third point of reference does not arise.

The following were the judgments delivered:—

SARGENT, C. J.—The first question as to the application of the Statutes of Limitation to service *vatans* turns upon the nature

(1) I. L. R., 7 Bom., 188. (2) I. L. R., 6 Bom., 211.

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of the estate which the holder for the time being of the *vatan* has in the *vatan* property.

In *Kuria* v. *Gururáv*(1) the Court would appear to have assumed that land belonging to a service *vatan* "was held on a tenure of successive life-estates, the right to which accrued on the death of each life-tenant." In *Bábáji* v. *Nána* (2), however, it is said by the Court: "The incumbent of a service *vatan* restrained by Regulation XVI of 1827, section 20, from alienating the *vatan* as against his heirs, is in a position parallel to that of a Hindu widow, who, except for special purposes, cannot, as against the heirs of her husband, alienate his immoveable property. Her alienation, except for such special purposes, is effective only to the extent of her own limited interest as widow, yet she completely represents the absolute estate in the immoveable property, and under certain circumstances the law of limitation might, during her incumbency, run against the heirs to the property, whoever they might be."

In determining which of these views is the correct one, it will be convenient to consider what was the nature of the estate of a holder of a *vatan* appendant to an hereditary office before the subject engaged the attention of the Indian Legislature in 1827. This question is discussed by Westropp, C.J., in *Krishnaráv Ganesh* v. *Rangráv* (3), and the conclusion arrived at by the learned Chief Justice, on the authority of Mountstuart Elphinstone's Report on the territories conquered from the Peishwa and the decisions of the Sadar Adálat, is that, both as to civil hereditary offices and the *vatans* annexed to them, the balance of authority inclines in favour of the alienability in permanence as well of the offices as of the *vatans* appendant to them, together or separately, but that "in the case of some, although not of all, such offices the assent of the Native Government seems to have been necessary to the validity of the alienation, and also, if the *vatan* were undivided, the assent of the co-parceners, if any." A re-examination of those authorities has led me to the same conclusion, which, if correct, can leave no doubt—although, as West-

(1) 9 Bom. H. C. Rep., 282. (2) I. L. R., 1 Bom., 535.

(3) 4 Bom. H. C. Rep., A. C. J., at p. 12.

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ropp, C. J., says at p. 15, it might well have been expected to be otherwise having regard to the purpose for which they were granted—that the actual incumbent of a service *vatan* previous to English legislation was regarded as fully representing the *vatan*. As one of the Court who decided the case in *Kuria* v. *Gururáv* (1), I may state that this important conclusion was not brought to our notice, or present to our minds.

Passing to English legislation on the subject, which commences with Regulation XVI of 1827, we find section 20 of that Regulation declaring that "the allowances derived by an hereditary officer shall in future be considered strictly as official remuneration of the person filling the office," and forbidding its alienation by any sole incumbent of the hereditary office, or by any co-sharer of such office, out of the family—a prohibition which was restricted by the interpretations put on the section by the Sadar Adálat on 22nd February, 1831, and 5th December, 1834, to an alienation exceeding the life-time of the incumbent or co-sharer.

The next Act (Act XI of 1843) regulates the service of hereditary officers in this Presidency, and provides for the assignment, by the Collector, of a portion of the rents and profits of the *vatan* for the maintenance of the officiating hereditary officer, leaving the surplus to be participated in by the other sharers in the *vatan*. After some diversity of opinion in the Sadar Adálat it was held that section 20 of Regulation XVI of 1827 was not affected by this Act, and that no part of the *vatan*, whether assigned by the Collector or constituting the surplus participated in by the co-sharers, could be alienated. This Act, as well as section 20 of Regulation XVI of 1827, was repealed by the Bombay Hereditary Offices Act (III of 1874). But by sections 5 and 7 of that Act the alienation of any *vatan*, or part thereof, is forbidden, without the sanction of Government, to any person not a *vatandár* of the same *vatan* and also of the *vatan* property assigned by the Collector under section 23 of the Act as remuneration of the officiating *vatandár* to any person without such sanction; and, lastly, by sections 10 and 11 power is given to the Collector to set aside any sale or transfer thereof,

(1) 9 Bom. H. C. Rep., 282.

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and to declare the same to be null and void, and to summarily resume possession.

It was contended by the Advocate-General that the object of the above legislation was that the land should be always forthcoming for remuneration of the office, and should not, therefore, be diverted from the particular family in which the hereditary office was vested—an object which would be liable to be defeated if the *vatan* property could be lost by the negligence of the incumbent. That such was the general object of the Acts referred to, may be conceded, and so far as that object would be liable to be defeated by an act of alienation by the holder for the time being of the *vatan*, the provisions of the Acts and especially of the Act of 1874, prohibiting alienation without the sanction of Government, are sufficient to provide against that contingency; but alienation implies action, not the passive lying by, of the incumbent; and a prohibition, which is confined in terms to alienation, cannot, therefore, avoid the effect of adverse possession by a stranger during the life of an incumbent of the *vatan*. That this is so, is illustrated by the analogous cases in England under statute 34 and 35 Hen. VIII, c. 20, and 13 Eliz., c. 10. By the former statute recoveries by tenant-in-tail in possession of lands granted by the Crown for distinguished public services are made void against the heirs; but, as shown by the case of *Stratfield* v. *Dover*(1), resort was had to the express prohibition of "acts suffered" by such tenant-for-life to avoid the operation of the Statute of 4 Hen. VII, c. 24, which barred the succeeding tenant when the tenant-in-tail in possession had been disseised and the disseisor had levied a fine with proclamations, and five years had elapsed with non-claim. Similarly in the *Magdalen College* case(2) the Court held that the disabling clause in the 13 Eliz., c. 10, which expressly forbids alienations by any master or fellows of a college other than for twenty-one years or three lives, avoided the effect of a non-claim by the master for the time being of the college after a fine levied by a stranger under 4 Hen. VII, c. 24, but it was on the strength of the words "estates suffered" in the clause in question. In both

(1) Cro. Eliz., 595.

(2) 11 Co. Rep., p. 66.

these cases it is to be observed that the Act under consideration was a public Act.

Passing to the instance of a private Act, we find in the *Earl of Abergavenny* v. *Brace*[1] that the majority of the Court —who held that the private Act of 2 and 3 Philip and Mary, c. 23, which made all alienations by the tenant-in-tail void as against his heirs, also excluded the operation of the Statute of Limitations 3 and 4 Will. IV, c. 27—relied principally upon the prohibition, by the Act, of "acts suffered" by the tenant-in-tail in arriving at that conclusion. Lastly, in *The Mayor of Brighton* v. *Guardians of Brighton*[2] it was held that apt words were necessary to exclude the operation of the Statute of Limitations, and that a mere prohibition against alienation in the act of incorporation of the plaintiffs without the consent of the vestry was not sufficient for that purpose.

