The Madras Law Journal.

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SUBROGATION AND SPECIFIC PERFORMANCE.

There is a tendency in some recent cases to confuse subrogation and specific performance and to treat rules applicable to one as equally applicable to the other. The operation of the doctrine of subrogation is supposed to be limited by the section of the Transfer of Property Act which declares that by force of a mere contract to sell no interest in the property is created.

In one respect there is a close resemblance between specific performance, and subrogation and that is that according to both as understood by English lawyers some act which ought to have been done or might have been done is deemed to have been done. The person who can claim specific performance may also claim in spite of the absence of a conveyance to be owner of the property contracted to be sold. The person claiming by subrogation may claim to be invested with a right which has not in fact been transferred to him. But there the resemblance ceases. In the one case a contract is necessarily presupposed; in the other there may or not be a contract. The English text-books do not, as far as I have discovered, treat of subrogation in anything like an exhaustive fashion. It has no article to itself in such a work as Lord Halsbury's Laws of England. There is some excuse therefore for having recourse to foreign literature—and there are at least two text-books on the subject by American lawyers. Subrogation is by them distinguished as contractual and jural. When a person interested in property pays off a mortgage on that property he may bargain with the mortgagee for the transfer to himself of the interest in the mortgage. That would be a case of contractual subrogation. It may be doubted however, whether the contract could be described as a contract to sell immoveable property. The mortgagee who is paid off has no interest to sell, and it cannot matter to him whether he reconveys the property to the person paying the money or transfers to him

his interest as mortgagee. It is by no means clear that a contract to make such transfer can properly be held to be affected by S. 54 of the Transfer of Property Act. But in the ordinary case where a claim by subrogation is made there is no pretence of a contract between the person so claiming and the holder of the mortgage in respect of which the claim is made. Subrogation of the jural type is that which is recognised in several sections of the Transfer of Property Act and which generally comes before the courts. There is nothing in that Act to limit or exclude the doctrine as recognised and illustrated by the English authorities. To hold that by force of a contract and without any conveyance or even without any contract a person may claim a mortgagee's interest in property, whereas in virtue of a contract to sell he could claim no interest, may be an anomalous state of things. But apparently it is the law in India. The proposition that an interest in immoveable property cannot be passed from one living person to another save by an instrument of transfer duly registered is not universally true.

H. H. SHEPHARD.

THE LAW OF APPORTIONMENT.

No rule is more characteristic of English Common Law than that which withholds from the Courts, in dealing with matters which form the subject of a contract, any power to adjust the relations of the parties to new circumstances which may have arisen. When a man puts goods on board a ship for their carriage to a certain port and the ship breaks down after performing half the voyage, the Common Law does not allow the court to award to the ship-owners half or any portion of the agreed freight. That freight has not been earned and there was no agreement to pay any other sum. It is not the business of the court to fabricate a new agreement for the parties. When a tenant for life lets the property for a year at a certain rent and dies shortly before the year is out and before the rent is due, the Common Law does not consider what part of the rent ought in justice to be paid to the representative of the deceased person. The rent had not become due and therefore at Common law nothing was payable.

In India as in England this common law way of looking at things has by statute been modified to a certain extent. The Contract Act has done something by providing for cases like that above mentioned of a ship reaching a half-way port but unable to go any further. The Transfer of Property Act in S. 36 has done something by providing for the apportionment of rent and other such dues as between the person originally entitled and his transferee. But this section being carefully restricted to the case of a transfer by the person entitled and to the relation between him and the transferee covers much less ground than does the English statute on which it is founded. The words of the section are so plain that a comparison between it and the sections of the Apportionment Act, 1870, is hardly necessary. But it may be interesting to mention that the commissioners in the original draft bill, having the statute before them, evidently intended a modification of the Common law rule at least as large as that which is furnished by the statute. The clause corresponding to S. 36, is framed in the most general terms, no reference being made to the case of transfer. It is simply an assertion that rents like interest on a debt shall be deemed to fall due from day to day and to be apportionable accordingly.

The Courts in India have expressed no doubt as to the construction of S. 36, and generally have held that the principle of

apportionment can be applied only to the cases within the section, the distinction between interest and dividends being in other cases preserved. But in two cases Madras Judges have taken a different line and have extended the principle to cases which are not within the section though they may be within the statute. In one case *Lakshmi Narayanappa* v. *Malloth Raman Nair* [1], Sir S. Subramania Iyer applied the doctrine to the case (heard by S. Subramania Iyer and Davies, JJ.,) of a tenant for life dying before the rent became due. In a recent case *Randipurazil* v. *Molloli* [2], where rent was claimed against the purchaser of property who had bought between two rent days the doctrine was applied in his favour and it was held he was liable not for the whole rent but only for an apportioned part. Of the two decisions this is the more striking for here there was a transfer but it was a transfer of the property subject to the rent, not a transfer of the right to receive the rent. Moreover, the question did not arise between the transferor and transferee. It is only after some discussion that it has been allowed that such a case would come even within the English Statute. These decisions are noteworthy because they assume that it is competent to the Courts in a matter for which the legislature has in part provided to supplement the legislation by appeals to equity. That the English Courts would not venture to act on this assumption is pretty clear from consideration of the cases on the Apportionment Act and it is difficult to see how the proceeding can be any more justifiable in India. The only justification that suggests itself would be that the Common Law rule has never been in force in India and that therefore S. 36 may be regarded as superfluous and anyhow not an exhaustive statement of the law. It would require some audacity to raise this contention, for it would mean that the distinction between interest on a debt and rents or dividends had been ignored by the Courts in India. It would mean that such interest and dividends had alike been treated, independently of Statutory Law, as apportionable. The argument too would ignore the inference which may fairly be drawn from the legislation of 1882, for the section itself being obviously suggested by the English Statute is evidence that the legislature considered the antecedent state of law to be the same in both countries. Why the legislature did not adopt the clause originally framed

