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LIMITATION ACT XV OF 1877, SCHEDULE II, ARTICLES 91 TO 93.

In our last number we attempted to find out the sense in which the expression 'to set aside' was used in Art. 91 of the Limitation Act. We shall now discuss the more important question whether that article and Arts. 92 and 93 govern only suits, where the sole relief sought is the cancellation or setting aside of the particular instrument in question, or a declaration that it is not a genuine instrument and has no operation as against the plaintiff, or whether they apply also to suits for possession of property, the plaintiff's rights in which would be barred or otherwise affected if the instrument were genuine or valid and legal; and here, as in our endeavour to understand the meaning of the phraseology of the statute, we shall seek help in other articles of the Act. At the outset we observe that the literal language of the articles does not apply to a suit for possession; on the other hand, Art. 46 provides distinctly and separately for a suit 'by a party bound by such award (*i. e.* award referred to in Art. 45) to recover any property comprised therein' while Art. 45 provides for a suit 'to contest' an award under certain regulations. This is strong proof that the legislature regarded a suit to contest an adjudication and a suit for possession of property affected by the adjudication as distinct classes of suits. Article 47 again lays down the period of limitation for a suit to *recover possession* of property comprised in an order of a criminal court respecting the possession of property. If the expression 'setting aside' were intended to cover any relief following on the setting aside, there is no reason why the language of Arts. 46 and 47 should have been made different from that of other Articles relating to actions to get rid of the effect of summary orders. Now the question is, whether there is any reason for giving to

these Articles a larger effect than the natural meaning of the words requires and holding that where the period prescribed by them has expired, a suit for possession of the property to which they relate will also be barred? Such a view has been maintained in several decisions and the reasoning by which it is supported may be briefly stated as follows. The property in question cannot be recovered unless the instrument be set aside. The Act provides a period of three years within which a suit should be brought to set aside the instrument. Therefore a suit for the recovery of the property cannot be instituted after the expiration of the same period. In *Janki Kunwar* v. *Ajit Singh*, I. L. R, 15 C, 58, the Privy Council state the reasoning thus, "The immovable property could not have been recovered until the deed of sale had been set aside, and it was necessary to bring a suit to set aside the deed upon payment of what had been advanced." A considerable number of cases lays down on the contrary that Arts. 91 to 93 and similar Articles of that kind refer only to suits where no other relief than the setting aside or cancellation of the instrument or a declaration is prayed for, and that the object was to provide a short period of limitation for actions where extraordinary equitable relief of a discretionary nature such as cancellation, declaration, &c., is sought. The decision in *Janki Kunwar* v. *Ajit Singh* as a pronouncement of the highest tribunal, so far as this country is concerned, would no doubt be conclusive, if it could be regarded as laying down a definite rule capable of easy application in practice. But as their lordships only ruled that where a document affecting a person's title to real property has to be set aside as a preliminary to recovering possession of the property itself, he cannot by omitting to set it aside be permitted to obtain possession of the property by a suit instituted after an action to set aside the document would be barred, and as we are not told when, in their lordships' opinion, the document should be set aside before a suit for possession can be maintained, the question seems still to be open to further argument. For ourselves we are not able to find any authority for holding that as a rule where the defendant in a suit for possession of property may set up some instrument in answer to the plaintiffs' claim, the plaintiff must obtain a decree setting it aside before he can recover possession. If the instrument is one executed by the plaintiff himself, it may either be absolutely void owing to legal incapacity on the part of the

plaintiff, or want of consideration, or of *concensus ad idem* or illegality, &c., or it may be merely voidable at his instance, as where his consent to the instrument was obtained by coercion or fraud, or undue influence, or misrepresentation, or for some other reason. In the latter case, the plaintiff, if he is not willing to be bound by the instrument, must repudiate it within a reasonable time, on failure of which he loses the right to question it, *Edwards* v. *Carter*, 1893, 1 A. C, 360. There is no particular form in which the repudiation has to be made; it is sufficient if the intention not to be bound by the contract be manifested in some way or other; if the other party to the contract do not accept the repudiation but insists that it is binding, even in such cases, the party avoiding is not bound to do anything more. If he was entitled to repudiate and he carried out his intention in some unmistakable manner, the contract would in consequence of his avoidance cease to bind both sides, and could no longer be enforced by his opponents. Such was the common law of England, and so far as we are aware, it is adopted by the Contract Act, see S. 19. The same rule is equally applicable where the transaction in question is not a mere contract, but a conveyance or grant which is necessarily preceded by, and the result of, a contract, as a lease or sale. If therefore A is fraudulently induced by B to make a lease to B, A may avoid the lease, and if he does so, B can no longer enforce it against him, and they would be entitled to be restored to the position in which they were prior to the lease. We are aware of no provision in any of the Indian statutes of substantive law showing that the law in this respect differs at all from the law of England. Now what is the result? If in consequence of the lease, A had put B in possession of the demised premises, he would by his repudiation become entitled to recover possession.

