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INFLUENCE OF ENGLISH LAW IN INDIA.*

At all times in the history of the world the influence of the civilisation and culture of one community or race over those of another is a more or less continuous phenomenon. The influence arises from such opportunities of contact as trade, geographical situation or colonisation. It results in the benefits or achievements of one civilisation being imparted to another and thus helps the progress of human civilisation as a whole. The influence of empire in the sense of political domination of one people over another is rarer and less normal but likely to be more powerful and enduring than the sources of influence just mentioned. Such influence has an unfavourable side as it is attended with injury, great or small according to circumstances, to the life and character of the subject people but that it may also have a beneficial character has a striking illustration in the history of the Roman Empire. This Empire gave the people under its sway the benefits of peace and security for about five centuries when it broke up as a result of the barbarian invasions in the fifth century A.D. When it fell, it left two great and priceless legacies for the life and civilisation of Western Europe, *viz.*, its religion and its law. After the conversion of Emperor Constantine, Christianity spread rapidly and replaced paganism in the Empire. When the Empire fell the Roman church retained and in course of time extended its authority and influence. It was ultimately able by effecting an alliance with the temporal rulers to organise a Christian Commonwealth in Western Europe known as the Holy Roman Empire. It became thereby a great unifying force and preserved Europe from the forces of violence and disruption during the Middle Ages. The other great link of unity in

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mediæval Europe was Roman law. It was received as the civil law of the countries of the Holy Roman Empire and sustained social order and the authority of the state for several centuries. While the Roman church declined in its power after the Protestant Reformation, the Roman law outlived it and remained as the law of those countries until modern times. Through these countries Roman law became the law of others outside Europe like Ceylon, Dutch East Indies, South Africa and parts of North and South America. By its great merits as a scientific jurisprudence, rich in its rules and applicable to widely differing conditions of time and place, it has deeply influenced the legal system and codes in force in the modern world.

The influence of the British Indian Empire on its people has been considerable and continues through several agencies such as law, religion, language and administration. Any fair or comprehensive view of this influence and its credit and debit sides is possible only at some future time when the period of conflicts is over and it can be known how far such influence has enabled the Indian people to attain a higher political stature and better conditions of life than they have at present. At the present day the whole subject is involved in acute controversy which is outside the range of this paper. But it is possible and indeed necessary sometimes to evaluate particular sources of influence for guiding our attitude to questions of practical importance in the present or immediate future. This is especially true in the case of the English law and legal system in force in our country because with the passing of provincial administration in the spheres of law and justice into Indian control questions of replacing or refashioning the whole or part of the existing system have begun to attract attention. With Indian control over these spheres becoming more complete in the provinces and in the central government in the near future such questions may become live issues at any moment. We have occasionally heard views expressed in recent times in favour of a wholesale abandonment of the present legal and judicial system and a reversion to a system of village tribunals which is believed to have functioned efficiently at an older time. I have therefore ventured to examine some of the main features of the English legal system in force in our country and the place which it occupies in Indian life and polity at the present day.

The characteristic features of the English legal system may be stated to be threefold; its judicial system, its laws and last, the doctrine of "Rule of Law" which enforces equality before the law even as between the subject and the state and its officers.

The judicial system of England consists of two parts, the judiciary and the legal profession. The judiciary is separate from and independent of the executive and is recruited entirely from the ranks of the legal profession. It is assisted by juries in the trial of civil and criminal causes. These circumstances as well as the terms and mode of judicial appointments have enabled the English courts to build up a reputation for a high degree of efficiency and integrity and to be regarded as the champions of popular rights and liberties. The decisions of courts conform to statute law or precedent and are subject to effective control and supervision by a Central Court at Westminster. By reason of its training, privileges and emoluments the legal profession plays a great part in the work of the courts and the presentation of opposite viewpoints by trained lawyers enables the courts to decide cases in accordance with settled rules and precedents and not arbitrarily. These features of the judicial organisation are designed to secure uniformity and certainty in the justice of the courts and prevent them from becoming instruments of oppression. The main features of this system have been introduced into India with important modifications required by local conditions, such as restriction of the system of jury trials to certain classes of criminal cases or the mode of recruitment of the judiciary. The importance of establishing central courts for effective control of subordinate courts in a large country like ours can hardly be exaggerated. The absence of such control was a grave defect in pre-British justice. The East India Company made various experiments with dual sets of courts but finally the High Courts in the provinces were invested with complete powers of supervision and control over the subordinate courts in those areas and their decisions are liable to further control and supervision by the Privy Council in England and now also by the Federal Court at Delhi.

The second feature of the English legal system is its laws. These laws are the result of a slow and orderly evolution in response to the needs of a people advancing in civilisation and prosperity. This circumstance has imparted to the English law a richness and comprehensiveness which have made its importation valuable in the changing social and economic conditions of our country. The establishment of original and appellate courts by the East India Company in the large areas which it began to acquire in the second half of the 18th century was followed by the promulgation of laws known as 'Regulations'. Lord Cornwallis played a great part in organising our judicial system and two of his contributions to it are his collection of those regulations and his institution of a legal profession by licensing vakils to plead before the courts and providing them with legal training. These regulations and the great codes of

substantive law and procedure which took their place in the 19th century substantially reproduce the principles of English law and govern the decisions of our Courts except in the regions of Hindu and Muslim family law and customary tenures. We must remember that though we had developed codes of laws in certain spheres of law like family law and succession there were large gaps in our indigenous jurisprudence requiring to be filled up by English law such as the law of contract, evidence, easements, administration of estates of deceased persons. What is perhaps more important is that the promulgation of uniform codes of laws throughout this vast country and their enforcement by a judicial system organised in the manner described already were features in respect of which the indigenous legal systems were unfortunately defective and should have resulted in a great improvement in the quality of justice that was available to our people when those systems were in force. I believe that it is not too much to claim for the English legal system that its introduction in India is perhaps the greatest single factor in producing conditions of civil order in which the large mass of our people could live their lives in peace and contentment and without fear of oppression and injury. With the elements of a civilised life thus secured our people have been enabled to entertain higher ambitions of securing unity and independence and raising their political and economic condition to the level prevailing among the foremost nations of the world.

The third feature of the English law is the rule of law and its application in India has produced results of a far-reaching character. The assumptions underlying that rule in England are the sovereignty of a democratic Parliament and the equality of all people rich and poor, official and non-official, before the law. By the application of the rule in India even the humblest ryot or citizen is able to pursue his remedy against the Government and high executive officials and challenge the validity of their acts, and even the competence of legislation. This was certainly a new experience in the life of the Indian people accustomed to reconcile themselves to official or royal disfavour and could not have failed to produce in them a sense of self-respect and independence as well as a consciousness of their power and position in a democratic state.

In speaking of such results of the introduction of the English law and legal system in India I do not ignore the evils, often of a grave character, in their working in India. We are only too familiar with the abuses to which our courts and their processes have been liable, such as perjury and subornation of evidence, vexatious litigation resulting in the ruin of families and often of whole villages. But serious as these evils are, we must recognise that the organisation of a judicial and legal system in

the manner described above should have relieved our people from far greater dangers of injustice and oppression. Besides it will appear on careful examination that these evils cannot be ascribed to any of the basic principles of this system which are indeed designed to prevent them. On the other hand they are due rather to failure to make suitable changes and adaptations in particular rules of substantive law or procedure. For instance the compulsory registration of wills, adoptions, authorities to adopt and marriages would avoid so many disputes that often take up the time of our courts. The evil of litigation due to the uncertainty of law is remediable by legislation and codification. The machinery for reform under the English legal system is twofold, first, the power of courts to meet new situations by the mode of interpretation and extension of old rules and precedents; second, parliamentary legislation. In a country like England governed by a democratic parliament the danger of a break-down in the legal system or of grave public suffering due to bad laws must be far less than in any autocratic state. Though the Indian legislatures have not obtained sovereign powers they have had for a long time past freedom to make necessary reforms in law and procedure and have often done so. It must also be remembered that there has been far more wasteful litigation due to uncertainty in the Hindu law than that attributable to defects in the rules of English law applied in this country. The great evils of excessive cost and delay of litigation are also remediable by administrative or legislative action.

