THE
MADRAS LAW JOURNAL.

VOL.] SEPTEMBER, 1929. [LVII

LAW REPORTS.*

The history of the Courts in India is a subject fairly well known and hardly requires elaborate treatment. The mofussil system of courts has been already dealt with and so far as the Courts of the Presidency Towns are concerned but a few facts need be mentioned.

Mayor's Courts were the first to be established and they were superseded in Calcutta by the Supreme Court in 1773. The Mayor's Courts in Madras and Bombay were replaced in 1797 by the Recorder's Courts. The Recorder's Court in Madras was abolished in 1799 and in Bombay in 1823 and Supreme Courts were established in their stead. In 1862 the High Courts were established which took the place of the Supreme and the Sudder Diwani and the Sudder Nizamut Courts.

The Supreme Courts followed the English rules of evidence and the reforms introduced in England were introduced into India by the Acts of the Governor-General in Council. In the mofussil, the Courts were not bound to follow the English rules though they were not prohibited from so doing. The rules followed by them were composed partly of the Muhammadan rules of evidence drawn from the Hedaya and the Law Officers and partly of rules drawn from English Text Books and Law Lectures except in those few particulars in which Legislation intervened. Somewhat comprehensive Legislation was attempted by Acts XIX of 1853 and II of 1855 which extended the Reforms introduced into the Supreme Court and the Rules of

*The seventeenth of a series of lectures arranged by the University of Madras delivered by Mr. B. Sitarama Rao, Advocate, Madras High Court.

Evidence to the mofussil. The amorphous nature of the rules of evidence explains the use of copies of copies and of correspondences of Collectors and other Revenue Officers without much scrutiny which we come across in the early Reports.

The various jurisdictions of the Supreme Court were known as "Sides," the Equity Side, the Crown Side and so forth. The Reports are also arranged that way and the procedure on each side was similar to the procedure of the corresponding court in England except that the *viva voce* examination of the witnesses was taken down in writing and the depositions were signed by the witnesses.

So far as the Company's Courts were concerned there were certain enactments which more or less regulated procedure; for instance, Bengal Regulation III of 1793, Madras Regulations II and III of 1802, Bombay Regulations II of 1827 and XVII of 1827 and so forth. The practice of these Courts was more similar to that of Courts of Equity than of Common Law, rather, near to the Scottish, it is said, than to the English system. The pleadings consisted of a plaint, an answer, a reply and a rejoinder and had all to be in writing. The parties were not restricted to any particular form. Each told his story his own way. The pleadings were argumentative and sometimes very voluminous and full of irrelevant matter and repetition. They often failed to bring parties to direct issue. A Regulation passed in 1814 required the Judge after the close of the proceedings to settle the issue, but this "most wholesome regulation" (as it was called by the Judicial Committee) was much neglected in practice and parties it seems brought in Exhibits and lists of witnesses from time to time with a petition stating the point which they were meant to prove. No particular course was prescribed to be followed at the final hearing. The Judge either himself perused the pleadings and depositions or heard them read and then the parties were heard which generally meant putting questions to a vakil of one of the parties which was answered by the vakils on the other side. The answer was met by their opponents as best they could. The Judge determined both facts and law. Before the enactment of the Civil Procedure Code of 1859 the Courts had on points of Hindu and Muhammadan Law the assistance of Law Officers well versed in those laws. Though their reputation for honesty was not of the highest, much of the Hindu Law as administered is the result of their exposition. Sir Thomas Strange gives a collection of these opinions with the remarks of Colebrooke and Ellis

under the designation of "Responsa Prudentum". Sir Francis Macnaghten, Sir William Macnaghten and coming to later times Messrs. West and Buhler, and the author of Vyavastha Darpana set out the answers of Pandits on the various points that arose with their own opinion and the authorities bearing on the subject.

Many curious but well-authenticated stories are told as to the ways adopted by Courts to secure unbiassed opinion from Pandits. In a Bengal case, the opinion of Benares Pandits was taken and questions were addressed to them by Sir William Jones in Sanskrit without giving them the slightest inkling as to where the case came from. Strange's Notes of Cases of the Supreme Court record a similar attempt made by the Madras Supreme Court with the Bengal Pandits.

The present procedure dates from Act VIII of 1859, the first Civil Procedure Code. The principal improvements which it made were according to Sir Barnes Peacock (1) it enabled courts to grant injunctions to restrain waste, injury and breach of contract; (2) to appoint receivers; (3) it provided for statement of a special case, and (4) it dispensed with the technical forms of pleading in Supreme Courts. The Code as passed did not apply to those courts. The Code was made applicable to High Courts in 1862 though as we know with reservations and exceptions. The improvements since made have been: the special procedure as to charities (section 539 of C.P. Code of 1882), interpleader (by Act of 1882), summary procedure in the case of Bills of Exchange first introduced by Act V of 1866 and since incorporated into the Civil Procedure Code, procedure for suits by and against partnerships as such (by Act of 1908), provision for suits to restrain public nuisances, third party procedure, garnishee proceedings and charging orders and originating summons. Procedure for the last four remains yet to be provided though so far as the Original Side of the High Court is concerned partial provision is made for some of these things like garnishee proceedings.

The Hindu Law contains several texts relating to limitation though Vijnaneswara had great difficulty in reconciling himself to a rule extinguishing title by wrongful possession, however long. The Muhammadan Law does not seem to recognise any rule of limitation.

The first enactment in India that dealt with limitation was Bengal Regulation III of 1793 which provided that as a rule all suits should be brought within twelve years of the time at which the cause of action arose. Regulation II of

1805 fixed 60 years as the period of limitation for suits by Government. It also dealt with suits for immoveable property, penalties and summary suits for arrears of rent. It declared that, as a rule, suits for redemption or for the recovery of the property deposited should not be barred. From time to time certain further enactments were passed fixing special limitation for certain special suits like suits to contest awards by Revenue Authorities, to set aside revenue sales, etc. As to appeals rules were prescribed by various regulations. There was no rule of limitation governing execution applications but Courts adopted twelve years' rule on the analogy of suits. Such a rule was not recognised in Bombay or Madras.

In Madras, Regulation II of 1802 prescribed a rule similar to that in Bengal under the Regulation of 1793. There was no regulation fixing the time limit to suits by the Government.

In Bombay, the Limitation Law was somewhat more elaborate. Regulation V of 1827 prescribed 30 years for suits for recovery of immoveable property and of hereditary offices, 12 months for suits for damages for injury to person and reputation, to suits for debts not in writing 6 years and to all other cases 12 years. Where possession of immoveable property is procured by fraud, 60 years was the period fixed. There was no limitation for suits to recover mortgaged property unless it was held for over thirty years by *bona fide* possessor as proprietor. As in Madras, there was no period of limitation prescribed for suits by Government. *Bona fide* possession for over 30 years conferred right on land the only instance of acquisitive prescription known to Indian Law so far.

The Presidency Towns followed the English Law of Limitation which they applied even to Hindus and Muhammadans suing in those Courts. Neither 2 and 3 Will. IV, c. 7 relating to acquisition by prescription of easements nor 3 and 4 Will. IV, c. 27 dealing with suits for real property nor the portion of it dealing with limitation on actions on special debts was extended to the Presidency Towns.

Act XIV of 1859 was the first comprehensive Statute of Limitation made applicable to the whole of India. It did not apply to suits as to public property or right which continued to be governed by the law previously existing on the matter. It introduced various periods of limitation: one year to suits for pre-emption, for damages for injury to persons, etc., to set aside revenue sales and attachments for public revenue or to set aside summary decisions, three years to contest awards, suits for money lent or on contracts not written or written and not

registered within 6 months, twelve years for specialty debts, legacies and immoveable properties, 30 or 60 years for recovery of deposits and mortgaged property respectively according as they are moveable or immoveable and a residuary article of 6 years. The immunities recognised under the Act were: lunacy, idiocy, coverture in the case of married women under English Law, minority, absence of defendant out of British India, *bona fide* prosecution of ineffective suit and trust. Aknowledgment, acquiescence and laches were defences as before notwithstanding the Act in the Supreme Court. For execution limitation of three years was applied except in the case of Supreme Court's decrees to which twelve years' rule applied. As the starting point in most cases was the date of the arising of the cause of action there was very considerable doubt and a crop of litigation. There was no acquisitive prescription even for easements nor was there any provision for co-existing disabilities or substitution or addition of party. These defects were made up in the Act of 1871. The starting point was stated with great particularity in each case providing more than 180 Articles instead of the few sections of the old Act. Rule of prescription as to easements was enacted. Staying of a suit by injunction was recognised as an additional ground of immunity. Co-existing disabilities were provided for. A rule of extinctive prescription (section 28) was enacted. 60 years' rule was enacted generally as applicable to suits by Government. Certain further improvements were made by the Act of 1877. Successive supervenient disabilities as well as disability of legal representatives was provided for. Purchaser for valuable consideration from trustees was protected by 12 years' possession whether a *bona fide* purchaser or not. Written acknowledgments saved not only debts and legacies but all rights (saving rights under decree according to certain interpretation). So also payment was given an extended saving operation. Certain immunities available only to suits were extended to applications. The Act of 1908 has effected some further amendments which are more or less in the nature of drafting amendments. An amendment of 1922 makes the various grounds of immunity available for suits under special enactments. Still there is room for considerable improvement. Lot of avoidable confusion centres round "adverse possession," "specific trust," "discontinuance of possession" and "cause of action". English Law has abolished adverse possession and Indian Law may advantageously follow suit. Prescription except in the case of easements is still ex-

tinctive and considerable difficulties are felt in the working of the rule.

Before we pass on, an account of the Criminal Courts, their procedure and the law that they administered may also be given here. The Moghul system which was retained for some time by the British was first the Nazim or the Supreme Magistrate who presided personally in the trial of capital offenders, the Deputy of the Nazim who took cognizance of quarrels, frays and abusive names, the Foujdar or the Officer of Police who was the judge of all crimes not capital. Reports of capital offences had to be sent up by him to the Nazim who would deal with them. Mohtesib was a special officer dealing with drunkenness, the vending of liquors, and the use of false weights and measures. These were courts of the capital. In the mofussil the administration of justice lay with the zamindars. In his Foujdari Court, he inflicted all sorts of penalties, but before executing death sentence he had to report the case to the capital. There was no regular course of appeals from these Zamindari Courts, but the Government interfered on complaint if they considered the case was one that deserved interference. The administration of justice was naturally very unsatisfactory and various attempts were made to improve the same and those attempts failing, in 1772, a new system of courts was introduced. In each District Foujdari Adawlut was established composed of a Kazi, a Mufti and two Moulvis who tried the case in the presence of the Collector whose duty it was to see that the cases were properly tried. A Superior Court was established at Murshidabad called Nizamut Sudder Adawlut, the officers of which were a Daroga, the Chief Kazi, the Chief Mufti and three Moulvis. They formed a Court of Revision as to the proceedings of the Foujdari Adawlut and in capital cases they had to signify their approval or disapproval of convictions and had also to prepare the sentence for the warrant of the Nazim. It will thus be found that referred trials are an ancient institution in the country and such of you as are students of Indian History must have read that in the extensive Empire of Aurangazeb no death sentence could be carried out without the previous sanction of the Emperor who passed orders after personally attending to the facts of each case. The arrangements made in 1772 also proving unsatisfactory, in 1793 an altogether different system was adopted and that was the system of Zillah Courts in each district presided over by Civilian Judges and above them four Provincial Courts of Appeal and a Sudder Diwani Adawlut or a Supreme Court. But all these was for civil work. The criminal work was

done by the Judges of Provincial Courts of Appeal who went on circuit to each Zillah. The Judges tried the case and the Kazi and the Mufti who were present had to write the sentence at the bottom of the record. If the Judge agreed with the sentence, it was passed except in capital cases which had to be referred for the approval of the Nizamut Adawlut which consisted of the same judges as the Sudder Diwani Adawlut. In the first instance, it was composed of the Governor-General in Council, but the composition was later on altered into one exclusively of Civilian Judges. In time the Provincial Courts also were abolished the criminal jurisdiction being conferred on the Zillah Judges. Thus the final form of Criminal Courts in Bengal was the Sudder Nizamut Adawlut and the Sessions Judges and Magistrates. These exercised jurisdiction over natives of India in the mofussil, but over Europeans the Supreme Court alone had jurisdiction. The system thus introduced was extended to North-West Provinces when they were acquired. The law administered by these courts is the subject of a digest known as Beaufort's Digest. In Madras the Appellate Court was known as Sudder Foujdari Adawlut. It was established in 1802. It got its Civilian Constitution in 1806. The Provincial Courts of Appeal exercising criminal jurisdiction were abolished in 1843.

The law administered was a compound of the Law of Koran, instructions from the Government, Regulations and Acts dealing with evidence, the ideas of justice and analogies and in fact everything that occurred to those who administered justice in those days. The Mahomedan Criminal Law which was supposed to be administered by these courts was a curious admixture of great vagueness and extreme technicality. To give an instance, there were five kinds of homicide: a wilful homicide by a deadly weapon, homicide like wilful homicide where the instrument was not likely to cause death, erroneous homicide or killing under a mistake, involuntary homicide by involuntary act and accidental homicide as where a man unlawfully dug a well and another fell and was drowned. Poisoning was not regarded as intentional homicide and there was acute controversy as to whether strangling was. It punished adultery with death. Mutilation was a recognised mode of punishment for robbery. Somewhat similar institutions were introduced also in Bombay.