1. (1902) I.L.R. 26 M. 540. 2. (1912) I.L.R. 38 M. 86=23 M L.J. 695.

and so modify the law to the same extent as in England it would be unprofitable to speculate. Possibly, it was thought that in an enactment relating to the transfer of property *inter vivos* the rule dealing with apportionment ought to be confined to the case of such transfers. However that may be, however unsatisfactory and inadequate the section may be, the supplementing of it would seem to be a matter for the legislature rather than for Judges.

In the second of the two cases cited it may be noted that after the fashion so common now in Indian Courts reference was made to American authorities. In a limited class of cases notably in those in which the physical conditions resemble those prevailing in the States rather than those in England, the citation of American Judgments of certain courts may be useful. But in the particular case there was no need to seek help from such a quarter. The justice of apportionment as applied to rents is authoritatively admitted by the English Law. At the best and on the assumption that there has been no legislation on the subject, American cases could only indicate what the law might have been in England or in India in the absence of legislation.

H. H. SHEPHARD.

SUMMARY OF ENGLISH CASES.

Adams *v.* **Thrift.** 1915 2 Ch. 21 (C. A.)

Company—Directors, liability of—Mis-statements in prospectus—Allotment of shares—Good faith—Uncorroborated statements of a promoter—Companies' Consolidation Act, 1908, S. 84.

Under S. 84, Companies' Consolidation Act a director of a Company at the time of the issue of the prospectus is liable for mis-statements in the prospectus, *inter alia* he had reasonable ground to believe and did up to the allotment of shares believe the statement was true.

A shareholder brought an action to recover compensation from the directors for misrepresentations in the prospectus on the faith of which, he had taken shares.

Held, the uncorroborated statements of a promoter ought not to be relied on by the intending directors as justification for their reasonable ground for belief; and consequently they were liable to the shareholder.

Herbert Morris, Limited, v. **Saxelby** 1915 2 Ch. 57 (C.A.)

Restraint of trade—Special branch of business—Employer and servant—Interests of servant and public to be considered.

Sargant, J. In determining the question of the reasonableness of a restrictive covenant between an employer and an employee, the interests of the employer are not the only elements to be considered. The Court should have also regard to the effect of the covenant on the employee, and on the damage to the public by its being deprived of his peculiar skill in the special branch of business.

The Court of appeal (Lord Cozens Hardy, M. R., and Joyce, J., Phillimore, L.J., dissenting) affirmed the decision of Sargant, J., and held that such a covenant ought not to be enforced.

In re **Houghton** *v.* **Houghton** (1915) 2 Ch. 173.

Intestacy—Son murdering intestate—Lunacy—Indictment for murder not proceeded with—Right to share in father's estate.

Where a person killed both his father and brother, and on the indictment for murder of his brother, it was found that he was insane when he committed the act, and consequent on this finding, the indictment for the murder of his father was not proceeded with, on a summons by the widow of the deceased father, whether the son, as one of the statutary next-of-kin was entitled to his share.

Held, it is not a necessary condition of the disqualifying rule that a murderer ought not to derive any benefit under the will of the deceased, that there should be a conviction for the offence.

Semble: The distribution of the property of an intestate being regulated by the positive provisions of statute law, a murderer can take a distributive share under the intestacy of his victim.

[*Cf. Vedanayaga Mudaliar* v. *Vedammal* 1.]

British Murac Syndicate, Limited, *v.* **Alperton Rubber Company, Limited,** (1915) 2 Ch. 186.

Company—Contract with a shareholder that he should have power to nominate a director—Article of association to that effect

1. I. L. R. 27 Mad. p. 591.

—Company's power to alter—Specific performance—Companies Consolidation Act, S. 13.

A company cannot alter its articles of association, if it would amount to a breach of contract.

Although the regulations contained in a company's articles of association are revocable by a special resolution, a special contract may be made with the company in the terms of or embodying one or more of the articles. In such a case the company cannot after the article or articles, as it would be a breach of contrac t.

A contract under which the plaintiff shareholder is to have the right of appointing two directors to the defendant company is not in the nature of a contract of service by which one person is compelled to accept another as servant; and the contract is specifically enforceable, the award of damages being a wholly inadequate and illusory remedy.

Thompson *v.* **Bradford Corporation and Tinslay,** 1915, III K. B. 13.

Highway—Corporation—Widening street—Post Office—Removal of telegraph Pole—Hole caused by removal—Improperly filled in—Negligence—Liability of Highway authority and Post Office.