The common law did not allow A to take any proceedings merely to have it decided that he was entitled to avoid the lease, and that his repudiation put an end to it. If in consequence of its becoming inoperative, he had any rights which he wished to enforce through the courts he might do so, but if there was none, he could not ask the courts merely to adjudicate on the circumstances under which the lease was made, and his right to avoid it. This was often a great hardship. The adversary might seek to enforce the lease long after its date, when all evidence of the fraud by

which he secured it would be effectually effaced, and A might in consequence be deprived of the fruits of his repudiation. In such cases, the courts of equity interfered to remove the grievance by enabling A to take proceedings in the nature of '*quia timet*' or *declarator*, whereby he could prove the fraud and get a declaration of the invalidity of the lease. If the lease or other transaction was evidenced by a deed or a written instrument, the court of equity further caused the defendant to deliver it up and ordered it to be cancelled. This is an important branch of the concurrent jurisdiction of the courts of equity. The Indian courts from the first exercised both common law and equitable jurisdiction, and declaratory decrees as well as decrees directing cancellation of instruments were always passed; and the former were regulated and controlled by S. 15 of Act VIII of 1859, and subsequently the Specific Relief Act codified the whole law as to such extraordinary reliefs. Sections 39 to 42 deal with the cancellation of instruments and declaratory decrees. The English law provides no limitation for such classes of suits, but the courts of equity refused to grant such discretionary remedies if the plaintiff did not move the court with promptness and diligence. Laches on the plaintiff's part was often a sufficient answer to such actions; moreover as equity followed the law, the equitable remedy could not be granted after the legal remedy was lost. Thus in the illustration, A could recover from B the premises leased in a court of law just as if B were a trespasser; and the court of equity could order the cancellation of the lease if it were written, or make a declaration of its invalidity at any time within the period before which an action to recover the property should be instituted, but not afterwards; and the court of equity could moreover refuse to interfere if A did not seek its aid with due diligence. There is no doubt that the substantive rights in the case of a voidable instrument are the same here as in England. The court of equity gradually extended its protection not only to cases of voidable but also to void agreements and conveyances. The ground of interference was the same. The conveyance or the agreement was calculated to throw a cloud upon the plaintiff's title and might injuriously affect him in many ways, as for instance, by making it impossible for him to dispose of it advantageously to other persons; or the evidence of the circumstances rendering it void might be lost; or if it was a negotiable instrument the defendant

might negotiate it and so on. In all such cases, the court made a declaration that the agreement or conveyance was void and inoperative; and after a time of doubt and wavering decreed also the cancellation of any instrument evidencing it; and with regard to them as to voidable transactions, no express provision is made by the English statutes of limitation. In India too, there was no special rule of limitation laid down for suits for such discretionary reliefs prior to Act IX of 1871; and if we may be permitted to say so. the statute of 1859 was scientifically correct in not enacting any rule on the point. The right to such reliefs is in the main an accessory to other remedial rights which the invalidity, or nullity of the agreement or conveyance gives to the plaintiff, or it is intended merely to enable him to resist the attempts of the adversary to enforce an unenforceable transaction. Such right therefore should last as long as the principal right to which it is accessory lasts, or as long as the adversary may attempt to enforce any rights under the invalid transaction. We would here repeat once more that the substantive law does not require that a person who wishes to aviod a transaction, or against whom a transaction which is a legal nullity may be set up, should get the adjudication of a court of justice that it is invalid. The expression in some proper and distinct manner of his own intention not to be bound by it is sufficient. The invocation of the assistance of the court is left to his choice. It is a remedy which is entirely in the discretion of the court to grant or not; and it is intended only for the greater protection and security of the other rights of the plaintiff. It is therefore proper that there should be no limitation in the case of such actions, save such as may apply to the principal right concerned. But the Limitation Act of 1871 adopted a different policy as well as the Act of 1877. There is no suit, whatever its nature may be, which is beyond the pale of limitation, and the pervading spirit of the statute is an anxiety to compel diligence by prescribing as short periods of limitation as possible. It has therefore prescribed a period of three years for such suits without reference to the limitation prescribed for enforcing the principal rights that may be concerned in each case, probably on the ground that parties ought to be diligent in asking for such extraordinary and discretionary reliefs. But is there anything in the statute to show that it was intended to curtail the period for the enforcement of

the principal right also? Is there anything to show that a suit for possession (as in our illustration) should not be permitted to be instituted after a suit merely for setting aside the instrument would be barred? We think not. On the other hand Arts. 46 and 47 show that the legislature would have employed more precise language if it intended to do so. But as we have already pointed out, the conclusion that such was the intention of the legislature does not generally proceed on the construction of the words in question, but upon a supposed rule of substantive law that before recovering possession, the plaintiff is bound to set aside the instrument, or rather to obtain the adjudication of a court cancelling it or declaring it invalid. We have attempted to show that there is no warrant either in the statutes, or in the principles of jurisprudence for this position. A substantive right may depend on other substantive rights, but we are not aware that it could be conditional on an adjudication by the courts that such other rights exist. The right to recover possession may depend on the plaintiff having the right to avoid, and his exercising it, or upon certain facts proving the nullity of the transaction in question, but it cannot be conditional on his first getting *the courts to say* that he was entitled to avoid, or that the facts rendering the transaction a nullity existed in reality. It follows then that the reasoning on which the Arts. 91 to 93, or 91 alone as in some cases, are construed so as to bar a suit for the recovery of the property concerned is very faulty. Moreover, all these Articles refer only to cases where a transaction is reduced to a written instrument. If there be a rule of law that a voidable sale should be pronounced not binding, or a void sale should be declared legally null, before, say, the plaintiff could recover possession of the property, why is not a short period of limitation similarly provided for obtaining such an adjudication in cases where there is no instrument evidencing the sale? Take for instance, a sale of immovable property for a price of less than 100 Rs. where there is no document embodying the transaction. If the vendor's consent has been procured by fraud and he consequently repudiates it, Art. 91 will not apply to the case. If he is bound to set aside the sale by means of a suit, he would have six years within which to do so under Art. 120 of the Limitation Act. If he is not bound to do so, why should he be bound to set aside a sale where it is evidenced by an instrument? If he is bound to set it aside why should he have

