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PANCHAMA TEMPLE ENTRY.

I. THE LEGAL ASPECT.

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The question of temple entry of what is called the untouchable classes is now engaging the attention of certain minds. It is necessary that this question is discussed in its several aspects and the authorities bearing on the question considered so that it may be seen on what basis the so-called disqualification rests. I am using the word "so-called" advisedly, as before a disqualification can be said to be *real* it must be shown that the *persons* for whom this right of temple entry is now claimed are Hindus following the Hindu religion and that temples such as those existing in Southern India are founded also for the benefit of these people so that they may also be said to be beneficiaries or objects of the trust. Before proceeding to consider the question, it must be admitted that there is no desire, much less any wide desire, on the part of the people for whom the right is claimed to enter these temples; nor is their non-admittance felt to be a grievance by these people or to be an obstacle to their worshipping Hindu Gods if they want to do so.

Unlike Northern India, temples in Southern India are of *two* classes:—(1) those founded on Agama Sastras; and (2) those founded on Tantric Principles. Temples in Malabar are based on Tantric Agamas and the Tantric mode of worship prevails. These will be dealt with last. Most of the temples in Southern India except those of Malabar are based on the Agamas. Temples founded for Siva, His consort, Ganesa and Subramania are mostly governed by the Kamika and other Saiva

Agamas, while a few of them are based on Vaidik worship; while Vaishnava temples are of two classes, *viz.*, (1) those governed by the Vaikhanasa doctrine of worship, and (2) those founded on the Pancharathra doctrine of worship. There are some Swyamboo Lingams in certain Kshetrams and these will be dealt with later on. It is a basic principle of these Agamas that the worship should be in the methods pointed out severally by them and the different castes entitled to, and bound to, worship, together with the way in which they should worship if they want to do so in these temples are also regulated by them. We shall refer to these texts later on. If temples are founded on the principles laid down by the Agamas and the worship is governed by them it is rather difficult to say that these Agamas should be followed as regards some particulars of temple worship and not as regards others.

But apart from these, there are certain legal principles governing these trusts. A *temple* is not a *public* place in the sense in which a *public road* is. This is forgotten by those who plead for the Adi-Dravidas or the so-called Harijans entering temples, the entry into which is prohibited for them except in the case of Melcote in Mysore and some of the Malabar temples. They are open only to the persons belonging to the religious community for whose use and benefit they are dedicated. If others are admitted it is only by sufferance and not as a matter of any right.

In *Venkatachalapathi* v. *Subbarayadu*[1] Muthuswami Aiyar, J., after pointing out that the question in such cases (*viz.*, the right to enter a temple or, as in that case, a particular portion of a temple) was, what was the nature and extent of caste status necessary, according to the usage and recognised trusts of the temple, to the exercise of the right, observed at p. 306:

> "Hindu temples being religious institutions founded, endowed, and maintained for the benefit of those sections of the Hindu community who conform to certain recognised usages as those of the castes for whose benefit the temples are by immemorial usage dedicated as places of worship, persons who conform to those usages stand to the managers for the time being in the relation of *cestuis que trustent* by reason of an implied contract."

If the question in these cases is for whose benefit the founder (known or unknown) founded these temples, and usage is to be looked into as an index to the founder's intention, in

1. (1890) I. L. R. 13 Mad. 293.

the absence of any endowment deed governing the same, the usages of centuries that these Adi-Dravidas or Panchamas have not been admitted into the inner precincts of the temple will show that the founder never intended these Adi-Dravidas to be beneficiaries of these temples and the fact that Adi-Dravidas might have *darsan* of the God when taken out in procession just like others, such as Moslems, Christians, etc., and *enjoy* such *darsan* can confer no rights on them.

Indeed, it would be a question whether these Adi-Dravidas are Hindus not in the sense whether they are governed by Hindu Law (as that is not the test, *for there are Mahomedans and others governed by* Hindu Law) but in the sense whether they are followers of the Hindu religion which recognises the Vedas, Puranas and Agamas as authoritative. If the Baghavad Gita is to be applied to, as some politically-minded Hindus in their eagerness to bring these Adi-Dravidas to the Hindu-fold want, it is a double-edged weapon. There are only four castes mentioned. If Adi-Dravidas are Panchamas and are not Chandalas, it is certain that, according to the Baghavad Gita which divides Hindus into four castes only, the Adi-Dravidas being *Panchamas* and not *Chandalas*, according to the nationalist opposition leader in Madras, they are not Hindus and their admission into Hindu temples will be outrageous and unjust. If, however, they are Chandalas, who are also specifically mentioned in the Baghavad Gita, they cannot be among the four castes of Hindus whose origin is mentioned in the Baghavad Gita.

Indeed the speech of Mr. M. C. Raja when he came here after the Poona pact and gave an interview to the Press here would show that until this pact the Adi-Dravidas whom he represents were not Hindus but by the Poona pact they became admitted as such. The fact that they have their own Gods, their own temples, their own priests and their own customs will also show that there is much to be said for the fact that they form a class by themselves and not persons governed by what is ordinarily known as Hindu faith. Some of them may form Bhajana parties and sing praises of Siva or Vishnu just as they may take part in the Mohurrum celebrations by Muslims and make vows or offers of *fatiha*, etc., at Mahomedan mosques, dargas, etc. This makes them neither Hindus nor Muslims. The question as to the meaning of the terms " Chandalas " and

"Panchamas," and who these are will have to be dealt with separately.

The matter may be looked at in another way. Hindu temples are open only to those who observe certain caste rules or usages and it is only those who observe such usages that will be entitled to participate in the benefits of temple worship. Certain people, according to usage or according to Agamas, which in this particular have been strictly followed by usage, are not entitled to partake in the worship going on in the temple precincts, though they may be entitled to have *darsan* when God is taken in procession outside the temple precincts. Whether they are entitled to make offerings directly even there, is itself a very doubtful question. The usage being that Adi-Dravidas are not entitled to participate in the benefits of the worship conducted in the inner precincts of the temple or even to *darsân* there and the usage being that even those that are entitled to partake of the benefits are only so entitled if they observe certain caste usages, it is not open to Adi-Dravidas to claim rights of worship just as it is not open to those who do not observe the caste usage to claim rights of worship. The latter, as has been observed by the learned Judge in the Madras case already referred to, are in the position of seceders. It will not be open to the seceders, though they may form a majority, to say that they are entitled to the benefits of the trusts notwithstanding their secession; and if the Adi-Dravidas themselves are not entitled to the benefits according to the presumed intention of the author of the trust, it is not open to others who may be entitled to worship to say that they will admit those thus excluded or those not intended by the author of the trust into its benefits. It is not open to a majority to alter the tenets or principles of a creed much less to an individual person, however eminent he may be, to do so.

In *Attorney-General* v. *Pearson*[1] Eldon, L. C., observed:

"If it turns out that the institution was established for the express purpose of such forms of worship, or the teaching of such particular doctrines, as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals, having the management of that institution, at any time *to alter the purpose for which it was founded*, or to say to the remaining members *'We have changed our opinions and you, who assemble in this place for the purpose of hearing the doctrines, and joining in the worship, prescribed by the founder, shall no longer enjoy the benefit he intended for you unless you*

1. (1817) 3 Mer. 353 at 400, 401: 36 E. R. 135 at 150.

conform to the alteration which has taken place in our opinions.' In such a case, therefore, I apprehend, considering it as settled by the authority of the case I have already referred to, that, where a congregation became dissentient among themselves, *the nature of the original institution* must alone be looked to, as the guide for the decision of the Court—and that, to refer to *any other criterion*—as to *the sense of the existing majority* would be *to make a new institution*, which is altogether beyond the reach, and inconsistent with the duties and character, of this Court."

Later on, in the same case, the Lord Chancellor (Eldon) observed at page 157:

"I must here again advert to the principle which was, I think, settled in the case to which I referred the other day as having come before the House of Lords on an appeal from Scotland, *viz.*, that if any persons seeking the benefit of a trust for charitable purposes should incline to the adoption of a different system from that which was intended by the original donors and founders; and if others of those who are interested think proper to adhere to the original system, the leaning of the Court must be to support those adhering to the original system, and *not to sacrifice the original system to any change of sentiment* in the persons seeking alteration, however *commendable that proposed alteration may be.*"

The disputes arising from the cases of the various secessions which took place in Scotland have elicited from Courts definite principles governing the subject. The first case of secession was that from the Church of Scotland in 1740. This secession arose merely from a difference of opinion on a particular point; but the seceders still retained the plan of Church government by which the national church was regulated and formed themselves into a church judicatory. The congregation which separated from the established church on the same principle submitted to this judicatory, and among these was the congregation at Perth. By voluntary contributions, they purchased a piece of ground and built a chapel on it. Many contributed by their personal labour, by the use of their carts and horses for so many days, weeks and months and the minister's stipend was paid, repairs made and debts paid off by contributions at the church doors.