The Penal Code was passed in 1860 and was followed a year afterwards by Act XXV of 1861, the first of the Codes of Criminal Procedure and with them and the establishment of the

High Courts, we come to the modern system. The Criminal Procedure Code of 1861 was not applicable to the Chartered High Courts or the Chief Courts in their original jurisdiction or the Presidency Magistrate and allowed a right of appeal to the Crown which is not recognised by the English Law except in those cases of writs of error with which we have dealt already or as provided by the Statute of 20 and 21 Victoria in the case of Courts of Summary Jurisdiction when the order of the Court is erroneous in point of law or is in excess of jurisdiction. The changes since effected in the procedure have been mainly in the matter of the trial of European accused, the institution of criminal proceedings, *i.e.*, sanction, etc., the enlargement of the list of offences that can be compounded and the introduction of provisions like section 562 dealing with first offenders Various Acts were passed assimilating the procedure of the Courts of the Presidency Towns to some extent to those in the mofussil and ultimately in 1882 a comprehensive Code of Criminal Procedure was passed applicable to both Mofussil Courts and the Courts operating in the Presidency Towns. It combines, it is said, the merits of the English or the accusatory system with some of the facilities afforded by the continental or inquisitorial system. The reference is here to the examination of the accused provided for in the various sections of the Criminal Procedure Code. The Indian Criminal Procedure provides for appeals and revisions to a much greater extent than the English procedure.. Even its final form after the Act of 1908 as amended recently, it will be noticed, does not embody the developments suggested by modern Criminology such as are to be found in the English Children's Act, Prevention of Offences Act though it must be conceded that effect is sought to be given to some of them by executive orders. The right to postpone sentence in deserving cases was claimed by the High Court of Calcutta as part of its inherent powers. The Mofussil Courts cannot, of course, claim this inherent power. The Code of 1872 gave to Appellate Courts power to enhance sentence while dismissing the appeal of the accused. This power is taken away and only the High Court has power to enhance sentence by way of revision in the later Acts. The Penal Code is one of the much praised Acts of Indian Legislature and in spite of its many defects has served its purpose fairly well. Its sentences can hardly be said to be other than monstrous. No civilised country to-day imposes such heavy sentences as does the Penal Code. Heavy sentences have long gone out of fashion

in England and the odor of sanctity and perfection attaching to the Penal Code should not deter indigenous legislatures to thoroughly revise the sentences and bring them into conformity with modern civilised standards.

The Reports of the Nizamut Court of Bengal as well as the Foujdari Court of Madras are available and though their value to the practical lawyer is of the slightest, to the historian of law in India they must afford ample materials for its reconstruction.

An Act of 1843 required the judgments of the Sudder Court to be recorded in English and the decisions came to be issued monthly for the benefit of the public from 1845. In 1850, marginal abstract of the decisions came to be added. The decisions of the Agra and the Madras Courts came to be similarly published in 1846 and 1849 respectively. The series continued right up to the establishment of the High Court. In 1850 one Mr. Bellasis published a small volume of the reports of the decisions of the Sudder Diwani Adawlut of Calcutta from 1840—1848, for the most part decisions of the Full Court. In 1851 a monthly series of Nizamut Adawlut decisions began to appear—in Madras also about the same time monthly reports of the Sudder Foujdari Adawlut. Sudder Foujdari Adawlut reports of Bombay from 1827-1846 were published in 1848. Since 1844, select reports, that is, cases selected out of the monthly reports as cases deserving of being treated as precedents, were published with notes. In 1848, the publication was discontinued by a resolution of the court. In Bombay, Borrodaile, a Judge of the Sudder Adawlut of Bombay, published a volume of reports of the decisions of that Court. The Sudder Court had some distinguished Judges, among others Colebrooke and Macnaghten of Calcutta. Colebrooke was Chief Judge of the Sudder Diwani Adawlut from 1801-1816.

Morton's Reports are the earliest reports of the Supreme Court of Calcutta. They cover the long period from 1774 to 1841. For parts of the same period, you have Bignell's Reports, 1830 to 1831, Montriou's Reports, 1846 and Fulton's Reports, 1835 to 1844. Montriou published select cases from Morton, which are called Morton's Reports by Montriou. Taylor's Reports are for 1847 and 1848, Taylor and Bell's Reports from 1849 to 1853, and Boulnois from 1853 to 1859. Gasper has a Commercial Cases, 1851 to 1860 and another volume of decisions in Small Cause Court Cases by the Supreme Court.

I

These Reports contain decisions of great value to the historian. They show how these Judges, some of them great and sound lawyers, were groping towards a statement of the law which should not wound their susceptibilities as English Lawyers and at the same time should be free from the insular and technical features of the English law and suit the widely altered conditions of India. For instance, the very first page of Morton's Reports contains the case *Ex parte Commula,* where the question was whether the Court could grant administration in respect of the estate of a Hindu, and, if it could grant, whether the administration should be according to the Statute of Distributions or according to Hindu Law. Sir Elija Impey and the other Judges after great doubt and difference of opinion ultimately came to the conclusion that administration could be granted but that the distribution should be according to Hindu Law. In 1778 the Judges will be found gravely discussing whether a repugnancy between the English date and the Indian date given in the plaint should non-suit the plaintiff. The earlier judgments in Morton are from the Notes of Sir Edward Hyde East and are somewhat short, but the judgments of later date as well as the judgments reported in the other series are fuller with facts, arguments and judgments. There are many judgments showing great research and learning. For instance, we have an elaborate judgment as to the validity of mortgages without possession under the Hindu Law in Fulton, p. 37. The judgments of the Sudder Court used to be quoted in the Supreme Courts and *vice versa* though they were not absolutely binding. The authority of these reports and the extent to which they are binding on the High Courts is discussed in 4 Rangoon 313. The Sudder Court decisions contrast unfavourably with those of the Supreme Court in that they exhibit neither the elaborateness nor the knowledge of the Supreme Court judgments. The judgments are short and as brevity is not necessarily wisdom, they do not give the satisfaction which fully considered judgments give. The successive Chief Justices of the Supreme Court of Calcutta were Impey, Anstruther, East (1817), Grey (1826), Ryan (1837), Peel (1842) and Colville. Ryan and Colville subsequently went to the Privy Council. Like the English Judges of old, some of these Judges had their Notes. For instance, Hyde East's Notes of Cases (1791 to 1819) like those of Perry in Bombay or Strange in Madras are the only records we have of the early performances of these Courts. For Bombay, we have another Report of Cases illustrative of

oriental life and the application of English Law to India by Sir Erskine Perry who is regarded on all hands as something of a genius and one of his famous judgments is the Khoja case. The Reports are very highly regarded. For the Calcutta High Court after it is constituted we have regular Reports from 1862. Indian Jurist (O.S.) for 1862 reports the original side and original appellate judgments of that Court and Privy Council decisions coming from that Court. For the Full Bench we have the Weekly Reporter Full Bench for 1862 to 1865. For the appellate side we have Hay's Reports and Marshall's Reports (1862—1863). Coryton (1862—1863), Hyde (1863—1864) and Bouke 1865 deal with the original side. Indian Jurist (N.S.) deals with 1866 and 1867. From 1868 we have the Government publication known as the Bengal Law Reports. The Weekly Reporter by Sutherland begins in 1864 and goes up to 1876. The Weekly Reporter is one of the worst abused though by no means the least useful reports we have. In 27 Cal. 965. Lord Hobhouse referring to a decision therein reported says: "That report is one of the large number contained in the Weekly Reporter which are useless or misleading, because the facts of the case are not stated." Many of the recent non-official Reports share this quality with the Weekly Reporter, but they have not so far had the distinction of being remarked on by the Privy Council. Many of the cases in the Weekly Reporter are also reported in the Bengal Law Reports which err if at all on the other side of over-reporting of facts and arguments. The earlier volumes of the Weekly Reporter had separate pagings for Civil Rulings, Miscellaneous Rulings, Criminal Rulings, Full Bench Rulings and Privy Council Rulings which was reduced later on from 16 W.R. into Civil Rulings and Criminal Rulings. Hay and Marshall are much prized Reports. They contain some valuable judgments of Sir Barnes Peacock. Reports of some early decisions both of the Sudder and the Supreme Courts dealing with Hindu Law are to be found in Text Books like Sir Thomas Strange's Book on Hindu Law, Sir Francis Macnaghten's Considerations of Hindu Law, Sir William Macnaghten's Principles and Precedents of Hindu and Mahomedan Law, The Vyavastha Darpana, Morley's Digest and West and Buhler's Digest of Hindu Law. Even valuable Privy Council decisions will be found so imbedded. These last have been picked up and published along with those found in other recognised sources in the Indian Reports by Sanjeeva Rao and others. The famous names connected with the Sudder Court are those of

W.R. 62 (F.B.)]. Markby wrote the remarkable judgment in which he held with Romesh Mitter, J., that a decree for restitution of conjugal rights cannot be enforced either by handing over the wife bodily to the husband or by putting her into jail. His judgment is a most learned and comprehensive judgment and showed him to be much in advance of the times though his view has not yet been accepted fully by the Legislature. Order 21, Rule 33, Civil Procedure Code, is a partial vindication of his point of view. His judgment in 4 Cal. 142 on *de facto* representation in suits shows a wider outlook than that of the majority and the principle has been followed since. Phear, J., was another of the striking personalities on the Bench. He subsequently became Chief Justice of Ceylon. Sir Richard Couch came to Bengal as Chief Justice after acting for some time as Chief Justice of Bombay. Sir Richard Couch does not seem to have occupied the same dominating position as Sir Barnes Peacock. The fact that for many years the Privy Council was manned by Bengal Lawyers has given the decisions of that tribunal a distinctly Bengal tone. Ryan, Colville, Peacock, Couch, Wilson and later on Ameer Ali have been all judges of Calcutta and it is difficult for anybody to shake off his early predilections and training and as a result the Bengal view-point was heavily weighted in the Privy Council and the other points of view suffered. The predominance of Colebrooke coloured for a time even the interpretation of certain terms of the Mitakshara and the genuine Mitakshara point of view elaborated by the Bombay and Madras Judges did not receive due consideration till it was too late, having regard to the course of decisions to hark back to the original authorities.

From 1875 the Law Reports commence.

SUMMARY OF ENGLISH CASES.

G. SCAMMELL AND NEPHEW, LIMITED *v.* HURLEY AND OTHERS, (1929) 1 K.B. 419: 98 L.J.K.B. 98.

Conspiracy—Borough Council—Duty under statute and by contract to supply lighting and power—Strike—Inability to supply for both—Bona fide *stoppage of power—Acts done in* bona fide *intended execution of the statutory body—Action for damage suffered thereby—Action commenced more than 6 months after the acts complained of—Public Authorities Protection Act.*

The Stepney Borough Council was bound by statute and by contract to supply owners or occupiers within its borough elec-

tricity for power and lighting. In April, 1926, a general strike was threatening and a committee of the council which was in sole charge of the electricity concern met and *bona fide* decided that if the Electric Trades Union would continue lighting, the committee would abandon the supply of power. The Union agreed and during the strike the power was stopped The plaintiffs sued certain *individuals* of the committee, alleging that they wrongfully and maliciously conspired and combined amongst themselves and with the Electricity Trades Union and stopped the supply of power thereby causing damage to the plaintiffs. The action was commenced more than 6 months after the acts and neglects complained of.

Held, that the acts complained of having been done in intended execution of the statute and not from any improper motive, such as spite or a purpose entirely outside statutory justification, the defendants were protected by the Public Authorities Protection Act and the action was barred as being more than 6 months after the neglects complained of.

Per Greer, L J. and (*Semble*) *Scrutton* and *Sankey, L.JJ.*—The Corporation itself could not have been sued for the damages arising from the failure of supply and much less therefore can a committee to whom management is committed. The rule of law established in *Lumley* v *Gye,* (1853) 2 E. & B. 441, is not applicable to the case of a servant or agent on behalf of his principal breaking a contract made with that principal.

Per Greer, L.J.—If a plaintiff gives no evidence in support of his case the fact that a defendant's denial is not entirely satisfactory cannot be used as proof of propositions of which the plaintiffs have failed to give evidence.

Per Greer and *Sankey, L.JJ.*—The rule in *Selmes* v. *Judge,* (1871) L.R. 6 Q.B. 724, that if a person knows that he has not under a statute authority to do a certain thing and yet intentionally does that thing he cannot shelter himself by *pretending* that the thing was done with intent to carry out that statute, does not apply to a situation such as the present, where in order to perform one part of their duty (*viz*, supply of electricity for lighting) under the Act, it was inevitable that there should be a default in carrying out another part of such duty.

WILLIAM BEAN & SONS *v.* FLAXTON RURAL COUNCIL, (1929) 1 K.B. 450.

Corporation—District Council—Appointment of sub-committee to enter into contract—Contract beyond Corporation's

Powers—Relaxation of by-laws—If sub-committee can validly contract.

In building certain houses, the plaintiffs had failed to comply with certain by-laws of the District Council regarding drainage and consequently differences arose between the Council and the plaintiffs. The District Council appointed a sub-committee expressly to settle these differences and the Committee agreed that in the event of the plaintiffs doing certain things like submitting a lay-out plan, etc., the drainage should remain as at present.