In neither the Act III of 1874— passed, it is to be similarly observed, after the Statutes of Limitation had been introduced into this country, although the Legislature has expressly prohibited the alienation by holders of service *vatans* to persons outside the *vatan* without the consent of Government, and has invested the Collector with large powers of control over the *vatan* property with a view to its preservation for the purposes of the office—nor in any of the other Acts is there anything to be found which can be held to protect either the heirs of a *vatandár*, or the public interest as represented by the Collector, against the effect of adverse possession by a stranger.

It may be said, however, that although the Act of 1874 does not avoid the effect of adverse possession, still the general scope of the Legislation since 1827, upon which the Advocate General relied, and the prohibition against alienation, which is particularly directed to give effect to that object, are sufficient to preclude our regarding the incumbent as fully representing the *vatan*, and that, therefore, a fresh cause of action should be deemed to accrue to each succeeding holder of the *vatan* against an intruder on the *vatan* whose adverse possession had commenced in the life-time of his predecessor. Assuming, however, as I think we must, that

(1) L. R., 7 Ex., 145. (2) L. R., 5 C. P. Div., 369.

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the incumbent for the time being did fully represent the *vatan* before English legislation, the mere restriction of his power of alienation outside the family without the sanction of Government cannot, in my opinion, be held sufficient to change that character, or to prevent his representing the *vatan* in all questions with the outside world relating to it as fully as he had hitherto done. I am, therefore, of opinion that, in the absence of fraud and collusion, the two first questions should be answered in the affirmative—leaving, of course, what is to be considered as adverse possession to be determined in each particular case.

With respect to the third question referred to us, I entirely agree in the conclusion arrived at by my brother West, and do not wish to add anything to the reasons by which he has supported it.

WEST, J.—The following questions were referred by a Division Bench on the 23rd April, 1884, to a Full Bench :—

1. Whether adverse possession for twelve years during the life-time of one holder is a bar to succeeding holders?

2. Whether a judgment against one is *res judicata* as regards a succeeding holder?

3. Whether lands become alienable when the services are abolished?

I am of opinion that the third question proposed to the Full Bench does not admit of a single and invariable answer. So long as lands are assigned by the sovereign to the support of a public office, or the land-tax payable on lands is remitted in consideration of services to be performed by a particular family or line of holders, the lands are, according to the principles of the Hindu law and the customary law of the country, incapable of an alienation or disposal, such as to divert them, or the proceeds of them, from the intended purpose—*Rávlojiráv* v. *Balvantráv Venkatesh*[1]. This principle has been recognized in many decisions[2]—*Mussamut Kustoora Koomaree* v. *Monohur Deo*[3]. It often coincides in its operation with another principle, *viz.*, the compulsory

(1) I. L. R., 5 Bom., 437. (2) West and Bühler H. L., (3rd ed.), 741, 742, 846.
(3) Calc. W. R. for 1831, p. 39.

force of a special family custom of inheritance, which prevents alienation of the patrimony beyond the family[1]—*Thákur Ishri Singh* v. *Thákur Baldeo Singh*[2]—,and in some cases even its partition within the family[3], while it replaces the ordinary rule of the joint inheritance of a group of sons by that of primogeniture or some other mode of singular succession[4]. When an estate is freed from its connection with a public office, the reason arising from that connection for the preservation of the estate, intact and unincumbered, necessarily fails. There is not in the lands themselves, according to Hindu law, any inherent quality limiting them to special kinds of ownership and devolution[5]. They become subject to the ordinary laws of descent and disposal, just as where a particular custom concerning them has been abandoned[6]; or they have passed into a family not subject to the custom—*Shewlal Dhurmchand* v. *Bhaichand Luckhoobai*[7]; *Abraham* v. *Abraham*[8]; *Soorendronath Roy* v. *Mussamut Heramonee Burmoneah*[9].

But though the political and public tie, which kept a '*vatan* estate together, may thus have failed, a concurrent family custom producing an effect wholly or partly the same, may continue and may singly bind the hands of the successive holders of the property as straitly as before[10]. The abolition of the public duty does not in this sense, any more than the remission or the imposition of the land-tax, alter the nature of the estate—*Keval Kuber* v. *The Tálukdári Settlement Officer*[11]; *Rájáh Leelanund Singh Báhádur* v. *Thákur Munurunjun Singh*[12]. It is only necessary to bear in mind that this 'estate', the proprietary relation of a family to certain lands, is not by Hindu law a quality of the lands; it is a jural character of the family[13]—*Rany Padmavati and Baboo Doolar Sing*[14]; *Rany Srimuty Dibeah* v. *Rany Koond*

(1) West and Bühler H. L., 159, 184(*a*).
(2) I. L. R., 10 Calc., at p. 807.
(3) West and Bühler H. L., 743.
(4) West and Bühler H. L., 69, 156, 158; *Ishri Singh* v. *Thákur Baldev Singh*; I. L. R., 10 Calc., 805.
(5) West and Bühler H. L., 744.
(6) *Ibid*. 3, 4.
(7) See 7 Harr. S. D. A. Rep., 195.
(8) 9 Moo. I. A., 242.
(9) 12 Moo. I. A., 91.
(10) West and Bühler H. L., 2, 744(*b*).
(11) I. L. R., 1 Bom., 586.
(12) L. R. Ind. Ap. Sup. Vol., 181.
(13) West and Bühler H. L., 744.
(14) 4 Moo. I. A., 259.

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Luta[1]; and *Chundro Sheekhur Roy* v. *Nobin Soondur Roy*[2]. If the family custom forbids alienation beyond the life of the alienor, the custom will operate equally after the patrimony has ceased to be a '*vatan*' in the technical sense as before[3]. That such a custom exists, or does not exist, may, in most cases, be gathered with reasonable certainty from the previous practice of the family. If, while the *vatan* has been reserved for the office-holding member, the rest of the family estate has been sold or mortgaged or divided or dealt with as an ordinary joint property, that is an indication that no special custom has prevailed; that the *vatan* has been kept together, not by the family law, but by the official obligation. In some cases the *vatan* estate itself has been distributed within the family or group of *vatandárs* after the fashion of an ordinary divisible property[4], though kept from leaving the family by the expressed or understood terms of the official tenure[5]. When the office ceases, the tenure ceases too, though not by the office becoming a sinecure —*The Government of Bombay* v. *Desái Kallianrái Hakoomutrái*[6] —and there being no special family custom, the property may be dealt with in the usual ways—*Adrisháppa* v. *Gurushidappa*[7]; *Desái Máneklál Ámratlal* v. *Desái Shivlál Bhogilál*[8].