There was a further secession among this new party of secessionists in 1745 due to a dispute about the lawfulness of a clause in an oath imposed on persons elected into the magistracy in some of the royal boroughs. The old party (of secessionists) who considered this clause lawful were termed the Burghers. Those who objected to the same were styled as Anti-Burghers. These did not raise any disputes as to the property held by the minister belonging to the Burgher party. There was a fresh secession in 1795 or 1796 in the Burgher party arising out of a dispute respecting the power of the

Magistrate to suppress heresy and other points. The Synod by a majority sanctioned the new doctrines. A majority of the money contributors together with the minister at Perth adhered to the original principles. His assistant, together with a majority of the congregation, adopted the new doctrine and adhered to the Synod. The latter claimed the property in the hands of the minister. The case came before the House of Lords. See *Craigdallie* v. *Aikman*[1]. [This case came again before the House of Lords. *See* (1820) 2 Bligh. 529: 4 E. R. 435, but nothing useful is found in that judgment bearing on the principle discussed here.] Eldon, L.C., observed at p. 606:

"With respect to the doctrine of the English law on this subject, if *property was given in trust for A, B, C*, etc., forming a congregation for religious worship; if the instrument provided for the case of a schism, then the Court would act upon it; but as there was *no such provision* in the instrument, and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property by the *cestui que trusts*, for *adhering to the opinions and principles* in which the congregation had originally united. He found *no case* which authorised him to say that the Court would enforce such a trust, *not for those who adhered to the original principles of the society, but merely with a reference to the majority*; and much less, if those who changed their opinions, instead of being a majority, did not form one in ten of those who had originally contributed; which was the principle here. He had met with no case that would enable him to say, that the adherents to the original opinions should, under such circumstances, for that adherence forfeit their rights."

The next dispute which came before the Courts was that arising in consequence of the formation of the Free Church. There was a Scotch Church in Liverpool established on the principles of the Church of Scotland. There was a deed of trust by which the property was vested in trustees to be used as a place of religious worship "according to the ordinances, rules and forms of the Church of Scotland," and a conveyance was made of the land and premises to the trustees to be for ever thereafter appropriated and used as a place of divine worship, according to the doctrine and discipline of the Church of Scotland. Subsequently a Lancashire Scottish Presbytery as formed to which the Liverpool congregation united, and all the Scotch Presbyteries in England united themselves in 1836 into a Synod which Synod complying with certain conditions was recognised in 1839 by the General Assembly of the Church of Scotland. In 1843 certain ministers and members of the Church of Scotland seceded from the Established

1. (1813) 1 Dow. 1: 3 E. R. 601.

Church; and adopted the name of the Free Church and the English Synod sympathised with the latter and recognised the latter as a Sister Church. The minister of the Church and the trustees in Liverpool co-operated with the seceders and the recognition of the English Synod was withdrawn and the minister was declared to be no longer a minister of the Church of Scotland. Four of the trustees of the Church in Liverpool filed an information and bill that the ministers and trustees who co-operated with the seceders having departed from the original trust should be prevented by injunction from using the Church in Liverpool otherwise than as a place of religious worship in the model of the Church of Scotland as established by law. Although there was a technical point raised by the defendants which succeeded, and the plaintiffs in accordance therewith subsequently were willing to amend their bill, judgment was pronounced on the merits of the motion by the Vice-Chancellor (Wigram) as that was desired by both parties. He observed in *Attorney-General* v. *Welsh*[1] as follows:—

"The grounds upon which this Court is bound to interfere are, *first*, that, by the original contract between the *cestui que trusts*, the Established Church of Scotland was the agreed model upon which the Oldham Street Church was founded; *secondly*, that the Established Church of Scotland has undergone no change, but remains as a model the same as it was in 1799; *thirdly*, that the state of things of which the plaintiffs complain must (if they are right) deprive them of the benefit of the trust until the cause is decided; and, *lastly*, that, according to the defendant's own shewing, there is no practical difficulty in putting things, until the hearing of the cause, upon a footing not obnoxious to the views of either party."

The next dispute which came before the Courts was that in connection with the Free Church. There was a secession from the Free Church and the new body was known as the United Free Church. There was property devoted by persons belonging to the Free Church. Some of the members united themselves with United Presbyterian Church and this United Church was called the United Free Church in 1900. The party of the Free Church who claimed to be the majority and became united with the other body thought that doctrines hitherto held were not in accordance with the true Christian religion. The rest who were stated to be the minority disapproved of the union and continued to profess the old doctrine. The question was whether it was open *to anybody to change, to give up the old faith* and still retain *the benefits intended for those who still believed in*

1. (1844) 4 Hare 572 at 589: 67 E. R. 775 at 782.

the old faith. The House of Lords held that those *who seceded were not entitled to any benefits.* The Lord Chancellor points out that persons or Courts are not entitled to speculate as to what is or is not important in the doctrine held. He (Halsbury, L. C.) observed in *General Assembly of Free Church of Scotland* v. *Lord Overtoun*[1]:

" Speaking generally, one would say that the identity of a religious community described as a Church must consist in the *unity* of its doctrines. Its creed, confessions, formalities, tests, and so forth are apparently intended to ensure the unity of the faith which its adherents profess, and certainly among all Christian Churches the essential idea of a creed or confession of faith appears to be the public acknowledgment of such and such religious views as the bond of union which binds them together as one Christian community. A Court has simply to ascertain what was the original purpose of the trust. My Lords, I do not think we have any right to speculate as to what is or is not important in the views held The question is what were, in fact, the views held, and what the founders of the trust thought important."

He then referred to three cases, one in England, another in Scotland and the third in Ireland, and after quoting from what was said in those cases (by Lord Eldon, Lord Moncreiff and Sir William Cusack Smith respectively) he observed at p. 614:

" The principles for decision thus propounded have been recognised and acted upon ever since, and it would seem that it may be laid down *that no question of the majority of persons can affect the question, but the original purposes of the trust must be the guide.*"

Again, later on, he observed at p. 626:

" My Lords, apart from some mysterious and subtle meaning to be attached to the word ' Church,' and understanding it to mean an associated body of Christian believers, I do not suppose that anybody will dispute the right of any man, or any collection of men, to change their religious beliefs according to their own conscience; but when men subscribe money for a particular object and leave it behind them *for the promotion of that object, their successors have no right to change the object endowed.*"

Again, later on, the Lord Chancellor observed at pp. 627 and 628:

"There is nothing in calling an associated body a Church that exempts it from the legal obligation of insisting that money given *for one purpose* shall not be devoted *to another.* Any other view, it appears to me, would be fatal to the existence of every Non-conformist body throughout the country. Assuming that there are differences of belief between them, those differences are not got rid of by their agreeing to say nothing about them, nor are these essentially diverse views avoided by selecting so elastic a formulary as can be accepted by people who differ and say that they claim their liberty to retain their differences while purporting to join in one Christian Church. It becomes but a colourable union, and no trust fund devoted to one form of faith can be shared by another communion simply because they say in effect there are some parts of this or that confession which we will agree not to discuss, and we will make our formularies such that either of us can accept it."

1. (1904) A. C. 515 at 612-613.

In the same case, Lord Davey observed at p. 645:

"The question in each case is, What were *the religious tenets and principles* which formed the bond of union of the association for whose benefit the trust was created? I do not think that the Court has any test or touchstone by which it can pronounce that any tenet forming part of the body of doctrine professed by the association is not vital, essential, or fundamental, unless the parties have themselves declared it not to be so. The bond of union, however, may contain within itself *a power in some recognised body to control, alter, or modify the tenets* and principles at one time professed by the association. But the *existence of such a power would have to be proved* like any other tenet or principle of the association."

Again, later on, the same learned Judge observed at p. 648:

"It is, indeed, almost a truism that an unestablished religious association is free from State control as regards doctrine, government and discipline. But that freedom which differentiates a voluntary association from an Established Church is not inconsistent with the adoption by the association of certain tenets which distinguish it from other similar bodies. The right of the Assembly to impose any innovation from established doctrine on a dissentient minority, and the limits of such right (if any) must be found *in the constitutional powers of that body, and must be proved by evidence.*"

James, L. J., in the same case observed at p. 656:

"It is worthy of remark that the Church is not a positive, defined entity as would be the case if it were a corporation created by law. It is a body of men united only by the possession of common opinions, and if this community of opinion ceases to exist, the foundations of the Church give way. But difference of opinion to produce this result must be in respect of fundamental principles and not of minor matters of administration or of faith."

Dealing with this question of what should be regarded as fundamental, the same Lord Justice (James, L. J.) observed at pp. 661 and 662:

"It still has to be considered whether the principle was essential and fundamental or a mere matter of policy It is difficult to define any positive standard between an essential and a non-essential principle But surely there is a great gulf between the principle of Establishment and that of Voluntaryism. It seems to me, having read the declarations of the General Assembly and the distinct utterances of Dr. Chalmers, that scant justice would be done to the eloquent leaders of the secession movement of 1843 if we construed them as treating the Establishment principle as being non-essential or unimportant Still more important is it to consider what was the view of the importance of the principle entertained by those donors who, may be, listened to the appeal of Dr. Chalmers. Would they have regarded it as non-essential? Would they have endowed a Church pledged to Voluntaryism? I think not."