Where a highway was widened by the local authority and on its request the postal authorities renewed a telegraph post standing on the road, and in filling up the hole did it so negligently—that the Plaintiff's steam wagon sank into the hole and was damaged, *held,* that the defendant corporation was liable as the duty was to so make it that it should reasonably be safe for the purposes for which it was intended to be used and the Post Office authorities also were liable on the ground that as having done a piece of work they did it negligently.

Per Bailhache, J.: "If a person does a piece of work negligently although he need not have done it at all, he is liable for the consequences of his negligence.

Huth *v* **Huth,** 1915 III K. B. 32 (C. A.)

Libel—Publication—Communication posted in unclosed envelope.

The defendant sent through the post in an unclosed and ungummed envelope a written communication which the plaintiffs

alleged, was defamatory of them ; *held*, in an action for libel, that there was no evidence of publication and the action would not lie even though there was evidence in the case that the plaintiff's servant abstracted the letter and read the contents thereof and in breach of his duty out of curiosity.

"If a person in breach of his duty were to open a letter and there was no reason to expect that he would commit that breach of duty, the fact that he had opened it and read it would not amount to publication by the person who read it...It is not part of a butler's duty to open letters which come addressed to the home of his master or mistress addressed to them and there is no presumption that a letter in an envelope which is ungummed is to be treated just as a post card."

Maskell *v.* **Horner** (1915) 3. K. B. 106.

Money had and received—Market tolls paid under protest and under threat of seizure of goods—Levy unlawful—Action for amount—Whether money paid under mistake.

Certain tolls were demanded of the plaintiff by the owner of a market and he paid the same under protest and under threat of seizure of goods and also because other persons like himself paid them. The levy of toll was found to be unlawful. *Held*, in an action for recovery of the tolls paid, that they were recoverable as money had and received as they were not voluntary payments but paid under protest and under circumstances showing no intention to give up his right to the same. *Held*, further, that they were not payments under a mistake of law or of fact as they were made merely to avoid being involved with the defendant.

JOTTINGS AND CUTTINGS.

The Wrong Practitioner.—He was a surly and quarrelsome old farmer, and the only person of any importance who had managed to avoid clashing with him was the mild-mannered vicar, relates the Boston Post.

But even this forbearing gentleman lost his temper when the farmer impudently turned his horses loose in the Churchyard and refused to make them out again.

High words ensued, and the vicar so far forgot himself as to call the farmer a "broken down old mule."

Off went the farmer on the instant and crashed noisily into the village Lawyer's office.

"The vicar has just called me a broken down old mule!" he bawled....."What am I to do?"

Now, the lawyer had once received a severe rebuff from the farmer and had waited for years for a chance to repay it. Here was his opportunity and he seized it with both hands.

'Don't come to me about that," he said coolly. "I can't patch you up. I'm no veterinary surgeon"—*Case and Comment.*

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An Unfortunate Simile.—"There are times," observes a member of the bar, when a lawyer regrets the use of an illustration which a moment before has appeared especially felicituous.

"The 'argument of my learned and brilliant brother,' said the counsel for the plaintiff in a suit for damages from Street-car Corporation in Boston, 'is like the snow now falling outside—it is scattered here, there, and everywhere.'

"'All I can say,' remarked the opposing counsel, when his opportunity came, 'is that I think the gentleman who likened my argument to the snow now falling outside may have neglected to observe one little point to which I flatter myself the similarity extends—it has covered all the ground in a very short time.'"—*Ibid.*

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Lord Halsbury's Ninetieth Birthday.—Lord Halsbury, who long ago earned the title of the 'Grand Old Man' of the Law, will complete his ninetieth year on Friday, having been born on September 3, 1825. Every member of the profession, proud of his extraordinary record of unabated vigour, will cordially wish him many happy returns of the day. It is sixty-five years since he began his distinguished career at the Bar, and thirty years since he began his unusually long tenure of the Woolsack. So sure has been his possession of the secret of perennial youth that, notwithstanding his approach to the nonagenarian stage, he has remained one of the youngest men in the profession. When ten years ago, Mr. Choate was entertained by the Bench and Bar of England on his retirement from the office of American Ambassador, he made a very felicitous allusion to the irrepressible vitality

of Lord Halsbury, who, as chairman of the gathering, had proposed his health. Quoting the familiar lines, 'time, like an ever-rolling stream, Bears all its sons away,' Mr. Choate observed: 'But the Lord Chancellor seems to stem the tide of time. Instead of retreating like the rest of us before its advancing waves, that happily he is actually working his way up stream' is scarcely less true to-day than it was ten years ago. Two other Chancellors of the Victorian era lived to be nonagenarians; Lord Lyndhurst was ninety-one when he passed away, and Lord St. Leonards reached the age of ninety-three. The 'Lyndhurst of our day,' as Sir Edward Clarke has aptly called him, continues to display a mental and physical vigour which encourages the hope that his years will exceed those of any of his predecessors.—*The Law Journal, 28th August 1915.*

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It is interesting to note that the Master of the Rolls stated last month that neither a Jew nor a Dissenter is capable of being Lord Chancellor. Certainly, neither has ever held the post, though it has been offered to a Dissenter who did not take it. About twenty years ago Mr. Gladstone stated in the House of Commons that the Lord Chancellor could not be a Roman Catholic, but might in his opinion be a Jew, Mahomedan, Buddhist or Hindoo; and Mr. Asquith in the same debate said the office might be held by a Jew or Dissenter or Agnostic. *The Law Student's Journal, 1st September, 1915.*

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Chief Justice Fuller.—Shortly before his death, the late Chief Justice Fuller presided at a church conference. During the progress of a heated debate a member arose and began a tirade against universities and education, thanking God he had never been corrupted by contract with a college.