There are other evils in the working of our legal system, which are not easily remediable. They arise from the disorganised conditions of the social and economic life of our people. In mediæval England perjury and subornation of evidence, intimidation and bribery of witnesses and juries were serious menaces to the judicial administration but they began to disappear in an era of commercial and industrial expansion and prosperity. In India we have not entirely emerged from such conditions. Disputes about possession of immovable property and family quarrels abound in our Courts and give great opportunities for perjury and fabrication of evidence. The prevalence of such abuses in the criminal courts leading often to perversion of justice and oppression is also notorious. These evils have, however, their roots in conditions external to the legal system though they cannot fail to infect and impair parts of the system itself. Cases like the Bhowal Sanyasin's recently decided by the Calcutta High Court, though not always so titanic in dimensions abound in our Courts and call for a decision on the truth of a will, a marriage, an adoption, the paternity or identity of a person or the possession of property. In England there were cases like the Tichborne case but they are now rare in that country and out of tune with the prevailing

temper of the people of that country or any other civilised country and their notions as to the true functions of their law courts.

It is therefore difficult to accept the suggestion that the remedy for such evils is the abandonment of the whole system with its paraphernalia of judges, lawyers and precedents and a reversion to an older system of justice of which Village Panchayats are said to be a principal feature. Even assuming that the people of an older age were satisfied with these tribunals and with the quality and effectiveness of their justice it is too large an assumption that the people now would be content to submit their disputes to such tribunals rendering merely arbitrary or discretionary justice and not controlled by rules or precedents or by any appellate or revisional courts. It seems to me that these tribunals will neither command public confidence nor deserve it. If such control is essential and is introduced it is difficult to see in what essential respects this system would differ from the present. I do not deny that with suitable checks and control a large proportion of petty disputes may be relegated to rural tribunals. This would, however, cover only a small fraction of the litigation that is inevitable in a large country with a growing population and expanding commerce and industry. The abandonment of a legal system and of laws which have been slowly evolved to suit the needs of a people advancing in their trade and industry cannot therefore be a wise suggestion.

There is no doubt, however, that there is real dissatisfaction with some features of the present system. As I have already said the remedy for some of its evils is in part to make necessary changes and adaptations in the judicial machinery or in substantive law and procedure. For the rest we must await a new order of amelioration in all aspects of our life in this country.

In view of the assertion often made about the superiority of pre-British laws and systems of justice in India to those now prevailing, I think it may be useful to set out the principal features of those laws and systems and compare them with the law of England in the 18th century when it was introduced in India. The comparison will be instructive and will show that English law and justice had attained a greater degree of development and were more suited to the needs of a progressive society than the indigenous systems of law then in force.

When we speak of pre-British justice we have to distinguish between the period immediately preceding British rule in the 18th century and an earlier age which represented the heyday of Hindu and Muslim rule. The former was a period of anarchy and confusion which followed on the decline and disintegration of the Moghul Empire. English law and procedure should have come as a great boon to the people in the areas in

which that law was introduced. The following extracts from the Fifth Report and other well-known authorities give us an idea of the conditions in Bengal at that time:

"The subjects of the Moghul Empire in that province derived little protection or security from any of these courts of adawlat; and in general, though forms of judicature were established and preserved, the despotic principles of the government rendered them the instrument of power rather than of justice, not only unavailing to protect the people, but often the means of the most grievous oppressions under the cloak of their judicial character." (From the Report of the Committee of Secrecy in 1773.)

"The Nawab Naxim was the head of the system of criminal courts and under him there were a series of criminal courts held by his deputies in Moorshidabad, his capital in Bengal. In the country criminal justice was administered by the Zamindars. It was a system under which extortion and oppression were rampant. The Naxims exacted what they could from the Zamindars whom they left at liberty to plunder all below" (Parlt. Papers, 1812, vii, 5; Holdsworth, History of English Law, Vol. XI, p. 174 from East India Company's Reports.)

"The Zamindars had also a police power and were bound by the terms of their tenants to arrest criminals and if they failed to do so were answerable to the injured person. But this system was wholly ineffective because it was notorious that the Zamindars connived at or actually committed the crimes they were supposed to suppress."

"The company inherited from the Moghul Government every evil that could afflict a political system; a disorganised and corrupt judicature and incompetent agents. Dacoity was rampant and there was no ordinary security in the land. The new courts although by no means perfect brought great relief to the ryots and talukdars, and within a short time began to foster confidence in the company's administration." (Ramsbotham, Camb. History of Empire, IV, 416).

"For the first time in living memory the province was placed under a government strong enough to prevent others from robbing and not inclined to play the robber itself;" Macaulay, Essay on Warren Hastings.

When we turn to an anterior period of time when Hindu and Muslim laws flourished, we find that they had developed a mature jurisprudence in certain spheres of substantive law like the laws of property, succession, marriage and family law. It is, however, not so clear that they paid the same attention to remedial law and procedure that the English law did from the 13th and 14th centuries. It must not be forgotten that in times of imperfect social order the law of remedies is far more important for the aggrieved party than codes of substantive law declaring rights and duties, just as in the lawless conditions which prevail in international relations it is useless to have a declaration of rights of world citizenship without effective remedies to enforce them. So we find that the practical sense of the English people made them evolve a judicial system and procedure which would confer on the individual subject effective protection against wrongdoing and their judges and lawyers concentrated their attention for several centuries on perfecting the processes of their Courts and their writs and forms of actions.

There are some learned writers in India who have endeavoured to make out that Hindu and Muslim courts had also perfected their laws of procedure which indeed according to them were comparable in many parts to such modern codes as the Civil Procedure Code, and the Evidence and Limitation Acts. Mr. Gururaja Rao's "Ancient Hindu Judicature" (1920) and Mr. Wahed Husain's "Administration of Justice in Mughal India" (1934) seek to establish this theory and describe in detail the judicial procedure and adjective law of Hindu and Muslim Courts. While such information is valuable, it is, however, far more important to know how and in what areas of this vast country these theoretically perfect systems of law and procedure were administered and whether they were improved and altered to suit new needs and conditions in the course of centuries. It is far more easy to enact laws than to administer them and in the widely varying conditions of different parts of India and at different times and periods these systems of law and procedure could not have had a uniform application and indeed if applied at all should have demanded constant alteration and adjustment. On these important matters authentic information is lacking in India while in England records of forms of actions, pleas and decisions of courts are available from nearly the 12th century and have formed the subject of research and study. This absence of information is by itself a sinister feature of our legal history. It indicates that during the long centuries the people had not obtained the benefits of a legal or judicial system which aimed at impartial or uniform application of laws and customs. There were able and just Emperors as well as able and just officials or judges but even in the best of times their justice was arbitrary though benevolent. The position of people living under such a system or want of it could hardly have been satisfactory on account of the chances of oppression and injustice to which they should have been liable. That this was the position is clear also from other well-known facts. The absence of a strong central Government was a defect common to Hindu and Muslim rule which should have led to laxity in control over the judicial administration especially in outlying parts of the empire. The indicia of a judicial system which aims at uniformity and certainty in its justice are records of judicial proceedings and trained judges and lawyers who can interpret laws and precedents. Such indicia had appeared in England at a very early time but were absent in India. The existence in England of a legal profession from which judges were recruited tended to create a strong body of professional opinion which profoundly influenced the course of justice and evolution of law in England. There were grave defects in the substantive law and procedure of England especially in its criminal law, which were due to historical and other causes and persisted till a late age, but a