On the argument addressed that the new body left to its members the freedom to differ on the question of Establishment, the learned Lord observed at p. 663:

"But this freedom to differ, whilst admitting the differences, does not lessen or remove them. The United Free Church, as a whole, holds within it neither the principle of Establishment nor of Voluntaryism; such questions were to be open questions. But the man who as a member of the Free Church had accepted the views of a Church which claimed Establishment as

one of its fundamental principles may well object when he is told that he shall no longer belong to a Church holding that principle, but that he must, under compulsion, join a Church wherein members of it may think as they will on this broad subject, and must, whether he wishes it or not, be in communion with the supporters of the voluntary system to the same extent as if they had been adherents to the principle of Establishment in accordance with the tenets of the Free Church."

Again dealing with one of the reasons of a learned Judge of the Court below that a Church is at liberty to alter its essential principle and yet preserve its identity, the same Lord (James, L. J.) observed at p. 664 :

"From this view I differ, because, regarding 'essential' as meaning fundamental, I do not think that a Church can change such fundamental principles and yet at the same time preserve its identity. As I understood, it was admitted at the bar this power of change is restricted so as to keep the Church within the limits of identity. The retention of the name does not preserve identity, and yet the change of principles might be so great as to leave nothing but the name of the Church."

Then again the same Lord (James, L. J.) observed at p. 665:

"We have to deal *with the rights of property, with the execution* of trusts, and we have to see that the objects the donors had in view are *carried out*. The Church may unite, but if property is sought to be transferred to the new body the identity of that new body—that is the Free Church—after the union must be maintained; and nothing in the deed gives a power to unite so as to bring into existence a Church incapable of identity with the Free Church."

Lord Robertson in the same case before considering the question whether a doctrine is essential or not observed at p. 683:

"I ought to point out that the judgment of Lord Young is wholly rested upon the ground, stated in very sweeping terms, that there is nothing to prevent a dissenting Church from abandoning a religious doctrine, however essential and fundamental, and that an *ex facie* absolute property title cannot be limited by reference, not expressed, to 'the essential doctrines and fundamental pr nciples in the constitution of the Church'. It is unnecessary to say more of this ground of judgment than that it is in flat contradiction of the decision of your Lordships' House in the case of *Craigdallie*, (1813) 1 Dow. 1 (16) : 3 E. R. 606."

Later on the same Lord observed at p. 690:

"Regarding the whole of the property now in dispute, I cannot see how, in law or in fairness, a majority of the men who acquired it on the representations made in the affectionate representation could have been allowed, say in 1850, to carry off the property to the Voluntaries and come forward, arm in arm with the Voluntaries, and claim it for the fused body."

Lord Alverstone concluded his judgment in the same case as regards the rights of the minority and those of the majority at pp. 720-721 :

"It only remains to consider the position of the appellants and their rights as a minority of the ministers and elders of the Free Church represent-

ing congregations or portions of congregations who are not prepared to join the United Free Church. It is not contended that they have changed their principles; it is not suggested that they have departed from any fundamental or essential principle of the Free Church; it is not alleged that they are not faithfully carrying out the objects of the protest of May 18, 1843. The respondents are threatening to attempt to eject them from their churches and manses, and to deprive them of any right to participate in any funds of the Church, simply on the ground that they decline to become members of the United Free Church. The decisions of the Court of Session in *Craigie* v. *Marshall*[1] and *Couper* v. *Burn*[2], unless overruled by your Lordships' House, are wholly inconsistent, in my opinion, with any such right on the part of the respondents, and I am unable to support a judgment which would deprive the persons *forming a minority of their rights simply upon the grounds that they are unwilling to become members of a body which has not only abandoned a fundamental principle of the Church to which they belong, but supports a principle essentially different from that on which that Church was founded.*"

If this is the principle applicable to churches which are only places where congregational worship is conducted, it will be so *a fortiori* in the case of temples where the theory is that by reason of vivification ceremonies, the God itself is said to preside in the idol located therein. The Madras case already referred to, *Venkatachalapathi* v. *Subbarayadu*[3], applies the principles laid down in the Scotch secession cases.

It cannot be denied that those who think that the Adi-Dravidas are entitled to enter the precincts of a Hindu temple for worship and those who think that they are not so entitled differ on a fundamental basis. The former think that the fundamental basis of Hindu Religion recognises no such disability on the Adi-Dravidas to enter temples while the latter fervently believe that the fundamental basis of Hindu Religion recognises that the entry of the Adi-Dravidas into temples would be a sacrilege and that the effects of the vivification ceremonies by which the Deity becomes incarnate in the idol are gone and the *pratishta* ceremonies have to be gone through again after purification.

It will be seen from the cases already referred to that only those who adhere to the doctrines and faith established and practised from the time a church or temple is founded are entitled to the benefits of the temple and to perform the worship therein; that unless there is an authority recognised in the original foundation of the trust or the original constitution to change the doctrine or faith which should be strictly proved, it

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1. 12 D. 523. 2. 22 D. 120.
3. (1890) I. L. R. 13 Mad. 293.

is not open to the followers of a faith even though they might form a majority to change so as to make their views binding on the minority and that those who dissent from such doctrines and hold different opinions are like dissenters or seceders, who are not entitled to the benefits of the original trust. Those who want a change may have their views enforced in new temples built or founded by themselves. Indeed, according to the Hindu Religion, no one, not even the king, has the authority to change or alter the principles inculcated in the sacred books. The trustees of existing temples will be guilty of a grave breach of trust if they side the seceders and do not adhere to the existing usage. Indeed this is the common law of Hindu religious endowments and this is also the English, Scotch and Irish laws. According to the Privy Council, in all cases of religious foundations or establishments, such as temples, usage is the only guide. It is the usage of each temple that has to be looked into and trustees are bound to observe those usages. It is a breach of trust for the trustees to convert the temples of which they are trustees into any other form of worship. The Madras Hindu Religious Endowments Act makes no new law. It only recognises the existing common law of India and the law and the usage of these temples. The repeal or omission of that section in no way will affect the law, unless the legislature, contrary to all notions of the law of trusts recognised by civilised countries, declare that trustees may commit breaches of trust with impunity or that those who conscientiously believe that the worship hitherto observed by them is the right one should, under pain of forfeiture of their rights, follow the new methods. Such a course will be the negation of all law and operate as a forfeiture of property. It may as well be said there are here some persons with plenty of money. They have no right to possess so much but must part with a major portion of it to persons who are in want. A resolution in the Council may be passed that these persons who possess such surplus should part with it voluntarily to their less fortunate brethren. If they do not do so, an Act will be passed that the taking of the surplus from such person is no wrong civil or criminal.

The Satyagrahis headed by Mahatma Gandhi openly declare that they do not care what the law is and whether the trustees if they disobey the law are guilty of a breach of trust and are liable to answer for such breach in Courts. It is hoped that

the law of trusts will not be different when the Swarajya constitution functions. When such constitution comes, is a trust for the benefit of particular classes of people not to be given effect to, and will it be extended to others not comprised in those classes; and is a trust to *A*, *B*, *C* not to be given effect to but will be deemed to be a trust for *A*, *B*, *C* and others, and the beneficiaries mentioned by the author of the trust have no choice left but must submit to a majority among them or even outside majority?

One would have thought that these Satyagrahis arrogate to themselves the role not merely of revealers of divine wisdom and religion but also that of law-givers. But the statement of their leader Mahatma Gandhi shows that while inviting them to break the laws he, in his great wisdom, will listen to no plea and that these poor trustees must themselves find out the means how to remove the legal obstacles and if they cannot, it was no concern of the Satyagrahis. Surely this is nothing but a negation of all law and order apart from the fact that they are oblivious to and shut their eyes to others' difficulties in their supposed call for divine light; and no society can exist for a single day which can tolerate such negation of the essential principles which alone can keep society together.

One can understand if these so-called religious reformers will sacrifice some iota of their money or moneys' worth and establish foundations based on the new doctrines they propound, if they have any faith in them and attract even the so-called sinners to such foundations. No, they want to have cheap methods of propounding their faith.

The temple of Sri Rama mentioned by Mr. Kesava Pillai where Adi-Dravidas worship or officiate is an instance where the founder has made the Adi-Dravidas beneficiaries.

It does not concern the reformers in the least whether it is not contrary to the terms of the deeds of foundation or not contrary to long-standing usages from which the terms of the foundation are inferred in the absence of a deed and whether they deprive people of the benefits which they are entitled to, for adhering to the doctrines for which the founder established the foundation. Of course, as already stated, it is no concern of theirs that the trustees by supporting them are guilty of grave breaches of trust for which the Courts will find them guilty and hold them responsible.