"Do I understand the speaker thanks God for his ignorance?" interrupted the Chief Justice.

"Well, yes," was the answer; "you can put it that way if you want to."

"All I have to say then," said the Chief Justice, in his sweetest musical tone, "is that the member has a good deal to thank God for."—Pathfinder. *Central Law Journal, Vol. 81 No. 6, P. 103.*

Humor of the Law.—John Doe, having taken a recent bar examination, was asked by his friend Richard Roe, how he came out, to which Doe replied:

"Well, I wrote Little on Mortgages and Trust Deeds, Moore on Facts, and Long on Domestic Relations. I fell on Guaranty and Suretyship and was Fuld on Police Administration, but Keener on Corporations. I got Wise on American Citizenship, but was Poor on Referees under the Code System. My Spelling on Trusts and Monopolies ranked me High on Injunctions and May on Insurance. I took a Knapp on Partition, was Tarde on Penal Philosophy, but started the Ball on National Banks and did my Best on Evidence. I was Hale on Torts, turned Gray on the Rule against Perpetuities, got Dropsie on Roman law of Testaments and pulled through by a Hare on Contracts." Case and Comment. *Central Law Journal. Vol. 81, No. 6, pp. 103*

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Christian Science and Practicing Medicine.—The Supreme Court of New York in an exhaustive opinion has affirmed the conviction of one Cole, a Christian Science Healer, for practicing medicine without a license. *People* v. *Cole* [1]. The evidence was that Cole had offices in the city of New York where he received his patients, and that while he did not make any definite charge for his services, taking, he said, what his patients offered him, he had an average income from his practice of six thousand dollars a year. Cole contended that in convicting him the courts were interfering with him in the practice of the tenets of his religious belief. But Clarke, JJ., who wrote the opinion of the Court said that the court did not assume nor had it the power to assume the function of curtailing a man in the practice of his religious beliefs. The commercialized use of prayer, however, for the avowed purpose of treating all persons seeking cure for all kinds of bodily ills, was not the practice of the religious tenets of a church. Laughlin, J., while agreeing with Clarke, J., was of the opinion that the acts performed by the defendant if performed in a Christian Science Church or in visiting and administering to the members of the church without charge would not be a violation of the statute regulating the practice of medicine.—*American Law Review.*

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The Jury Consumed the Evidence.—In Dakota recently a jury who was trying a man for a breach of the liquor laws of the State

1. 148 N. Y. S. 708.

were given three bottles of beer which he was charged with having in his possession for an illegal purpose and were allowed to take them into the jury room for examination. They soon returned with a verdict of guilty and left the court room, when lo, it was discovered that the bottles were empty. The Supreme Court ruled that a new trial must be awarded, saying:

"If the jury drank the contents of the bottle in order to test its qualities as an intoxicant they clearly violated the law, as they had no right to try any such experiment. Even if they drank it from a spirit of bravado prejudice will be presumed."—*Ibid.*

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An Astrologer is Not a "Fortune Teller."

In New York the defendant was charged with "pretending to tell fortunes," which is prohibited by the Criminal Code of New York [1]. The defendant did not deny the facts, but asserted that she was an astrologist by profession and her counsel argued for her on these lines:

"Astrology is the science which describes the influence of the heavenly bodies upon mundane affairs and upon human character and life. It is a mathematical or exact science, as it is based upon astronomy, which describes the heavenly bodies and explains their motions, etc. It is an applied science in that it takes the established principles of astronomy as its guide in delineating human character, and all its judgments are based on mathematic calculations. It is an empirical science, because its deductions are based upon accurate data that have been gathered for thousands of years. Astrology is the oldest science in existence. It is not only prehistoric, but pretraditional, and must not be classed with fortune telling or any of the many forms of demonology as practiced in ancient and modern times. Astrology is the science of the effects of the solar currents on the living things of earth, especially on human life.

In dismissing the charge the Court said:

"The status in question is peculiarly worded. 'Pretend to tell fortunes' are to be considered. This law was designated to prohibit persons who make pretence or make believe to tell fortunes. A deception or concealment of the truth is essential in each case. It is really a certain degree of quackery practiced to the

1. People v. Adams, N. Y. L. J., Jan. 4, 1915.

detriment of the community in general that is made unlawful by this statute.

"What is fortune telling and who is a fortune teller? The Standard Dictionary says 'that to tell one's fortune or tell fortunes is to foretell what is to happen to one, or to practice the prediction of future events with reference to persons through some professed faculty of penetrating, or specific means of calling up, the secrets of the future.' And it defines 'fortune teller' as 'one who tells or reveals future events in the life of another; one pretends to a knowledge of future events and makes a practice of foretelling them.'

"When the defendant prepared her horoscope of the complainant and got the relative position of the planets at the time of her birth, basing this horoscope on the well known and fixed science of astronomy, she violated no law. Her explanation of the relative positions of the planets constituted no violation of law. For the palmist to tell that a certain line in the palm of the hand is the 'lime line' or the 'head line' or the 'heart line' has never been held, as far as I know, a violation of this law now under consideration, but it has been held to constitute one a disorderly person, within the meaning of this statute, to say that the life of a certain individual will be long or short. At best this is but a guess or conjecture. To prophesize that one will be more happy in the future than he has been in the past might under a certain circumstance constitute a violation of the said section of the Code of Criminal Procedure.