strong body of professional opinion and the ingenuity of lawyers and judges helped to relieve the law from the evil operation of such defects and to make it respond to new situations. On the other hand in India the law continued to be more or less in a primitive condition and it fell to the East India Company to remove serious defects in it. For instance the Muslim criminal law had three kinds of punishments, first, retaliation including the price of blood; second, prescribed penalties and third, discretionary correction and punishment. The Fifth Report of 1798 states that the nature of the first punishment was alone sufficient to require the interference of the Company's Government with the 'futwas' or sentences of the Nazim. The Company's Government also abolished certain distinctions made by Abu Hanifa and directed that in determining punishment for murder the intention of the party rather than the mode or instrument used should be considered. The Company's courts also commuted sentences of mutilation to imprisonment and hard labour. They supplied the deficiencies of the Mahomedan law in awarding adequate punishment for certain crimes which were rampant, *e.g.*, dacoity, gang robbery, banditry, perjury, forgery, subornation of evidence, female infanticide which was prevalent among Hindus. They abolished the custom then prevalent of levying as commission a fourth part of the value decreed on the decision of suits and all other fees and arbitrary fines. It must also be mentioned that both before the royal courts and before village or communal panchayats primitive modes of trial by oath and ordeal prevailed. The above description of the state of Mughal justice is supported by the works of such well-known authorities as Prof. Jadunath Sarkar and Messrs. Edwards and Garett of the Punjab Service. Whatever was the state of justice in the chief cities it should have been chaotic in the outlying provinces over which the central government's control was imperfect. In these extensive areas aggrieved parties either resorted to self-redress by retaliation or otherwise or sought the not always reliable or effective verdicts of the local Zamindar, official or panchayat.

The decision of civil and criminal disputes by panchayats was a well-known and ancient feature of Indian life and history but it is necessary to bear in mind that there is no evidence that the panchayat was at any time part of a legal or judicial system in which its decisions were in practice controlled by any revising authority. On the other hand its prevalence during the centuries preceding British rule was the result of weak central government which left local government to villages and townships and did not interfere with their management of their affairs so long as they paid their quota of revenue. Therefore political troubles or change of governments and rulers did not prevent this kind of local government from continuing in its

own way. As a matter of fact in times of disorder and disturbance the people clung to their village or caste organisation as the last remnant of civil government available to them and had their legal and social problems satisfied by that agency. The judicial panchayat had in it the elements of the jury system and may have often been successful in dispensing simple and ready justice such as was appreciated in a former age. But in the absence of effective control it was liable to gross abuse, corruption and oppression. This appears to be borne out by the enquiry made by Mountstuart Elphinstone about the working of panchayats in the Mahratta country and is discussed in a book entitled "Panchayats under the Peshwas" by H. George Franks who had access to original records in the Record Office at Poona. This author states that under the Mahratta rulers whose military activities left them little time to organise any system of judicial administration rich and powerful men could bribe and intimidate panchayats or assemble a rival panchayat to upset the verdict of another. The learned author's reference to the practice of panchayats to discriminate in the award of punishment gives us a glimpse of the quality of justice then available. It is said that if a poor man killed a rich man he got the penalty of death or mutilation; if a poor man killed his equal, he could buy off this penalty by payment of a fine of Rs. 350; if a rich man killed a poor man he always paid the fine and not the penalty. It is, however, probable that fellow-feeling and the democratic instinct made these tribunals generally fair in their verdicts and they dispensed such justice as the people of the time understood and appreciated. But it is a great mistake to regard the panchayat in the form and conditions in which it prevailed as having ensured an ideal form of justice in the past and therefore worthy of replacing the judicial institutions of the present time. The suggestion that a reversion to a system of village autonomy of which the panchayat was a part is a panacea for many of our difficulties appears therefore to be unsupported by historical facts. It is, however, beyond dispute that with proper supervision and control the panchayat is a useful agency especially in rural areas for deciding many disputes and quarrels which now swell the work of the regular courts of law. It has therefore been given a place in our judicial system by legislation like the Village Courts Act.

We now turn to the system of law and justice in England at the time of its reception in India in the 18th and 19th centuries. It is well-known that English law is not to be found in any great code like the Code Napoleon of France or the codes of other countries in Europe but is the product of a slow evolution during several centuries. It is therefore necessary for understanding its nature, content and influence to advert not merely to the chief events in this evolution but also to some of the more prominent

events in the history of the English people and to the forces, political, economic and religious, which determined the character of their laws. Before the Norman conquest the English people had laws of a primitive kind and had not learnt to submit to any State authority in the administration of justice and had not attained any uniform system of law or procedure. Though England was for more than three centuries a province of the Roman Empire and governed by Roman law the Anglo-Saxon invasions of the 5th century A.D. had the result of destroying all traces of the old legal system and replacing it by institutions which in their origin were purely Germanic. In later times English law was deeply influenced by ideas derived from Roman jurisprudence but this was due in part to the administration of the Canon law by the church courts and functionaries and in part to the study of Roman law by judges and lawyers but not to any surviving traces of the original dominion of Rome. From the 5th to the 9th century the country was invaded by different tribes and it was only in the 10th century that it was unified into one kingdom. Even then justice was in the hands of local assemblies like the Hundred and the shire or of landowners who held their own courts. There was yet no King's court or Common law. These local and feudal tribunals were more in the position of arbitrators to whom the submission of the aggrieved party was optional as he had the alternative of self-redress or private vengeance against the wrong-doer. A large part of the Anglo-Saxon laws was concerned with tariffs of compensation even for serious crimes like murder and it was open to the aggrieved to accept money and give up the blood feud or vengeance. The result of the Norman conquest was the introduction of precise and orderly methods into the government of England. By the end of the 12th century largely as a result of Henry II's reforms, judicial administration had been improved and had begun to acquire some modern features. The King's court began to assume importance and to step into the place of the local and feudal courts as well as of the courts of the church, and many serious crimes became pleas of the Crown and heard in that court and not in the local courts where primitive methods of trial by duel and ordeal were in vogue. The institution of trial by jury had become a part of the procedure of the King's court and contributed to its popularity and to its being preferred by suitors to the rival courts. Other attractions of that court were the remedies provided by the issue of appropriate writs for various wrongs, principally for dispossession of land, disputes about which then went before the feudal lord from whom the land was held. A most valuable feature of Anglo-Norman justice was that records of proceedings of the King's courts were kept by its clerks and officials. This practice ultimately paved the way for the authority of precedent in English law. In the beginning of the 13th century the famous Magna Carta of the year 1215 made a memorable declaration of rights and

liberties of the subject and became in later times a priceless weapon against autocratic monarchy. Its provisions making the assent of the barons essential for certain acts of the King contained the germs of the idea of Parliamentary sovereignty. In the 13th and 14th centuries the King's Court had become dissociated from the King and split up into the courts of the Common law and the King's Council. Thus the courts of law became distinct from the administration and came to be presided over by professional judges. About the year 1300 we can see the beginnings of an organised legal profession. The Inns of Court had been founded and gradually the tradition was established that the judges of the Royal courts should be drawn from the ranks of the most eminent lawyers. By the Statute of Westminster II (1285) the common law courts extended their powers by inventing new writs to suit the advancing needs of the people. On account of the influence of the church which encouraged the practice of making dying dispositions in its favour, wills of chattels came to be recognized and the rights and duties of executors were declared by the Magna Carta (1215) and the Statute of Westminster (1285). By far the most outstanding event in English legal history in the 13th century was the summoning of a representative Parliament by Simon De Montfort in 1265. In 1295 the King (Edward I) himself summoned a Parliament to help him with money and counsel in his war with France. Since that year Parliaments have been summoned in continuous or all but continuous succession and parliamentary government became later on the principal feature of the constitution of England. The year 1295 was also memorable because Edward I who was noted for many law reforms began the practice of recording the Statutes of the Realm. By the end of the 13th century the foundations of a modern judicial system had been laid and the twofold sources of the law which the courts should administer, *viz.*, precedent and statute, were reaching recognition and becoming matters of record. During the succeeding centuries the legal structure so erected received numerous additions and alterations required by an advancing civilisation and a population growing in numbers and prosperity. In the 14th century the Court of Chancery had begun to recognise Uses and Trusts and exercise a distinctive jurisdiction which in later years enriched English jurisprudence. This century saw the beginning of written pleadings in the common law courts in place of the old oral statement and answer by the opposing counsel and of the Year Books which were the first law reports in England. The Year Books were anonymous compilations of notes of cases in the King's courts and gave way later to the works of particular and nominated reporters and ultimately to reports issued under official authority. By 1700 the supremacy of Parliament and of the common law courts over the executive had been established as a result of the Revolution Settlement and the "Rule of law" had become a valuable and unique feature of the English constitution. By the end of the 18th century the great