SUMMARY OF ENGLISH CASES.

MIDLAND BANK, LIMITED *v.* RECKITT, (1933) A. C. 1.

Banker—Solicitor and client—Power of attorney by client to solicitor—Authority to draw cheques on client's purpose on client's account—Solicitor drawing cheques but paying into his own Bank for his own private purposes—Liability of rece ving bankers—Negligence—Bills of Exchange Act, S. 82.

T, a solicitor, had a client *R*, who, as he was obliged to be abroad, gave a power of attorney to his Solicitor *T* empowering him to draw cheques upon *R's* banking account and to apply moneys for the purposes of *R*. *T* to *R's* knowledge acted under the power often. *T* signed the cheques on books supplied by *R's* bank *B* at the cost of *R*, signing the cheques on the impression made by a rubber stamp containing in the upper line "*R* by" and on the lower line "his attorney" and placing his signature between the lines, so that the completed signature on each cheque ran as "*R* by *T*, his attorney". *T* drew cheques like this and paid them into his own account with the *M* bank (defendants). He had an overdraft with the *M* bank and as it was much overdrawn, the bank insisted on his covering the overdraft. *T* paid in by this fraudulent means by cheques drawn on *R's* account. In an action by *R* against *M* bank for damages for conversion of the cheques, *M* bank relied on S. 82 of the Bills of Exchange Act and pleaded that they had received payment of the cheques (crossed) in good faith and without negligence.

Held, that the onus of proving the absence of negligence is plainly upon the bank. They had notice in the form of the cheque that the money was not the money of *T* but of *R*. In the omission of an ordinary business precaution, in breach of a plain duty imposed upon a creditor to take reasonable care to see that a known agent, who is paying his own debt out of his principal's money is acting within his authority, the bank were negligent in making no enquiry as to their customer's authority to make these payments and S. 82 did not avail the bank.

Lord Reading, C. J.'s reading of S. 25 of the Bills of Exchange Act in *Morison's case*, (1914) 3 K. B. 356, disapproved.

Reckitt v. *Barnett, Pembroke & Slater, Ltd.*, (1929) A. C. 176, applied.

The clause in the power of attorney that the principal "ratifies and confirms and agrees to ratify and confirm whatsoever the attorney shall do or purports to do by virtue of these presents" cannot help the bank. A ratification in advance seems to contradict the essential attributes of ratification. It cannot be construed as extending the actual authority given by the power of attorney; it

may amount to a promise to adopt acts done within the ostensible authority.

CELLULOSE ACETATE SILK COMPANY, LIMITED *v.* WIDNES FOUNDRY (1925), LIMITED, (1933) A. C. 20.

Contract—Penalty and liquidated damages—Measure of damages fixed by contract—Inadequacy of damages—If can be gone into.

A contract for the erection of an acetone recovery plant provided that the plaintiffs were to deliver and erect the plant in 18 working weeks from receipt of final approval of their drawings and further provided that if this period of 18 weeks was exceeded, the plaintiffs were "to pay by way of penalty the sum of 20*l.* per working week" over and above the 18 weeks, subject to events beyond their control. The plant was not installed in time but was done only 30 weeks later. The plaintiffs claimed the contract price and the defendants counter-claimed for the delay and claimed the actual loss they had suffered.

Held, that what the parties meant was that in the event of delay the damages and the only damages were to be 20*l.* a week, no less and no more. It must have been obvious to both the parties that the actual damage would be much more than 20*l.* a week, but it was intended to go towards the damage and it was all the sellers were prepared to pay. The plaintiffs were therefore liable to pay 600*l.* only as liquidated damages.

GREENWOOD *v.* MARTINS BANK, LIMITED, (1933) A. C. 51.

Estoppel—Husband and wife—Joint account in bank—Forged cheques by wife paid by bank—Husband getting to know of the forgery—Silence for some time till wife died—Loss of remedy to the bank against forger—Husband if entitled to money.

A husband opened with the *M* bank a joint account in the name of himself and his wife. It was arranged with the bank that cheques on this account should bear the signatures both of the husband and of his wife. The husband also had a separate account. The wife had forged her husband's signature and drawn out moneys from the bank without the husband's knowledge. In 1929 the husband came to know of it but at the request of his wife, he kept quiet without informing the bank of it. Some months later the husband threatened to inform the bank, whereupon the wife committed suicide. Thereupon the husband sued the bank for the amount that they debited him with on the forged cheques.

Held, that the husband owed a duty to the bank to disclose to the bank the forgeries as soon as he discovered it, that by his silence he has deprived the bank of their right to sue the wife in tort and on which the husband himself would have been responsible as for his wife's tort. The silence until after his wife's death amounted in these circumstances to a representation that the cheques were not forgeries and deprived the respondents of their remedy.

PRONEK *v.* WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY, (1933) A. C. 61.

Negligence—Railway Company—Level crossings—Preferential right to run cars on highway by statute—Extent of—Duties to public.

A railway company incorporated by special Act of the legislature of Manitoba had a preferential right of way for all their cars and trains on the tracks and highways and any vehicle, horseman or foot passenger should, on the approach of any car, give the car right of way. The cars running after dark should be provided with signal lights to be conspicuously displayed thereon. The appellant sustained injuries while returning home at 7 P.M. The horses taking fright ran at full gallop and a company's car with a dim light on ran into it from behind.

In an action for damages,

Held, that the statutes gave the company the right to lay and operate the track, but the members of the public continued entitled to use that part of the highway, though the company had a preferential right in the sense that, on the approach of a car, other users of the highway were to give the car "right of way". But that did not involve that the cars were to be driven in disregard of other users of that part of the highway. The company were under a legal duty by their servants to be on watch for the safety of the people on the track and to equip the car with lights adequate at night to enable the driver to stop in time to avoid wayfarers. There was a reciprocal duty to take reasonable care to avoid the car and not to be guilty of contributory negligence. The appellant was lawfully on the highway and was neither a trespasser, nor a mere licensee, nor was he there at his own risk. The appellant was not guilty of contributory negligence and was entitled to damages.

VANDEPITTE *v.* PREFERRED ACCIDENT INSURANCE CORPORATION OF NEW YORK, (1933) A. C. 70.

Insurance Act (British Columbia), 1925, S. 24—Motor car—Insurance—Car driven by third party with owner's permission—

Third party risk—Indemnity in favour of owner—Availability of to drivers with owner's permission—Unsatisfied judgment against driver—Action against insurer for the same—Defence of original action by insurer—If estops insurer.

V sustained injuries owing to the motor car in which she was a passenger being involved in a collision with a motor car driven by *J. B.*, daughter of *R. B.* She (*J. B.*) was driving the car with her father's permission. *V* brought an action against *J. B.* for damages and obtained judgment. Execution was issued against *J. B.* but it was returned unsatisfied. *R. B.* had insured with the respondent company in respect of the car and they had taken over and conducted the defence of the action against *J. B.* The policy indemnified the insured against third party risks and the indemnity was also available to any person while riding in or operating the car with the permission of the insured. *V* claimed to recover the unsatisfied judgment debt from the Insurance Company on the grounds that within the meaning of S. 24 of the British Columbia Insurance Act, *J. B.* was the insured inasmuch as the indemnity was available to her and in any case the company was estopped as by conducting the defence of the suit, they recognised *J. B.* as the insured.

Held, *R. B.* never made the contract of insurance as *J. B.'s* agent. In any event unless it is established that the person who directed the insurance to be effected (*R. B.*) actually intended to cover that particular person (*J. B.*), no one can claim the benefit of the clause indemnifying any person operating with owner's permission. There was no evidence that *R. B.* had any intention to insure any one but himself. Even if he had so intended he had no authority from *J. B.* to insure on her behalf and at no time did she purport to adopt or ratify any insurance even if made on her behalf. She cannot therefore be deemed in law 'insured' under the policy. In any case provisions of S. 24 would not be satisfied by anything but a contract at law, enforceable directly against the insurers by the insured in her own name. As for estoppel, even assuming that by conducting the defence, they can be said to have admitted *J. B.* was the insured, that would not benefit *V*, because she was no party to such an estoppel.

N.B.—S. 24 runs as follows:—"Where a person incurs liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of such liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the

policy, but subject to the same equities as the insurer would have if the judgment had been satisfied."

CIPRIANI *v.* BURNETT, (1933) A. C. 83.

Trinidad—Contract—Sweepstake—Decision of Turf Club final —Reference to Turf Club if a condition precedent.

A sweepstake was organised and controlled by a Turf Club in Trinidad affiliated to Trinidad Turf Club. Though a contract for the sale of a lottery ticket was unlawful under Trinidad law, a sweepstake organised by Trinidad Turf Club or an association affiliated to it was excepted. Printed upon the ticket was a condition that in the event of any dispute arising with respect to any matters concerned in the drawing of the sweepstake or the awarding of the prizes the decision of the stewards of the Trinidad Turf Club thereon shall be accepted as final. Upon the drawing, another, other than the respondent, was declared the winner. The respondent claimed that if drawn properly, he should be the winner. He did not allege fraud or want of *bona fides* in the drawing but only objected to the manner of it.