"The defendant has given ample proof that she is a woman of learning and culture and one who is very well versed in astronomy and other sciences. Her chart here, as made out, may be verified, as she states, by those who may be disputations on the subjects of its accuracy in the books and records of astronomers for years. And when the defendant stated to the prosecutrix that these planets and their relative positions indicated this or that, and this or that ought to happen, if the signs meant anything, with the distinct understanding had between them that the defendant was giving no assurance that this or that eventuality would take place, I say she violated no law."—*(Ibid).*

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The following extracts from Lord Alverstone's *Recollections of the Bench and the Bar* by the American Law Review are sure to be found interesting.

Like all great lawyers he has a high regard for his profession: "In reviewing the leading events of my professional life, I have been confirmed in the opinion that I have long entertained, that the Bar is a great profession for men of ability and industry. I have often said that, given that a man who knows his work has the courage and perseverance to go through the period of waiting, he will ultimately succeed. Of course there are degrees of success, and luck or good fortune has a great deal to do with the amount of it. But all said and done, if a man is competent and has the courage to stick to his work, I do not believe in absolute failure. Sir John Karslake, when asked what were the three things which were necessary for success at the Bar, said the first was tact, the second tact, and the third tact. He was not far wrong. I have seen many errors made, cases lost, and clients affronted by a want of ordinary tact on the part of the barrister. Of course, it will be remembered that when Sir Edward Clarke was asked what where the three essentials, he replied: 'To be very poor, very ambitious, and very much in love.' No doubt these qualifications also may have much to do with a man's success. I knew one barrister who for eight years never got any work at all. He was of untiring energy and very able. He stuck to his work manfully, and in the end acquired a very large practice."

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(The division of the legal profession into barristers and solicitors.) "I am led at this point to refer to the question of a possible fusion of the two branches of the profession. I have always been, and still am, strongly opposed to the idea of fusion, and I shall refer to it again by way of illustration when dealing with international arbitrations. Dealing with the question on its merits, in heavy litigation a properly instructed barrister with all the facts before him is, in my judgment, the best qualified person to present a case in a way which will attract the attention of, and be easily followed by a tribunal which, for the first time, is called upon to listen to the merits of case, whether of law or fact. The solicitor who has been engaged in preparing the brief, and has perhaps brooded over it for several months, is apt to attach undue importance to particular incidents without sufficiently considering

their bearing as a whole, or their weight in connection with other incidents and arguments in the case. I frequently discussed the question with Sir Charles Russell, and he entirely concurred in my opinion; he held that a barrister coming new to the consideration of the facts is able to take a more detached view of the whole case, and to present it to a fresh mind as a complete story, putting the material incidents in their proper order, and not attaching undue importance to special facts. I asked Mr. Benjamin his opinion on the question, he having experienced both systems. He said he agreed that for a country with a long-established procedure, the English system was far the best; but he thought that for new and young countries which had not reached the state of final development, it would be difficult to maintain the separation which exists in this country, and that it was necessary that lawyers should be allowed to conduct cases in court as well as to act as solicitors. I can only say that in my opinion the existence of a body of men who devote themselves solely to advocacy, and have little or nothing to do with the cases until they are brought to them for conduct in court, has been of immense value to our English system of jurisprudence. The independence of the Bar arising from the absence of any personal interest in the success of proceedings has given them a position in public opinion which could not possibly be attained under any other system."

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The picture of the barristers' clerk.—"The position of barristers' clerks is anomalous and interesting. They are paid by the by client sfees of half a crown for a consultation, a five per cent. on the brief fees. I know of no other instance where the personal attendant on a professional man is paid indirectly by the clients. The result is that their good or ill fortune is linked together with that of their masters, and they learn to identify themselves with them. Many very amusing stories have been told about them, and are well known. One I do not remember to have seen quoted. Lord Herschell, then Mr. Herschell, had a clerk who was a great character. In the year in which Mr. Justice Willes died, Herschell came back at the end of the Long Vacation and asked his clerk what was going on. The clerk said: 'Nothing particular.' 'Well,' said Herschell, 'but haven't they been asking you anything?' 'Oh, yes,' he said, 'they have asked me whether we're going to take a *puisne* Judgeship.' 'What did you reply?' said Herschell. 'I

said "Thank God, we haven't fallen as low as that!" ' An amusing incident came under my direct personal notice. When Mr. Justice Bowen, afterwards Lord Bowen, was offered a Judgeship in the Queen's Bench, he sent for me, as I knew him very intimately, and asked me what I thought he ought to do. I said: 'Well, Bowen, if you don't accept the Judgeship, you must take a silk gown and go through the hard work of the profession, and I doubt whether your health would stand it.' 'Well,' he said, 'it is strange you should have said that, when I tell you that during my eighteen years at the Bar I have been away for two whole periods of twelve months from ill-health.' Just at this time gossip said that Mr. Bowen was hesitating. Mrs. Bowen was anxious that he should accept the Judgeship. 'Block—that was his clerk's name—said, when asked: 'Our voice is weak, and the sooner we get on the Bench the better.' Strangely enough, it was a true summary of the position. I could tell of many other instances in which clerks have shown their acumen and loyalty to their masters, but the above which I have quoted will be sufficient to indicate the relations which prevailed between barristers and their clerks, and the attitude assumed by the latter."