increase in commerce and territorial possessions and the economic and social changes following on the industrial revolution resulted in the addition of large bodies of law in the sphere of contract, tort and mercantile law and of legislation especially in the domain of public law and administration like the poor laws and the laws of local government. Sir William Holdsworth points out that the expansion of England in the west by the growth of the American colonies which she lost later and the expansion in the east by the acquisition of the Indian Empire had important effects on English law by making it no longer an insular but a world system of law and by helping the formation of a colonial constitutional law relating to such matters as the position and powers of governors of colonies and of colonial legislatures, the Crown's prerogative in the colonies, the law applicable to settled and conquered colonies and so on. The position of Colonial courts and the effect of their judgments raised questions which pertain to a body of law known as Private International Law or Conflict of Laws. The union of England and Scotland by the Act of Union in the 18th century enriched the laws of both the countries. Scotch law had been formed on the Roman model and was free from the technicalities of the English system of pleadings. Scotland had from an early time a system of registration of deeds. Its closer touch with continental legal systems gave it a law of bankruptcy which was superior to that of England. Scotch law never permitted a creditor to arrest his debtor on mesne process as English law did. In Scotland, a prisoner was not refused the aid of counsel; the institution of criminal proceedings was under the supervision of a Public Prosecutor; and the insistence of verbal technicality which was a blot on English Criminal Procedure was unknown. These features of Scotch law influenced English law just as the principles of English mercantile law were imported into Scotch law. In the 18th century great principles were established in the sphere of liberty of the subject, first by the decisions in the cases arising out of the "general warrants" which negatived executive prerogative to arrest persons otherwise than in due course of law and secondly, by the passing of Fox's Libel Act which enabled juries to give general verdicts in cases of libel including political libel or sedition. This Act was valued as a great safeguard for the liberty of the press and freedom of discussion. In spite of these features of its development the English law and procedure of the 18th century had grave defects deplored even by contemporary opinion. This was due to the fact that the pace of law reform was slow but in 1776 Bentham's Fragment on Government had been published and his zeal for law reform and codification bore fruit in the 19th century. In this century there were large additions to substantive law brought about by the great increase in trade and industry such as the law of joint stock companies, patents, trade-marks, employer's liability. The memorable reforms by way of simplifying civil and criminal

procedure and unifying different sets of courts in the Supreme Court have been reflected in the Indian Codes of Procedure. The rules of prescription and limitation of claims to real property enacted by the Statutes of 1832 and 1833 were embodied in our law and should have contributed not a little to security of titles and property in India.

The building up of the English legal system was primarily the work of lawyers and judges during several centuries but we must not forget that there have been some imponderable factors which have exercised great influence on English law. The introduction of Christianity in England in the 7th century (664 A.D.) brought with it certain moral ideas and revolutionised English law. Christianity had inherited from Judaism an outlook upon moral questions which was strictly individualistic. The salvation of each separate soul was dependent on the actions of the individual. This was in contrast with early Anglo-Saxon laws which looked not to the individual who did the act but to the group or family of which he formed a part. After the spread of Christianity responsibility shifted from the group to the individual who did the act; and then the intention of the actor became material for judging the nature of the act. The Church also introduced ideas of political organisation and of law and of morality far higher than those possessed by the barbarian tribes. The leading ideas of the Christian Fathers were those of the Roman jurists. The Church inherited some of the ideas of Imperial Rome and its teaching tended to add a new sanctity to the office of the King and thereby to the authority of the state which made for the cause of law and order. The church also introduced the customs of making a will and conveying land by written documents. The lawyers and judges of the 12th and the 13th centuries were ecclesiastics learned in the Canon law which was itself an adaptation of the Roman law to the needs of the Church and their influence on English law was considerable. The writ of 'novel disseisin' invented for dispossession of land had a Roman origin and its modern counterpart in India is the action under S. 9 of the Specific Relief Act. In this and many other respects English law was influenced by the legal renaissance of the 12th and 13th centuries in the continent of Europe, a renaissance marked by a revival of the study of Roman jurisprudence by mediæval canonists and lawyers. The second factor to be mentioned under this head is also a religious one, *viz.*, the Protestant Reformation in the 16th century. It undermined the authority of the Church and by denying the position of religion as the basis of civil government it tended to favour absolutism and the divine right of Kings but also let in alternative theories like the theory of social contract and tended to undermine the authority of the King also. Among other factors which influenced English law are the political thought of writers like Locke in the 17th century who pleaded for a limited monarchy and Parliamentary supremacy and the ideas of the

French Revolution in the 18th century which helped the growth of democracy in England.

Indian law to-day substantially reproduces the rules of English substantive law and procedure developed in the manner set forth above. These rules have been in large part embodied in the great codes which have been enacted since the middle of the last century and for the rest they are to be gathered from English books and precedents. The excepted regions are those of personal law and customary tenures. English law is usually considered to have been introduced into India in 1726 by a charter of George I which established Mayor's courts in Madras, Bombay and Calcutta but this is only for the purpose of deciding that later statutory modifications in England should not be applied in India. The Company's courts which functioned in those cities had already begun to apply English law and procedure to cases before them. The charter of 1668 by which Charles II granted Bombay to the East India Company empowered the Company to establish courts and enact laws for the good government of Bombay and directed that these courts and laws may be as near as may be agreeable to English courts and laws. Accordingly certain laws were framed which made provision for such matters as trial by judges and jury, regular sittings of the court, records of its proceedings, levying of reasonable court-fees fixed at 5 per cent. of the value of the claim, appeals from the courts to the Governor, registration of all sales and transactions relating to lands and houses. The second section of the laws deserves special mention. It provided first, that no person should be dispossessed of houses, goods, lands or other rights or suffer corporal punishment for any cause or crime before trial and conviction by a jury of twelve men except as otherwise provided by those laws or any future law and secondly, that no person should suffer penal or civil imprisonment without a specific warrant for his commitment and any such person might be released without bail if the cause or matter were not prosecuted within ten days after his commitment had been certified to the court. Evidently the authors of these laws intended to reproduce the provisions of the Magna Carta in this regard.

The above resume of the principal features of the laws and legal systems of England and India can leave us in no doubt about their comparative state of development and suitability for people emerging from mediæval to modern conditions of life. The English law and legal system had attained a far greater degree of development and were more suited to the needs of a progressive people than the Indian. We cannot be prevented by any sense of pride or other feeling from admitting this fact. The features noted in the English system and its development ensured an efficient judiciary which was independent of the executive and able to maintain effectively but with due regard to the interests of the state the rights and liberties of the individual

in a democratic polity. Its substantive law and procedure had grown with the nation and by their richness and flexibility served the needs of a new age of commerce, industry and empire. These qualities were largely due to its unique feature of having grown through precedents. This feature is often regarded as a demerit of the English system but in reality it is otherwise. It can of course become a great source of uncertainty and confusion but such a state of affairs can be mended by legislation. The function of precedent is to restrict to the barest possible minimum the scope of discretionary or arbitrary action on the part of the judge. Indeed the whole merit of the English legal system appears to be that it thereby limits the danger of injustice due to human factors in the working of the judicial system. Similarly in the administrative sphere executive action is largely regulated in modern times by statutes and rules which leave only a minimum scope for individual discretion.