a longer period within which to do so than in the case of a written sale? Again, suppose a vendor who has been fraudulently induced to sell, has not parted with the possession of the property. Is he still bound to bring a suit to pronounce the sale not binding on him within three years? And if he does not do so, would he afterwards in a suit for possession by the vendee be debarred from contending that the sale was voidable and that he had repudiated it in exercise of his right to do so? Apparently according to *Jugaldas* v. *Ambashankar*, I. L. R, 12 B, 501, he would be estopped from raising such a contention. This means that in all cases where a person has entered into any transaction, he must file a suit in order to avoid or to treat it as void and the purchaser would acquire a valid title to the land unless he does so, whilst according to S. 28 of the Limitation Act, title to immovable property is not lost unless there has been *adverse possession for* more than twelve years. The courts have however seldom gone to this length, (see the judgment of *Muthusami Aiyar, J.* in *Sundaram* v. *Sithammal*, I. L. R, 16 M, at p. 315,) though we admit it is only the logical conclusion of the opinion put forward in several cases. We cannot but think that the error on the part of the courts is in large measure due to the unscientific change in the legislation of 1871. It is wrong in principle to provide a special and shorter period of limitation for suits to set aside instruments or to declare them forgeries, while the rights to property to which those instruments relate survive. This led to the enunciation of the strange doctrine that when a person enters into any transaction in relation to property, he cannot avoid it where it is voidable without instituting a suit for the purpose, and repudiation of the transaction substantially means getting the adjudication of a court that he is entitled to repudiate it. Another source of the error though we do not see much evidence of it in the decisions on the point is probably the mistaken analogy derived from other articles where the expression 'to set aside' is used. Where there is a summary adjudication by a court or an executive officer invested with authority to make the adjudication, and the decision is made conclusive by law, subject to the right of the party affected by it to set it aside (Arts. 13, 14), it follows that the consequential relief obtained by an adversary in pursuance of the summary order is a necessary result of the adjudication itself, and the person who has lost possession of the property in consequence of it, must necessarily set aside the summary order

before he can recover the possession he lost in execution of it. This is a matter of substantive law, not of the construction of Arts. 13 and 14. The distinction between these cases and those falling under Arts. 91 to 93 is this. A summary decision can be set aside only by a court, and no act of a party affected by it can deprive it of the effect which it has in law. On the other hand, an instrument executed by a person or a transaction entered into by him, if it is voidable, ceases to be operative when *he* has repudiated it; the repudiation is not an act to be done by the court, but by the party himself and it requires the intervention of no one else. See *Shivaji Yesji Chawan* v. *The Collector of Ratnagiri*, I. L. R, 11 B, 429. Similar observations will apply to Art. 12. Sales held by judicial or executive officers have the effect of transferring the ownership of the property sold unless and until they are *set aside*, (only the constituted tribunals have power to deprive them of their effect in law), and one who has lost his possession in consequence of such a sale cannot therefore recover it without setting aside the sale by a suit. In all these cases, the expression *set aside* does not mean *recover possession* or anything else that the words do not import, but the person affected is, as a matter of substantive law, bound to set aside the decision or the sale before recovering possession. While these Articles may legitimately be referred to, in order to understand the meaning of the phrase 'set aside,' the rules of substantive law applicable to them bear no real analogy to those governing the class of cases to which Arts. 91 to 93 are applicable. We have till now, to avoid confusion, confined ourselves to cases where the instrument in question was executed by the plaintiff. Of course the same rule will apply where it was executed by his predecessor in interest. But a few words must be said in reference to cases where the document is executed by a person in the position of the manager of a family, a guardian, an agent or other person whose acts, under certain circumstances only, will bind the plaintiff. With regard to these, the decisions have on the whole been to the effect that Art. 91 will not prevent the plaintiff from bringing a suit to recover the property affected after the expiration of the period mentioned therein. We have already referred to some of the decisions in which it is held that one is not bound to 'set aside' an instrument executed by a person standing in any of the relationships referred to, as the instrument would in law be void where it is not within the

powers of the person executing it; and no attempt has been made to argue that, as a suit to declare their invalidity, would be barred under Art. 120 after the expiration of six years, a suit to recover possession would also be barred after the same period.

Having thus examined at some length the argument on which the opinion that Art. 91 will bar after the expiration of the period provided by it all suits for the recovery of the property to which the instrument relates and not merely suits designed for the single object of setting aside or cancelling the instrument, it is not necessary to examine the case-law on the matter in detail. The decisions on the subject are so conflicting that we have considered it more useful to discuss the question on the principles on which it must rest than to examine the opinions of the judges who have had to consider this and other sections. The general effect of the cases may be briefly summarised thus. A number of cases lays down that where the instrument is one executed or alleged to be executed by the plaintiff himself or his predecessor or privy in interest, the plaintiff cannot succeed in recovering the property without setting it aside, and Art. 91, 92 or 93 bars a suit for recovery of the property after the expiration of the three years. A good number of other cases holds that Art. 91 is not intended to cut down the period of limitation for suits for recovery in any case. *Stuart, C.J.* and *Straight, J.* took opposite views of the meaning of the section in *Hezari Lal* v. *Jadaun Singh*, I. L. R, 5 A, 76. The suit was ostensibly one for possession of certain property and avoidance of a deed of gift executed more than three years before the suit by the person from whom plaintiff got the property by inheritance. Fraud and coercion were the grounds on which the right to avoid the instrument was put forward. *Straight, J.* was of opinion that Art. 91 did not apply to such a case. He said, "In my opinion Art. 91 is intended to apply to suits of the kind mentioned in S. 39 of the Specific Relief Act, and to cases where a plaintiff seeks to have cancelled or set aside some instrument he has been induced by misrepresentation, concealment of facts, or other means of a like kind to enter into, or where the cancelment or setting aside of an instrument is the only relief asked." *Stuart, C.J.*, in dissenting from this view observed, "But it is the defendant's deed of gift, and not any flaw in the plaintiff's hereditary title, or the action of any third party under any kind of adverse contract, which stands in the plaintiff's