It seems that this result is contemplated by the Bombay Acts II and VII of 1863. The former is the one that applies to the southern districts of the Bombay Presidency, whence the present case comes. Section 1 of the Act enables the Governor in Council to make a summary settlement with the holders of land who claim exemption from the land-tax; but clause 2 of the section excepts from the rule "lands held for service". By section 16 the Governor in Council may determine what are and are not "lands held for service," and when he has once made a settlement under the Act, he has conclusively elected to treat the estate

(1) 4 Moo. I. A., 292.
(2) 2 Calc. W. R., 197.
(3) West and Bühler H. L., 173, 742.
(4) See Act XI of 1843, s. 13.
(5) West and Bühler H. L., 173, 180, 184(*a*) and cases there cited.
(6) 14 Moo. I. A., 551, 558.
(7) L. R., 7 I. A., 162.
(8) I. L. R., 8 Bom., 426. A *saranjam* given for the support of a distinguished family is generally in its nature impartible and inalienable apart from any connexion with a public service—see *Rámchandra Sakhárám* v. *Sakhárám Gopál*, I. L. R., 2 Bom., 346.

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embraced in such settlement as lands not "held for service", since such a tenure would make the settlement impossible[1]. Accordingly section 2 provides that such "lands shall * * * be the heritable and transferable property of the * * * holders, their heirs, and assigns, without restriction as to adoption, collateral succession, or transfer." It is plain that such language must have been used with the intention of wholly freeing settled lands from official obligations. The terms on which the proposed benefits are to be secured are an annual payment of one-fourth of the land-tax previously remitted, *plus* $\frac{1}{16}$ of the full land-tax. On such terms the estate, with which we have now to do, has been settled. It is no longer affected with a liability on account of service; and unless as a family estate, subject to a special family custom—*Soorendronath Roy* v. *Mussamut Heeramonee Burmoneah*[2]; *Bhau Nánáji Utpat* v. *Sundrábái*[3]—it has become in all respects, except its partial exoneration from land-tax, like the ordinary landed property of the district.

There is a question which may be regarded as a particular form of the third one submitted to us, and which seems to arise in this case. It is this, where service lands, or what were deemed service lands, have been aliened, and at a later period the service has been disclaimed or abolished, does this latter event render indisputable by the alienor's heirs the title of the alienee in possession which, had the liability to service continued, might have been disputed? Assuming that there is no special family custom operating apart from the law which preserves service lands for the intended uses, it seems that the answer to the question thus proposed, must be in the affirmative, with an addition of the terms on which family property can usually be aliened. The service lands are a property, not merely a remuneration; otherwise the right to them would cease with a discontinuance of the service—*Forbes* v. *Meer Mahomed Tuquee*[4]; *Rájáh Leelanund Singh Báhádur* v. *Thákoor Munurunjun Singh*[5]; *James*

(1) See the rules under Bombay Act II of 1863 and Bombay Act III of 1874, ss. 4, 8, 9 and 10.

(2) 12 Moo. I. A., 91.

(3) 11 Bom. H. C. Rep., 249, 269.

(4) 13 Moo. I. A., 464.

(5) L. R. Ind. Ap. Sup. Vol., 182.

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Joseph Sparrow v *Tanáji Ráv Rája Sirke*(1). As a property they would, subject to known restrictions, be bound by the transactions of the owner for the time being(2); *Trimbak Bálkrisna Gadre* v. *Náráyánráv Dámodar Dábholkar*(3). The change in the character of a holding on the death of a particular tenant from tax-free *inám* to taxable *rayatwari* did not, it was ruled in *Vishnu Trimbak* v. *Tátia*(4) and *Rajkishen Singh* v. *Ramroy Surma Mozoomdár*(5), destroy the original estate or free the lands from specific liens created by the last *inámdár*. Here there has been an imposition, not of the full land-tax, but of $\frac{3}{16}$ths of it. This would not destroy the previous estate, nor would it annul a prior alienation. The nullity of the alienation, if it is null, must arise from a character possessed by the estate at the time of the attempt to alien. On a literal construction of the regulation, the estate held by the *vatandár* would be inalienable. It is conceded, however, that it was not absolutely inalienable: the *vatandár's* conveyance was valid, at least for his own life—*Krishnáráv Ganesh* v. *Rangráv*(6) and *Rávlojiráv* v. *Balvantráv Venkatesh*(7). Thus the prohibition against alienation has been allowed to deprive a *vatan* of the usual incidents of an estate only so far as was necessary to prevent its permanent severance from the services annexed to it (8)—*Zamindár of Sivagiri* v. *Alwar Ayyangar*(9); *Muttayan Chetti* v. *Sivagiri Zamindár*(10); *Rája Nilmoni Singh* v. *Bakranáth Singh*(11); *Muttayan Chettiar* v. *Sangili Vira Pandia Chimnatambier*(12). The nature of the estate, as such, was not otherwise varied from the common type.

In the case of the *Abergavenny* estates(13), where there was a special statutory prohibition against alienation, it was still said: "It cannot be contended that, in consequence of the limita-

(1) 2 Borr. R., 501. Comp. Co. Lit., 42a, 204a.
(2) West and Bühler H. L., 614, 622, 637, 641.
(3) Printed Judgments for 1884, p. 120.
(4) 1 Bom. H. C. Rep., 22.
(5) See, too, I. L. R., 1 Calc., 186.
(6) See 4 Bom. H. C. Rep., 1, A. C. J.
(7) I. L. R., 5 Bom., 437.
(8) See West & Bühler H. L., 162, 163.
(9) I. L. R., 3 Mad., 42.
(10) *Ibid.*, 370.
(11) L. R., 9 I. A., 104.
(12) *Ibid.*, 144.
(13) L. R., 7 Ex., 145.

tion imposed upon them, the successive holders of the estate are not to be regarded as tenants-in-tail at all. The limitation of the estate * * * * necessarily makes each succeeding holder of the estate a tenant-in-tail, and what follows comes as a proviso upon the Statute"[1]. So here the Hindu law makes each succeeding holder take as an heir to his predecessor, notwithstanding the collateral contingent operation of the rule for preserving the *vatan* from dissipation[2]—*Timangavda* v. *Rangangavda*[3]. In the case of an alienation by the *vatandár* in possession, the successors reclaiming after his death would do so in virtue of the special right conferred on them incidentally to their obligation to perform the service; and the incident would cease along with the obligation—*Krishnaráv Ganesh* v. *Rangráv et al* [4]. As heirs they could reclaim only in the same circumstances as other heirs. The right of repudiating the ancestor's transactions arose through the office descending; in this sense, it was that the alienation was void against the heirs—*Rávlojirav* v. *Balvantráv Venkatesh*[5]. If legally possible, it was but voidable, and the special burden on the lands having made the alienation, not originally null, but only subject to defeasance for the benefit of the service—*Adrisháppa* v. *Gurushidappa*[6], [7]—that cause for recovery could no longer avail when the service itself had once been finally dispensed with.