Held, that the dispute between the parties was one connected with the drawing of the sweepstake, etc. and the respondent should have therefore gone to the stewards of the Trinidad Turf Club as the special tribunal constituted therefor, and cannot ask the Court to substitute its judgment for that of the stewards. It is not essential in order to exclude a right of action at law that the contract should in terms prescribe that the award of the specially constituted tribunal shall be a condition precedent to any legal proceedings.

A. E. CAMPBELL *v.* T. E. ROFE, (1933) A. C. 91.

Company—Issue of preference shares—Power to conferred by memorandum—No express power under the articles—Vesting of "business of the company" in the directors—Company if can issue preference shares—New South Wales Companies Act, 1899.

In the liquidator of a company incorporated in New South Wales, the liquidator sought to place *R* on the list of contributories in respect of 8,000 preference shares allotted to him as part of the original capital by the directors on *R's* application, which was in response to a prospectus issued by the directors offering such shares. *R* disputed the validity of the allotment. There was no resolution of the company creating preference shares. The memorandum of the company conferred the power on the company to issue preference shares but the articles did not expressly confer it.

But Art. 10 provided that " the shares shall be under the control of the directors who may allot or otherwise dispose of the same to such persons on such terms and conditions as it thinks fit . . . ", and Art. 117 vested 'the management of the business of the company' in the directors.

Held, that with regard to this issue the New South Wales Law is the same as the English Company Law of that period (1899). In the absence of any article clearly restricting the company in that respect, the company is entitled to exercise the powers expressly conferred on it by the memorandum. Art. 10 includes the power to control the character of the shares. If Art. 10 should be read as not conferring that right, then Art. 117 clearly delegated to the directors power to do everything that the company could do except where the authority of a general meeting of the company is expressly prescribed, and that such delegation would include power to issue preference shares.

OLIVER *v.* BIRMINGHAM AND MIDLAND MOTOR OMNIBUS COMPANY, LIMITED, (1933) 1 K. B. 35.

Negligence—Infant—Crossing road with grandfather—Negligence of grandfather—Negligence of omnibus driver—Right of infant to damages.

At about 10-30 P.M., an infant aged 4 years, was crossing a road with his grandfather, who was holding his hand. When in the middle of the road, the grandfather was startled by the defendant's omnibus, released the infant's hand and jumped aside. The child was struck by the omnibus and injured resulting in the loss of four fingers on the left hand. In an action by the infant for damages for injuries caused by the negligent driving of the omnibus, it was found that the driver was negligent in not giving proper warning but that the grandfather was guilty of contributory negligence.

Held, that the negligence of the grandfather was no bar to the infant's claim and that the infant cannot be so identified with his grandfather, who was in charge of him, as to make grandfather's negligence, his own.

Waite v. *North Eastern Railway Co., E.*, B and E. 719, must be regarded as overruled since the decision in *Mills* v. *Armstrong, The Bernina*, 13 A. C. 1, which expressly overrules *Thorogood* v. *Bryan*, 8 C. B. 115.

WINDRIDGE *v.* ANCIENT ORDER OF FORESTERS FRIENDLY SOCIETY, (1933) 1 K. B. 42.

Friendly Societies Act, 1896—S. 84 (c)—Making false return —What is—Making of a false document—If complete offence before sending the return to the Registrar.

The crucial date is not the date when the signatures on the return were affixed in accordance with the internal rules of the society. It may well be that at that time there was some offence committed and that it was a continuing offence. But the particular offence of making a false return is only complete when the return was sent to the Registrar. Before that, it is only a preparation of the return and not making a false return.

REKSTIN *v.* SEVERO SIBIRSKO GOSUDARSTVENNOE AKCIONERNOE OBSCHESTVO KOMSEVERPUTJ AND THE BANK FOR RUSSIAN TRADE, LIMITED, (1933) 1 K. B. 47.

Banker and customer—Order by customer to transfer his account to another—Account transferred—Garnishee order on bank after transfer but before notice of it to transferee—If valid.

R obtained a decree against *S* for 2500*l* in 1931. *S* had a balance at the Russian Bank of over 9000*l* at that time. Somedays after the decree. *S* wrote a letter to the bank to transfer the amount to his credit to a delegation of Soviet Socialist Republics, a body having diplomatic immunity from legal proceedings. This order of transfer was never revoked by *S* and no debt was owing from *S* to the delegation. Before the bank could serve the notice of transfer on the delegation, *R* served on the bank a garnishee order nisi. The Bank contended that as they had transferred the account, there was no balance to *S* account, on which the garnishee order could operate.

Held, that at the time when the garnishee order was served on the bank, the bank must be regarded as still holding the credit balance for the use of *S*, and there was a debt due from the bank to *S* as their customer. What was done by the bank was mere internal machinery for recording what was to be done by the bank on the instructions of *S* and that there could be no effective transfer of the customer's money until the proposed transferees had received notice of and had assented to the moneys in question being transferred to them. The bank's closing the account is not sufficient to bring to an end the relationship between the bank and *S*. The power to *S* to revoke the direction to transfer was still in existence when the garnishee order was served.

Roberts v. *Jones*, 61 L. J. Q. B. 523 distinguished and doubted.

Joachimson v. *Swiss Bank Corporation*, (1921) 3 K. B. 110 followed.

THE KING *v.* MIDDLESEX JUSTICES. EX PARTE BOND, (1933) 1 K. B. 72.

Res judicata—*Husband and wife—Petition by husband for divorce—Wife appearing but not defending—Decree absolute—*

Subsequent application by wife before Court of Summary jurisdiction for custody and maintenance of children—Return of application to be presented to Divorce Court—Filing of application before Divorce Court—Objection to jurisdiction of Divorce Court.

The parties were married in 1919 and a girl was born to them in the end of 1920 and another son in 1923. In 1930 the husband filed a petition for divorce. The wife entered an appearance but did not defend the suit and the decree was made absolute. Then the wife made, in 1931, an application to the justices under the Guardianship of Infants Acts, 1886 and 1925 for custody and maintenance of the children but the justices referred her to the Divorce Court. The wife then made the application before the Divorce Court and the Court ordered the application. The husband then sought to quash the order by a writ of certiorari.

Held, that whether regarded as a refusal by the justices to make an order, from which the wife did not appeal, or as a decision that the matter was one which would more conveniently be dealt with in the High Court, the order was ***res judicata*** and the Divorce Court has jurisdiction.

(Per Lord Hewart, C. J. and Avory, J.) that under S. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, the jurisdiction of the Divorce Court in these matters is an overriding jurisdiction and even if the justices made an order, there is nothing to prevent the husband from going to the Divorce Court the next day and asking for a contrary order.

Per *du Parcq, J.*—" I am not entirely satisfied that the jurisdiction of the Divorce Court is exclusive".

JOTTINGS AND CUTTINGS.

Lord Sankey on Legal Education.—On Tuesday of the present week the Lord Chancellor (Lord Sankey), representing the Crown as Visitor of Downing College, Cambridge, opened four new blocks of living rooms and a pair of wrought-iron gates, the gates having been presented by Professor Kenny's daughters as a memorial of their late father. In the course of a very thoughtful and considered speech Lord Sankey had a good deal to say about legal education. He had always taken a profound interest in the subject, as he felt that the higher the standard of legal education the greater the respect in which the lawyer would be held by the community. His Lordship referred to the Committee he had recently appointed to inquire into our methods of teaching the law, and he expressed the wish that, in a country where everyone was presumed to know the law, some elementary teaching of the subject should be given to

all who would be called upon to guide and direct the destinies of our Empire. He explained that he had appointed the Committee referred to principally because he considered that we were now at the turning point in the history of the Profession. The merely practical lawyer to-day was not all-sufficient. The Courts were now concerned with great social experiments, and law schools must aim at shaping the minds of their students to a critical understanding of the foundations of jurisprudence. The schools had therefore to teach the importance of both stability and change. If, as Mr. Robson suggested in his paper mentioned in a previous paragraph, a real "assault upon authority" is upon us and the principle of *stare decisis* is to be seriously called in question, it is obvious that the methods of legal education will require to be radically changed, and we look forward to the report of the Committee appointed by the Lord Chancellor for valuable suggestions on the subject.—*L. T.*, 1932, p. 243.