way; and should it be set aside, the necessary consequence would be the recovery by the plaintiffs of the property comprised in the deed of gift . . . . . The sole and only question therefore, so far as relates to the plea of limitation, is simply and only whether this deed was a valid and effectual gift of the property comprised in it to the defendant Jadaun Singh, and as such the deliberate act and deed of Narain Singh, the donor, and no examination of the plaintiff's right . . . . . is in any way involved. And that in my opinion, is a question or state of things provided for by Art. 91 of Sch. II of Act XV of 1877 and not by Art. 144 of the same schedule." The learned judge distinguishes *Sikher Chund* v. *Dulputty Singh*, I.L.R, 5 C, 363 on the ground that there was no question of fraud or coercion or other circumstances relating to the execution of the document in that case, but the point was whether the instrument executed by the manager of a Hindu family was binding on the family or not. We take the learned judge to mean that in *Sikher Chund* v. *Dulputty Singh*, the instrument was void as against the family but in the case before him the instrument was binding on the plaintiff unless fraud or coercion could be proved. In *Sobha Pandey* v. *Sahodra Bibi*, I. L. R, 5 A, 322, *Oldfield* and *Brodhurst*, *J.J.* observed that the suits to which Art. 91 applies are "suits of the nature of those referred to in S. 39 of the Specific Relief Act." The instrument in the particular case was not executed by the plaintiff but by a third person, and they held that the suit was substantially only for a declaration that the instrument did not affect his rights to the property, but the dictum regarding the class of suits covered by the Article is important. *Straight*, *J's* view was followed by *Oldfield* and *Tyrrell*, *J.J.* in *Uma Shankar* v. *Kalka Prasad*, I. L. R, 6 A, 75. Where the purchasers of property sold in execution of a decree sought to recover property from a mortgagee of the judgment-debtor on the ground that the mortgage was collusive and fraudulent, Art. 91 was held not to apply. The plaintiff no doubt claimed adversely to the judgment-debtor charging him with colluding with the mortgagee, and his case therefore was that the instrument as against him was void, and not merely voidable, but the decision did not proceed on this narrow ground. The learned judges observed, "The avoidance of the mortgage does not necessarily involve the cancellation of the instrument. *In any case the suit is one for the possession of immovable property*, and is governed by the law of limitation applicable

to such suits, which is not affected by the incidental question being raised whether the claim to possession can be defeated by the existence of a mortgage in favour of the defendants." This was adopted and followed by *Straight* and *Tyrrell, J.J.* in *Ikram Singh* v. *Intizam Ali*, I. L. R, 6 A, 260. On the other hand the contrary view was adopted in *Bhawani Prasad Singh* v. *Bisheshar Prasad Misr*, I. L. R, 3 A, 846 by *Straight* and *Duthoit, J.J*, and in *Hasan Ali* v. *Nazo*, I. L. R, 11 A, 456, *Straight* and *Brodhurst, J.J.* held that the heir of a Mahomedan who had made a gift of certain property could not recover the property more than three years after the donee had taken possession on the ground of fraud in the execution of the deed of gift. Their lordships strongly relied on a Privy Council ruling, *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri*, I. L. R, 13 C, 308 and observed, "In the present case it seems equally clear to me that the plaintiffs cannot dislodge the defendants from the property, of which they are admittedly in possession without clearing out of their way the deed of gift of October, 1875, and that merely because they choose to call the suit one for possession of immovable property, they cannot escape the obligation to do so." It is at the least very doubtful whether the Privy Council ruling really supports the view adopted by the Allahabad Court. In that case the reversioners of a Hindu sued to recover possession of certain property after her death. The property was in the possession of a person adopted by the widow, who had put him into possession more than twelve years before the suit. The Privy Council held that under Art. 129 of Act IX of 1871, relating to a suit to set aside an adoption, the suit was barred after twelve years from the date of the adoption. Their lordships proceeded upon the construction of the words 'to set aside an adoption' They considered the phrase to be wanting in precision, but from the reported cases in which it was used, they came to the conclusion that it was "a short and familiar way of describing a class of suits well known to practitioners, and spoken of in those terms with accuracy enough for all ordinary purposes" and that it had been "for many years employed in the ordinary language of Indian lawyers to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature." Their lordships then draw attention to the distinction between the