The second question, like the third, seems to admit of different answers according to circumstances. In the case of self-acquired property, a judgment affecting it is necessarily *res judicata* against a succeeding holder taking through the judgment-debtor. In the case of ancestral estate a judgment on the right to it against a father must generally be *res judicata* as regards his issue[8]—*Mayárám Sevárám* v. *Jayvantráv Pándurang*[9]; *Pitam Singh* v *Ujagar Singh*[10]—though a decree in a suit, seeking to make the patrimony answerable for a father's transactions, will generally

(1) L. R., 7 Ex., *Per* Cleasby, B., at p. 153.

(2) West and Bühler H. L., 184 (*a*).

(3) Printed Judgments for 1878, p. 240.

(4) See 4 Bom. H. C. Rep., at p. 15, A.C.J.

(5) I. L. R., 5 Bom., 437.

(6) See I. L. R., 4 Bom., at pp. 502, 503.

(7) West and Bühler H. L., 162, 163.

(8) West and Bühler H. L., 616.

(9) Printed Judgments for 1874, p. 41.

(10) I. L. R., 1 All., 651.

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not bind the sons, unless they are made parties[1], [2]. Even a widow, limited as her estate is, represents the expectant heirs in a suit directed against the property on a title not derived from her —see the cases of *Bábáji* v. *Nána*[3] and *Jugol Kishore* v. *Mahárája Jotindro Mohun Tagore*[4]; and if a judgment obtained against a father would not bind his issue, there would be virtually no limitation to suits claiming property as ancestral. A fraudulent and collusive suit will entitle the son to get the judgment, by which he is wronged, set aside; but, apart from fraud, the law of *res judicata* must guard titles against claims of members of joint families, heirs to ancestral estates, equally as against any other claims.

In the case of collateral succession[5] the collaterals, after the generation in which a grant or conveyance was made, must come in by heirship, seeing that a gift to persons unborn is not recognized by the Hindu law[6]. As representing a public interest they might get an improvident alienation or incumbrance set aside—*Rájáh Nilmoni Singh* v. *Bakranáth Singh*[7], but as heirs they take through their predecessors in title the property of the latter, in a quantity and quality determined by the rights established against it, as well as those established in its favour[8], as one and the same estate, not as several estates in the hands of the successive possessors or groups of possessors. In the case of an impartible *zamindári* it has lately been held at Madras—*The Sivagiri Zamindár* v. *Tiruvengada*[9]—that a compromise embodied in a decree against an ancestor gave a right of execution against his issue, though this involved a severance of part of the estate, and though in the language of the Judicial Committee "the same principle which precludes a division of a tenure upon death must also apply to a division by alienation"—*Rájáh Nilmoni Singh* v. *Bakranáth Singh*[10]. The

(1) West and Bühler H. L., 168, 617, 750.

(2) *Ibid.* 642.

(3) I. L. R., 1 Bom., 535.

(4) L. R., 11 Ind. Ap., 66.

(5) Nephews were held to have been represented by their uncle—*Nárdyan Gop Habbu* v. *Pándurang Ganu*—I. L. R. 5 Bom., 685.

(6) West and Bühler H. L., 179, 185, 217.

(7) See L. R., 9 I. A., 104.

(8) West and Bühler H. L., 162.

(9) I. L. R., 7 Mad., 339.

(10) L. R., 9 I. A., at p. 122.

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case just referred to shows that the collateral public interest might guard an estate which, apart from that connexion, would become subject to all the ordinary incidents of property.

In the case of a *vatan* or property held on a tenure of public service, it follows, from the considerations already stated, that each holder of office in succession, being subject to the service, may, or at least might, under the Hindu law and Regulation XVI of 1827, insist, as against his predecessor's alienation, on a restoration of the property to its intended uses—*Rájáh Nilmonî Singh* v. *Bakranáth Singh*(1). It is in this sense probably that the learned Judges in *Kuria* v. *Gururáv*(2) said that a *vatan* is held "on a tenure of successive life-estates". No holder could dispose of the *vatan* for a term extending (as the cases have determined) beyond his own life. But the validity, as against the issue, of a decree as to the ownership of a particular field or area, obtained against the ancestor rests on different considerations. The observations of Mr. Reeves on the operation of the English Statute *De Donis* are here very pertinent. "It was intended," he says, "by that Act to bind up the hands of the tenant-in-tail from prejudicing his issue, but not to preclude third persons from pursuing their lawful claims against the land entailed. It could not be said in oppositson to *their* right that the will of the donor should be observed. The Statute provides only against voluntary alienations, and, among others, declares that a fine levied upon such entailed land shall be void—a fine being at that time an amicable suit for the single purpose of transferring the possession and right of land. But to all involuntary alienations, to all recoveries by right, such land entailed was still liable notwithstanding the strict restraint on alienation by the owner" (Reeves's History of the Common Law, Vol. III, p. 330). In other words, an entail or a dedication to a public service cannot affect the right of outsiders to lands not embraced in it, or which could not legally be embraced in it. If, then, a *vatan* is an estate, as it seems to be, it would be contrary to sound legal principles that the same man should have to prove again and again in successive suits that a piece of land held by him as his own did not form part of the *vatan*. For the

(1) See L. R., 9 I. A., 104, 120, 121. (2) 9 Bom. H. C. Rep., 282.

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quieting of titles here, as in the case of an ancestral property of the usual kind, it is necessary that some one should be recognized as capable of representing in litigation the aggregate of interests, in virtue of which he is in possession of the *vatan*[1]. Under the Hindu law the son in each generation represents his father, and takes up his *persona* as centre of a connected group of rights and liabilities in the fullest possible sense[2]. As regards the issue, therefore, of a *vatandár* against whom a judgment has been given, it seems that no doubt ought to be entertained of their being bound by the judgment as *res judicata*. A *vatan*, recognized as such, cannot legally pass away from the *vatandár* family—*Wamnáji* v. *Parashrám*[3]—, and even though the family should have divided into several branches with rights enjoyed in rotation, this does not seem to constitute for each branch so distinct an estate that, on its falling into possession, that branch can claim to revive a contest in which another branch has already been defeated[4]; *Smith* v. *Lord Brownlow*[5]; *Phillips* v. *Hudson*[6]. Under the Regulation law each branch as it succeeded to the office and the emoluments constituting the *vatan*, might claim to renew the struggle as representing *an inalienable public interest;* but this interest is now placed under the guardianship of the Collector, who has absolute power to defeat a judgment that would withdraw land from the *vatan* holding[7]. The *private right* should not be incapable of final determination. It is not, in fact, ever disputed that a *vatandár* in possession may singly sue to recover property wrongfully severed from the *vatan*. He is not called on to join every one however remotely interested as a plaintiff—Comp. *Pyke* v. *Crouch*[8]. But if he has the capacity thus to represent the aggregate of interests in a successful suit, he must have it equally in an unsuccessful suit, and in the absence of fraud, he must have it no less in a suit in which he is defendant. In the case of the *Zamindár*

(1) See Code of Civ. Proc. (XIV. of 1882), s. 13, Expl. 5.