Judicial Resignations.—Rumours of judicial resignations are often rife at the end of the Trinity Term, but when the Courts reopen in October they prove as often to be false. This has always been so. It was told of Mr. Justice Wightman, who stayed in the Court of King's Bench beyond the usual span, that at the end of one summer term he announced to his brother judges that he intended to send in his resignation. When the judges reassembled for the Michaelmas term at Westminster Hall, he appeared again hale and hearty. "Why, brother Wightman," said Sir Alexander Cockburn, who was then Lord Chief Justice, "you told us that you were going to send in your resignation to the Lord Chancellor in August." "So I did," said the Judge, "but when I went home and told my wife she said, 'Why, William, what on earth shall we do with you messing about the house all day?' So I was obliged to come down to Court again."—*L. T.*, 1932, p. 250.

Reform of the House of Lords.—This question, which is again to the front by reason of the report of a joint committee of peers and members of the House of Commons, although it is obviously more a political than a legal one, has, nevertheless, an interest for lawyers in view of the House of Lords being the ultimate appellate tribunal for Great Britain and Northern Ireland. In the report to which reference has been made it is not contemplated that the judicial side of the House should be affected in any way, for among the various proposals for improving the *personnel* of the second chamber there is no suggestion that the Lords of Appeal in Ordinary should not continue to be members. A larger infusion of the

legal element might, indeed, be advocated with advantage, and it is permissible to deplore once again the shortsightedness of the Lords when, led by Lord Lyndhurst, they rejected the proposal of the ministry of the day for the creation of life peerages. We have, it is true, life peers now, but they are those only who have been so created under the Appellate Jurisdiction Acts to qualify for the judicial work of the House. In treating of this subject, Bagehot, one of the acutest critics of our political system, said in his classic work on "The English constitution," that in following the advice of Lord Lyndhurst, "the House of Lords rejected the inestimable, the unprecedented, opportunity of being tacitly reformed. Such a chance does not come twice. The life peers who would have been then introduced would have been the first men of the country. Lord Macaulay was to have been among the first; Lord Wensleydale (Baron Parke)—the most learned and not the least logical of our lawyers—to be the very first. Thirty to forty such men, added judiciously and sparingly as years went on would have given to the House of Lords the very element which as a criticising chamber it needs so much." It were well that Bagehot's weighty words were kept in mind in any proposal for the reform of the Upper House; and further, the advantages of a larger legal element quite distinct from the Lords of Appeal (who by the very fact that they are judges wisely abstain from the discussion of purely political subjects) should also be kept in view. This would, of course, involve, in carrying out Bagehot's idea, statutory power being given to create life peers apart altogether from that conferred by the Appellate Jurisdiction Acts.—*S. J.*, 1932 p. 805.

The "Tote" and the Law.—A morning newspaper is responsible for the statement that dozens of "Tote" clubs have recently been established, and dozens more are projected for London and its suburbs. The deduction may be made that the proprietors of these places deem they are within the law, and perhaps the further deduction that, until quite recently, there was no such assurance, otherwise so obvious a source of profit would surely have been long ago exploited. The newspaper suggests that these clubs have come about as the result of a decision to the effect that a "Tote" at a dog-race is not illegal. *No doubt Everett* v. *Shand*, (1931) 2 K. B. 522 (75 Sol. J 323) is indicated. In that case it was held that the "Tote" was not a contrivance for gaming at any game or pretended game of chance within S. 3 of the Vagrancy Act Amendment Act, 1873. The decision was in fact contrary to *Tollett* v. *Thomas*, (1871) L.R. 6 Q.B. 514. *The Divisional Court in Everett* v. *Shand could hardly have over-ruled that in Tollett* v. *Thomas*, but the judges in *Everett*

v. *Shand* held that the House of Lords had impliedly over-ruled the older case in *A.-G.* v. *Luncheon and Spor s Club Ltd.*, (1929) A. C. 400, although no cases are discussed in the judgment, nor was *Tollett* v. *Thomas* mentioned even in the Court of Appeal. The decision in *A.-G.* v. *Luncheon and Sports Club Ltd.*, was on the repealed betting duty, but it was to the effect that the respondents, who had established a "Tote" at the Stadium Club, making only the usual 10 per cent. deduction from the gross takings for expenses, etc., were not betting with the members. Lord Buckmaster appeared to think that the members were betting with each other (p. 405)- Lord Blanesburgh doubted it (p. 407). In *Everett* v. *Shand* both Lord Hewart and Humphreys, J., appeared to think that subscribers to a "Tote" betted *inter se*. In neither case, however, was such a conclusion necessary to the decision, and it conflicts with the very definite ruling of Lord Russell in *Ellesmere* v. *Wallace*, (1929) 2 Ch. 1 (see p. 55), that there cannot be more than two parties to a bet. The result appears to be that, in staking money on the "Tote" nobody is betting with anybody else and it is not a lottery, because the prize does not depend on mere chance, but on the choice of a horse. On this reasoning, anybody may lawfully set up a "Tote," and persons may resort thereto and even stake ready money, without infringing the law. If so, it is a fine illustration of the efficacy and coherency of our betting and gaming laws.—*S.J.*, 1931 p. 805.

Chief Justice Marshall.—During recent years one of the most pleasant features in the relations of Great Britain and the United States has been the frequency with which there has been interchange of visits between the distinguished lawyers of each nation. Lord Reading has just returned from his mission of representing the English Bar at the laying of the foundation stone of the new Supreme Court at Washington, and Lord Craigmyle, whom most of us remember better as the bearer of his former title, Lord Shaw, has completed at Baltimore, Washington, New York and Philadelphia his lectures on "John Marshall in Diplomacy and in Law"—a noble theme which he handled in language aglow with admiration, and worthy of the great jurist whose genius he was celebrating. John Marshall became Chief Justice of the Supreme Court of the United States in 1801, and held office till his death in 1835, and during those years it fell to him to secure for the Court over which he presided the decision, in controversies between the States and the central Government, of what is and what is not constitutional. As was said, "he found the Constitution paper and he made it power; he found it a skeleton and he clothed it with flesh and blood." So detached a writer as the late Lord Bryce waxed almost dithyrambic

in his admiration for Marshall and his interpretative work. Little wonder, then, that Americans, as he said, have been wont to regard him as a special gift of favouring Providence. Rarely does it fall to a Judge to leave an impress so indelible on the records of his time. How did he achieve this? The opportunities that came to him were doubtless unique, but the success of his work, as Lord Bryce also pointed out, was due to the fact that he never trod on purely political ground, and never indulged the temptation to theorise, but was content to follow out as a lawyer the consequences of legal principles, so that the Constitution seemed to rise under his hands to its full stature, standing revealed in the harmonious perfection of form which its great framers had designed.—*S.J.* 1932, p. 821.

Exhibits.—On several occasions in recent months Lord Justice Scrutton has called attention to a matter which he regards as one of importance, namely, the frequency with which documents put in evidence in the trial Court have failed to be available when an appeal comes on in the Court of Appeal. There appeared, he said, to be very much greater laxity in the matter of identifying what has been put in evidence in cases in the King's Bench Division than in those tried in the Chancery Division. No doubt it is difficult for those conducting a case in the Court of first instance to prophesy whether there will be an appeal, and therefore whether a particular document should be retained by the Associate or that he should at least ascertain where it may be obtained should an appeal be entered and heard, but there ought to be some more effective method of identifying the whereabouts of Exhibits than obtains at present. In Scotland the procedure in the matter of productions is more methodical than with us. There it appears to be the rule that documents intended to be founded on at the hearing require to be lodged in Court at a comparatively early stage of the litigation, and failure to comply with this rule may entail penalties on the defaulting party. In the case of an appeal being proceeded with copies of all the relevant documents put in at the trial have to be furnished for the appellate Court.—*S.J.* 1932, p. 822.

Hereditary Judgeships.—The appointment of Master Joseph Chitty to be Chief Master of the Chancery Division provides yet another example of legal heredity. His father, of course, was the celebrated Judge whose genial habit of introducing personal recollections into his judicial utterances earned him the nick-name of Mr. Justice Chatty. It was the same Judge who, when the ceiling of his Court crashed down one day, made the prompt comment:

"*Fiat Justitia, ruat caelum.*" The tendency of succession to breed success is very strongly marked at the Bar, as witness the families of Coleridge, Vaughan Williams, Finlay, Thesigar, Pollock, Lush, Channell and Phillimore. Most of these distinguished names constitute an adequate reply to Lord Justice Bowen's cruelly pointed pun, that while some judges take their positions "*per capita.*" others take "*per stirpes*". At the last call to the Bar, a Roche and a Luxmoore figured in the respective Call Lists of the Inns where their fathers are Masters of the Bench. The Coleridges, of course, almost founded a legal dynasty in rivalry to the Pollocks. Then there are the Russels of Killowen, father and son, who reaped between them the laurels of the King's Bench and of Chancery. Charles, J., and Macnaghten, J., also carry on the torch of paternal achievements.—*S.J.* 1932, p. 830.