The introduction of the English legal system in India has in the first place filled up large gaps in our private and public law. Our codes of laws had attained remarkable maturity at a very early time but their growth had been unfortunately arrested except in certain spheres like family law with the result that our judicial organisation and public law were notably inadequate to meet the needs of a large population. In the second place English law has made our people more law-abiding and law-minded than they were before. No doubt it has led to litigiousness but litigiousness is better than lawlessness. Thirdly, English law has introduced ideas of rights and duties which are appropriate to a modern social and economic polity and to regulate the relations of the people in various spheres of life and activity. Lastly, the application of principles of English constitutional law like the 'rule of law' has had incalculable results on the life and spirit of the people. The right to sue the government and its officers in the ordinary courts of law for relief against illegal acts of government has undoubtedly infused a spirit of self-respect, independence and respect for law in the ordinary citizen. Perhaps this has been a greater asset for the growth of democratic movements in this country than the love of democracy and liberty resulting from a study of English language and literature which have however reached only a small fraction of the people. Some of the underlying assumptions of the 'Rule of law' are the absolute supremacy of the law as opposed to arbitrary power, the independence of judges from the executive and their freedom from the influence of politics. These principles are of immense value to the citizen and secure his regard for his legislatures and law courts. Sir William Holdsworth observes that the effect of the doctrine in England was to create a law-abiding habit, *i.e.*, the habit of persons dissatisfied with the policy pursued by the state to appeal to the courts for the proper enforcement or interpretation of the law or to Parliament to change the law. He says that in the great controversies of the 17th and 18th centuries

in England persons and parties who complained of grievances turned to the courts or to Parliament and did not desire to overturn the existing machinery of the law. We can well understand this as we have had recent experience of controversies that arose over the Agriculturists' Relief Act and the 'Temple-Entry' Act in Madras and the Prohibition Act in Bombay. There is no doubt that the rule of law is a valuable safeguard against minority opinion taking to the paths of political obstruction or revolution. It is also a striking illustration of the emphasis laid by the English law on the rights of the individual and the way it co-ordinates these rights to the needs of the state. The rights and liberties of the individual are the results of the practical application of the higher principle of the dignity and sanctity of the human personality, a principle which runs like a golden thread through the whole texture of the law and constitution of England.

I recognise that a due appreciation of the merits of the English legal system in India is beset with certain difficulties. In the first place there are grave defects in the working of the system in Indian conditions. Even in England there have been in recent years loud complaints about the heavy costs and long delays of litigation but these and other evils assume exaggerated proportions in India. I have alluded to these evils and shown that they do not detract from the value of the basic principles of the legal system because they arise either from lack of adequate action by way of law reform and adaptation of law and procedure to Indian conditions or from causes external to the system itself. Secondly it is difficult for many of us to dissociate the English law and legal system from the conditions of political domination under which they were imposed on this country and all the consequences to the life of the people which such domination involves. The difficulty has been enhanced by the political controversies during the last 2 or 3 decades and accounts for expressions of opinion unfavourable to the whole legal system. But a more detached judgment on our part has now become necessary because as I have said, questions of replacing or fashioning the whole or part of the existing legal system may become live issues in the near future. I venture to say that the great codes of substantive law and procedure which have been slowly perfected during the past 100 years will in large part continue to be the law in a free India. A country can adopt the laws, language and culture of another without accepting the domination of the latter. In the last century many countries in Europe and elsewhere modelled their laws on the Code Napoleon of France. At an earlier time the United States of America adopted English law after achieving political independence. In recent years renascent Turkey adopted the Roman script in place of the Arabic, and European codes like the Swiss civil code in place of the older system of Islamic law. So I maintain that neither prejudice nor sentiment due to historical causes or political controversies will stand in the way of our

adopting large parts of the legal and administrative systems perfected in the course of the last two centuries. I recognise however that many parts of the English law especially in the sphere of procedure and judicial organisation may undergo substantial alteration to suit a changed polity. For instance the 'rule of law' which is only a rule of procedure or remedial law is a valuable and vital part of the English law. But there is a growing section of opinion in England and elsewhere that the administrative tribunals in the French system perhaps afforded more speedy and effective and less expensive justice in disputes between the citizen and the state and that they avoided the dangers of undesirable antagonism arising between the judges and the executive by reason of such disputes being relegated to the ordinary law courts under the doctrine of rule of law. With the extension of governmental activity in recent times and new types of legislation conferring powers on various administrative authorities and officers the jurisdiction of law courts to issue writs and injunctions interfering with the exercise of statutory powers may suffer diminution in the future. Again it is not an unlikely contigency in the future that a competitive legal profession whose numbers and emoluments are determined by the economic laws of supply and demand may be considered to be productive of more harm than good and unsuited to the circumstances of our country. In this and other ways the English law and legal system may in course of time be subject to drastic adaptation and alteration. Above all the present war may bring about catastrophic changes in existing forms of social and political organisation and in the principles of law which are an integral part of such organisation. But whatever the future holds for us and others, we cannot underrate the merits of the English law or its services to India.

The Hon'ble Justice Sir S. Varadachariar observed.—The main purpose of Mr. Ramaswami Aiyar's lecture has been to sound a note of caution against the hasty introduction of radical or fundamental changes either in the system of law or in the system of legal administration now in vogue in India. I have been of much the same opinion and as I have heretofore given expression to my views on some occasions, I shall briefly deal with the matter. I recognise that we are at a disadvantage in discussing this topic, because we—both of the bench and of the bar—are likely to be suspected by the outside world as being vitally interested in the maintenance of the present system for our own advantage. I am anxious that the subject should be examined by the outside world on the merits of the arguments advanced without reference to the persons from whom they emanate. It is a danger attaching to most discussions of important sociological questions that they are not always discussed on their true merits and the conclusions are often warped by bias or

prejudice. The question which Mr. Ramaswami Aiyar has referred to has in a sense already become a live issue and will continue to be a live issue. Members of the Bar who naturally enjoy more liberty than members of the Bench in dealing with questions of this kind would do well to take steps to create an intelligent public interest in the question rather than merely ask the outside world to accept their own opinions at their face value.

At the present day, those who propose a revision of the existing legal and other institutions of this country are impelled by a strange mixture of ideas. In one sense they are anxious to go forward; in another sense, perhaps unconsciously, they wish to go backward. Slogans founded upon socialistic, communistic, or the most advanced democratic theories—theories of liberty, equality and fraternity, are strongly in evidence in our midst. At the same time some of the advocates of these very theories wish to go back to the quasi-ascetic ideals of an arcadian life. While not criticising either of these view points, one is obliged to take note of the fact that none of us seems to have much of a choice in the matter. We are as it were dragged along the current of influences and forces over which we have little or no control. There are countries which even to-day would prefer to be left to remain at least where they are if they cannot go back to where they were, but they are unable to do so. The very achievements of science which we all admire and of which we all seek to take advantage make that impossible. There is no longer any possibility of isolation. If that is the present position and if the society in a country wishes to have the benefit of modern conditions, it is no good having an ideal partly going backward and partly looking forward. All of us see the necessity for continuity in our history and in our institutions. But it will be difficult, however, to determine whether the continuity should be with the life of the last 150 years or with an earlier period, overlooking these 150 years.