Held, that it being beyond the powers of the Council itself to so act in defiance of the existing regulations as to drainage, the sub-committee could have no greater powers and that therefore the agreement was invalid.

FARNWORTH *v.* MANCHESTER CORPORATION, (1929) 1 K.B. 533: 98 L.J.K.B. 224.

Corporation—Authority to erect an electricity generating station—Nuisance—If authority to erect confers authority to damage third person's property—Nature of statutory authorities.

By the Manchester Corporation Act, 1914, the defendant corporation was empowered to erect a generating station for electricity and to acquire the land in question for the purpose. The Corporation so acquired the land and erected on it a large station with 50 chimneys which in the process of generating electricity emitted large quantities of sulphuric acid thereby damaging the plaintiff's land near by.

Held, by Scrutton and Sankey, L.JJ. (Lawrence, L.J. dissenting) that the Courts, in construing private acts, act on a presumption that power to damage the property of a person is not intended unless clear words to that effect are used and from the mere fact that power to erect a generating station was given, it cannot be presumed that such power in itself chartered the commission of a tort unless it was incidental to the exercise of the statutory authority and not preventible by reasonable precautions.

Quebec Railway, Light &c., Co. v. *Vandry,* (1920) A.C. 662 applied.

Per Lawrence, L. J.—"The Legislature has frequently invested public bodies with powers, the exercise of which, although interfering with the private rights of individuals, are of

advantage to the public" and "the real question in all those cases is whether, on a sound construction of the particular statute in question, the Legislature has or has not expressed an intention that the thing complained of may be done notwithstanding that it injures others" and no action for damages or nuisance will lie for doing that which the Legislature has authorised, if it be done without negligence.

Truman's Case, (1885) 11 A.C. 45 applied.

BARROW, LANE AND BALLARD, LTD. *v.* PHILLIP PHILLIPS AND CO., (1929) 1 K.B. 574: 98 L.J.K.B. 193.

Sale of goods—Parcel of specific 700 bags at wharf—Part of the bags lost before date of contract—Loss not known to parties at the time of contract—Validity of contract.

By a contract for sale, the plaintiff sold to defendant company 700 bags in one lot lying at London National Wharves, but at the time of contract 109 bags had been abstracted without the seller's knowledge. The defendants handed to the plaintiffs two bills of exchange in return for a delivery order on the wharfing company. After the date of the contract some more bags were taken away with the result the purchasers got only 150 bags. The question arose as to the liability of the purchasers for the bags abstracted after contract.

Held, by Wright, J., that a contract for a specific parcel of 700 bags is something different from a contract for 591 bags and the position is as if the whole 700 bags had ceased to exist. To compel the buyer to take 591 bags in those circumstances would be to compel him to take something which he had not contracted to take and would be unjust. But if the whole 700 bags had remained in the wharf at the date of the contract, the fraudulent abstraction after that date would fall on the buyer as the property passes to the buyer by the sale.

ANSELL *v.* INLAND REVENUE COMMISSIONERS, (1929) 1 K.B. 608: 98 L.J.K.B. 384.

Revenue—Stamp Act, 1891 *and Finance Act,* 1910—*Settlement—Voluntary disposition* inter vivos—*Chargeable as a transfer with regard to some items—Transfer of Government stocks—Duty payable on them—If as a transfer or as a settlement—Dispositions by a single document and same words if "distinct matters" because they deal with different goods.*

By one instrument, a settlor voluntarily disposed of some properties including certain Government stocks. The settlement also operated as a transfer *inter vivos* of the other properties and therefore was chargeable under S. 74, sub-section (4) of the Finance Act, 1910, as a conveyance only and not as a settlement. By a provision in the first schedule, transfer of Government stocks were exempt from stamp duty. The question arose if the Government stocks were not liable to duty on the basis of a settlement as they were included in an instrument with other stocks which were chargeable with duty as on a transfer.

Held, that the deed, so far as it concerns the Government stocks, deals with them as a distinct matter just as if it was a separate deed. If two different classes of property are transferred by the same words of assignment in the same document and those two properties are different from the point of view of Stamp Act and taxation, they are to be treated as "distinct matters" for purposes of stamp duty and be separately charged with duty.

In re A DEBTOR, (1929) 1 Ch. 362: 98 L.J. Ch. 38.

Bankruptcy—S. 1, Sub-sec. (1) (h), Bankruptcy Act, 1914 —A statement by debtor and a representative of petitioning creditors of his intention to offer composition—If a notice that the debtor "has suspended or is about to suspend payment of his debts."

At an interview in London between the debtor and an agent appointed to represent the petitioning creditors avowedly for the purpose of discussing with the debtor his prospects of liquidating the debt due to the creditors, the debtor stated orally that it was his intention in the event of the Swiss creditors adopting a certain composition to get into touch with his English creditors and offer them a composition also and that if the Swiss did not agree to the suggested composition, then the English creditors may file a petition in bankruptcy against him.

Held, that the oral statement evinced a clear intention on the part of the debtor to suspend payment of his debts and was a notice to the creditors through the agent that he had suspended payment of his debts within the meaning of S. 1, sub-section (1) (*h*) of Bankruptcy Act, 1914.

Per Greer, L.J.—"A mere statement that a debtor is in difficulties and cannot pay his debts" is not an act of bankruptcy unless there is the intention to suspend payment.

J

GRANT *v.* DERWENT, (1929) 1 Ch. 390: 98 L.J. Ch. 70.

Trespass—Soil above sewer in plaintiff's ownership—Defendant's premises adjoining it—Corporation connecting the defendant's drain with the sewer at defendant's request and expense—Corporation statutorily empowered to do it—If agent of defendant.

The plaintiff was the owner of certain property underneath a strip of which was a sewer laid down by the then Local Board. On the other side of the plaintiff's road, the defendant built a number of houses and requested the Corporation of the place to connect the drainage to those houses with the sewer underneath the plaintiff's lands at the defendant's expense in exercise of its statutory powers. The Corporation got on to the plaintiff's land to so connect it and the action was brought for trespass against the defendant on the ground that though the Corporation did the actual work, it was at the request and expense of and as agents for the defendant that they did it.

Held, the defendant was quite within his rights in requesting the Corporation to do this work which it was its business to do and which it had power under the statute to do. It was the Corporation which did the work of its own accord and not as agent for the defendant as he had no power to control its actions or to say in what manner or under what powers the connection should be made.

VERNER-JEFFREYS *v.* PINTO, (1929) 1 Ch. 401.

Moneylenders Act, 1927, S. 5—Introduction to moneylender of a customer by a tout—Loan by lender—Tout not employed by the lender to invite any person to borrow—Transaction if legal.

Where a money-lender advanced moneys to a person introduced to him by a canvasser or tout, not employed by the money-lender for the purpose, the question arose if the transaction was legal and enforceable.

Held, by the Court of Appeal (Lawrence and Russell, L.JJ., Lord Hanworth, M.R., dissenting) that mere acting as agent or canvasser does not render the transaction illegal. The agent must have been employed by a money-lender or any person on his behalf for the purpose of inviting, etc. Where a statute is susceptible of two readings, that version must be chosen which lessens the list of misdemeanours rather than that which increases it.

["Section 5, Sub-section (3), Moneylenders Act, 1927:—"No moneylender or any person on his behalf shall employ any agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a money-lender, and no person *shall act as* such agent or canvasser, or demand.....for introducing.....to a money-lender any person desiring to borrow money."]

KENNEDY *v.* THOMASSEN, (1929) 1 Ch. 426: 98 L.J. Ch. 98.

Contract—Offer and acceptance—Offer by trustees under a will to redeem an annuity—Offer accepted by annuitant and a release deed executed and signed—Death of annuitant after communication to her solicitor but before communication to the trustees—If contract complete by mere acceptance and release.

With a view to commute certain annuities payable under a will to A, the trustees under the will proposed to A through her solicitors a commutation at a certain figure. After some negotiations, A agreed to the commutation figure, and on the 12th executed and sent a release deed to the solicitors to be given to the trustees on the commuted amount being paid. The solicitors wrote to the trustees only on the 24th accepting the offer and asking them to pay the amount. Meanwhile A died on the 17th. The trustees paid the amount to the solicitors in ignorance of the death. The release was undated and the solicitors inserted the date 30th and gave it to the trustees. In a claim by the trustees for repayment of the amount,

Held, this is not a case in which the posting of the acceptance concluded the contract. The acceptance was not in fact communicated to the trustees' solicitors until the 24th by which time the authority of A's solicitors to act for A and communicate the acceptance on her behalf ceased by her death on the 17th. Also the contract was not complete by mere execution of the release deed as the purchase price had also to be ascertained and the death of the annuitant has rendered the contract incapable of perfomance in that there was no consideration which the purchaser would receive for his money.

In re TAYLOR'S SETTLEMENT TRUSTS. PUBLIC TRUSTEE *v.* TAYLOR, (1929) 1 Ch. 435: 98 L.J. Ch. 142.

Bankruptcy—Power to require income of any year to be paid as to one moiety to bankrupt and as to the other to his wife—

Power exercised for the year—Power exercisable by bankrupt if "for his own benefit"—*Bankruptcy Act*, 1914, *S.* 38, *Sub-S.* (*b*).

A power which cannot be exercised for his own benefit alone but for the mutual benefit of himself and another is not a power to appoint for one's own benefit within the meaning of S. 38, Sub-S. (*b*) of the Bankruptcy Act, 1914; but if the power is exercised, any benefit derivable therefrom will pass to the trustee in bankruptcy.

CHANEY *v.* MACLOW, (1929) 1 Ch. 461.

Vendor and purchaser—Auction sale—Sale of freehold house—Highest bidder refusing to sign the contract—Auctioneer signing it instead—Signed not in the sale room but at auctioneer's office—Extent and duration of auctioneer's authority.

At a sale by auction of a freehold house held by the plaintiff the defendant was the highest bidden and consequently the house was knocked down to him. But when the junior clerk of the auctioneer went to him for particulars re his name etc., he refused to sign the contract on the ground that he had not seen an onerous condition in the sale before. After the day's auction was over, the plaintiff was informed by his clerk of the protest but as the defendant did not go to him at his office even after two hours, he signed the contract as the defendant's agent. In an action for specific performance of the contract, it was contended that the auctioneer had no authority to sign the memorandum (*i*) after the purchaser had clearly indicated that he would not sign it, and (*ii*) at his own office after leaving the sale room.

Held, by the Court of Appeal (affirming the judgment of Maugham, J.), the auctioneer is by the nature of his employment an agent of both the buyer and the seller and the authority is not limited to making an entry in the particulars of sale but extends to making out a proper memorandum of the sale sufficient to satisfy the Statute of Frauds, and signing such a memorandum on behalf of the vendor and purchaser. There is no definite period of time within which the authority must be exercised, the only rule being that it must be exercised within a reasonable time so as to form part of the transaction of the auction sale and where as here the auctioneer goes to his office in the reasonable expectation that the defendant would call and sign the contract there, the sale may be said not to have been over till then.

In re LEWIS MERTHYR CONSOLIDATED COLLIERIES, LTD. LLOYDS BANK, LTD. *v.* THE COMPANY, (1929) 1 Ch. 498.

Companies (Consolidation) Act, 1908—S. 107—Floating and fixed charges—Re debentures—Appointment of receiver—Preferential creditors—Claim of—Question of priority.

Lloyds Bank, Ltd. were the holders of the first and second debentures of the Company, the first one being secured by fixed as well as floating charges on the Company's assets. A receiver was appointed to take charge of the assets and manage the affairs of the Company. Under the Companies Act compensation payable to the employees of the company would rank as a preferential claim over any floating charge, and the question arose if such priority extended even over the assets of the company subject to the fixed charge created by the debentures.

The Court of Appeal (affirming the judgment of Tomlin, J.) *held*, that upon a true construction of S. 107 of the Companies (Consolidation) Act, 1908, the right of priority of the preferential creditors extends only over the debentures secured by a floating charge and not over those secured by a fixed charge.

Per Lawrence, L J.—"In my judgment the fact that the debenture in the present case is one which combines with the floating charge, a fixed charge does not bring the section into operation as against the assets comprised in the fixed charge."

ATTORNEY-GENERAL *v.* LONDON AND HOME COUNTIES JOINT ELECTRICITY AUTHORITY, (1929) 1 Ch. 513: 98 L.J. Ch. 162.

Statutory body—Scheme of powers—Power to promote or oppose Bills "for the purpose of the scheme" *at Corporation's cost—If grants expressly or impliedly power to promote a Bill to improve the scheme.*

Where a statutory body was authorised to promote or oppose any Bill in Parliament for "the purpose of the scheme", the question arose if it could expend its fund in promoting a Bill which is outside the purposes of the scheme giving more extensive powers.

Held, that the scheme specifically grants such a power only to promote a Bill for the purposes of the scheme and, in the face of such an express power, the defendant body cannot be said to have an implied power to promote such a Bill.

CUMMING AND WEST, *In re.* NEILSON AND CRAIG *v.* THE TRUSTEE, *Ex parte,* (1929) 1 Ch. 534: 98 L.J. Ch. 83.

Bankruptcy—Partners A and B—Prior ante-nuptial settlement by A—Covenant thereunder by settlor to keep alive an assurance policy on his life—Breach of such covenant—Trustees under settlement proving for compensation in A's bankruptcy—Rejection of proof by trustee in bankruptcy if proper—If the claim is postponed to those of joint creditors of A and B—Bankruptcy Act, 1914, *S.* 33, *sub-sec.* (6), *S.* 42, *sub-sec.* (2) *and S.* 63, *sub-sec.* (1).