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The English Barrister looks for his fee not to the client but to the Solicitor, and that the latter is not always trustworthy, Lord Alverstone discovered on one occasion: "I had received a guinea brief in a case in the City of London Court, which some friend of mine had returned. The next day the solicitor came to the Mayor's Court to speak to me about it. Salter saw him, and said to me: 'Don't you have anything to do with that fellow. He will just suck your brains, and never pay you.' I thanked him very much, and the next day the solicitor came to my chambers, No. 2, Pump Court, with a two-guinea brief for me to go to Judges' Chambers, I said to him: 'I will take this case on one of two conditions. Either you pay me the guinea I earned yesterday, or the two guineas on this brief.' He said, 'All right, sir, I will go and get the money.' He went away, and I never saw him again." There are several good stories in the "Recollectons" of lawyers and judges. Of a Mr. Brown, a leader at the Bar in his days, the author says: "He was a great lawyer, but somewhat slow and deliberate in his arguments. There was a good story current of him when I first knew him. It was said that while he was arguing

before Chief Justice Jervis—a man of very acute mind and a rapid thinker—and was proceeding with his usual caution, the Chief Justice interrupted him: 'Get on, Mr. Brown, get on!' Brown stopped. 'I beg your Lordship's pardon, but I apprehend that my arguments cannot proceed with as much rapidity as your Lordship's mind.' 'For God's sake, don't stop to tell me that' said the Chief Justice." This of Pollock: "Chief Justice Abbott, afterwards Lord Tenterden, was presiding at the Yorkshire Assizes, which were then held at York only, and Pollock had to open the case for the plaintiff in a very heavy dispute about a colliery contract. He was called at five o'clock in the morning in order to read his brief, but happened to take 'The Heart of Midlothian,' and was so interested in it that he never touched the papers until breakfast time. The Court in those days sat at nine, and there was therefore no chance whatever of his mastering the case so as to present it in a proper form to the jury; he found, too, that some two or three hundred letters had passed between the parties. Accordingly, with the greatest coolness, he said to the jury: 'I could not better present the facts of the case to you, gentlemen, than by using the language of the parties themselves, and I shall therefore read to you the correspondence which has passed in chronological order.' This he proceeded to do, and had continued reading for nearly an hour, when Chief Justice Abbott, who was very much afraid of Pollock, thought it was time to intervene: 'Mr. Pollock, is it absolutely necessary for you to read all this correspondence? Cannot you condense it a little?' To which Pollock replied: 'Absolutely necessary, my Lord, for I never read it before.' Of course, in the face of such sublime impertinence there was nothing more to be said, and the case proceeded."

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And he tells this story of a distinguished English novelist and "a hard-working barrister by the name of Codd, who had a large family and was always struggling in his profession. In a post office prosecution, tried before Baron Bramwell at the Chelmsford Assizes, Codd was defending the prisoner. Among the witnesses was Mr. Anthony Trollope, the well-known novelist. He knew nothing about the facts of the particular robbery in question, but having an official position in the post office, he was called to prove the practice in the post office as to the sorting, removing,

and otherwise dealing with the letters, so that the Jury might understand what opportunity the prisoner had had for committing the theft. I need not say that in such cases the witness is as a rule not cross-examined, but makes his statement and leaves the box. Accordingly Mr. Anthony Trollope, to whom Bramwell had nodded, was leaving the witness box, when Codd, who saw an opportunity for making a point, said: 'Stop a moment, Mr. Trollope.' Trollope came back. 'What are you, Mr. Trollope?' said Codd; 'I have already told the Court that I am a supervisor in the post office.' 'But are you anything else?' Trollope replied: 'Yes, I am an author.' 'Ah!' said Codd, 'you are an author, are you? What was the last book you wrote?' Trollope replied: '"Barchester Towers,"' or whatever it was—the particular book is immaterial. 'Well, then,' said Codd, 'was there a word of truth in that book from beginning to end?' 'I do not understand what you mean,' replied Trollope. 'You can answer a plain question: Was there a word of truth in that book from beginning to end?' 'It was a work of fiction.' 'Fiction or not, was there a word of truth in it from beginning to end?' 'Well,' said Trollope, if you put it in that way, there was not.' Codd said: 'Thank you, Mr. Trollope,' and sat down. He called no witnesses, but made a violent speech to the jury, in which he asked them how they could possibly convict the prisoner on the evidence of the principle witness when the principal witness was a man who was obliged to admit that he had written a book without a word of truth in it."

CONTEMPORARY LEGAL LITERATURE.

In the *Harvard Law Review* for May, Professor Samuel Willinston controverts the position that a pardoned criminal is in the same position as if he had never committed the crime. The pardon removes all legal disqualifications attaching to *conviction* but it does not rehabilitate the man in so far as his character is concerned. A man convicted for perjury is under the Common law disqualified from giving evidence. Pardon has the effect of removing this bar but does not and cannot remove the stigma on his credit. The disqualification or disability that attaches to the fact of the commission of the offence as distinguished from the conviction would still remain.