language of the Act IX of 1871 on the point and that of Art. 118 in Act XV of 1877 "to obtain a *declaration* that an alleged adoption is invalid or never in fact took place." In a later case which was also governed by the Act of 1871, their lordships threw out a strong observation that even under the later Act, the result would be the same. They said "it seems to be more than doubtful, if these were the words of the statute applicable to the case, the plaintiff would thereby take any advantage," *Mohesh Narain Munshi* v. *Taruck Nath Moitra*, I. L. R, 20 C, 487. We think it very doubtful whether the Privy Council could be said to have laid down any general principle capable of being applied to the construction of Art. 91. Their lordships proceeded mainly upon what they considered was the accepted meaning of the phrase 'to set aside an adoption' and they further considered that the Art. 118 of the present Act is substantially tantamount to the same thing. With the greatest respect we may be permitted to state that there is a strong body of professional opinion in this country, that the expression in question has not been understood by lawyers generally in the sense which the Privy Council put upon it. But whatever that may be, we cannot with the Allahabad Court accept these decisions as laying down any general rule, that where a document or transaction, if true and valid, would bar the right of a plaintiff to recover property, a suit for possession must be brought within the same time as a suit to set it aside, or to obtain a declaration that it is inoperative as against him. It will be noted that the Privy Council ruling related to acts not done by the plaintiff or his privy in interest, but by a stranger; and that if the rule deduced by the Allahabad Court were sanctioned by their lordships' rulings, there would be no distinction between a transaction or a document that is void or a document that is a forgery, and a transaction or a document that is binding on the plaintiff unless repudiated; but in all cases where the defendant sets up any transaction, that if true and valid would be an answer to the plaintiff's claim, the plaintiff must bring a suit for possession within the period applicable to an action for declaration or cancellation, that is, within six or three years as the case may be. We think the decisions in question do not warrant such an interpretation. A more important decision is that in *Janki Kunwar* v. *Ajit Singh*, I. L. R, 15 C, 58 already referred to. There the instrument was one executed by the substantial plaintiff in the

case; and it was not void, but only voidable. The utmost that the case could be said to decide is that where a document has to be set aside by the plaintiff, a suit for possession would be barred after the period provided by Art. 91. But as already observed, their lordships do not say in what cases a document should be set aside; and anyhow it cannot be necessary to do so, where it is void as against the plaintiff.

In the Calcutta High Court also it has been held though not perhaps directly decided that if an instrument or transaction be not void as against the plaintiff, but is binding on him, unless he avoid it, Art. 91 will bar a suit instituted after the time provided by it. In *Sikher Chund* v. *Dulputty Singh*, I. L. R, 5 C, 363 where the suit was by a minor and the document executed by the guardian and treated as void, *Garth, C.J.* and *Prinsep, J.* observed, "if the guardian has exceeded his authority, the instrument is not the act of the minor, and it would not be incumbent on him to sue to set aside as in the case of one who has himself executed an instrument, the validity of which he impugns." We do not understand the learned judges to lay down, that Art. 91 will apply to all cases where a man impugns his own instrument including those where it may be absolutely void owing to illegality, want of consideration, or other circumstance, but only where it is voidable. This is the view taken in *Raghubar Dyal Sahu* v. *Bhikya Lal Misser*, I. L. R, 12 C, 69. There too, the point did not arise directly for adjudication, but the court, *Field* and *O'Kinealy, J.J.* observed, "Articles 91, 92 and 118 are particularly concerned with instruments or transactions which, if allowed to stand unchallenged once they became known, might become important evidence against the persons, whose rights they purported to affect. If those persons omit to challenge them within the shorter period of limitation allowed for doing so, they will not be precluded from having the longer period of limitation allowed by the law for the recovery of immovable property; but in this latter case they will probably have to show that the instrument or transaction which they neglected to challenge, is null and void so far as they and their interests are concerned." In an older case however *Trilochun* v. *Nobokuishore Guttuck*, 2 C. L. R, 10, it was held that the Article will apply only where 'setting aside' the instrument is the only object of the suit. The suit was for possession, and the

ground on which the document set up in defence was impeached was that it was vitiated by fraud, so that it was only voidable and not null *ab initio*. It was found however by the court that the document was also false.

In Bombay too, both views have prevailed. The point received the attention of *West, J.* and *Nanabhai Haridas, J.* in *Boo Jinatboo* v. *Sha Nagar Valab Kanji*, I. L. R, 11 B, 78. The object of the suit was to recover possession of certain lands, notwithstanding certain bonds executed in relation to them by the plaintiff. Both fraud and want of consideration, which latter would make the transaction an absolute nullity, were alleged. The judgment proceeded on the broad ground that Art. 92, Act IX of 1871 (corresponding to Art. 91 of the present Act) applies only where "a bare declaration is asked regarding the cancellation of the bonds." They said, "We do not think that Art. 92 of Act IX of 1871 applies to a case like the present, in which the remedy sought is the recovery of land alleged to be wrongly withheld from the plaintiffs. Effect can be given to the Article in question by applying it to the well known class of cases of outstanding intruments by which, should they pass into the hands of an innocent holder for value, such holder would have a right to recover on them. Should the person who has given any such instrument leave it outstanding for any length of time, he would enable the holder to raise money, perhaps, on a false show of wealth. Here the defendants hold possession and use the bonds taken by them to guard it. The object of the suit is to deprive them of that possession and recover it for the plaintiffs." The learned judges were of opinion that *Dakhina Mohun's* case did not affect the question. We have already seen that in the later case of *Jugaldas* v. *Ambashankar*, I. L. R, 12 B, 501, the contrary view was held in relation to documents which are voidable, even to the extent of preventing the privy of the executant from setting up in defence that the document was invalid for fraud. It is possible, that the instrument was never repudiated in the case until three years had elapsed, and in that case the decision would certainly be unexceptionable, as the time provided for bringing a suit to set aside an instrument must be taken also to limit the executant's or his privy's right to avoid. Again in *Abdul Rahim* v. *Kirparam Daji*, I. L. R, 16 B, 186 the court reiterated the view of *West* and *Nanabhai Haridas, J.J.* and said that "it is now, we think, fully settled that they