(2) West and Bühler H. L., 162, 165, 216.

(3) Printed Judgments for 1884, p. 220, See Code of Civ. Pro. (XIV. of 1882), s. 30.

(5) L. R., 9 Eq., 241.

(6) L. R., 2 Ch. Ap. 243; Comp. *Nandun Lall* v. *Lloyd*, 22 C. W. R., 74, Civ. Rul.

(7) Bom. Act III of 1874, s. 10.

(8) 1 Lord Raym. 730.

of Sivgiri v. *Arunáchala*(1) the High Court of Madras says: "His (the *zamindár's*) argument is, that a creditor who wants to make a *zamindári* available is bound to sue, not only the *zamindár* for the time being, but all those possible successors to whom the estate may pass before the debt is liquidated. The effect of this, however, would be to raise a great number of collateral issues * * * *. It seems to us that a *zamindár* represents the estate during his life for all practical purposes." This was in the case of an impartible *zamindári*, which might be supposed to bear the closest resemblance to an entailed estate under the Statute *De Donis* in England(2); yet the decree against the father was given effect to on the estate in the hands of the son —*Muttayan Chettiar* v. *Sangili Vira Pandia Chinatambier*(3). Property dedicated to religious purposes is, by Hindu law, inalienable—*Mahâranee Shibessouree Debia* v. *Mothooranath Acharjo*(4); (5); *Khushalchand* v. *Mahádevgiri*(6); yet a decree obtained without fraud against one *mahant* or *shebait* binds his successors, —*Goláb Chand Báboo* v. *Prosunno Coomaree Debia*(7); *Jevun Dass Sahoo* v. *Siáh Kubeeroodeen*(8); *Prosunno Coomare Debia* v. *Goláb Chand Baboo*(9). He fully represents the estate in litigation, and a judgment for or against him is *res judicata* for his successor though in case of an alienation or incumbrance limitation is computed against the successor only from his succession—*Mohunt Burm Suroop Dass* v. *Khâshee Jha*(10).

How far English precedents can or cannot help us in our present inquiry, may best be gathered, perhaps, from *Ferrer's* case and the notes in Thomas and Fraser's edition of Coke's Reports (Part VI, 76). An adjudication under the Common Law did not prevent the pursuit of the same right by an action of a higher nature, and thus even the same plaintiff who had failed in a *formedon in descender* might sue again in a *formedon in reverter* or *remainder*. He could not have a new *formedon in descender*,

(1) I. L. R., 7 Mad., at p. 335.
(2) West and Bühler H. L., 161.
(3) L. R., 9 I. A., at p. 144.
(4) 13 Moo. I. A., 273.
(5) West and Bühler H. L., 201, 741, 785.
(6) 12 Bom. H. C. Rep., 214.
(7) 20 Calc. W. R., 86.
(8) 2 Moo. I. A., 392.
(9) L. R., 2 I. A., 150.
(10) 20 Calc. W. R., 471.

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but his issue-in-tail could. This was a consequence of the express provisions of the Statute *De Donis*(1). "So", Coke says, "if he be barred in a writ of error on the release of his ancestor, his issue shall have a new writ of error, for he claims, not only as heir, but *per formam doni*, and by the Statute shall not be barred by feigned pleading or false pleading of his ancestor so long as the right of the entail remains." On the same principle it was that a warranty given with an entail was itself entailed, so that a release of the warranty by an ancestor could not bar the issue(2). But these decisions rested on the explicit language of the Statute. But for the Statute of Westminster II, as Coke says, even if the tenant-for-life, where the remainder was over in fee, had suffered a recovery, he in the remainder was without remedy—a consequence which Coke approves as *tending to prevent a multiplicity of suits* on the same cause of action The power thus placed in the hands of the tenant-for-life was so abused that the assent of the person in remainder or reversion was made necessary by the Statutes 32 Hen. VIII, c. 31, and 14 Eliz., c. 8, but still with a saving in favour of any who should recover against the tenant-for-life by a real, not a fictitious title. Thus in a really contentious suit the tenant-for-life represented, not only his own interest, but all interests in succession to it, though these were drawn from a source higher than his own estate. The entailed warranty, too, would lose all its efficacy for the issue by the ancestor taking advantage of it, though fictitiously, in the feigned action of recovery(3). A fictitious recompense in lands awarded, from the common vouchee enabled the tenant-in-tail, on the principles settled in *Taltarum's* case, to bar the estate-tail itself with the remainders and the reversion depending on it(4). The strong tendency of the English jurisprudence to give effect to a judgment obtained against the actual holder of a free-hold estate in this way defeated the stringent provisions of the Statute law.

The subsequent history of this branch of the English law need not be traced. In the present day the complete representative

(1) See Revised Statutes, Vol. I, p. 42.

(2) Co. Lit., 392B.

(3) Co. Lit., *ub. sup.*

(4) Cruise's Dig., Vol. V, 270; Shepp. Touch., Vol. I, p. 39, note 6.

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capacity of the holder of an estate of inheritance is unquestioned[1]. It is plain that, even where the Legislature had pronounced against alienation, the force of a judgment recovered was so great, and the difficulty of distinguishing after many years between contentious and amicable proceedings was so great, that the doctrine of *res judicata* became the commonest foundation of ownership. Nor could the ascription of lands to the support of public services prevent this when the devolution of estates without a new appointment or sanction by the Crown at each descent had once been recognized[2]. All lands were held immediately or mediately from the Crown on various tenures of service, the due performance of which could not but be impaired or endangered by alienation; yet alienation, mostly by judicial forms, became the almost universal rule, recognized as inevitable and beneficial as the special liability of the land for the chief public services became obscured in the later developments of the political and fiscal system.

English analogy, then, points clearly to this, that, in the absence of express legislation to the contrary, the holder of an hereditary estate, such as a *vatan* is, represents in litigation the aggregate of interests in the land which, for the time being, centre in him. By a suit in which he is successful he wins for all: by one in which he fails he loses for all. The exceptions rest on temporary contractual relations, on defect of the estate, or on specific statutory provisions.

If we look to the Continental systems derived from the Roman law, we find the same efficacy given to judgments obtained against the holders of restricted estates. The law of substitutions derived from the Roman law of *fidei-commissa* and of substitutions, though very different from the latter, was once widely prevalent. It wholly forbade any alienation such as to impair the estate of a successor: yet as the holder, while he held the property, held it as owner, all rights and liabilities as to suits concerning the estate centred in him: *ipsi et in ipsum competunt*]

(1) See *per* Lord Eldon in *Cockburn* v. *Thompson*, 16 Ves., 326; and *Lloyd* v. *Johnes*, 9 Ves., at pp. 56, 57.