Two partners A and B were adjudicated bankrupts in 1927. In 1910 A had executed an ante-nuptial settlement by which he had assigned in favour of the trustees a life assurance policy on his life and he had covenanted with the trustees to keep it alive, and in default to pay sufficient sum to secure that benefit. The trustees under the settlement put in in A's bankruptcy a proof of claim for £386-6-3 which they claimed to be due to them as compensation for the breach of covenant to pay the premiums on the policy. The trustee in bankruptcy rejected the claim on the ground "that by reason of the provisions of S. 42, Sub-S. (2) of the Bankruptcy Act, 1914, the said claim for dividend is postponed until all the creditors for valuable consideration in money or money's worth have been satisfied." On an application by the trustees under the settlement, the question arose whether the claim was postponed not only to the claims of separate creditors of A but also to those of the joint creditors of A and B.

Held, that the proof was properly rejected for the reason that the covenant on which the claim is based is obviously one for the future payment of money and the fact that it is taken for the protection of the property which has been assigned will not prevent it from being one for future payment of money within the language of S. 42, Sub-S. (2). Also the claimants are not 'creditors' within the meaning of that section, these being given only "a special right, namely, a right to claim a dividend in the settlor's bankruptcy under or in respect of the contract, after all the claims of the other creditors for valuable consideration have been satisfied".

BERNHARDT *v.* GALSWORTHY, (1929) 1 Ch. 549: 98 L.J. Ch. 284.

Law of Property Act, 1925—*Receiver in an administration action—Distributing rents and profits among* 36 *persons—Statutory trust for sale—If can exercise without leave of Court.*

A receiver appointed in an old administration action was to receive the rents and profits and distribute them amongst 36 persons, the distribution to continue until the death of a certain person. The legal estate was vested in the defendant (Public Trustee) and on the Property Act, 1925, coming into force, he became invested with the statutory trusts for sale as it was held in trusts for several persons as tenants-in-common. But the question arose, if he could exercise the power of sale without leave of Court.

Held, by *Eve, J.*—That the decision in *Cardigan* v. *Curzon-Howe*, (1885) 30 Ch.D. 531, applied and that the sanction of Court was not necessary as the statutory trusts displace the trusts for the execution of which the decree was made.

In re MICHELL. THOMAS *v.* HOSKINS, (1929) 1 Ch. 552: 98 L.J. Ch. 197.

Will—Two codicils to it written on the same date—One practically a duplicate of the other but for some slight verbal alterations—Attested by the same persons—If substitutional or cumulative.

A few months after the will, a testator executed two codicils on the same day, one practically a duplicate of the other except for the slight difference in some minute details. The codicils were witnessed by the same persons also. A year later he executed a third codicil by which he made some further specific bequests, "besides those mentioned in my will or codicils." The question arose if the legacies given by the first two codicils were copies one of the other or cumulative.

Held, there was sufficient in the two codicils to rebut the presumption that gifts by two testamentary documents to the same individual ought to be treated as cumulative and not substitutionary.

WEBB *v.* WEBB, (1929) P. 159: 98 L.J.P. 72.

Divorce—Petition by wife to extinguish the interest of the husband and others under the marriage settlement—Jurisdiction of Court to grant—Interest of third persons if can be extinguished also.

By a marriage settlement, certain funds were held in trust for the husband and an interest was also created in favour of her next of kin. On a decree absolute being made dissolving the marriage, the wife moved for the extinction of the interests in the funds of persons other than the wife.

Held, the Court has jurisdiction to extinguish the interest of the husband in the wife's fund, but will not do anything to prejudice the interests of the next of kin, unless there are no living persons who will be prejudiced or they consent to the order.

EARLY, SMITH AND PAVEY, *In re.* THE TRUSTEE, *Ex parte,* (1929) 98 L.J. Ch. 34.

Construction—"Shall" if peremptory—Deed of Arrangement Act, S. 11*—Failure to give security in* 7 *days—Court if can extend the time.*

The trustee under a deed of arrangement omitted by inadvertence to furnish a required security to the Registrar which by S. 11 of the Deeds of Arrangement Act, 1914, *shall be* given within seven days.

Held, the time allowed is peremptory and cannot be extended.

DEW *v.* UNITED BRITISH STEAMSHIP CO., (1929) 98 L.J.K.B. 88.

Contributory negligence—Coal trimmer—Injured by falling from an open hatchway—Statutory duty to fence the hatchway—Failure of—Knowledge of coal trimmer—Negligence in not taking precaution—Contributory negligence if a defence for breach of statutory duty.

The plaintiff, a coal trimmer, tumbled down an open hatch on a ship and broke his leg. In an action for damages for such injuries, it was found that though the ship-owners were negligent and failed to fence it as per their statutory duty, the plaintiff knew of the openness of the hatch and was negligent also in that he did not take sufficient precaution.

Held—"The defence of contributory negligence means that an accident has happened, contributed to by the negligence of both sides and that neither had a chance, after the negligence of the other, of avoiding it by reasonable care." The defence of contributory negligence is a good defence to an action based on breach of statutory duty.

Admiralty Commissioners v. *S. S. Volute,* (1922) 1 A.C. 129: 91 L.J.P. 38 followed.

ANCHOR DONALDSON, LTD. *v.* CROSSLAND, (1929) A.C. 297.

Workmen's Compensation Act, 1925, *S.* 12*—Employer—Ending a weekly payment—Reference to arbitration by work-*

man—Arbitrator awarding interim compensation—Jurisdiction to.

The employer who had all along been paying compensation to the workman subsequently stopped it on the ground that the workman had recovered and the incapacity ceased. The workman disputed it and applied to an arbitrator claiming compensation at the former rate and for an interim award pending the arbitration.

The question arose if the arbitrator is entitled to grant interim compensation before he is satisfied after inquiring into the facts that the incapacity exists.

Held, the right to award compensation is vested in the arbitrator and that gives him seisin of the dispute relating to compensation. To decide otherwise would mean that, in a statute based upon the principle that arbitration and not the usual proceedings in the courts should be the means of settling disputes, an interim matter in the arbitration is to be settled by those very Courts, the authority of which has been excluded.

Ocean Coal Co. v. *Davies,* (1927) A.C. 271 and *Niddrie and Benhar Coal Co.* v. *Dee,* (1927) A.C. 299 distinguished.

BLACKWELL *v.* BLACKWELL, (1929) A.C. 318: 98 L.J.Ch. 251.

Will—Legacy in favour of five persons on secret trust—Memorandum written down by a trustee of the particulars of the secret trust on the same date—Will declaring that the legacy was fiduciary—Parol evidence of trust—Admissibility of.

A testator by a codicil to his will gave and bequeathed to five persons as trustees a certain sum with uncontrolled discretion to apply the income arising therefrom "for the purposes indicated by me (testator) to them (trustees) with full power at any time to pay over the capital to such person or persons indicated by me as they think fit." One of the trustees made a memorandum of the terms of the trust on the same day. The trustees accepted the legacy also. The residuary legatee brought this action for a declaration that no valid trusts of a legacy of the above sum was declared by the testator in favour of the secret beneficiaries on the ground that the parol trust was hit by S. 9 of the Wills Act.

Held, affirming the Court of Appeal, that "it has long been settled that if a gift be made to a person or persons in terms

absolutely but in fact upon a trust communicated to the legatee and accepted by him, the legatee would be bound to give effect to the trust, on the principle that the gift may be presumed to have been made on the faith of his acceptance of the trust, and a refusal after the death of the testator to give effect to it would be a fraud on the part of the legatee'' and the same principle applies where the fact that the gift itself is upon trust is mentioned in the will Parol evidence is therefore admissible to prove the terms of the trust.

In re Fleetwood, (1880) 15 Ch.D 594 followed.

JOTTINGS AND CUTTINGS.

Reclaimable and Irreclaimable Offenders.—A letter appeared in *The Times* of the 20th instant in which the writer, Sir Arthur Conan Doyle, advocated for the "irreclaimable criminal" perpetual segregation in an institution akin to a criminal lunatic asylum, and instanced the recent case of an offender who, on being sentenced to imprisonment, sent up a note to the judge saying that he had no intention of reforming. The letter concluded: "It seems to me that if a man has been convicted three or four times of a penal offence he is a fit candidate for such a perpetual asylum." In view of this letter and the considerable and useful correspondence on the subject of hardened offenders which it has evoked, interest attaches to the meeting of the Central Discharged Prisoners' Aid Society, of which a report appeared, *ante,* p. 528. That there was unfortunately a certain residuum of hopeless cases amongst discharged prisoners all speakers were agreed, but they were equally unanimous that the number of such irreclaimable cases was relatively small The fact rightly referred to by Mr. Justice McCardie as both grave and important, that about 10 per cent. of the committals to prison were of persons under twenty-one years of age, confirms his argument that, were it from no higher motive than prudence on the part of society herself, everything should be done to convert this social liability into a useful social asset and to mitigate the ostracism which naturally tends to turn offenders into confirmed and hardened criminals While work of this importance is in the hands of a voluntary organisation an important factor in its success is, of course, bound to be its financial resources, which, unfortunately, are not too plentiful.—*L.T.*, 1929, p. 541.

Caricatures as Advertisements—Last Monday a jury returned a verdict for the plaintiff and assessed the damages at £1,000 in the case of *Tolley* v. *J. S. Fry and Sons, Limited.* The plaintiff is the amateur golf champion, and the defendants, the well-known chocolate manufacturers, had published a caricature of the plaintiff with a comparative diminutive caddy, and the following limerick printed below it:

> "The caddy to Tolley said: 'Oh, Sir!
> Good shot, Sir, that ball see it go, Sir
> My word, how it flies
> Like a cartet of Fry's.
> They're handy, they're good and priced low, Sir.'"

The plaintiff admitted that his size was the one thing about him which could be caricatured, but he did not complain seriously about the caricature nor about the quality of the poem published with it, his only remark on this score being that it was not a particularly good swing nor did he think it a very good limerick. The innuendo he relied on, put shortly, was that he had consented for gain to prostitute his reputation as a golfer and had thereby been guilty of conduct unworthy of his status as an amateur. An imputation on a golfer's amateur status was, he contended, likely to prevent him from playing in the amateur championship. Three out of the four caricatures which had preceded his were those of Cabinet Ministers, but Cabinet Ministers he regarded as professionals. Mr. Tolley had, of course, received no payment whatever in respect of the advertisement, and had been ignorant of the preparation of the cartoon until it appeared in very many newspapers and journals. Mr. Justice McCardie said in a recent case that "the words complained of must be such as would injure the plaintiff's reputation in the minds of ordinary, just and reasonable citizens." We cannot imagine any such thinking the less of Mr. Cyril Tolley after seeing the caricature in question, but we think the practice of using caricatures in connection with trade without the consent of the originals highly objectionable, quite apart from any question of defamation, and one which might even engage the attention of the legislature.—*L.T.*, 1929, p. 44.

Publication to Wife of Person Defamed.—The Court of Appeal have ordered a new trial in the case of *Watt* v. *Longsdon,* in which the defendant had communicated to the plaintiff's wife information as to the plaintiff's infidelity which he had after-

wards had to admit was untrue. The defendant stated that he and his family and the plaintiff's wife were on such close terms of friendship that it was his duty to assist and warn her in the circumstances. Mr. Justice Horridge seems to have inclined to the view that if a person had such an obvious interest as to make him or her a proper recipient of a statement it was not necessary that the person making the statement should be under any moral or social duty so to do. The Court of Appeal did not agree with this view. Lord Justice Scrutton, on the existence of a duty to communicate in cases of this kind, said that it was impossible to say that a stranger or friend was always under a moral or social duty to communicate to a husband or wife news of the character in question. It was equally impossible to say that he was never under such a duty. It must depend on the circumstances of each case. It could not be the duty even of a friend to communicate all the gossip the friend heard at men's clubs or women's bridge parties. Using the best judgment he could in a difficult matter, he had come to the conclusion that there had been no duty to communicate in the case in question. Having regard to the tragic effect which the mere shadow of suspicion may have on the closest human relationship, we think that what may present itself as a moral or social duty should be scrutinised with meticulous care and more often honoured in the breach than in the observance, and this may limit the scope of the duty and so affect the legal position.—*L.T.*, 1929, p. 64.

Novelists and their Law.—To most of us the creations evolved from the imagination of the great novelists possess a reality and verisimilitude entirely absent in many cases from the grave pages of the biographer and historian. Lawyers, whom Thackeray described as notorious novel-readers, find in the pages of their favourite writers of fiction not only a personal, but also a professional enjoyment, when, as often happens, legal problems and situations are discussed and described. Quite recently, it will be remembered, Professor Holdsworth gave us an entrancing book on the law and lawyers of Dickens, bringing into clear relief the accuracy of that distinguished novelist when handling legal problems, or picturing legal scenes. The late Sir John Rankine, for many years the occupant of the chair of Scots law in the University of Edinburgh, found an intensity of enjoyment during his last years in noting and commenting upon the legal aspects of Sir Walter Scott's novels, which more than once were quoted on the Scottish Bench as accurate

transcripts of northern jurisprudence. Scott, naturally, knew the law of his country with an intimacy possessed by few others, and was able to utilise with striking effect those features which lent themselves to picturesque treatment. Another novelist of a past day who recognised the value of legal topics in the development of her stories was George Eliot. In "Felix Holt," she introduced an abstruse point of real property law, but knowing its difficulty, had the good sense to consult the late Mr. Frederic Harrison, who, if we are not mistaken, wrote the "opinion," which appears in the novel, the problem having been worked out by him in consultation with Mr. (afterwards Lord) Herschell, on the lines suggested by the novelist. There are not in the novels of Jane Austen—George Eliot's great predecessor in the ranks of lady writers—many questions of law mooted, but one at least has, during the past few days, been engaging attention in the correspondence columns of *The Times*—a problem in real property law—as to which several learned persons have been offering solutions. Lawyers owe much to our novelists, and on the other hand our novelists owe much to the law.—*S J.*, 1929, p. 209.