(*i.e.*, Arts. 91 to 93) apply only to suits brought expressly to cancel, or set aside, or declare the forgery of some instrument, as in the case of *Rani Janki Kunwar* v. *Raja Ajit Singh*, I. L. R, 15 C, 58, (we do not think the illustration is correct), and that they do not apply to suits where substantial relief is prayed and where the cancellation or declaration is subservient or merely ancillary and not necessary to the granting of such relief." The allegation in the case was that the deeds of gift and sale were executed by the person whose property the plaintiffs inherited owing to fraud and collusion. The court held that if the documents were forgeries or invalid, "they will be nullities in no way binding on the plaintiff." This is no doubt true, in case of the documents being forgeries, but it is not easily intelligible in the case of their being invalid by fraud; and we are left in doubt whether the court intended to lay down that in the case of voidable instruments also, the plaintiff might ignore them and institute a suit for the possession of the property; especially as in the latest Bombay case, *Nabab Mir Sayad Alamkhan* v. *Yasinkhan*, I. L. R, 17 B, 755, *Sargent, C.J.*, and *Candy, J.* seem to rule that where a document is executed by the plaintiff himself, he may be bound to set it aside and a suit for possession after the period prescribed for doing so might be barred, see page 756.

With regard to the Madras court also, we find both views enunciated. In *Unni* v. *Kunchi Amma*, I. L. R, 14 M, 26, *Shephard* and *Weir, J.J.* laid down that where a document is only voidable, he must first obtain its cancellation before seeking to recover the property to which it relates, but in the case of void instruments this is not necessary; see also *Nagathal* v. *Ponnusami*, I. L. R, 13 M, 44, and *Anantan* v. *Sankaran*, I. L. R, 14 M, 101; and the learned judges were of opinion that *Jagadamba Chowdhrani* v. *Dakhina Mohun*, L. R, 13 I. A, 84 had no bearing on the case. In *Sunduram* v. *Sithammal*, I. L. R, 16 M, 311, *Muthusami Aiyar, J.* enunciated a wider rule. The suit was for possession. Defendant claimed under a conveyance executed by one of the plaintiffs. The court found that the conveyance had been obtained by fraud and was supported by no consideration. On the latter ground, the instrument was void altogether; but the learned judge said, "I am of opinion that Art. 91 is not applicable to suits in which the substantial relief claimed is the recovery of land." . . . . . "Again Art 91 describes the suit to which it is applicable as one in which the relief claimed

is the cancellation or the setting aside of an instrument, and does not in terms apply to a suit for possession in which an averment regarding an outstanding instrument is made by way of confession and avoidance in order to prevent the defendant from setting it up as an answer to the claim." *Best, J.* however decided the case on the mere narrow ground that the instrument in the case was void for want of consideration.

The review of the cases we have made shows that in the case of an instrument executed by the plaintiff or his privy which is binding on him until it is avoided or repudiated, in almost all the High Courts, opposite views have been laid down with regard to the supposed necessity of setting aside the document by a suit and the consequent result of Art. 91 in barring suits for possession instituted after expiration of the time for setting aside the instrument. But on the whole the predominant opinion probably is that where the instrument is not quite void as against plaintiffs, Art. 91 will in effect bar a suit for possession, not instituted within the time prescribed by it. Whether the courts would be prepared to say similarly that where a voidable transaction is oral, it must similarly be set aside within six years under Art. 120 and a suit for possession after that period would be barred, we cannot tell, but logically they would seem to be bound to hold so. Where the document is void, on the whole the weight of authority is in favor of the position that it need not be set aside as pointed out in our former paper, although in cases where the instrument is the plaintiff's, there is some slight tendency in some cases to hold that it may have to be set aside, see *Nabob Mir Sayad Alamkhan* v. *Yasinkhan*, I. L. R, 17 B, 755 ; the judgment of *Best, J.* in *Sundaram* v. *Sithammal*, I. L. R, 16 M, 311 ; and the construction put upon the Privy Council ruling in *Jagadamba Chowdhrani* v. *Dakhina Mohun* by the Allahabad High Court in *Hasan Ali* v. *Nazo*, I. L. R, 11 A, 456 would lead to the conclusion in all cases alike of void and voidable instruments and transactions not evidenced by instruments, a suit would have to be brought within three or six years, as the case may be, to get rid of their effect, and that a suit for possession of the property after that period would always be barred. Such a construction however, the Bombay court refused to adopt in *Boo Jinatboo* v. *Sha Nagar Valab Kanji*, I. L. R, 11 B, 78 and the Madras court in *Unni* v. *Kunchi Amma*, I. L. R, 14 M, 26. In

cases where an instrument void as against the plaintiff has been executed by a stranger, whether he be an agent or a guardian, or the manager of a Hindu family, or one standing in any other similar relation to the plaintiff, the decisions are almost uniform that such an instrument need not be set aside, except in the single case of documents relating to adoption, with regard to which the Privy Council has laid down a sweeping rule that they cannot be impeached at all except within the time prescribed by Art. 118. We have already indicated that our own opinion which we cannot entertain without great diffidence under the circumstances, is that these Articles do not apply to any suits where the plaintiff seeks to recover possession of property. Whether we are right or wrong, we think the confusion which these Articles and other analogous ones which we have referred to have created, makes it imperative that the legislature should make a clear declaration with regard to their purpose and meaning and modify their language so as to remove the ambiguity and obscurity. On a matter of limitation more than on any other it is necessary that the law should be clear and simple; and we cherish the hope, that steps may be taken to remedy the defects we have ventured to point out.