Mr. J. L. Thorndike argues that the grant of a general power exercisable by deed or will to a person to whom a life-estate is granted is not equivalent to the grant of an absolute estate to him and therefore such a grant is bad if the grantee was not in existence at the date of the grant by reason of the rule against perpetutites. This view is against the view of both Farwell and Gray, but nevertheless the writer thinks that both on principle and on authority the view propounded by him is the right one. In the case of a power, an estate does not become vested till the power is actually exercised and as such though the life-tenant who is the donee of the general power has got the capacity to convert himself into an absolute owner, it is wrong to regard him as an absolute owner.

Mr. C. N. Gregory discusses the effect of war on the operation of statutes of limitation. The rule laid down by the English Courts, *viz.*, that the statute of limitation is no bar to a party whether he be a subject of the realm or a foreigner who is not in England at the time the cause of action accrues and who continues to reside abroad has prevented the question from turning up in England as often it would otherwise have been. In England, the general rule seems to be that a state of war does not prevent the statute running. The reason as given in *Lee* v. *Rogers*, and *Backford* v. *Wade*, which are the leading English cases on the subject is that the statute does not provide an exemption in the case and therefore it should run. The American Courts have been somewhat more liberal and hold that the statute will not run when parties are so divided by the line of war that the plaintiff cannot have access to the court, or when the court to which the plaintiff can have a right of recourse does not sit on account of the disorder of war. The writer thinks that the old English precedents can be got rid of in two ways, first, they refer to cases where the want of authority in the Courts alone was pleaded and not either the fact that there was no Court or that the party could not have recourse to Courts. Secondly, the rule that enemy's cause of action is suspended and not destroyed is of later growth and would seem to require the adoption of the more liberal rule.

Property in water is an article of interest in the Canadian Law Times for July which summarises the law as to waters, as

to the water of the high seas, of surface water, water running in defined natural channels and water in artificial channels.

Another writer questions the tendency of Courts to disallow costs on extra-judicial considerations such as that the parties were not "businesslike" or "might have been more generous" or "dissuaded testators from exercising charitable intentions" or "the plea was unmeritorious." He thinks that costs instead of being an indemnity for expense necessarily incurred in enforcing a legal right or resisting an unfounded claim, have come to be considered more or less in the nature of a bonus for the performance of certain indeterminate and unclassified works of supererogation, not affecting the determination of legal issues but opening up a large vista of moral and social proprieties or even coming to a point of questioning the policy of a statute which affords a defence to the suit.

The August issue of the same Journal contains an account of the life and work of Chief Justice Cockburn who was holding that office for 21 years from 1859 to 1880. He took part in many important cases which have settled the law among others *Campbell* v. *Spottiswoode*, *Sugden* v. *Lord St. Leonards*, the *Tichborne case* and *Queen* v. *Eeyn*. On one point he felt very strongly and that was that witnesses were just as necessary for the administration of justice as judges or jurymen and are entitled to be treated with the same consideration and their affairs and private lives ought to be held as sacred from the gaze of the public as those of the judges or the jurymen and no questions ought to be allowed unless they are clearly pertinent to the issue before the court except where the credibility of the witness is deliberately challenged by counsel. The lofty conception Cockburn had formed of the duty of an advocate found fitting expression in a speech delivered at a banquet given by the Bar to the French Advocate, M. Benger. Lord Brougham in response to a toast had said "the first great quality of an advocate is to reckon everything subordinate to the interests of his client". Shortly after, Chief Justice Cockburn in replying to the toast of "the Judges of England" said: "Much as I admire the great abilities of M. Benger to my mind, his crowning virtue—as it ought to be that of every advocate is that he has throughout his career conducted his cases with

untarnished honor. The arms which an advocate weilds, he ought to use as a warrior; not as an assassin. He ought to uphold the interests of his clients *per fas* and not per *ne fas*. He ought to know how to reconcile the interests of his client with the eternal interests of truth and justice." Of these words it has been said: "They are the best epitaph which can be bestowed on Sir Alexander Cockburn".

In the *American Law Review*:—(July—August) Mr. R. H. Rogers elaborates the view that equity to start with was not at all a system of jurisprudence but the exercise of King's grace in matters in which the King or his Chancellor as the keeper of his conscience thought the law had worked harshly. The Chancellor had his ordinary jurisdiction in which he was in the same position as other courts but in so far as he was exercising the King's power of *mercy* he was acting above the law. The principles on which the Chancellors acted were reduced to a system when the early ecclesiastical Chancellors were succeeded by *Lawyer Chancellors*. The essential difference between the jurisdiction of courts and of the Chancellor is brought into relief by this circumstance, namely, that while the House of Lords reversed the judgments of the law courts, it only advised the King to interfere when the appeal was against the decision of the Chancellor in his extraordinary jurisdiction.