Mr. Justice Oliver Wendell Holmes.—Like many of our English judges, Mr. Justice Oliver Wendell Holmes—honoured son of honoured sire—appears to possess the secret of longevity, and with it all the intellectual alertness that has marked his career from its beginning. Few can boast a judicial experience extending over so many years as Mr. Justice Holmes. Appointed to the Supreme Court of Massachusetts as far back as 1882, he was, seventeen years later, promoted to the office of chief justice of that tribunal; and three years thereafter he exchanged that position for the still higher dignity of Associate Justice of the Supreme Court of the United States, the duties of which he continues to discharge with his accustomed vigour, despite the fact that recently he celebrated his eighty-eighth birthday; and his judgments are, as they always have been, couched in classical English and graced with that great learning which he long ago taught us to know and admire in his classic volume on "The Common Law." He can claim forty-seven years of continuous judicial service, and the claim must surely be unique in the annals of the law. Not only in law, but also in arms has he gained distinction. It seems almost incredible, but it is nevertheless the fact, that he saw active service in the Civil War, and was seriously wounded four or five times,

returning to service again each time as soon as the doctors allowed him. No wonder that his father, as appears from a letter reproduced in the current issue of the *American Bar Association Journal,* was proud of his son—"his boy" he calls him—who stood over six feet in his military shoes. An admirable portrait of the distinguished judicial veteran which many of his admirers in England will be glad to see, is given in the same number of the *Journal.*—*S.J.,* 1929, p. 225.

Law Reports with Editorial Comments.—Some little time ago the "Dominion Law Reports", published weekly, and giving all the Imperial, Dominion and Provincial case law of Canada, introduced, and continue to furnish, a somewhat novel feature, namely, an editorial comment on the most important cases appearing in each issue It is, of course, no new thing to have selections from our case law presented to us with learned annotations, as. for example, in "Smith's Leading Cases," and other collections on the same lines; but till now it has not been usual for a volume of contemporary reports to be issued accompanied by comments on the cases it contains Although somewhat novel, the idea is none the less excellent. All reports are not of uniform interest; indeed, some of them, by reason of their subject-matter, are so dull as to be actually repellant to the average practitioner who may therefore be pardoned if, not unfrequently, he carries the art of skipping to its utmost limit. A note to such cases may helpfully point out their importance if not their charm. Other cases, again, while not of this class, may be made more valuable by a note pointing out their relation to previous decisions. So there is much to be said in favour of the plan adopted by our Canadian confrères of prefixing to each number of their reports short comments on the cases included. It means, of course, a good deal of extra work for the editor, who has usually quite enough to do in seeing that the reports are accurate and equipped with all the necessary references, without having also to write notes on the individual cases, but if it can be done—and apparently the editor of the "Dominion Law Reports" finds it possible to do it—there is no doubt that it will appeal to his subscribers and prove to be of general utility.—*S.J.,* 1929, p 241.

The Foreign Office and the World Court.—In a strong, but not too strong, letter to the *Daily Telegraph* a few days ago, Professor J. H. Morgan, K.C, the distinguished authority on

constitutional and international law, protests against the proposed nomination by the Foreign Office of its legal adviser to fill the vacancy in the Permanent Court of International Justice at The Hague created by the lamented death of Lord Finlay. No one, we suppose, would venture to criticise the work that has for many years been done by the present legal adviser to the Foreign Office, but his undoubted competency for the post which he at present holds does not warrant the conclusion that he would be equally qualified to fill the position to which it is proposed to exalt him The Permanent Court of International Justice is a tribunal of a very special character, in which it is imperative not only that each member should be a jurist of wide knowledge, but likewise that he should be a person who has had the training of a judge, accustomed to regard the problems which came before him unhampered by views acquired in government service. The bureaucratic tendencies of which we have heard so much in recent years will not, we venture to hope, be carried to the extent of promoting a civil servant, however distinguished in his own sphere, into the high position of a judge in the most remarkable tribunal the world has ever known, especially when there are so many eminent judges and ex-judges from among whom a selection could be made that would command universal approval. Professor Morgan has done a public service in calling attention so pointedly to the subject, and we trust that his protest will have the desired effect—*S.J.*, 1929, p. 257.

A Vote for a Company—The vote, originally an exclusively masculine privilege, and now common to either sex, is still denied to the sexless company, which of course is nevertheless subject to taxation. In constituencies like Poplar, where most of the rates and taxes appear to be paid by limited companies or other statutory corporations, their boards are reported to feel, perhaps naturally, some grievance about such a state of affairs. In two recent instances at Finsbury an attempt has been made to rectify that grievance, and the issue has materialised in separate cases brought as tests before the Court of Appeal. Directors of two limited companies applied for registration of their votes in respect of tenancy agreements with them for rooms as business premises at the offices of the companies. The registration officer allowed the claims, which were sustained on appeal by the county court judge. Mr. A J. Frost, a member of the Finsbury Borough Council, appealed to the Court of

Appeal, presumably under S. 14 (2) of the Representation of the People Act, 1918, which provides for an appeal to that court, but not further. The Court of Appeal, Scrutton, L.J., dissenting in the first case, have upheld the decision of the county court judge, so the law is laid down subject only to alteration by Parliament. In the first case, that of a Mr. Caslon, his business was admittedly that of the company which employed him only, though he wrote a few private letters at his desk. In the second case a Mr. Wilkin claimed to carry on some independent business of his own, in addition to his services to the company which was his landlord. Scrutton, L.J., held that Mr. Caslon carried on the business of the company, and not his own "business, profession or trade within S. 1 (3) of the Act." He also said there was material to find that the tenancy agreement was merely colourable, though for the purposes of his judgment he followed the court below, and treated it as genuine. The other judges held that Mr. Caslon was conducting his own business and none the less so as a servant of the company. In effect his business was the company's business. All the judges held, following decisions on the Rent Restriction Acts, that a room was "premises." "Occupation" has of course been held to mean exclusive occupation under the Act of 1832: see *Downing* v. *Luckett*, (1847) 5 C.B. 40 (though of course there might be exclusive occupation by joint tenants). This would mean that the tenant would have the right to lock out even the superior officers of the company, and therefore the office boy's stool would not qualify him for a vote. In *Mackay* v. *McGuire*, (1891) 1 Ch. 250, it was held that a tenancy at will qualified for the franchise. It is of course unnecessary to add that a board of directors could not dictate to their tenant the way he should vote, though they might have a shrewd idea of his political views before they conceded him his tenancy agreement.—*S.J.*, 1929, p. 258.

The Right of Sterilisation.—A remarkable passage in the hearing of an otherwise commonplace charge of drunkenness and assault is reported from Old-street police station. The prisoner was a young man, and a representative from the London County Council had seen him, and was prepared to make an order concerning him under the Mental Deficiency Act, 1913. The county council was also prepared to place him in an institution. Mr. Jenkins, who defended, appealed that he might be set at liberty, that being the wish of his relatives. Mr. Clarke

Hall demurred on the ground that, if free, he might become the father of other mental defectives The prisoner's brother assured the magistrate that he would not marry, to which Mr. Clarke Hall objected that, nevertheless, he might have children. Mr. Jenkins is reported to have asked the brother if he was prepared to have the prisoner "medically treated." The brother is reported to have assented, and Dr. Williams, medical officer to the London County Council, to have observed that "it would be rather a new process in this country." If the conversation occurred as reported, comment may be made that, assuming "medically treated" meant "rendered incapable of procreation by operation," Dr. Williams understated the matter. There need be no hesitation in stating that such a process would be an illegal operation, and even discussion of it in a court of law as a practicable course appears surprising. It is understood, no doubt, that the operation in question is not the barbarity inflicted by jealous medieval husbands on guilty lovers, and even now used for various reasons in the East, but a minor one, entailing a minimum of pain and discomfort, and no appreciable after-effects, other than that desired—in attaining which, presumably, it is as effective as the older method. A doctor who performed this operation on a person mentally incapable of giving assent would at the very least be guilty of a serious assault or unlawful wounding. It may also be laid down with some confidence that, even in the case of a person capable of giving assent and doing so, the operation would amount to assault in a country where the law forbids consent to that minor form of battery, with temporary instead of permanent result, known as the "knock-out." Whether the person consenting would be guilty of "self-mayhem" is perhaps an academic question, but it may be suggested that the Sovereign is entitled to rely on his subjects to ensure their continuance—indeed, they only can bring about that result. Whether the law should be changed in respect of mental defectives, and perhaps criminals, etc., is, of course, a highly controversial matter, which Mr. Neville Chamberlain has wisely postponed until after the election. It is understood that some American States are trying the experiment of sterilising the alleged unfit, perhaps spurred thereto by the criminal and medical history of the ill-starred Jukes family. Sterilisation is, of course, as irrevocable in its way as hanging, and the definition of unfitness an extremely difficult matter. Such an experiment, therefore, is certainly not one to be adopted in haste.—*S.J.*, 1929, p. 258.

L

Gretna Green Marriages.—The prominence given in the lay press to a recent marriage at Gretna Green and the comments made thereon, show that in some quarters a good deal of misconception still prevails regarding irregular marriages in Scotland. First of all it should be observed that there is no peculiar sanctity attaching to a marriage contracted at the village of Gretna Green, whose fame, or notoriety, perhaps we should say, dates from the days before Lord Brougham's Act of 1856, when, owing to its proximity to the border, it was one of the first villages accessible to English runaway couples desirous of a speedy wedding. At the time there was no necessity for either of the intended spouses having been resident in Scotland; this, however, was altered by the statute of 1856, which by S. 1 enacts that "after 31st December, 1856, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage; any law, custom or usage to the contrary notwithstanding." The computation of the twenty-one days' residence is strict, as is shown by the decision of Sir James Hannen in *Lawford* v. *Davies,* (1878) 4 P. D. 61. There a man and a woman, both of whom were domiciled in England, arrived in Scotland about 4 a.m. on 1st July, 1870, remained there until 21st July, and between 11 and 12 a.m. on that day contracted in Edinburgh an irregular marriage. It was held that the marriage was invalid as they had not "lived in Scotland for twenty-one days next preceding such marriage". An irregular marriage as explained by Mr. F. P. Walton in his "Handbook of Husband and Wife according to the Law of Scotland," is one contracted without any religious ceremony, by the parties declaring that they accept each other for husband and wife. The church has always frowned upon this method of entry into the matrimonial state, but there is no doubt of its validity provided there is a *bona fide* acceptance of each other by the parties for husband and wife, and provided, as we have seen, the requisite residential qualification is fulfilled. Such a marriage may be validly entered into at any place in Scotland, Gretna Green having no monopoly in this matter.—*S.J.*, 1929, p. 274.

Mr. Justice Hughes and the World Court.—One of the most interesting features of the current issue of the *American Bar Association Journal* is the tribute paid by distinguished

American lawyers to Mr. Justice Hughes on the eve of his sailing for Europe to take up his duties as a member of the Permanent Court of International Justice, a post for which his training as a former judge of the United States Supreme Court, and as a former Secretary of State, pre-eminently fits him. No one present in Westminster Hall some years ago, when the English and Canadian Bars welcomed their brethren from the United States, will ever forget the impression made by Mr. Hughes by his magnificent oration and the tribute he paid to the civilising influence of English law throughout the world. For his new work no worthier representative of his country could have been chosen; so said Mr. John W. Davies, the former Ambassador to Great Britain; while Mr. George W. Wickersham, a former Attorney-General of the United States, declares this appointment to be but the beginning of a new and enlarged opportunity for distinguished service. In the *Journal*, there is an excellent portrait of Mr. Hughes as well as the reproduction of a photograph, taken, it is true some time ago, of the judges of the Hague Court, included in the group being the late Lord Finlay and the late Mr. Andre Weiss, who represented France. As we ventured to urge in a recent issue, it is to be hoped that the successor of Lord Finlay will have judicial qualifications equal to his, and we would now add, equal to those of the great lawyer whom the United States has chosen as her representative.—*S.J.*, 1929, p. 289.