THE RIGHT TO PRIVACY.

The extension and development of the law of individual rights has become a study of absorbing interest since the late Sir Henry Maine traced the history of many modern legal conceptions to the earliest records of juristic thought in Ancient Greece and Rome. From the time that he gave his labours to the world, a large body of workers in the domain of jurisprudence are devoting their attention to its study as a progressive science. While the demands of a progressive society compel a shifting of the ancient boundaries of rights and duties, a historical grasp of legal ideas liberates the mind of the jurist from the conventions and artificial trammels peculiar to each age and facilitates a recognition of new rights. Starting from the conception of corporeal property we have arrived at the notion of incorporeal rights and the law has come to recognize property "in the products and processes of the mind, as works of literature and art, goodwill, trade-secrets and trade-marks,"

The law has also accorded its protection to the free and undisturbed pursuit of one's calling which is the means of acquiring property. We have again, beginning with the notion of a right to personal safety and to personal freedom, advanced to the recognition of a right to the society of certain relations and to freedom of contract. The scope of personal immunity has been extended beyond the body of the individual to his reputation. Thoughts, emotions and sensations have acquired legal recognition in certain respects The progress of civilization is forcing into prominence the necessity for recognising and giving adequate protection to new rights. To quote from an article in the 4th Vol. of the Harvard Law Review, p. 195, "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life and numerous mechanical devices threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the housetops. For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons." Messrs Warren and Brandeis have in the course of a very able review demonstrated in the article we have already referred to and from which we shall make no apology to quote very largely, the necessity for the recognition of the right to privacy. There is no decided case in the English reports in which the right in question has obtained distinct acceptance. In a recent American case, *Schuyler* v. *Curtis*, *Judge Obrien* has accepted the position contended for by Messrs Warren and Brandeis. In an action for an injunction to restrain certain enthusiasts from setting up a bust after her death, of one Mrs. Schuyler who was largely interested in private charities, though she had never entered public life, *Judge Obrien* granted the injunction on the ground that she was a private character and that there was a right to privacy entitled to protection. The English case of *Monson* v. *Tussaud* which is an action for an injunction against the exhibition of an effigy of the plaintiff in waxwork and an account of which has recently appeared in the English Law Journal raises the question and the decision of the judges is awaited with great interest. There are of course English cases which vaguely shadow forth a principle which, there is good reason to believe, is not much removed from the right to privacy. "The legal doctrines relating to infractions of what is ordinarily termed the common law right to intellectual and artistic property, are, it is believed, but instances and applications

of a general right to privacy." In the case of *Millar* v. *Taylor*, 4 Burr, 2,362, *Mr. Justice Yates* said, "Ideas are free. But while the author confines them to his study they are like birds in a cage which none but he can have a right to let fly, for till he thinks proper to emancipate them, they are under his own dominion. It is certain every man has a right to keep his own sentiments, if he pleases; he has certainly a right to judge whether he will make them public or commit them only to the sight of his friends. In that state, the manuscript is in every sense his peculiar property and no man can take it from him, or make any use of it, which he has not authorized without being guilty of a violation of his property. And as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication." Whether the intellectual product is a piece of poetry, a play put upon the stage, *Maiklin* v. *Richardson* cited Ambl, 695, a manuscript copy of a history lent to a friend, *Duke of Queensbury* v. *Shebbeare*, Copinger on copyright, p. 8, a lecture delivered to an audience, *Abernethey* v, *Hutchinson*, 3 L. J, Ch, 209 and *Nicols* v. *Pitman*, 26 Ch. D, 374, a letter written to a friend, *Gee* v. *Pritchard*, 2 Swans, 402, a doctor's recipe for a disease, *Yovall* v. *Winyard*, 1 J. & W, 394, a secret in the compounding of a medicine, *Morrison* v. *Moat*, 9 Hare, 241, or a gallery of etchings made by a person, *Prince Albert* v. *Strange*, 1 Mac & G, 25, the owner is entitled to an injunction restraining the unauthorized publication of it. Apart altogether from the Copyright Acts which only apply to works published, the judges answered the question put to them by the House of Lords in *Donaldson* v. *Buckett*, 4 Burr, 2408 that at common law the author of any book or literary composition had the sole right of first printing and publishing the same for sale and might bring an action against any person who printed, published, and sold the same without his consent. The ground of the protection afforded has been variously stated by judges in different cases that the injunction is directed against a breach of trust or confidence by the publisher he having obtained knowledge of the intellectual product while in a position of confidence, that it seeks to prevent a breach of an implied contract on the part of the publisher not to publish, or that there is a right of property which needs to be protected. It is impossible to accept these explanations as altogether satisfactory in all the cases we have enumerated. What right of property is