(2) The decision in *Rajá Nilmoni Singh* v. *Bakranath Singh*, L. R., 9, I. A., 104, 124, turns on the same point.

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Consequently, a successful suit on a right contradicting his title effaced at once both his title and the substitutions depending on it. The "remainder-men," or the guardians of the substitution, could intervene to prevent illicit dealings, or to protect the proceeds of necessary sales; but they could not avert the operation of *res judicata* resulting from an honest contest. Another consequence of the "*persona*", to which the estate was annexed, being completely filled, was that a title by prescription acquired against the life-holder was acquired against all his successors. As all rights centred in him, that adverse act, and the submission to it, which extinguished them in him, extinguished them altogether[1]. According to the Scottish law, an action *boná fide* litigated by an heir of entail is *res judicata* in questions with succeeding heirs[2], and the force of judgments extends much further than would be necessary for the adjudication of the present case.

It would seem, then, to be a general principle of jurisprudence, that a mere special line of descent or mode of devolution prescribed in particular cases, does not make the property subject to it exempt from the effects of a judgment against the person in whom at the time the estate is vested. The particular law of devolution in such a case no more involves such a consequence than the general law of devolution which would otherwise operate. Where the aggregate estate is not fully represented, *res judicata* can affect it only to the extent of the representation.

The first question proposed to the Full Bench remains, and as to that it is not disputed, that in the ordinary case of property, whether self-acquired or ancestral, held by a Hindu father as ostensible owner, adverse possession bars, not only his right, but the right of his issue—*Shankarráv Rámchandra* v. *Venkatráv Raghupat Deshpánde*[3]. Yet, according to the Hindu law, the sons are co-owners with the father, and he cannot dispose of the patrimony indiscriminately without their assent[4]. Many

(1) See Pothier Tr. des Substitutions, 5 *passim.*

(2) Ersk Ir. Vol. II, p. 1137.

(3) See Printed Judgments for 1882 p. 212.

(4) Mitacs., Ch. I, s. 1, pp. 27, 28; s. 5, pp. ,

alienations and incumbrances detrimental to the sons have, in fact, been set aside at their suit[1]. A restricted power of dealing with the property, therefore, does not involve an incapacity of submitting to adverse possession until limitation has given a title by prescription to the adverse holder[2]. The representation of the estate is full, as in the case of resignation or abandonment of his holding by a *mirásdár* (*Arjuna* v. *Bhavan*[3] and *Davlata* v. *Beru*[4]); if it were not, then the sons should come forward, even in their father's life, to complete the representation—see *Náráyan G. Habbu* v. *Pándurang*[5]—and to protect the interests diffused amongst them[6]. If this, indeed, were not so, no length of adverse possession would be a safeguard even against the possession of a stranger wholly without title continued for six months[7], so long as the original right of the united family could be traced—*Goodtitle d. Parker* v. *Baldwin*[8].

In the case of collateral succession the matter is still plainer. The collateral heir is not co-owner, except as a co-member of a united family; and as the owner may alien the property so as to disappoint the collateral heir, it is obvious that he may submit to the growth of a prescription that will annul the estate[9] before the collateral's right to it ever becomes more than a mere expectancy. Is a service holding, then, of so different a character that limitation and prescription do not affect it? Though different views have been held on the subject, yet, according to the best authorities, a *vatan* is an estate given to a family with certain obligations annexed to it[10]—*Krishnáráv Ganesh* v. *Rangráv et al*[11]. The gift of an estate, however, can confer no right to appropriate other men's property, and the law of prescription rests on a presumption, that a right held for a certain time without contest as against a person capable of contesting

(1) West and Bühler H. L., 194, 631, 639, 810.

(2) Coleb. Dig., Bk. V, tt. 384, 396.

(3) 4 Bom. H. C. Rep., 133, A. C. J.

(4) *Ibid.* 197, A. C. J.

(5) I. L. R., 5 Bom. at p. 685.

(6) See Limitation Act XV of 1877, ch. II, art. 126.

(7) Specific Relief Act, s. 9.

(8) 11 East., 488.

(9) See Coleb. Dig., Bk. I, Ch. III, t. 113, 126; Comm., Bk. V, t. 395, 396; Narada, Pt. I, Ch. IV, 5, 18; Pt. II, Ch. XI, 27; Colebrooke in 2 Str. H. L. 27; W. & B. H. L., 695.

(10) West and Bühler H. L., 173, 845.

(11) 4 Bom. H. C. Rep., A. C. J., at pp. 11, 13; *Adrishappa's* case cited already.

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it, could not have been successfully contested[1]. The presumption is not less strong against the holders of a *vatan* than against any other proprietors; social order and security would be as much disturbed by unlimited claims brought forward by *vatandárs* as by any other class. The preservation of the property as a support for the services necessitates a distinct set of rights, both as to substance and as to procedure—*Rájáh Nilmoni Singh* v. *Bakranáth Singh*[2], but the special assignment acts as a concurrent or collateral restriction without making the *vatandár's* estate any the less an estate, subject as much to the ordinary rules, except where these come into conflict with the public interest and its peculiar safeguards[3]. Lord Eldon said, though in a somewhat different connection, "the ordinary rules are applicable to estates granted by the Crown itself for the maintenance of dignities with reversion in the Crown"—*Davis* v. *D. of Marlborough*[4]. Subject to the statutory rules they, Lord Eldon thought, were still estates governed by the ordinary law. Similarly in *Mancharám* v. *Pránshankar*[5] it is said that, apart from questions as to the capacity of an alienee of sacred property to perform the functions connected with it, "there may be alienations which are free from these objections, and in such cases there would appear to be no reason why any restriction should be placed upon the exercise of any of the ordinary rights of property." So, too, it seems, are *vatan* estates governed by the ordinary law as to all their incidents, except so far as the public rights may be impaired by allowing the consequences of these incidents. The public rights had formerly to be asserted by the successor to the estate, and coinciding in the same person with the private heritable right were hardly distinguished from it; but it is evident that there can be no real and general quieting of titles if some prescription will not guard them against claims, even in an alleged public interest. This was recognized

(1) Sav. Syst., ss. 237, 252; Pothier Prescr iption, ss. 4, 162; Dig. L. 41, t. 3; L. 1 cited by Lord Blackburn in *Dalton* v. *Angus*, L. R., 6 A. C. at p. 818; Sp. Ap. 27 of 1871.

(2) See L. R., 9 I. A., at p. 122; and comp. the St. 34 and 35 Hen. VIII, c. 20.

(3) Comp., as to the Ghatwali tenure, *Anundo Rai* v. *Kali Prosad Singh*, I. L.R., 10 Calc., 677, 685.

(4) 3 Swanst. at p. 136.

(5) I. L. R., 6 Bom., 298.