No Change.—It seems passing strange that so many sexually minded young persons stood their ground in the Divorce Court after Lord Merrivale, P., had observed during a recent case: I notice a lot of young women who seem to take an indecent interest in these indecent discussions. . . . Their own sense of propriety must be their guide as to whether they stay or not." On a somewhat similar occasion, Mr. Justice Maule took a rather more indifferent view of the matter. A witness hesitated to go baldly into some indecent details in a Court crowded with eagerly expectant ladies. "Out with it," said the Judge. "The ladies don't mind and you need not be afraid of me." We are not so very different from our fathers (and, incidentally, our mothers and grandmothers) to judge by a description of the Divorce Court in a Newspaper of 1870. "Far too many ladies crowd the Court and listen unabashed to details the reporters can barely mention." The same article observes that "things are not what they seem in the Divorce Court. As a rule, the feminine petitioners are prettier than the respondents." The writer notes "a curled darling of a man dressed not wisely, but too swell." A co-respondent? No. A petitioner.—*S. J.* 1932, p. 830.

A "Poor Person".—Anther matter was the reappearance as a litigant of Mr. Bottomley, who at one time might have been a Cabinet Minister, and, when a rich man, appeared in person with great distinction and success in many a hard-fought action in the Courts. He was admitted as a poor person under the Poor Persons Rules to prosecute his appeal in *Bottomley* v. *F. W. Woolworth & Co., Ltd.*, The defendants made an unsuccessful application to the Court of Appeal for security for costs. Under the rules when once a

certificate has been granted to a litigant to appear as a poor person, he cannot be made liable for costs.

So Scrutton, L J. ., in delivering the unanimous judgment of the Court dismissed the application, indicating at the same time that the applicants were not wholly unprotected. They could move to " distransfer " the appellant under Order XVI, rule 29; and on such an application it was open to the Court to consider not only the question of means but also whether there were reasonable grounds for the appeal. But so long as the certificate stood the Court had, clearly, no power to make an order for security for costs.

So Mr. Bottomley was held to be entitled to all the advantages of a poor person litigant; probably the most distinguished person who has yet taken advantage of the Rules.—*L J.* 1932, p 442.

Napoleon and Codification —During the Napoleonic war and while, consequently, feeling in this country was intensely bitter against the head of the French nation, Thomas Campbell, the poet, at a literary dinner, startled the company by proposing the health of Napoleon. When the first marks of disapprobation had subsided, Campbell dissolved their anger into laughter by addding, " You must remember that he shot a bookseller!" Lawyers, and chiefly, of course, French members of the Profession, may well in imagination render tribute to the memory of Napoleon as their great law-giver. The project of unifying the innumerable varieties of local laws and customs which overspread the country suited his genius for order, and to the lawyer's mind nothing is so distasteful as disorder in the domain of law, and so the Code Napoleon, prepared by the commission he set up, has proved an inestimable boon to France. Naturally, the lapse of time has wrought changes in the life and thought of the country, and have necessitated changes in the Code, but this was inevitable and in no way detracts from the brilliancy displayed by those employed to carry out the work. During its progress Napoleon took a deep interest in the undertaking, and is said to have made many useful suggestions for its improvement. So proud was he of it that he declared that his name would live not by his military exploits but by the Code which bears his name. It can hardly be said that this prophecy has heen wholly realised. To many men the glamour of his battles completely overshadows the peaceful and more beneficent work of reducing the legal chaos into order and precision, but to the lawyer, who cares greatly for clarity and precision in law, he will ever be remembered as one of the greatest benefactors of his race. Truly he built well when he built up the Code Napoleon.—*L.T.* 1932, p. 510.

Lawyers as Witnesses.—In a case which was before the Court of Appeal recently attention was drawn to the evidence give by one of the witnesses who happened to be a member of the legal profession, and the members of the Bench noted with some amusement that a great part of what was said by the particular witness consisted of animated speeches instead of mere answers to the questions put to him. This circumstance led Lord Justice Scrutton to remark that legal witnesses were prone to this, instancing Lord Chancellor Selborne whom he had heard on one occasion giving evidence which consisted chiefly of irrelevant statements. This tendency has long been a matter of comment. Lerd Campbell remarked that most men who are accustomed to appear before the public, when examined in a court of justice, make the worst witnesses, and he recalled that Garrick, who in one case was called to explain what "free benefit" is, could only say that a "free benfit is a free benefit", an explanation which was certainly not illuminating. Erskine, afterwards the Chancellor, was another who did not shine when in the witness box. When called to give evidence on behalf of Arthur O'Connor on his trial for high treason, we find that again and again the Attorney-General intervened to protest against the speeches which Erskine would insist on giving irrespective of their relevancy; and Campbell adds that there was much tittering in Court "by this egotistical garrulity". As an advocate, Erskine was *facile princeps,* as a witness he "floundered," which he did "in honour of his hosts", as Jekyll wittily put it, when he stammered and hesitated in his speech at a dinner givan by the Fishmongers' Company.—*L.T.* 1932, p. 511.

Letting the Cat out—The discussion of the question of Cabinet secrecy recalls a story of Lord Robertson, the eminent Scottish Judge, which demonstrates that there are more methods than one of letting a cat out of a bag in the political world. During the constitutional crisis resulting from the budget of 1909, no one who had attended the final meeting of the Conservative party at Lansdowne House would say what had occurred. Lord Robertson *said* nothing compromising, but to a reporter of his acquaintance, he handed a sheet of foolscap with the remark, "I was just playing with a quill pen and I thought of you." The paper contained a list of names in the margin and a few sentences against each It was a complete minute of the decisive meeting.—*S.J.* 1932, p. 918.

Bar Council Report.—The council, having defined a "practising" barrister as "a member of the Bar who is entitled to practise and who holds himself out as ready to do so," held that "a practising barrister ought not to write for publication about cases in which he is or has been engaged." After he has ceased to

practise a barrister's literary activities are a matter for his own discretion, but he should, of course, bear in mind the confidences which have been reposed in him and the feelings of the Persons concerned in any cases he writes about.—*L.T.* 1933, p. 1.

Some other Bar Council Decisions.—Among other decisions of the Bar Council the following may be noted. On the not unimportant question of fees, the Council have held that a barrister ought not, "save in very exceptional circumstances," to allow reduction or elimination of an agreed fee after a case has been heard, and that the fact that a fee has been reduced on taxation is not such an exceptional circumstance. It having been reported to the Council that a County Court registrar had claimed a discretion under Order LIII, rule 22 of the County Court Rules to disallow counsel's fees where he did not consider the employment of counsel necessary, the counsel stated that they considered this decision wrong and hoped that an early opportunity would be taken in a suitable case to challenge the same. The words of the rule in question are exceedingly wide, but rule 1 of the same Order provides that all costs shall be taxed by the registrar "according to the scales." The scales deal with counsel's fees and with regard to them no specific discretion seems to be vested in the registrar "under the scales or rules." Among the other replies given by the Council, were rulings that a lady barrister who had practised under her maiden name might continue to do so after marriage, that an Officer in the Regular Army ought not to practise at the Bar concurrently with carrying out his military duties, though he might read in chambers, and that where a barrister held general retainers for two companies who afterwards became opposing parties in an action, the rights of the parties to his services depended on the dates of the general retainers and not on those of special retainers subsequently given. The question of retainers, it was stated, was under consideration by a special committee of the council.—*L.T.* 1933, p. 1.

Hilary Term.—That pregnant saying of the late Bishop Stubbs that "the roots of the present lie deep in the past" finds its exemplification all through our national history and very markedly in the law and legal organisation, although, immersed as most of us are in the daily round and common task of professional work, we rarely give heed to those aspects of our legal administration which call up old memories. Next week, what was formerly called Hilary Term, but which we now know as Hilary Sittings, commence. Why Hilary? Mention of that name recalls one of the Fathers of the Church, the great Bishop of Poitiers, often styled "Malleus Arianorum," on

account of the part he played in the Arian controversy of the fourth century, whose life work has been sketched with sympathy and admiration by the late Dean Farrar in his "Lives of the Fathers". But it may well be asked, how comes it that Hilary should have his name associated with one of the divisions of the English legal year? Here it is that Stubbs' saying receives fresh testimony to its truth. In those now far-off days when clerical influence in the domain of legal organisation was supreme, the clerics, who were the judges as well as the statesmen of the nation, decided that certain holy seasons should be exempted "from being profaned by the tumult of forensic litigations", and on what days the Courts might lawfully sit without wounding any ecclesiastical susceptibilities; and then it was that the practice arose by which each of the four divisions of the legal year was named from some festival or saint's day which preceded, or was coincident with, its commencement, and as Hilary's day falls on 13th January, the term commencing after the Christmas vacation was named in his honour. At one time, as the reader curious in such matters will find explained in "Blackstone," the terms played a great part in procedure, certain returns having to be made on particular days, and the Courts dealing with particular kinds of business on set days, but all this learning was swept away by the Judicature Act, 1873, which left the old names merely as serving to indicate the space of time comprised between the periods of vacation during which the Courts sit. A French writer in dealing with this subject made a careful calculation and found that after deducting Sundays and holidays our Courts sit about two hundred days in the year —a length of session which he seemed to regard as by no means excessive.—*S. J.* 1933, p. 1.