Enthusiasm for the Law.—While it is true that the generality of men exhibit much more enthusiasm for their hobbies than for their ordinary avocations, there are others who make a hobby of their work and throw into it, and extract from it, that intensity of enjoyment which the majority of their fellows show only for golf or cricket or fishing, or other sport. In the law there have been a few of such enthusiasts who have found their chief delight in its study or exposition. In this select band may certainly be included Baron Parke, who is reported to have taken, on one occasion, a "beautiful demurrer" to the bedside of a sick friend to cheer him in his illness; in various other ways, too, he showed his passion for the law. Akin, surely, to the Baron was the old conveyancer of whom mention is made by Lord Campbell in one of those biographical volumes which make fascinating reading, but which, as was said by Sir Charles Wetherell, had added a new terror to death. The old conveyancer obviously loved his work, for, when asked whether he did not find

it extremely irksome to spend his days poring over abstracts of title, conveyances and mortgages, admitted that sometimes he did find it wearisome, but, he added, with a glow of enthusiasm, that every now and then he was cheered by coming across "a brilliant deed." Happily the race of legal enthusiasts is not extinct even in these prosaic days. In the syllabus of his course of lectures to be delivered at the School of Economics on the value of judicial records as an aid to the study of legal and economic history, Mr. Hubert Hall speaks of "the lure of the plea rolls" and other matters which to him, at all events—and we trust to many others also—have a fascination and charm which it is pleasant to note. Law is too frequently reputed to be "harsh and crabbed," whereas, to those who woo her aright, it may be "a perpetual feast of nectar'd sweets."—*S.J.*, 1929, p. 305.

Lawyers in Parliament.—England once had a *parliamentum indoctum,* the unlearned Parliament as it was popularly called because of the exclusion from it of all lawyers. This was a long time ago—in 1404 to be precise—and the experiment has never been repeated, from which we may conclude that this ostracism of the legal profession was not the success that was anticipated. Nowadays there is invariably in each House of Commons a large infusion of lawyers. Taking *The Times* list, we find that in the newly elected House there are something like sixty members of the Bar, and fourteen members of the solicitors' branch. Such a preponderance of the legal element in the legislature has frequently given rise to reflections of a caustic character from critics whose charity of thought is not their chief endowment. That some lawyers may have been actuated by mercenary motives in seeking election may be conceded, but those are in a decided minority; the bulk of them, like those from other callings who have sought the suffrages of the constituencies, have been animated by the honest desire to serve their country and its interests by placing their knowledge at its service. There is ample scope for the work of lawyers in Parliament; they can help to improve the draftsmanship of statutes and, what is even more important, they can direct reasoned protests against the encroachments of bureaucracy More than the lay members, they know the subtle dangers which bureaucracy threatens to the liberty of the subject Let our legal representatives in the House of Commons be vigilant in this matter, and the public will realise the advantage of having trained observers safeguarding their interests.—*S.J.*, 1929, p. 373.

Litigation as a Luxury.—In a case at Watford, Judge Crawford is reported to have made strong comment on the folly of a young man who had a wife and three children, and only earned £3 a week, indulging in litigation. After hearing that he "instructed counsel" (no doubt the reporter's way of stating that the solicitor did so on his client's authority and behalf), the judge is represented as observing: "You have no more right to instruct counsel than I have to live in Grosvenor Square". No doubt it is unwise for any person of narrow means to indulge in frivolous or vexatious litigation. If the judge is correctly reported, however, his argument is a dangerous one. The courts of law are vital parts of the machinery for redressing injustice, and it would be very unfortunate indeed if a judge in effect said to a poor man: "You have no business to seek justice, for you cannot afford it". Possibly the young man's claim (or defence—the report is by no means clear) was untenable. In such case, however, one would expect the judge to scold, not the actual litigant, but the solicitor who assisted him to bring an unsound case into court, and the barrister who advised such a course. A man who finds himself badly off under a particular social system, and is then told that justice is too expensive for him, may become the raw material of a Bolshevist. The problem of the cost of justice is, of course, one ever present in a 'civilised' country, and the large class of which the litigant in question was a member, namely, that just outside the official class of "poor persons," may be a special source of anxiety, for "*Dives*" has no grades. When there is medical need, the very poor use the hospitals without payment, and fees for those who can afford them are graduated, roughly it may be, but a millionaire would expect to pay more than a mechanic. The absence of proper relief in legal costs to the classes just below income-tax level (for the rare extension of Ord. 16, r. 22 (2) or (3), hardly seems sufficient) may be regarded as a defect in our system, not to say a justification for that much-abused individual the "speculative solicitor".—*S.J.*, 1929, p. 374.

No Arranged Divorces.—In a case recently before the Divorce Court, where the preliminary conversations between the spouses were revealed, as one may suppose, rather more fully than in some others, Lord Merrivale is reported to have observed, "Divorce by pre-conceived arrangement is impossible under English law. Divorce by consent is almost impossible. It is quite plain that this was a pre-concerted arrangement." The

distinction between the impossible pre-conceived arrangement and almost impossible consent might, perhaps, have been elaborated more fully, but his lordship no doubt correctly set forth the theory of English law. That being so, however, it seems unfortunate that, not only is there a very prevalent opinion among the public that the exact opposite is the case in practice, but that various successful petitioners have actually boasted that they have arranged for divorce with their spouses. And, further, some of them have even boasted of successful conspiracy to deceive the court, spending a few hours of night in an hotel bedroom with a woman unknown, in order that the judge might infer the moral offence essential for divorce, but which did not actually take place. Indeed, one successful play was based on the thesis that respectable middle-aged women will arrange for a consideration to play the part of enchantress in a conventional hotel bill divorce drama. Certainly, the unknown woman is so completely out of the ken of the court in the ordinary case that she might be the petitioner's grandmother, if of sufficiently youthful appearance for the part—and modern grandmothers specialise in youthfulness. "You can smell collusion," said Mr. Justice Bargrave Deane, in his evidence to the Royal Commission on Divorce. The smell, however, is not evidence. And if an unquestioned lady comes to a respectable solicitor, with the hotel bill in her hand, and assures him that no one is more surprised and distressed than herself at the contretemps, what else can he suppose than that she speaks the truth, the whole truth, and nothing but the truth, and would not for worlds deceive the august Court which she invokes to right her grievous wrong?—*S.J.*, 1929, p. 391.

King's Proctor's Dilemma.—Of late years there has been an ever increasing number of what are known in the Divorce Court as "discretion" cases, in which a petitioner for dissolution of marriage prays the court to forgive his or her own matrimonial lapse. These cases constitute a considerable portion of the so-called defended lists, and the unfettered discretion conferred by statute upon the Divorce Court has resulted, especially since the war, in divorce judges tempering mercy with justice in unbounded measure. But there is a particular aspect of this exercise of judicial discretion which is giving the King's Proctor's department much food for thought. It often happens, especially in these days of divorce on assize where many of the

King's Bench judges have not been trained in the pitfalls and peculiarities of the matrimonial jurisdiction, that a petitioner either through ignorance of the requirements of the law or of deliberate intent, fails to disclose his or her own lapse, and secures a decree *nisi*, without the court's being placed in possession of such a material fact. The King's Proctor's suspicions are aroused, either by kind friends or other means, and after a careful and expensive inquiry he discovers the facts, and enters a plea to show cause why the decree should be rescinded. The petitioner admits his fault and his reticence, and asks the court, notwithstanding, to exercise its discretion. In a good many cases recently the court has exercised its discretion in this way, letting the decree stand, but condemning the petitioner in the costs of the King's Proctor. Often, however, the petitioner has sued as a poor person, or is so poor that these costs cannot be recovered, and this term at least two of the divorce judges have called a halt to this procedure by rescinding the decree *nisi*. As regards the general principles of the exercise of the judicial discretion, the President, Lord Merrivale, in a recent case in which both spouses had lived each with another person in a *quasi*-conjugal manner for a number of years, adjourned the petition and called upon the King's Proctor to present his view of the matter. When this case comes up again for argument there can be little doubt that an attempt will be made to lay down some more definite limits for the exercise of the court's discretion than exist at present.—*S.J.*, 1929, p. 392.

Macnaghten, J., and Matrimonial Values.—Meanwhile Macnaghten, J., who is not to be caught napping on a point of law or legal procedure, has distinguished himself in a divorce case at Liverpool Assizes, where he refused to accept the inflated estimate by a jury of the value of a wife The wronged husband had put her value at 250*l.* and claimed that amount. The jury awarded 1,500*l.* damages against the co-respondent; but the judge refused to allow the amount claimed in the petition to be amended. Clearly he was right in so refusing, and particularly so as the reason given for the application to amend appears to have been only this: that the petitioner was unaware of the wealth of the co-respondent. The value of any commodity does not vary according to the financial position of the purchaser; and it has been laid down time and again that a wife's worth to her husband is to be assessed in currency on a cold and calculated estimate of her actual value.

The jury's finding will no doubt operate to induce future husband petitioners to think more highly of their errant spouses. —*L.J.*, 1929, p. 474.

Forensic Fat.—Since the passing of the Murphys and of Mr. Solomon Ford the English Bar is remarkably deficient in fat and in the kind of humour which goes therewith. Curtis Bennett, on festive occasions, has made fun of his own rotundity, but he is not to be compared with the corpulent giants of the past.

Sir Nicholas Bacon, Lord Keeper, was a rare specimen, and the only holder of the Great Seal to whose vast proportions the attention of posterity has been emphatically called. He had much wisdom, according to Fuller, *"in corpore crasso,"* and Camden refers to him as *"vir præpinguis ingenio accerrimo."* Not only his peers, but Queen Elizabeth herself, made merry over his fatness. She observed that "his soul lodged well." He, like our own Murphys and Curtis Bennett, was able to see the humour of his girth, and his letters contain many references to his infirmity.

Towards the close of his life it became the practice of the Bar to hold up their opening observations until he had tapped three times on the floor after taking his seat on the Bench. The signal was an intimation that he had recovered his breath and was ready to begin.—*L.J.*, 1929, p. 474.

The Cost of Litigation.—It may be true, as Lord Lyndhurst said, that "cheap law does not always mean cheap justice," but it is undeniable that dear law means injustice; and the cost of even the most trivial litigation at the present day is such as to close the Courts to a large and increasing proportion of His Majesty's subjects." So says Mr. C. H. S. Fifoot at the beginning of an article in the current *Fortnightly Review* on "The Cost of Litigation." Mr. Fifoot is a law tutor at Oxford and may be thought to be remote from the practical side of this ever-present question, but he supports his theme from the Law Reports and from a County Court case within his personal knowledge. From the Reports he takes the very curious case of *Kasler* v. *Slawouski* (1928, 1 K.B. 78), where a claim in respect of damage for defective goods was thrown back through three successive intermediate tradesmen on to the original seller The damages were 67*l.*, but A. had to pay this sum and accumulated costs amounting to 622*l.* In the County Court action the unsuccessful plaintiff in a motor accident case owed his own

solicitor 65*l.*, and had to pay the defendant's costs amounting to 72*l.* 17*s.* 6*d.* Of the latter sum counsel had seven guineas and the solicitor 6*l.* profit charges. The balance chiefly went to witnesses. These things are familiar, and they prompt the frequent advice to keep out of litigation. Mr. Fifoot recognises this, but of course it does not meet his aim, which is to secure the reduction of costs. The abolition of the House of Lords—a suggestion which had finally to be omitted from the Judicature Acts—would not go far, and Mr. Fifoot's practical proposals are the establishment of Sir Edward Parry's Conciliation Courts, the simplification of procedure in Divorce and Workmen's Compensation, and the replacing of the Law Society's system of Poor Persons assistance by the institution of a Government Department for the like purpose. The last is neither likely nor desirable, and none of the proposals touch the real question: Is it practicable to reduce the costs of litigation? Most practitioners probably will say the answer, save for possible reforms of procedure, is in the negative. And it is only such reforms that afford any hope.—*L.J.*, 1929, p. 19.

A Reforming Chancellor.—Reforms are the least of things we should expect from a Socialist Government or a Labour Lord Chancellor; and that is why the Lord Chancellor's remarks at the Lord Mayor's dinner to His Majesty's Judges was scanned with eager curiosity by all those who look to the law for their livelihood. The fears of those who may have anticipated some hint of a legal revolution were not only allayed, they were replaced by hope and pleasurable anticipation for the future.

He boldly recognised, as L.C., the two great evils, which, as Sankey, J. and L.J., he had from time to time criticised and denounced. Evils which not only affected the body politic and struck at the foundations of our constitutional liberties, but also tended to take bread from the mouths of lawyers, their wives and children. Practically every judge, jurist and constitutional lawyer has spoken in strong terms of these two matters; but it is the first time a member of the cabinet has committed himself in such unmistakable terms to the view that something must be done.

The giants to be attacked are these: (1) the increasing usurpation by Ministers and their Departments of the function of the judiciary; and (2) the antique procedure which places the private citizen at an unfair disadvantage in his disputes with the

Crown and its servants. Two fronts you will observe, but the same foe.—*L.J.*, 1929, p. 28.

Speech of the Lord Chancellor at the Lord Mayor's Banquet to the Judges.—The Lord Chancellor said:—My Lord Mayor, My Lords, Ladies and Gentlemen,—I thank you, Sir, for the kind manner in which you have proposed the toast of His Majesty's judges, and you, ladies and gentlemen, for the cordial way in which you have received it. Let me thank you too, Right Worshipful Sir, on behalf of my colleagues, for your kind welcome and your very delightful hospitality.

I am happy to be able to assure you, Sir, that the old reproach of the law's delays can no longer be laid to our charge, for all the divisions of the Court are well abreast of their work. There are no arrears. Indeed, the lists in the Court of Appeal are almost too forward, and but very few weeks elapse between a hearing in the Court of First Instance and a re-hearing up above.