I also wish to emphasise the fact that we are every day necessarily brought into contact with the outside world. We are anxious to do business with other countries and we want people in other countries to do business with us. If that kind of business intercourse is to be fruitful, the people of those countries should have confidence in the system of laws administered here. Unless a system of administration, similar in all essential respects to that obtaining in other civilised countries, obtained here also it would be impossible to have that degree of commercial intercourse as is desired. The conditions that led to the system of capitulations and special tribunals in certain countries should not be allowed to exist in our midst. Again, you cannot forget the complexity of the problems that come up

before a court of law at the present day. However much one might appreciate the utility of the procedure before village tribunals of the past, which might have been sufficient to deal with the problems that arose in former times which were comparatively simple, it should be realised that we cannot cope with modern conditions and modern political ideas by reverting to a state of things which existed a thousand years ago. We have also to take note of a tendency inevitable in the course of the advance of civilisation, namely, the tendency to substitute for the system of *personal* laws, a system of *territorial* laws. The existence of different personal laws administered in one and the same country is hardly consistent with modern political theories. If a system of territorial law is to replace the system of personal laws it is difficult to conceive of a better collection than those which have been evolved by the courts in India, during the last hundred years, consistently with the conditions in the country. You are aware that in many respects the English law has not been blindly followed here. I understand Mr. Ramaswami Aiyar as only protesting against any blind change in the existing system of law merely on the ground that the adoption of a system of law based on foreign sources is inconsistent with the self-respect of this country. Few of us can be blind to the need for changes in many respects in our judicial administration, either from the point of view of economy or of the speedy disposal of litigation. You should not be against changes or think of a thing as good simply because the particular system or institution has been there for a long time. There is an ancient sloka showing that this was realised even in olden days.

पुराणमित्येव न साधु सर्वम् ।

The main consideration for those to whom it may fall to deal with these questions will be to keep in mind the possibility of reconciling any radical departures whether in the system of substantive law now obtaining here or in the system of judicial administration with the political aspirations of those who are compelled to adapt themselves to the modern international conditions. It is on grounds like these that one should like the public to consider this important question.

SUMMARY OF ENGLISH CASES.

KAY *v.* LOVELL, (1940) 1 Ch. 650.

Solicitor's lien for costs—Extent of charge in partnership suit.

A solicitor in a partnership action is entitled to an order for taxed costs, charges, and expenses properly incurred of and in

reference to the action as solicitor for the party and to a charge on the share of his client which is in Court. Order to be in the form in Seton on Judgments and Orders, 7th Edn., Vol. II, p. 1040, Form 6.

KERR *v.* JOHN MOTTRAM, LTD., (1940) 1 Ch. D. 657.

Companies—Articles of association providing that minutes book should be conclusive evidence of facts stated therein—Other evidence inadmissible to disprove such facts—Cf. *Companies Act* (1929), *S.* 117 (3).

In a suit for specific performance of a contract for sale of shares to plaintiff by a company, the plaintiff sought to lead evidence to displace the record in the minutes book of the company of what took place. The articles of the company provided that the minutes were to be conclusive evidence. The plaintiff can have an opportunity of establishing, if he could, that the minutes were not a *bona fide* record of what took place or that they had been falsely and fraudulently written up after the events with a view to setting up a story which was not in accordance with facts. But where the minutes were a correct and *bona fide* record, they were to be regarded as evidence which is not to be displaced.

PUBLIC TRUSTEE *v.* PEARLBERG, (1940) 2 K.B. 1.

Sale of land—Contract for sale—Rescission by vendor—If possible when action for specific performance pending—Right of vendee to return of deposit.

It is well settled that a vendor cannot rescind a contract for sale of land where he has himself brought an action for specific performance which is pending at the date of the alleged rescission, for a claim for specific performance of necessity implies an affirmance of the contract. The vendee is entitled to counterclaim for return of deposit.

R. *v.* COWELL, (1940) 2 K.B. 49.

Criminal Law—Confession by prisoner alleged to have been obtained by improper means—When prisoner could object to admissibility and himself give evidence.

A confession is *prima facie* admissible if it was made after proper caution and not as the result of any inducement or threat. It is open to the prisoner to object to the admissibility of such confession on the ground that it was improperly obtained and it is proper in such cases to allow the calling of the prisoner him-

self as a witness if the justice of the case requires that it should be done.

HILLS *v.* CO-OPERATIVE WHOLESALE SOCIETY, LTD., (1940) 2 K.B. 74.

Res judicata—Recovery of damages under Employers' Liability Act, 1880, *for personal injuries caused by negligence in the course of common employment—Action at common law against employer for same act of negligence—If barred.*

There is nothing in the Employers' Liability Act, 1880 which confers on an injured workman any cause of action different from that which he would have had by the law of England but for the doctrine of common employment. Where plaintiff has recovered damages under the Employers' Liability Act, 1880, in respect of the matters complained of in the action he is debarred from claiming or recovering any sum in respect of these matters under the common law.

VRONDISSIS *v.* STEVENS, (1940) 2 K.B. 90.

Insurance—Marine insurance against loss of freight—Loss of freight due to impossibility of repair to complete the voyage, and constructive total loss of freight arising therefrom—Liability of underwriters.

A clause in a policy of marine insurance provided "In the event of total loss and/or constructive and/or compromised total loss of vessel, total loss and/or constructive total loss of freight *arising therefrom* is not recoverable." Shortly after starting with the cargo the ship struck a reef of rock and was so severely damaged that she had to be beached. It was alleged that it was impossible to repair the vessel so as to enable her to complete the voyage with the cargo and so the voyage had to be abandoned. Alternatively it was alleged that as the cost of repair would exceed the value of the ship after repair it was abandoned. In a claim on the insurance policy for loss of freight against the underwriters, on a preliminary issue of law.

Held, if the ship was abandoned because, although the ship could be repaired the cost of permanent repairs would have exceeded its repaired value, the loss of freight did not arise from constructive total loss. But if it was not a matter of expense and if the ship could not have been rendered fit to complete the voyage with her cargo, it may fairly be said that the loss of freight within the meaning of the exception clause arose from the constructive total loss of the ship in the sense that there was a physical impossibility of repair.

SAINT LINE, LTD. *v.* RICHARDSONS, WESTGARTH AND CO., LTD., (1940) 2 K.B. 99.

Contract—Damages for breach—What can be claimed as direct and immediate damages.

The defendants contracted to provide and instal engines in plaintiff's ship. The contract provided that defendants' liability shall not extend to any indirect or consequential damages. On breach of contract,

Held, the plaintiffs were entitled to claim damages for loss of profit, expenses of wages, etc., and fees paid to experts for superintendence. All these heads were not "indirect or consequential".

WELD-BLUNDELL *v.* SYNOTT, (1940) 2 K.B. 107.

Mortgages—First mortgagee exercising power of sale and paying over a larger balance to second mortgagor—Right to recover excess as money overpaid under mistake of fact.

Plaintiff, a first mortgagee having exercised his power of sale, by mistake presented to the defendant the second mortgagee an account showing a larger balance and paid over the same to him. In an action to recover this excess as money paid under a mistake of fact the defendant pleaded estoppel.

Held, the mistake of fact *prima facie* entitled the plaintiff to recover. A first mortgagee is not under any duty to inform the second mortgagee of the true state of accounts between himself and the mortgagor and so the plea of estoppel must fail.

HEYWOOD AND BRYETT, LTD. *v.* HEYWOOD AND SON, (1940) 2 K.B. 145.

Workmen's Compensation Act (1929), *S.* 6—*Claim for indemnity against sub-contractors by the contractors who had paid compensation to sub-contractors' servant who was injured—If could be defeated by showing negligence or breach of statutory duty by the principal contractor which caused the accident.*

The Workmen's Compensation Act, S. 6, contains no limitation of the right of the principal to indemnity against his sub-contractor in respect of compensation paid to an injured servant of the sub-contractor. The right is absolute and the claim cannot be resisted by showing negligence or breach of statutory duty on the part of the principal as causing the accident. Willis Workmen's Compensation, 32nd edition, at p. 20, dissented from.