The Remuneration of the Junior Bar.—The Attorney-General (Sir Thomas Inskip, K. C.), in the course of his address at the Annual General Meeting of the Bar, held on Wednesday of last week, said, in effect, that most members would welcome the Council's recent decision on the thorny problem of the two-thirds rule. It had, Sir Thomas observed, never been in the interests of the Bar that rules should exist which prevented the services of its members from being given on terms which the lay client considered fair and reasonable, and he hoped that the modification just made in an at one time strict rule would help the public to understand that they were in no way penalised by the few rules laid down by the Profession for its own proper guidance. The rule in question, it may be noted, tended, and still tends, to keep down the fees of leaders as well as to raise those of members of the junior Bar, and its main purpose has been, not to victimise the public, but to aid the fair dis-

tribution of remuneration in accordance with the work done. Its recent modification is an additional reason for making the fees for the preliminary work of litigation a fairer recompense for the skilled, and, so far as the lay client is concerned, unnoted, labour devoted to anxious and responsible tasks by members of the junior Bar. Making telling speeches in court is not the principal means whereby junior counsel "travail for their livings", and, as the Attorney-General noted, the effect of their valuable preliminary and interlocutory services are often credited to their leaders. The two-thirds rule has had some slight effect in preventing the fee-books of counsel from bearing witness to this unfair attribution.—*L. T.* 1933, p. 61.

Counsels' Fees generally.—After noting that the modification of the two-thirds rule, referred to above, was not the only contribution of the Bar to keeping down the cost of litigation—the junior Bar having refrained from pressing their overwhelming case regarding remuneration for preliminary services—Sir Herbert Cunliffe, the new Chairman of the General Council, spoke of counsel's fees generally. The public, Sir Herbert thought, did not quite understand that the great mass of the work of the Bar was done for a moderate, and, in some cases, a quite inadequate reward. He referred to the popular delusion regarding counsel's remuneration, based on the heavy fees sometimes paid to fashionable counsel, and remarked that heavy fees were rare and that in some cases they were justified by the complexity and importance of the work done, though in others they were paid merely because the lay clients insisted on fashionable counsel being briefed. It was not fair to blame the counsel concerned, for often they had to put their fees up in order to keep their work manageable. Barristers generally would prefer to see a more equal distribution of financial rewards. The Bar, it cannot be too often reiterated, being an engrossing, dignified and attractive profession, has always attracted, and, even in these times, continues to attract, very many of the cleverest men in the country. Counsel with legal ability abound, and there are, as Sir Herbert Cunliffe said, plenty of able and experienced barristers willing to do sound and efficient work for reasonable remuneration. The sooner the public choose their counsel as sensibly as they select members of the other professions that serve them the better it will be for the Bar as a whole, whilst some few barristers may, justly or unjustly, consider that solicitors are not entirely blameless with regard to the unreasonable distribution of work. Certainly there is no other vocation in which conditions at all comparable prevail,

and this is, of course, due to some extent to the number of barristers who are congregated within a very small area. Some of the measures of decentralisation which have been suggested might do something to mend matters.—*L. T.* 1933, p. 61.

Judicial qualities.—In the speech biography of Viscount Buckmaster recently published under the title, "An Orator of Justice," there are several references by the noble lord to the qualities which should distinguish him who holds judicial office. In a finely-worded passage he pays tribute to that detached view which the great majority of those holding judicial posts take of the functions entrusted to them. As he says, "we may each of us repeat with pride the boast that 'there is no individual whose smile or frown, there is no Government, Liberal, Conservative, or Labour whose favour or disfavour can start the pulse of one of our Judges on the Bench, or stir by even one hair's breadth, the even equipoise of the scales of justice.' That has been obtained after centuries of effort and struggle, because any one who reads our history knows it was not always so." Elsewhere in the volume we have an attack on the system, formerly not unknown, to make promotion to the Bench dependent to some extent on political activity for the party from which promotion was looked for. "Judicial offices," said Lord (then Mr.) Buckmaster, "from the highest to the lowest have been tossed to this man and that man as a reward for party services, or, still worse, for personal favour. It ought to be regarded as an improper thing for a Government to appoint a man who is notoriously unfit, I do not say by reason of his character, but by reason of his disposition or temper or lack of learning and experience, to discharge the duties he is called upon to discharge." Observations such as these prompt the enquiry: What are the qualifications essential for the efficient performance of the duties which fall to the members of the Bench? A former Lord Chancellor was alleged to have said that in his choice of a new Judge he was primarily moved to select a gentleman and if he knew some law so much the better. Character was thus put first, and perhaps rightly so, but surely rather more professional knowledge than "some law" is desirable. Bacon, it will be remembered, insisted that Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Further, that patience and gravity of hearing is an essential part of justice, an overspeaking Judge being no well-tuned cymbal.—*L. T.* 1933, p. 69.

BOOK REVIEWS.

THE NEGOTIABLE INSTRUMENTS ACT, by K.Bhashyam, B.A.,B.L. and K. Y. Adiga, B.A., B.L., Advocates, High Court, Madras. 5th Edition. Published by The Eastern Law House, Calcutta. Price Rs. 12.

It is with pleasure that we welcome the fifth edition of this well-known work. It is no exaggeration to say that ever since the appearance of its first edition, it has been recognised as the leading text-book on the subject of Negotiable Instruments and that every succeeding edition has added to its usefulness and lawyers and judges have, for nearly a quarter of a century, turned to its pages for light and guidance. This is not a little due to the fact that the authors have not always contented themselves with giving the effect of the decisions but suggested solutions of unsettled questions and expressed their own opinions wherever they are called for. To refer to only one instance in the present edition, the learned authors have doubted the correctness of the recent decision of Krishnan Pandalai, J., in 36 L. W. 29 (N. R. C.) and seem to prefer the older decision in *Muthu* v. *Velu*[1] on the question of the negotiability of a discharged note or bill and have given their reasons for the opinion at page 274 of the book. But at the time when they wrote the book the full report of the latest case might have not been available to them. The case has since been fully reported in *Venkanna* v. *Subbayya*[2] where the learned Judge has reviewed and discussed all the previous cases and authorities. It is perhaps an interesting speculation whether the discussion of the question in the case has led the authors to change their opinion. We wish to draw special attention to the portion of the work relating to the banker's rights and liabilities in respect of negotiable instruments on which recently there have been several pronouncements by the highest courts in England. The learned authors have collected them and given their effect and tried to evolve working principles out of them. We have no doubt that the work will meet the highest expectations of the bench and the bar.

THE LAW OF MADRAS LOCAL BOARDS, by C. V. Naidu, Advocate, Madras High Court. Part II. Price Rs. 5.

This volume is taken with the commentaries on the Indian Elections Offences and Inquiries Act and the Election Rules framed under the Madras Local Boards Act etc. The law is brought down by the author to the 15th November, 1932. As "elections have

1. (1916) 2 M. W. N. 107.
2. (1932) 64 M. L. J. 241.

come to stay in our country and they have their virtues and vices" and the defeated candidates are not always disinclined to attack the election of the successful candidates, even if they cannot thereby secure the seats themselves, this book is an indispensable guide to the candidates, their agents and advisers and also to judges who have to adjudicate on such questions. We have no doubt that this work will be largely used by all those having to do with elections and election offences in the Local Boards.

THE CODE OF CIVIL PROCEDURE, by Messrs. V. V. Chitaley and K. N. Annaji Rao. Vols. I and II. (Vol. III in the Press.) 1933 Edition. Published by The All India Reporter, Ltd., Nagpur. Pre-publication price Rs. 24. Post Publication price Rs. 28.

Much as one may regret it, there is no denying the fact emphasised in the Preface that the judicial decisions on the Law of Procedure occupy a considerable portion of our law reports and digests. The fact that the authors have taken two volumes of over 1,000 pages each to reach O. 31, Civil Procedure Code, shows the volume of case-law on this subject. The first volume deals with the sections and the second with Orders 1 to 30. The authors have taken great pains to compile all the cases under each section under appropriate headings for the benefit of the legal profession. The system followed, namely, to write a running commentary stating the general principles and relegating the list of cases to footnotes, with a small note in brackets about the point decided in each case, is convenient and calculated to give to the reader the clear law on a point in a short space. We congratulate the authors on the successful way in which they have given a clear summary of the principles deducible from the case-law. In cases of conflict of opinion the authors claim to have discussed the questions on first principles and arrived at definite conclusions. The claim is justifiable but we wish the discussion on principles is more frequent. Amendments in the rules by the various High Courts are set out under each rule and that enables one to better understand the law of the province. The book is only moderately priced at Rs. 24 pre-publication and Rs. 28 post publication. This book is a useful addition to the books on the subject. We have great pleasure in recommending this book to the profession as at the same time giving the law on the point and serving as a ready referencer.