The circuits are in the same happy position, and, although it is not always possible to prevent some loss of judicial time, great care should be taken not without reason to make any change in a system which has lasted so long and entered so successfully into the life and customs of our people. I should like to be allowed to mention here the great work which is done by the County Court Judges throughout England and Wales. The cases which have been entrusted to them, and are being more and more entrusted to them, are among the most important, and probably come nearer to the life and the homes of the great majority of our fellow-countrymen than even those which are tried in the High Court of Justice. I welcome this, my first opportunity, of pointing out and paying a tribute to the great services rendered to the cause of justice by my brethren of the County Court Bench.

A great deal has been heard lately of the cost of litigation, but something is to be said for not making law too cheap so as to prevent persons rushing to Court on the slightest provocation. To some extent the expense of litigation is caused by litigants themselves, who, quite rightly, like to have their cases properly presented—but those who employ fashionable advocates must be content to pay fashionable prices! It is not a bad thing that the fear of costs should deter vexatious litigation. I say, without fear of contradiction, that, from the most highly-placed

solicitor in the City or Lincoln's Inn to the most humble one who practises in some small provincial town, the majority endeavour to settle many more cases than they fight.

In speaking of this subject one cannot forget the vast amount of work done gratuitously by both branches of the profession in poor persons' cases. Under the new rules the work in this connection was decentralised, and over eighty committees, appointed by the Law Society in London and the provincial law societies, and approved by the Lord Chancellor, were set up. They enquire into the merits of cases, and, if satisfied, grant the applicant a certificate enabling him to proceed as a poor person. Solicitors and counsel of the very highest standing are enrolled on a voluntary rota to conduct the cases, and neither receive any remuneration for their work. It would appear that the problem of the poor person's lawyer in the High Court and the Court of Appeal is in the way of being satisfactorily settled by the devoted and self-denying efforts of the solicitors' branch of the profession. All honour to them. During the year 1928 poor person litigants in London alone received on judgment or by way of settlement over 10,000*l.*

The training of lawyers for both branches of the profession is a matter which cannot fail to interest those entrusted with the administration of justice. It is the duty of our generation to see that its successor has a proper supply of skilful and honourable advocates, and the problem of legal education is one which should engage the attention of all those who feel some responsibility for the future. This duty is discharged by the professors at our universities, by the Council of Legal Education and the Law Society, by the members of both branches of the profession who take students to read with them, and, may I add, by the judges, who are always ready to encourage the young advocate struggling with his first cases. We do not forget the dreadful occasions when we were in a similar position.

My Lord Mayor, the rule of law is the condition of liberty. Amid the cross-currents and shifting sands of public life the Law is like a great rock upon which a man may set his feet and be safe, while the inevitable inequalities of private life are not so dangerous in a country where every citizen knows that in the Law Courts, at any rate, he can get justice. Let the ambition of the lawyer be to serve the State and protect the rights of his fellow men. In a great commercial and industrial community like our own, the fulfilment of contracts and dispatch in the administration of the law are, as it were, part of our life-blood.

One of the most ancient codes teaches us to commend the man who sweareth unto his neighbour and disappointeth him not, though it be to his own hindrance. His Majesty's judges are charged with the administration of the law, but there are two matters relating to such administration which in recent years have caused some anxiety not only in the public mind, but among trained lawyers. The first is what has been described as a growing tendency to transfer decisions on points of law or fact from the Law Courts to the Minister of some Government department. The second is the general position of the subject when engaged in a dispute with the Crown, or an individual when engaged in a dispute with a Department of State. This is neither the time nor the place at which I should pronounce any definite view on either of these points, but I think that there is a general agreement both within and without the profession that these matters require further careful investigation. And it would be a source of satisfaction to me if it were found possible while I hold office to initiate and complete such an investigation, and to allay the anxiety which no doubt prevails in the public mind with regard to them. Another matter to which public attention should be called is the authority conferred upon a minister to implement Acts of Parliament by regulation. This is not a modern practice, but one the increase of which in recent years should not be lost sight of.

In the administration of justice judges are assisted by two necessary and powerful allies—the Bar and the Press. So long as we continue, please God, to have a fearless Judiciary, a vigilant Bar, and a pure and responsible Press, so long will justice be administered properly and to the general satisfaction. In an Empire such as ours, comprising men of all sorts and conditions, of varying creeds and various races in different stages of development, the proper administration of the law, whether here at the heart or in some remote outpost of our civilisation, is of supreme and vital importance. British love of justice, British respect for order, British desire for peace—that is the goal upon which I would have us set our eyes—those are the delectable mountains whose heights it is worth while to capture. That achieved, the memory of our Empire will endure when its triumphs have become an empty name.—*L.J.*, 1929, p. 31.

"To make the Punishment fit the Crime."—"We have said again and again, and we now repeat, that in sentencing a prisoner

regard *must* be had to the intrinsic nature of the offence. It is all wrong to send a man to a long term of penal servitude because at some other time for some other offence he has received heavy punishment."

That observation was made, says *The Times*, by the Lord Chief Justice (Lord Hewart) in giving judgment in the Court of Criminal Appeal reducing to nine months' imprisonment with hard labour a sentence of five years' penal servitude passed at Staffordshire Quarter Sessions on Alfred Thomas Woodward. Woodward, who had been previously convicted six times, had pleaded "Guilty" to obtaining by false pretences several small sums of money, amounting in the aggregate to 5*l.* 0*s.* 6*d.*

In the case of John Henry Smith, 21 years old, who also appealed from Staffordshire Quarter Sessions, the Court described as "quite excessive" a sentence of two years' imprisonment with hard labour passed on him for shopbreaking and larceny of a trivial amount. In reducing that sentence, also to nine months' imprisonment with hard labour, the Lord Chief Justice said that the remarks which he had made in Woodward's case were equally applicable. Regard *must* be had to the intrinsic gravity of the offence. Smith's previous convictions were for minor offences, such as sleeping out.—*L.J.*, 1929, p. 34.

Irish Privy Council Appeals.—It is known that the Irish Free State Government desires to abolish the right of appeal to the Privy Council. That was made clear four years ago at the time when the Irish Land Act, 1922, was amended so as to overrule *Lynham* v. *Butler*. In the debate in the House of Lords on that occasion it was pointed out that the appeal, which is preserved by Art. 66 of the Constitution, could be got rid of only by Act of the Imperial Parliament; but Lord Cave and Lord Haldane both admitted that there was no constitutional objection to overruling retrospectively a particular decision of the Courts, though a repeated overruling, so as in effect to make appeals futile, would be a different matter. The question has arisen again in connection with the Copyright (Preservation) Bill now before the Free State Legislature, on which we print this week a letter from Messrs. Syrett and Sons. Their clients, the Performing Right Society, obtained in 1927 from Johnston, J., an injunction against the Bray Urban District Council restraining the performance of certain music, the copyright in which was vested in the Society. The question was whether the

Copyright Act, 1911, applied in the Free State at the time of the alleged infringement. Mr. Justice Johnston held that it did, but the Supreme Court reversed his decision, holding that the Act ceased to apply when the Treaty between Great Britain and Ireland was sanctioned by the Irish Free State Agreement Act, 1922. Consequently there was after this Act—or, perhaps, after the making of the Treaty on December 6, 1921—no copyright in Ireland. This was not anticipated, for the Free State, assuming that the Act applied, passed the Commercial and Industrial Property (Protection) Act, 1927, by which the Act of 1911 was repealed and new copyright provisions introduced, with a saving for rights acquired before December 6, 1921. This, however, did not help the Society, since they had acquired their rights after that date. Hence the appeal to the Privy Council, for which special leave has been given, and which is now pending.—*L.J.*, 1929, p. 35.

Evidence in India.—A Templar, writing to me from the neighbourhood of Rawal Pindi, calls my attention to certain points of the Indian Law of Evidence, whereby plaintiffs, defendants and persons charged with criminal offences are incompetent witnesses in their own cause. His observation of the course of a number of criminal trials has led him to the conclusion that this rule operates greatly to the advantage of the guilty. The prisoner, as things are, may make a statement; and not improbably he will attribute the damning evidence against him to the artful contrivance of conspiring members of a rival caste. A few questions in cross-examination would make all things plain; but the harrassed prosecutor longs in vain for the opportunity.

It would seem that the Indian Reformers might well direct their attention to this matter of the Law of Evidence; for the advantages of making the accused a competent witness are now universally acknowledged. It makes the conviction of the guilty more certain and, at the same time, increases the unlikelihood that an innocent person will be condemned.—*L.J.*, 1929, p. 46.

The Open Witness-Box.—In this country we had a hard fight and a long wait before the rule which still prevails as to the competence of witnesses in India was abolished. In 1828 the Forgery Act enabled the person whose name was forged to

be a competent witness, despite his interest in the case. But Lord Denman and his friends had been agitating for twenty years before Lord Denman's Act of 1843 was passed, rendering competent as witnesses all persons who had an interest in the trial, or who had been convicted of crime.

Some thirty Acts were passed thereafter, rendering parties to civil suits, and persons accused of different crimes competent to give evidence; but it was not until 1898 that Lord Halsbury's Act was passed, making the accused person in all criminal cases and the husband or wife of such accused person, competent, but not compellable witnesses, and setting forth the rules under which they might be examined.

It is not without interest to consider the opinion of the late Sir Harry Poland, that stout opponent of untried and risky innovation in legal matters, as expressed by him two years after the passing of the Act of Lord Halsbury: "I will only say," he remarked to a classroom of students, "that all the predictions of its opponents have been falsified, and that it works admirably.....We have now, after many struggles, an open witness box, and the juries are at last left to determine the truth or falsehood of the evidence from whatever source it may come."—*L.J.*, 1929, p. 46.

A Tichborne Tragedy.—The Tichborne trial will for centuries yet provide a topic of mystery and amusement; and Orton achieved one of his objects, at least, for his name will always be connected with the Tichborne name and estates. Comment in the *Cornhill* article has shown that the personality of this Orton is still very much mysterious and alive.

I am reminded that at least one legal reputation was ruined by the case; at any rate, Dr. Kenealy, Orton's counsel, descended rapidly thereafter into the pit of failure. It was not, indeed, his conduct, unseemly though it was, during the course of the Tichborne trial which led to his being disbarred and disbenched. The action taken by the Benchers of his Inn, that is to say, Gray's Inn, was due to the violence of his language in attacking, as Editor of the *Englishman*, eminent Judges and members of the Bar.

The only effect of his attack on Cockburn, C.J., and Hawkins, Q.C., in open Court, was his exclusion from the Bar Mess of the Oxford Circuit.—*L.J.*, 1929, p. 46.

Dr. Kenealy and the Benchers.—But the Gods were driving him to his doom, and he was in that frame of mind which made the doom inevitable when, in the summer of 1874, his fellow-Benchers of Gray's Inn invited him to explain his conduct as Editor of *Englishman*. His wife wrote that he had a headache and could not appear. Thereafter it was moved by Manisty, Q.C., and seconded by Holkar, Q.C., "That Dr. Keanly, being Editor of the newspaper, is unfit to be a Master of the Bench of this Honourable Society," and "that the call of Dr. Kenealy to this Bench be hereby vacated."

But he recovered from his headache, and so far from repenting, carried on the unequal war in his unfortunate paper. "Wherever the English language is spoken," he wrote, "and this paper is read they (the Gray's Inn Benchers) will be spat upon by every lover of truth and justice." He professed to discover in the L.C.J. a striking resemblance to Scroggs and Jeffreys. In a word, he carried on. And the end came when, in 1875, his call to the Bar was vacated and he was expelled from the Society. Not long after his name was struck from the Queen's Counsel's list.—*L.J.*, 1929, p. 46.

Bowen's Rhyme.—This is part of the rhyme wherein Bowen, L.J., at a later date described the discursive irrelevance in which Serjeant Kenealy and the Chief indulged during the course of that memorable and protracted trial:—

Meanwhile, about us and afar,
  Again across the storm;
Kenealy and the Chief at War,
  Each in the best of form.
Of virtue, science, letters, truth,
  They talked till all was blue;
Of Paul de Kock, the bane of youth,
  Of Bamfield Moore Carew.
If fools are oftener fat or thin,
  Which first forget their tongue,
Why all tobacco mixed with gin
  Is poison to the young.
And, whether Fielding's better bred
  Or Sterne, so full of fun;
Poor Mathew sighed and shook his head,
  "The Will of God be done."

L.J., 1929, p. 46.

CONTEMPORARY LEGAL LITERATURE.

In a fairly long article contributed to THE HARVARD LAW REVIEW (February, 1929), Mr. Edmund M. Morgan discusses the "Rationale of Vicarious Admissions" and advances certain powerful arguments against the reception of those admissions except when they satisfy the test of trustworthiness. "The exclusionary rules of evidence are more intended to protect the party against whom the evidence is offered rather than "to operate as automatic eliminators of untrustworthy testimony." "Truth is the object of all trials," and the Courts receive admissions by a party as truth of the matters asserted in them as (1) it is not likely that he would make a statement less favourable to himself than the truth will warrant and (2) he cannot be heard to object that he was not under oath and had no opportunity to cross-examine himself. But different considerations arise when they are sought to be used against a third party. And the writer strongly denounces the use of them against third persons except when they satisfy the elements of trustworthiness.