ENGLISH *v.* WESTERN, (1940) 2 K.B. 156.

Insurance—Motor insurance against third party risks—Exclusion of indemnity against claim by "any member of assured's household"—Sister of insured—If member of household.

A policy of motor insurance provided that the underwriters shall pay all sums which the insured shall become legally liable

to pay by way of compensation for death or bodily injury to any person but excluded liability in respect of death or injury to any member of the assured's household carried in the car. In respect of a claim by a sister of the assured who was himself a member of his father's household.

Held [reversing (1939) 4 All.E.R. 345, *Goddard, L.J.*, dissenting].—The phrase of exception covers only the narrower class, the members of a household of which the assured is the head and the case is outside the exception and the company is liable to indemnify the assured in respect of the claim.

HYETT *v.* LENNARD, (1940) 2 K.B. 180.

Income-tax—Assessee subletting shop owing to closing of that branch—Difference in rent paid and rent received—Whether trade expense.

The assessees who carried on business as a ladies' tailor at some 9 or 10 shops in London and its suburbs took an assignment of a lease for 35 years at an yearly rent of £3,500 without option to determine at an earlier date. Owing to increasing loss the branch business in the leased premises was closed and the assessee demised the remaining term of the lease at a reduced yearly rent of £2,500. The assessee claimed a deduction for the difference in the rent he had to pay and the rent he received,

Held, he was entitled to the deduction claimed.

BEARE *v.* CARTER, (1940) 2 K.B. 187.

Income-tax—Amount paid to author for licence to publish an edition of his book—If capital payment.

Fees paid to an author for obtaining from him licence to publish an edition of his book is capital payment and not assessable to income-tax.

MANSEY *v.* MANSEY, (1940) P. 139.

Divorce—Desertion—Accommodation offered by husband—How far offer to resume cohabitation.

If the husband says he wants to live in such and such a place, then assuming always that he is not doing that to spite his wife, and that the accommodation is of a kind which one would expect a man in his position to occupy, the wife is under the painful necessity of sharing that home with him. If she will not, she is committing the matrimonial offence of desertion.

JOTTINGS AND CUTTINGS.

Lord Hewart's retirement.—Lord Hewart has been the Lord Chief Justice of England for perhaps one of the longest periods in the history of that office, having been appointed to that post in March, 1922, in succession to Lord Trevethin. Possessing a great reputation both at the Bar and in the House of Commons and gifted with considerable forensic eloquence, a trenchant style and a delicate sense of humour, his appointment as Lord Chief Justice was acclaimed with universal satisfaction. Both in civil cases and in the Central Court of Criminal Appeal, he has been responsible for many noteworthy judgments. Lord Hewart is also well known to the public as the author of "The New Despotism," containing a forceful protest against the tendency of recent legislation to permit encroachments on the jurisdiction of the judiciary by the heads of departments being vested with final quasi-judicial jurisdiction in many matters under cover of rules and regulations framed under the different statutes. Lord Hewart retires full of honour and glory and few will be disposed to challenge his claim to be regarded as one of the most successful incumbents of the office of Lord Chief Justice.

Viscount Caldecote's new appointment.—Lord Caldecote's appointment as Lord Chief Justice of England is unique in one respect, namely, that it is almost if not quite the first instance when an ex-Lord Chancellor becomes the Lord Chief Justice. Better known to lawyers as Sir Thomas Inskip, he was Solicitor-General during 1922-1924, 1924-1927, 1931-1932, and Attorney-General during 1927 and 1932-1936. From 1936 onwards he has been a Minister of the Crown in various departments. During the present year he was appointed Lord Chancellor in the place of Viscount Maugham, but after a short spell on the Woolsack he gave place to Viscount Simon, the present Lord Chancellor. As a Minister, Lord Caldecote does not seem to have achieved much success. But his legal attainments are great and undeniable and it may well be that as Lord Chief Justice he has come into his own.

Indian States and archaic rules.—It has recently been stated in the press that in some of the Rajputana States the law and procedure as administered even to-day tend in many cases to be the "proverbial ass" instead of commanding respect. Laws are said to be in force permitting a creditor to chain his debtor and march him along the public streets and allowing animals to be tried for crimes and suitably punished. In 'The Princes of India' Sir William Barton mentions that even in a comparatively modern state like Hyderabad the Koranic law of retaliation still prevails. It may be remembered that a few years ago considerable criticism was occasioned by the procedure directed by a Full Bench in that State to be observed in carrying out the sentences of death

and rigorous imprisonment imposed on an accused, namely, that "the man should first serve three years in jail and thereafter be hanged", ignoring what might be called the principle of the merger of the lesser penalty in the larger in such a case. Even in modern England the laws and rules are found to contain a number of anachronisms. The trial in 1936 of Lord de Clifford for a motoring offence in accordance with the privilege of peerage showed that "the formality of a trial by the House of Lords was an absurd anachronism." The case was entirely one for the ordinary Criminal Courts and the arguments in favour of the retention of the antiquated procedure had no vesture of substance. In fact Lord Atkin described it as an "outworn appanage of peerage."

The remedy both in British India and in the Indian States for getting out of such a condition is surely to have a Law Commission appointed periodically to suggest expurgations of laws which are altogether out of consonance with civilised notions and ideas.

Latin as Legal Language.—In the course of his judgment in a shipping case before the House of Lords last week, Lord Wright entered a strong protest against the use of certain latin phrases, such as "*novus actus interveniens*", "*causa causans*", and "*causa sine qua non,*" as, in his view, they only distracted the mind from the true problem, which was to apply the principles of English law to the realities of the case. English law, as he went on to point out, is quite able to find in its own language expressions which will more fully state the problems in such cases as that before the House, and these should be sufficient. Certainly Latin does not quite hold the place it once did in the vocabulary of the law. For centuries it was the language of our records, and Blackstone, ever a fervent admirer of its precision, termed it the "universal dialect", so adapted, as he considered, to the needs of the nation. Indeed, thirty years after it received its official death-blow, he declared that the laudable intentions which had prompted its disappearance were such as the English language could not satisfy. While we may not be disposed to accept this categorical statement, it is curious to note that not a few Latin phrases have entered into the very texture of our legal vocabulary; phrases such as "*habeas corpus*", "*nulla bona*", "*nudum pactum*", and a large number of others which the lawyer is at least expected to know although he may not find it necessary to make frequent use of them.—*S. J.*, 1940, *p.* 409.

The Two Races of Man.—In his own whimsical fashion Charles Lamb, in one of his delightful Essays of Elia, divided the human species into two distinct races, the men who borrow, and the men who lend, designating the former "the great race",

Lawyers, as such, can have no quarrel with Lamb's two categories, in view of the fact that their services are so frequently invoked by both, by the lenders in seeking to recover the money which they have incautiously advanced and find a difficulty in retrieving by their own unaided efforts, and by "the great race" in the hope of staving off the claims till a more convenient season, or, possibly, setting up some vigorous defence under the Statute of Limitations or otherwise. All through the ages many debtors have shown a decided inclination to avoid payment, and have evinced a wonderful ingenuity in these efforts, although they have not always succeeded in achieving the desired result; and one of the interesting chapters of legal history is that which is concerned with the various means by which pressure has been brought upon recalcitrant debtors to perform the elementary duty of paying their bills.—*L.T.*, 1940, *p.* 350.

In Roman Law.—In ancient Rome we read that, when recourse to the debtor's property was useless, or where none existed, the debtor himself was absolutely in the hands of his creditor. He was not yet actually a slave, but the creditor could load him with chains and, after a certain time, could sell him as a slave. It might, of course, happen that against the same debtor several creditors had claims, and in such a case it was said that the law empowered them to chop the unhappy man to pieces and divide his carcass amongst themselves, the law considerately providing that any error in the division of the spoil should in no wise prejudice the creditors' rights, thus avoiding any quibbling objections such as were successfully urged by Portia in the defence of Antonio. A modern historian of Rome, Mr. E.S. Shuckburgh, however, says that, while the law permitted the debtor's body to be divided up among the creditors, such a practice was never in fact followed. Whether this is accurate or not may be difficult to ascertain with certainty, but one thing is very clear: that debtors had a bad time, just as they have experienced in much later days in most countries. —*L. T.*, 1940, *p.* 350.