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by the framers of the Elphinstone Code[1], who in the 5th Regulation provided that a possession acquired without fraud, either of lands or of an hereditary office, should ripen into ownership in thirty years[2]. Section 20 of Regulation XVI of the same Code provides that *vatan* property shall not leave the *vatandár* family, and once annexed immediately to the office shall remain annexed to it; but this could not prevent the operation of Regulation V, because under that law should property be claimed, whether as *vatan* land or not, thirty years' possession by the defendant had to be received "as proof of a sufficient right of property in the same"—*Sitárám Vásudev* v. *Khanderáv Bálkrishna*[3]. Sections 35 and 36 of Regulation XVII of the same Code[4] show that the Legislature accepted the principle of prescription creating a private right of property or of fiscal exemption equally against the State as against the individual[5]; against the State, therefore, also where represented by the individual[6]. It might well be then that a title had been fully acquired in this case by the donee before Act IX of 1871 came into operation, which would not be affected by that Act or the subsequent repeal of the Regulation[7].

The recent Limitation Acts, though less distinctly expressed for the conversion of possession into ownership, are, for the purposes of the present discussion, laws of acquisitive prescription[8]; the right acquired under them is gained in a shorter time, but is of the same kind as under the earlier law[9]—*M. S. Sinde* v. *G. P. Sinde*[10]; *Gundo Anandráv* v. *Krishnaráv Govind*[11]; *Giriápa* v.

(1) As by the English Legislature in the Statutes limiting the *nullum tempus* doctrine, 9 Geo. III, c. 16, &c.; see, too, Act XV of 1877, Sch. II, 130.

(2) See West & Bühler H. L., 697, 698.

(3) See I. L. R., 1 Bom., 288.

(4) The principle prevailing under the Roman law and the system derived from it, that public and sacred property being *extra commercium* could not be acquired by *usu capion*, was not admitted in the Bombay Regulations. Hence no provision was made for *immemoriale tempus* where the question was whether property was public or not?

(5) See Sav. Syst., ss. 247, 195, 198, 199, 201. The Hindu law excepted the king's property from the rule of prescription; Co. Dig., Bk. I, Ch. III, t. 114.

(6) See Sav. Syst., *ubi sup*. and s. 248.

(7) Act XV of 1877, s. 2.

(8) Rights not exercised are lost under the chief Continental Codes—see Sav. Syst., s. 251.

(9) See Act XV of 1877, s. 28.

(10) 4 Bom. H. C. Rep., 51, A.C. J.

(11) *Ibid.* 55, A. C. J.

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Jakana (1). If the successor, by virtue of the grant to a *vatandár* who has aliened part of the *vatan*, is not merely an heir, then he must be a remainder-man, and this, according to the Hindu law, he could not be after the decease of contemporaries of the original grantee—*Kumar Tarakeshwar Roy* v. *Kumar Joshi Shikhareswar*(2). Under article 140, Sch. II of Act XV of 1877 he is barred by twelve years' possession after his heirship has become a present estate(3), and by section 28 of the Act his right has, at the same moment, become extinguished. The decisions say that it has become extinguished in favour of the adverse holder for the prescribed time, whose ownership, except as against some wholly independent title, must thus at the same moment have become complete(4). That this was the intention of the Acts appears from their preambles, though it must be admitted that the enacting parts are by no means perfectly adapted to the purpose. The case of *Ganga Govind* v. *The Collector of the* 24 *Pergannas*(5) is to this effect. The Judicial Committee say: "It is of the utmost consequence in India that the security which long possession affords should not be weakened;" and, again, "If the party out of possession could set up a sixty years' law of limitation merely by making common cause with a Collector, who could enjoy security against interruption?" The case was one under Bengal Regulation III of 1793; but, as shown in *Brindabun Chunder Roy* v. *Tara Chand Banerjee*(6), the principle of it has been applied to many cases under Act XIV of 1859, though that Act contains no section which directly constitutes a law of *usu capion* or acquisitive prescription. In *Rám Lochun Chukerbutty* v. *Rám Soonder Chukerbutty*(7) Sir R. Couch, C. J., says: "They (the plaintiffs) having been in possession of the land for more than twelve years, the title of any other person had been, to use the language of the Judicial Committee, * * * extinguished in their favour. The effect of their possession was to extinguish other titles, if any existed."

(1) 12 Bom. H. C. Rep., 172.
(2) See L. R., 10 I. A., 60.
(3) See *per* Lord Mansfield, C. J., in *Fischar and Taylor* v. *Prossesr*, Cowper at p. 218.
(4) *Radha Govind* v. *Inglis*, Calc. Law Rep., 364.
(5) 11 Moo. I. A., 345, 362.
(6) 20 Calc. W. R., Civ. Rul., 114.
(7) 20 Calc. W. R., Civ. Rul., p. 104.

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In these cases the learned Judges followed the analogy of the decisions of the English Courts on the provisions of the Limitation Acts of Henry VIII and James I. These were, in form, Statutes of Limitation only; but they were construed so as to operate as laws of "acquisitive prescription". The Statute of James I says, that all writs of *formedon in descender, etc.,* "shall be sued and taken within twenty years next after the title and cause of action first descended or fallen." It might be argued that this should mean after the particular title and cause sued on first became available to the plaintiff; but the Courts held that twenty years' adverse possession against a first descendant or remainder-man barred his and all the subsequent estates by devolution of the same right—*Tolson* v. *Kaye* (1). Though a transferee in fee had held for more than twenty years during the life of the tenant-for-life, who had conveyed to him, the remainder-man, it was held, was not barred, as the possession of the transferee was wrongful only from the death of the tenant-for-life—*Doe d. Souter* v. *Hull*(2): but the lapse of twenty years from that event bound all claimants under an entail—*Tolson* v. *Kaye*(3), and gave to the transferee a sufficient title, "because a possession for twenty years is like a descent which tolls entry"—*Stocker* v. *Barny*(4). It was contended for the heir-in-tail "in so far as he must be of the blood of the donee-in-tail, it is true he takes by descent; but in so far as he takes nothing from his ancestor, but claims *per formam doni,* he may be esteemed in some sort a purchaser;" but this distinction from the heir of one seised in fee was rejected by the Court. The case as put for the heir-in-tail was very analogous to the one before us, though the words "first descend," which occur in the English Statute are not used in the Indian Limitation Acts. It is "his title," *i. e.* the title of the claimant under the entail, which "first descends" in order to make the Statute of James I operative, and this is, for the purposes of limitation, identified with the title of the ancestor

(1) 3 Brod. & Bi., 217. (2) 2 Dow. & Ry., 38. (3) 3 Brod. & Bi., 217.

(4) 2 Salk., 421, quoted Cr. Di., III, 436; 5 Bac. Abrt., 220, 221. *Usu capion* operating to add ownership directly to possession has never been fully received into the English law. It is simply by preventing actions that legislation has given its due effect to long possession—see Bracton, ff. 51, 52, and Co. Rep. *loc cit.*; *Brassington* v. *Llewellyn*, 27 L. J., Ex., 297.