The writer takes up the cases of admissions by agents, co-conspirators, principals and sureties, joint owners, joint obligors and privies in interest and points out how the courts have loosely drifted from the test of trustworthiness to extraneous considerations drawn from the substantive law and fallacious reasoning. For example (1) in the case of an agent, authority to do an act does not necessarily imply authority to talk about it. (2) To say that when an agent merely transmits information to his superior, it is as if the superior was speaking to himself is specious; (3) in the case of joint obligors, the only thing which one has authority to do for all is to discharge the obligation. But, to assert that the admissions of the co-obligor will be as worthy of consideration as those of any other omits all consideration of the chief reason for receiving personal admissions. (4) On the ground that under the substantive law, a subsequent purchaser stands in his predecessor's shoes, the predecessor's statements are admitted against the successor-in interest, which really means that he is compelled to vouch for the veracity of his predecessor. Since in most cases the ground of reception has been loosely stated, the Courts wandered about "in a bog of uncertainty," and testimony has often been received without the slightest guarantee of trustworthiness. The writer is alive to the considerations of expediency which have driven Courts to engraft these exceptions to the rule against admitting

hearsay evidence, but yet feels that, to admit those statements on grounds other than that of trustworthiness will be lamentable.

In Glanville v. *Sutton & Co.*,[1] the defendant's horse was harnessed to a van, the carman being at the time engaged on business at some neighbouring premises. The plaintiff who passed by in front of the horse's head was suddenly bit and injured. It was proved that to the defendant's knowledge it had on prior occasions bit other horses. It was held following *Nanton* v. *Brocklebank*,[2] that proof that the owner knew that his horse was dangerous to other horses did not make him liable in respect of another damage cause to man. The *Scienter* to be proved was the knowledge of the particular kind of damage caused. In a note on this case in the Law Journal, Vol. LXVII, p. 396, Mr. R. Denthorne refers to some leading cases on the subject. In the case of animals by nature wild, such as lions, tigers, etc., which though tamed are likely to return to their former ferocious habits, the owners of the animals keep them at their peril and the party injured can recover without proof of *Scienter* (*May* v. *Burdett*).[3] But in the case of domestic animals, knowledge of their vicious propensities must be brought home to the owner either by prior instances or from the nature of the animal. If the horse is 'savage' (*Lowery* v. *Walker*),[4] or ungovernable or in the course of being 'broken in' (*Michell* v. *Allestry*)[5] or is accustomed to bite to the owner's knowledge (*Walker* v. *Hall*),[6] the owner is certainly liable, even though the injured man is at the time on the owner's land by his permission. In other cases the injured person is obliged to prove a clear case of negligence for, in the words of Pollock, C. B. in *Greenland* v. *Chaplin*[7] "a person is not expected to anticipate and guard against that which no reasonable man would expect to occur."

Definition of equity has always been and still is a burden to the classifier and the theorist and the Property Statutes of 1925, though simplifying the Equity Rules themselves has rendered the task of the theorist more onerous. The reason is not far to seek. The peculiar history of equity law which has developed various doctrines mutually almost unrelated to meet and neutralise several common law rules has been the main reason for this difficulty. It was with the chancellorship of Lord Nottingham

1. L.R. (1928) 1 K.B 571 · 97 L.J. K.B 166
2 L.R. (1923) 2 K B. 212 · 92 L.J.K B. 624.
3. 16 L.J.Q.B. 64. 4. (1911) A.C. 10 5 84 E R. 932.
6. (1876) 40 J.P. 456. 7. (1850) 19 L.J. Ex. 293.

that it formed itself into a stable system of rules and now as Mr. H. G. Hanbury points out in his illuminating article "Field of Modern Equity" in THE LAW QUARTERLY REVIEW (April, 1929), it is entering on an "artificial mechanical phase." It has assumed an important place in the Law of Property at the present day and that, the writer thinks, is largely due to the modern view that property should be capable of free and easy transfer.

Maitland postulates that in as much as every equity must yield to the overriding rights of the *bona fide* purchaser for value without notice of the legal estate, it can never be a *jus in rem*. Ames has said that it is the very keynote of equitable jurisdiction that "equity acts *in personam*". But the writer point out that such statements require some modification in view of *Sinclair* v. *Brougham*,[8] which treats the following of trust moneys by beneficiaries as a proceeding *in rem*. And it may now be more accurate to regard equitable rights and interests "as hybrids standing midway between *jura in personam* and *jura in rem*."

After pointing out in some detail the influence of equity on the law of contracts and traces of its "guiding hand" in the remedies for breach of contract, *viz.*, injunction, cancellation, rectification and specific performance and in the doctrine of part performance, the writer concludes this portion of the article with an approval of Maitland's dictum: "Equity has added to our legal system, together with a number of detached doctrines, one novel and fertile institution namely the trust, and three novel and fertile remedies namely specific performance, injunction and judicial administration of estates. Round these..... most of these equitable rules group themselves." The learned writer then considers some criticisms against equity as a subject for a text book and thinks there is still a place for a text book on general equity. Only, as a result of the Property Legislation, it may have to incorporate more of property law than before Property law has not made any revolution in the subject but as Sir Leslie Scott says it has effected an 'evolution'.

Maitland classifies trusts into those arising (1) by act of parties, and (2) by operation of law. The former is sub-divided into express and implied and the latter into resulting and constructive trusts. The classification, the writer says, is not wholly satisfactory It does not faithfully depict the real spirit

8. (1914) A.C. 398.

of the doctrine of trusts. *Keech* v. *Sanford*[9] may aptly be said to be the meeting place "for two kindred principles (1) that one to whose hands trust property comes with knowledge of the trust will be bound by the trust and (2) that one "who stands in a fiduciary relation to another ought not to be allowed to keep for himself a benefit gained from property which in conscience belongs to that other, but must hold that benefit for that other's account." The distinction between express and constructive trusts becomes material in the law of Limitations. *Soar* v. *Ashwell*[10] is an instructive decision and may serve as the basis of a new classification.

The writer concludes the article with an examination of the place in the modern system of such maxims of equity as (1) Equity Acts *in personam*. (2) Equity follows the law. (3) *Qui prior est tempore potior est jure* and (4) He who seeks equity must do equity. Though other maxims have their own place and can yet profitably continue to fill "the worthy place of co-adjutors to the study of equity jurisprudence," the last of the maxims above stated has come to acquire a special importance. The whole doctrine of set off rests on this maxim which for convenience the writer calls the rule in *Cherry* v. *Boultby*.[11]

Under the caption "Voluntary payment to a foreign administrator," Mr. Joseph H. Beale has contributed an article to THE HARVARD LAW REVIEW (March, 1929), wherein he discusses the American Law on the subject. On account of historical accidents, a distinction had been drawn in England between an executor and an administrator. Before Edward I, the executor was recognised as receiving from the dead man his entire estate in trust for the purposes of the gift The Ecclesiastical Court and later the Chancery and the King's Courts compelled the executor to carry out the trust and also upheld a writ of debt for and against executors. By later statutes the earlier executor was in effect made a universal successor, with this exception that personal torts still die with the deceased.

As it was considered by the Church a sin to die intestate, the Bishop took the goods of the intestate and after giving the wife and children their proper proportion, the remainder was taken for purposes conducive to the salvation of the intestate's soul. Later such work was shouldered by the ordinary and in

9 2 Wh. and Tred 648, 9th edn 10 (1893) 2 Q.B. 390.
11. (1839) 4 My. and Cr. 442.

1357, by 31 Edw. III. C. 11, it was deputed to "the next and most lawful friends of the dead." (Administrators). Like the executors, they had the right to sue and the liability to be sued for debts due to and by the estate.

In America this distinction has never been made. The only difference between them is that the executor is nominated by the testator whereas the administrator is appointed by the Court, with the result that where the executor dies further administration is carried on by an administrator with the will annexed. The writer examines in some detail the exceptional cases in which the distinction has been made in American Courts. All the cases are almost agreed in giving the administrator the right to collect in *his own state* a *chose in action* due to the deceased. The idea of the executor being regarded as a universal successor has not found favour with the American States. On the theory of the executor being a universal successor, it would be difficult to support the right of the ancillary administrator to collect choses in action within his own state as aganist the domiciliary administrator. Schouler states that "the administrator appointed at the domicil of the deceased owns all chattels and claims of the deceased everywhere while the ancillary administrator owns only those situated within his jurisdiction." This, the writer thinks, may be supportable as regards negotiable papers as, for purposes of administration they are treated like chattels. "The true view," the writer thinks, is "that neither the executor nor the administrator to-day gets any title to mere choses in action of the decedent." He only gets a right to collect them and this right like all other rights created by law extends no further than the boundaries of the state.

The writer next discusses some leading decisions bearing on the question under review. In his view, as a result of the decisions, a payment made to a foreign administrator would be a valid discharge of the debt if there were no local creditors or at the time no local administrator. But if there are local creditors, though no local administrator, it would not be a valid discharge. Also, the foreign administrator will not be allowed to sue for the debt, if it will have the effect of prejudicing the local creditors. The reason for these distinctions seems to lie in the assiduity with which each country protects its own citizens against the withdrawal into another country of assets on which they relied for payment of debts due to them.

(We may refer our readers to Dicey's "Conflict of Laws" Rule 131 (*u*) and Williams on Executors 11th Edn., pp. 1275 to 1280 for a learned discussion of the subject).

THE LAW JOURNAL (12th April, 1929) contains a short note headed "Aerial Trespass." In the last issue we had occasion to summarise two interesting articles on the subject from THE AMERICAN LAW REVIEW. In England, the matter is now covered by S. 9 of the Air Navigation Act, 1920 according to which no action will lie in respect of trespass or nuisance by reason only of the flight of aircraft over any property at a height above the ground which is reasonable or the ordinary incident of such flight, etc. The note extracts the views of Messrs. Pollock and Salmond on the question, the former inclining to the view that under the common law, it will constitute a trespass unless it can be said that the scope of possible trespass is limited by that of possible effective possession and the latter to the contrary view, *viz.*, that "mere entry into airspace is not an actionable wrong.".

BOOK REVIEWS.

QUESTIONED DOCUMENTS, by Albert S. Osborn. Second edition, 1929. Examiner of Questioned Documents with an Introduction by Prof. Wigmore. Published by Boyd Printing Company, Inc., Albany, New York. Sweet and Maxwell, Ltd. Price Rs. 41-4-0.

This is the second edition of a work whose first edition appeared about eighteen years ago and the passing of years has resulted in a thorough revision of the matter contained in the first edition and the addition of a vast deal of useful and new matter. It must be admitted that in this country the detection of spurious documents has not ordinarily rested upon a scientific consideration of the principles bearing upon questioned documents In some cases, Judges have gone further and held that expert testimony on questioned documents is of a very unsatisfactory character and not entitled to any high probative value. It may be that such views result from the circumstance that experts are brought in on both sides and give contrary opinions and the Judges themselves and lawyers are not familiar with the principles underlying a scientific investigation of the question. The present work presents the principles underlying

a scientific investigation and will be read with interest by lawyers and judges and we hope that they will be better able to discharge their every-day duties of finding out by scientific means whether the documents which are questioned are genuine or otherwise.

DONOGH'S INDIAN STAMP ACT, eighth edition. Revised by K. J. Rustomji, Bar.-at-Law, 1929 Published by Messrs. Butterworth & Co. Price Rs. 12.

Donogh's Stamp Law has held a leading place among the treatises on the subject for several years. Indeed its value has been recognised by the Government with the result that copies of the book have been supplied by the Government to various officers. It is fortunate that after the death of the author, Mr. Rustomji has undertaken the revision of the present and the last editions. The distinctive feature of the present edition is that the editor has incorporated opinions of leading writers on the English Stamp Law in their appropriate places. The English treatises are not easily available in the mofussil and the editor has done a distinct service in quoting from them wherever necessary. The most important legislative change introduced since the publication of the last edition is the one abolishing the stamp duties on cheques and demand drafts. This and other legislative changes have been noticed in the present edition and the case-law has been brought down to the end of 1928. The book will therefore retain its leading place among the treatises on the subject.

THE INDIAN COMPANY LAW, by Messrs. S. Parthasarathy Aiyangar, B.A., B.L., and V. K. Thiruvenkatachari, M.A., B.L., Advocates, Madras, 1929. Published by Messrs. Butterworth & Co. Price Rs. 12.

We welcome this work by two members of the Madras Bar whose names are already familiar as writers on legal topics. There are already some commentaries on the Indian Companies Act giving the annotations under the various sections. Such publications are not of much use to the businessman or even a beginner in the Company Law. To them a lucid statement of the leading principles of Indian Company Law under various chapters in their natural order will be of great advantage and this is the task which the learned authors have undertaken in the present work. They have also not embarrassed the reader by

innumerable citations of reported decisions. They have chosen only the leading decisions to illustrate the points dealt with. It may be admitted that a judicious selection of decisions illustrating the leading principles is a difficult one; and the authors have succeeded in selecting the cases which bring out the principles clearly. The chapters on auditors and the balance sheet contributed by Mr. Cole will be read with interest. The forms adapted from the English Company Practice will, we have no doubt, be found useful, and we believe that the value of the work will be appreciated by lawyers and businessmen. The get up and printing of the work leave nothing to be desired.

We are glad to acknowledge the receipt of the Madras Acts (Criminal), 1802-1927, Part 5 by Mr. P. Hari Rao, B.A., B.L., Advocate, High Court, Madras, published by T. A. Venkasami Rao.

We are glad to acknowledge the receipt of Parts 1 to 4 of Volume I of the Tamil All-India Law Journal.