A Witty Chief Justice.—When we mentally try to call up the personality of Edward Law, who, after studying all the mysteries of special pleading in the chambers of George Wood —the future Baron Wood of the Court of Exchequer—and, later, sharing in the defence of Warren Hastings, rose to be Chief Justice of the King's Bench, we naturally think of him as a master of the common law and a judge of the greatest learning which he could expound in a way there was no mistaking, but we are apt to forget that to these great qualities he added a power of sarcastic comment which, however much it delighted the

audience, was by no means quite congenial to those who were its victims. As one writer put it, in dealing out satire upon barristers and witnesses, and even on his judicial compeers, he was not seldom needlessly severe in the perpetration of jests the force of which lay solely in their cruelty. It is said, moreover, that at least on one occasion his satirical comment ruined a young member of the Bar for life. Making his first forensic appearance in Westminster Hall, this novice began thus: "The unfortunate client for whom I appear—hem, hem, I say, my Lord, my unfortunate client—". At this stage of the argument, if so it can be called, the Chief leant forward and, speaking in a soft, cooing voice that was all the more derisive because it was so apparently gentle, quietly said, "You may go on, sir; so far, the court is entirely with you". The old writer who preserves this anecdote contrasts this unkindly cut with the very different observation by Mr. Justice Talfourd, who endeared himself not only by his charm on the Bench but by his lifelong devotion to his friend, Charles Lamb, whose life he wrote sympathetically and with great skill and attractiveness. On the occasion in question a nervous member of the Bar was almost overpowered and unable to continue his address, whereupon the judge, appreciating the position, interrupted by quietly saying, "Excuse me, but for a moment I am not at liberty to pay you attention". Thereupon the judge took up a pen and wrote a short note to a friend. Before the judge had finished the young barrister had recovered his self-possession and by an admirable speech secured a verdict for his client. If, instead of appearing before Talfourd, it had been the young man's lot to appear before Lord Ellenborough, his fate would certainly have been sealed. —*L. T.*, 1940, *p.* 364.

"Why I Like the Judge".—Not long ago a twelve year old school girl who had just given evidence before Mr. Justice Stable in the King's Bench Division recorded her impressions under the heading: "Why I like the judge." She wrote: "I like the judge because he explained so I could understand what he said; he was very nice to me, he smiled at me and then I was not afraid of him: he looked nice in his robes and wig, I thought he would have a long wavey wig." I expect Mr. Justice Hawkins made an equally good impression on a small boy whom he once examined to test his fitness to take an oath. "If I were to say you had an orange in your mouth, would that be the truth?" he asked. "No, it would be a lie," said the child. "And if I said you had one in your hand?" "That would be another lie." "And if I promised you a bag of oranges and then didn't give them to you, what would that be?" "That would be a lie." "And if I did give them to you?" "That would be the truth." "Very well, I will." And he did.—*S.J.*, 1940, *p.* 391.

The Child's Mind.—There is a story how the pious and simple-minded Parke, J., once found himself at cross-purposes when examining a little girl in similar circumstances. He asked her a number of questions about the Catechism, the Ten Commandments and the Lord's Prayer, and was very much edified by the accuracy of her answers, which drew from him a series of exclamations of praise. Finally, his thoughts turned to night prayers and he said: "Just tell us, little girl, what you do before going to bed?". To his surprise there was an embarrassed silence. He repeated the question with encouraging expressions, but for a long time could get no answer. At last amid a breathless hush she said confidentally: "I put off my clothes and put on my night cap." The famous Maule, J., had quite a different style for those occasions. "Do you know what an oath is, my child?" he once asked a little girl. "Yes, sir, I am obliged to tell the truth." "And if you always tell the truth, where will you go when you die?" "Up to heaven, sir," "And what will become of you if you tell lies?" "I shall go to the naughty place, sir." "Are you sure of that?" "Yes, sir, quite sure." "Let her be sworn. It is clear she knows a great deal more than I do."—*S.J.*, 1940, *p.* 391.

BOOK REVIEWS.

HINDU LAW by Golap Chandra Sarkar Sastri, 8th Edition, by R. N. Sarkar, M.A., B.L., 980 pages. Published by S. C. Sarkar and Sons, Ltd., 1—1—1 C, College Square, Calcutta. Price Rs. 12.

Sarkar Sastri's Hindu Law has always been regarded as a scholarly treatise on that subject. The present edition of the work by Mr. R. N. Sarkar fully maintains the reputation of its predecessors. The effect of the various pieces of legislation affecting Hindu law has been duly noticed and stated at the appropriate places. The text of such enactments has also been given in the form of an Appendix, thereby adding to the utility of the book. No really important decision has been missed and the citation of cases is full. To agree with some of the views expressed in the book may be difficult, as for instance, with the statement that the widow of a predeceased son would take an absolute estate under the Hindu Women's Rights to Property Act, 1937. (pp. 215, 432). This does not however in any way affect the merit of the work. We are sure that the book will constitute a useful and welcome addition to the library of every lawyer.

PLEADINGS IN INDIA—PRINCIPLES AND PRECEDENTS WITH NOTES by J. P. Agarwala, B.SC., LL.B., 850 pages. Published by S. C. Sarkar and Sons, Ltd., 1—1—1—C, College Square, Calcutta, 1940.

In England, pleadings have long ago become an art and the work of Bullen and Leake constitutes a monumental treatise on that subject. In India so far there is nothing comparable to it

and Mr. Agarwala has now attempted to place before the legal profession a book modelled on similar lines. The first ten chapters deal with matters like Rules of pleading, Alternate and inconsistent pleadings, Particulars, Signing and verification of pleadings, Attacking of opponent's pleadings, Amendment of pleadings, Construction of pleadings, Institution of suits, Parties to suits and Frame of suit. These are followed by as many as 336 forms of plaints each concerned with a different type of suit. The form in which the appropriate defences to such actions should be delivered is also elucidated elaborately. Notes explanatory of the relevant law have been given with each precedent, thereby enhancing the usefulness of the work. The statement of principles in certain places is not quite happy. On p. 121 it is stated: "No company, association or partnership shall consist of more than ten members for the purpose of carrying on the business of banking." What S. 4 of the Indian Companies Act really states is that a company with a larger membership should be registered under the Act if it is to carry on banking business legally and not that the formation of a banking company with a membership of over ten persons is altogether prohibited.

The book is on the whole a useful publication and is bound to afford valuable help to the members of the legal profession.

THE MADRAS AGRICULTURISTS' RELIEF ACT (IV OF 1938), by M. V. Varadachariar, B.A., Pleader, Chingleput. Published by Arpudha Press, Chingleput, Price Re. 1.

For such a short Act there is now a considerable mass of case-law bearing upon the construction of the different provisions of the Madras Agriculturists' Relief Act, though but two years and a half have elapsed since the measure got into the statute-book. It is therefore inevitable that publications relating to the Act should frequently appear with commentaries noticing the decisions given up to date. In the present book the decisions up to May, 1940, seem to have been collected, though the views expressed in some of them have since then been revised. The rules framed under the Act till the 7th of May have been given as also the texts of a number of allied enactments, such as The Madras Debt Conciliation Act, 1936; The Usurious Loans Act, 1918; The Madras Debtors' Protection Act, 1934 and The Agriculturists' Loans Act, 1884, in the form of appendices.

We have great pleasure in welcoming this publication and we hope that the book will be of service to those for whom it is intended.