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who has allowed limitation to bar his entry. The grandson of the original alienor in this case, as son of the man who allowed (if he allowed) himself to be barred by limitation after his estate fell into possession, is undoubtedly an heir to his father; and, even if he can be supposed to take by a right analogous to one *per formam doni*, should, according to the English authorities, be barred by the quiescence of his ancestor.

Of the more recent English cases it was held by the Courts in *Cannon* v. *Rimington*(1) that, although the lapse of more than twenty years in the life of a tenant-in-tail, who had made a feoffment, would not bar his successor, yet if he had "voluntarily abandoned his interest and remained out of possession for twenty years, the issue-in-tail would have been barred." Bramwell, B., would have applied the same rule in the case of the *Abergavenny* estates; but the other Barons thought that the express provisions of the entailing Statute prevented limitation from operating. In *Earl De la Warre* v. *Miles*(2) it was held enough to give a title that the benefit in question had been enjoyed for the prescribed time as of right, not by permission, and that the right was a legally possible one. *The Mayor of Brighton* v. *Guardians of Brighton* (3) determined that, under Stat. 3 and 4 Wil. IV, c. 27 and 37, and Stat. 38 Vic., c. 57, s. 1, an exclusive possession for more than twelve years operates as a bar to an entry or suit, even in the case of a corporation for public purposes disqualified to alien, except with an assent which had not been obtained. The mere possession, after a right to sue had accrued, was held to give a title. Cases like the *Earl of Abergavenny* v. *Brace* (4) do not afford much guidance for those which are governed by a general law. Laws which bind up particular estates against alienation are of the nature of *jura singularia*, which, even in their own sphere, are not to be extended by mere inference(5) —*Somu Gurukkal* v. *Rangammal*(6). Beyond that sphere they cannot serve for any deduction of general principles on account of their exceptional character.

(1) 21 L. J., C. P., 137; 22 L. J., C. P., 153.
(2) L. R., 17 Ch. Div., 535.
(3) L. R., 5 C. P., 368.
(4) L. R., 7 Ex., 145.
(5) Comyns's Dig., Parlt. (R. 7).
(6) 7 Mad. H. C. Rep., at p. 14.

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The general principle that may be gathered from the English decisions is that neither a special mode of devolution—*Austin* v. *Llewellyn* (1)—nor an incapacity for alienation (2) will prevent limitation from operating against an estate. This is equally so in India, and even in the case of sacred property (3)—*Mancháràm* v. *Pránshankar* (4); *Trimbak Báwa alias Bhau Báwa* v. *Náráyan Báwa* (5); (6). In the case of *Kannan* v. *Nilakandan* (7) a sale had been made of a trusteeship of a temple with the annexed estate. This was pronounced invalid; yet, as the purchaser had held for the term prescribed by the Limitation Act, his possession was maintained against the claim of the other trustee. Yet sacred property is generally inalienable(8). When a possession contradictory of an alleged title has been held for the prescribed time, the law seems to presume a corresponding right contradicting that title, not one derived from it (9). An independent ownership cannot be affected by the special incidents of one opposed to it. The faculty of acting and submitting to acts that affect an estate throughout its further descent, is so much the more unquestionable in India than in England, as the Hindu law does not recognize the manifold coincident and contingent interests allowed by the English law. Even in the case of a widow, with her limited estate, the representation of the inheritance is complete—*Katama Natchiar* v *The Rájáh of Shivgunga* (10). A decree on a right paramount to her's prevails against the expectant heirs—*Jagat Kishor* v *Máháraja Jotindro Mohun Tagore* (11)—, and an adverse possession which bars her, bars the male successors to the estate—*Rám Dyal Gossain* v. *Kattyanee Debia* (12); *Brinda Dabee Chowdhrain* v. *Pearee Lall Chowdhry* (13); *Gobindmani Dassee* v. *Shamlal*

(1) 9 East, 276.

(2) *The Mayor of Brighton's* case *supra*.

(3) Comp. Steele L. C., 206.

(4) I. L. R., 6 Bom., at pp. 299, 300.

(5) I. L. R., 7 Bom., 188.

(6) West & Buhler H. L., 201, 741.

(7) I. L. R., 7 Mad., 337.

(8) West & Buhler H. L., 741, note (*d*), 785*n*

(9) The *longi temporis præscriptio* of the Roman and of the Canon laws rested on a presumed acquisition of rights of possible acquisition—See Sav. Syst., 36, 198, 199.

(10) 9 Moo, I. A., p. 604.

(11) L. R. 11 Ind. Ap. 66.

(12) 8 Calc. W. R., p. 257, C. R.

(13) 9 Calc. W. R., 460.

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Bysak (1). The analogy of the widow's estate was said to apply to a *vatan* in *Bábáji* v. *Nána* (2), and it is plain that the inalienable quality of a *vatan* cannot legitimately be made use of to determine the question of whether a particular piece of land is *vatan* or not. After the lapse of twelve years' adverse possession the law says that, having been held as non-*vatan*, it is non-*vatan*, and thus averts the evil of an indefinite repetition of suits which was dwelt on by the Judges in *Tolson* v. *Kaye* (3). When, therefore, the succeeding holder takes as heir of his predecessor, he is bound by the bar which bound his predecessor; and in India every successor after the first generation in possession as donees, must, in general, take as an heir, since the creation of executory interests or remainders for persons not in existence at the time of the deed is not allowed by Hindu law(4). The successors of living persons, by or for whom the estate is first taken, can take only by reason of their personal relation to their predecessors, and this is inheritance(5), even though an unusual line of descent may have been prescribed, to which the law, in the case of public grants and of religious endowments, gives effect(6).

KEMBALL, J., concurred in the judgments of the Chief Justice and Mr. Justice West.

NÁNÁBHÁI HARIDÁS, J.—I agree in the answers proposed to be given to the first two questions, for the reasons stated by the Chief Justice, and in the answer to the third question for the reasons stated by Mr. Justice West.

1885, *January* 13.—The case having gone back to the Division Bench, Sargent, C. J., and Nánábhái Haridás, J., passed the following judgment:—With reference to the judgments recorded by the Full Bench on the 7th of October, 1884, the Court reverses the decrees of the lower Courts, and rejects the plaintiff's claim.

Decrees reversed.

(1) Beng. L. R. (F. B.) at p. 51, citing 2 Bouln., 193.

(2) I. L. R., 1 Bom., at p. 535.

(3) 3 Brod. & Bi., 217.

(4) So under the Roman law—See Butler's note to Co. Lit., 191A.

(5) See Mit., Ch. I, s. 1, p. 2; Vyav. May., Ch. IV, s. 2, p. 1; W. & B.H.L., 59.

(6) West and Buhler H. L., 201.