Mr. E. A. Macullech gives a life of Earl Cairns, the great Victorian Judge of whom Lord Bryce says "as a Judge he will be held in honorable remembrance as one of the five or six most brilliant luminaries that ever adorned the English Bench since those remote days in which the beginning of legal memories is placed." He was an ideal judge and he looked it. He not only bent every effort to decide a case correctly but he knew how to hear a case with incomparable patience. He was not too reticent and no one could complain that he was too outspoken. He rarely ever interrupted counsel and never for the purpose of provoking a controversy or to expose the ignorance of the advocate. When he did ask a question, it was with such grave and respectful manner as not to offend or confuse but to bring to the surface some principle about to be overlooked or to suggest the application of one with unmistakeable clearness which put an end to further contention on that point. It is related of him that on one occasion while he was presiding in the House of Lords,

one of the Judges who had acquired the habit of sharply interrupting counsel with frequent questions commenced to do so, and he interrupted with the suggestion that the court was desirous of hearing the arguments of counsel and not of putting questions to him. His opinions were not lengthy but strong and couched in lucid language which left no doubt what he meant to decide. They reached to the vital principle of the case without unnecessary display of learning and in the fewest words possible. There was a paucity of authorities cited in his opinions as in his arguments before the bar but when there were cases really in point, he referred to them and analysed them with discriminating nicety. The precincts of the Court were to him sacred and no one was allowed to forget that the administration of the law was too serious a business to admit of levity.

BOOK REVIEWS.

INDIAN CONSTITUTIONAL DOCUMENTS, *by Panchanandas Mukherji, M. A., by Thacker Spink & Co., Calcutta.*

People interested in Indian Constitution are under deep obligation to Mr. Mukherji for his bringing together the various statutes bearing on the subject together with what is even more important because not easily accessible, extracts from the speeches of responsible Ministers and Viceroys relating to the question Despatches and Royal Proclamations. Books like this are indispensable for a study of the subject. The introduction is also sure to be felt helpful.

THE INDIAN COMPANIES ACT, *by S. Kasturi Rangachari, Lawyer's Companion Office.*

This Edition of the Companies' Act is bound to be popular with the profession. It has the merit, the rare one, of giving all the information that is ordinarily necessary to be had in connection with the company law of this country. It gives the entire English and Indian case law bearing on each section of the act arranged after the convenient manner of other Lawyer's Companion publications. It contains the English Act and a table giving corresponding references to that act as well as to the earlier Indian Acts. It gives all the minor acts relating to societies analogous to companies, such as the Presidency Banks Act, Co-operative Societies' Act, etc. The rules framed under the Act form one of the Appendices. We heartily commend the book to the profession.

JOTTINGS.

The Law Dinner.—The farewell dinner arranged by the Advocate-General in honor of Sir C. Sankaran Nair was a complete success, more than 130 people having been present. Sir Leslie Miller, three Indian High Court Judges, Sir Hugh Fraser, the Registrar of the High Court and a respectable number of Barristers, Vakils and Solicitors attended. Sir Sankaran Nair's European Colleagues were conspicuous by their absence, whether by accident or otherwise we do not know. In addition to the customary felicitations, some interesting points were touched on in the speeches that were made. The Advocate-General while prepared to make an exception in favour of Sir C. Sankaran Nair and to congratulate the Government and the people of India on the wise selection made in this particular instance, expressed approval of the principle adopted by the Indian Government of not holding out prospects of promotion before Puisne Judges of the High Court, and quoted the high authority of Lord Brougham in support of his position. He also referred to the question of the reform of the legal profession a subject that has for sometime been engaging his earnest attention. Sir C. Sankaran Nair responding to the toast said that, as from his experience, he was not able to say there was much to choose between the ordinary litigant and the local Government, he was bound to admit the force of the objection to the local Government having power to promote a judge; but he added that the objection might not have the same force when the appointment is made by the Viceroy and the Secretary of State. He excluded the Civil Service from his remarks as they were powerful enough to protect their interests even against the local Government and therefore there was little fear that their independence would be affected by the prospect of a possible promotion. He said that there was also another aspect of the case to be considered *viz.*, whether the introduction of the judicial temperament into the Executive Council was not likely to benefit the administration. At any rate, if there was a Judge in the council, it was not likely for instance, that the argument of the High Court that failure to adopt measures for the prompt administration of justice leads to larger resort being had to the Criminal Courts would have failed to convince the Government. Speaking of reforms

in the legal profession, of the dual agency in particular, he quoted Mr. Benjamin's opinion as to the relative merits of the double and the single agency *i. e.*, that while under the American system of single agency the interest of the clients was better served, the English system was helpful in producing a class of fair and powerful advocates of public causes. By the same person appearing as well as acting, there was the danger of his taking on some of the animus of the parties where cases are fought with bitterness and there is a tendency in Judges to attach more weight to the representations of Counsel instructed by a solicitor than to those of a pleader coming into direct relations with the client. Referring to the opinion of Sir Thomas Strange who thought that Natives of India were unfit to be pleaders as they would not have the moral courage to stand up for the rights of their clients Sir Sankaran Nair with a pardonable trace of pride, asked us to contrast those conditions with the present..

Sir Leslie Miller speaking for the Bench appealed for sympathy towards the hardworked (we should add ill-paid) Subordinate Judiciary whom he feelingly described, as living in far off places, unfriended, without decent company, without even proper accommodation, deciphering undecipherable manuscripts taking down interminable evidence, working against time and trying to do justice to the best of their ability. If they did even in those surroundings administer justice fairly and impartially, said Sir Leslie. "All honor to them, but if, as may happen in "very rare instances temptation was too strong, and some of them "failed, let us temper our disapprobation with sympathy."