there in a collection of gems or a gallery of etchings that entitles the owner to prevent the publication of a descriptive catalogue? And yet in *Prince Albert* v. *Strange*, the court issued an injunction against a publication of a catalogue of a collection of etchings made by her Majesty the Queen and the late Prince Consort. Is it a right of property in one's personal appearance that entitles the person to prevent the publication of a photograph? *Pollard* v. *Photographic Co.*, 40 Ch. D, 345. If the photographer could be restrained from selling copies where the person had consented to sit for a photograph, would the latter be less entitled to protection where the photograph is taken without his consent? It is not on the ground that the publication of the photograph is a libel that the injunction can be rested, for the photograph may be worthy of all commendation as that of a handsome personal appearance. The theory of breach of confidence although the circumstances of *Abernethy* v. *Hutchinson*, 3 L. J, Ch, 209, *Tuck* v. *Priester*, 19 Q. B. D, 639, and *Pollard* v. *Photographic Co.*, 40 Ch. D, 345 enabled the court to invoke it successfully is inadequate for restraining the publication of a letter by a stranger or by the addressee who was in no position of trust at the time of the receipt of the letter or the publication of a trade-secret where the knowledge was surreptitiously obtained. Whether the work is literary or artistic or common place, whether the product of labour is intellectual or tangible property, the common law recognizes the right of the owner to protection against publication. The Copyright Acts are levelled against the reproduction of published works but do not prevent a publication of an abstract, a catalogue, or digest, for such works "may be liable to be translated, abridged, analysed, exhibited in morsels and complimented." But the protection afforded to unpublished products is greater. The Vice Chancellor Knight Bruce said, in *Prince Albert* v. *Strange*, 2 DeGex & Smale, p. 689 "I claim leave to doubt whether, as to property of a private nature which the owner without infringing on the right of another may and does retain *in a state of privacy*, it is certain that a person who without the owner's consent, express or implied, acquires a knowledge of it can lawfully avail himself of the knowledge so acquired to publish without his consent *a description of the property*." In appeal, the Lord Chancellor, Lord Cottenham, said that "privacy was the right invaded in the case and that a man was entitled to

be protected in the exclusive use and enjoyment of that which was exclusively his." To quote again from Messrs. Warren and Brandeis, "the protection afforded by the common law to the author of any writing is entirely independent of its pecuniary value, its intrinsic merits or of any intention to publish the same and of course also wholly independent of the material, if any, upon which and the mode in which the thought or sentiment is expressed." The proper ground upon which the right to protection for thoughts and sentiments expressed in words or in writing or in works of art must rest is that there is a right to privacy against the infringement of which the law must afford relief. If there is a right to privacy for thoughts, feelings and sentiments, it is entitled to protection whether they find expression in writing, speech or conduct. As observed in the article from which we have quoted so largely already, "If the invasion of privacy constitutes a legal injury, the elements for demanding redress exist, since the value of mental suffering caused by an act wrongful in itself is recognized as a basis for compensation. The right of one who has remained a private individual to prevent his public portraiture, presents the simplest case for such extension; the right to protect one's self from pen-portraiture, from a discussion by the press of one's private affairs, would be a more important and far reaching one. If casual and unimportant statements in a letter, if handiwork however inartistic and valueless, if possessions of all sorts, are protected not only against reproduction but against description and enumeration how much more should the acts and sayings of a man in his social and domestic relations be guarded from ruthless publicity," when all the appliances of civilization are tending to make a knowledge of each man's belongings the property of the public and the feelings of man become more sensitive to publicity require even greater protection than his physical safety. The absence of malice and the truth of the publication can of course be no defences to an action for the gist of the complaint is the fact of the publication itself. As pointed out by *Judge Obrien* in the case of Mrs Schuyler there is nothing to prevent the publication of matter of public or general interest or where the owner has himself published it or impliedly sought publication by inviting the public attention by his conduct. According to the maxim *ubi jus ibi remedium*, the recognition of the right involves a remedy for its violation which may be damages

for the breach or an injunction to prevent the infraction of the right.

It may seem intolerable that any thing said or done by any individual should be so far protected that any communication of it by the hearer or observer which is not expressly or impliedly authorized or justifiable as privileged, should be deemed to be a violation of a right. It has also to be considered whether any repetition will amount to a sufficient publication so as to constitute an invasion of the right to privacy. It may be that we shall have to recognise the necessity of special damage which may include injury to the feelings, to render the publication actionable. But we can feel no doubt as to the recognition of the right itself.

NOTES OF INDIAN CASES.

Appandai v. **Srihari Joishi,** I. L. R, 16 M, 451. Obscurity is a very ordinary virtue of our Statutes. S. 622 of the Civil Procedure Code empowers the High Court to revise the decision of a court in certain cases where no appeal lies to the High Court against the decision. But the section does not say what are the courts whose decisions are liable to revision under this section. If we assume them to be those whose decisions are usually liable to appeal to the High Court, we are still not much better, because S. 584 merely tells us that a second appeal will lie to the High Court against the appellate judgments of courts subordinate to the High Court, and we are not informed what courts are subordinate to the High Court, and S. 540 does not help us. But we think that S. 622 was probably not intended to confer on the High Court any jurisdiction to revise the adjudication of courts not subordinate to it. The Charter gives the High Court the power of superintendence only over courts subject to its appellate jurisdiction. As the principle of law is that a right of appeal does not exist unless expressly given, it would seem to follow that only where appeals ordinarily lie to the High Court (or to a court subordinate to it) against the decisions of a court, can it be said to be subordinate to it, and the power of revision will also similarly not exist except in such cases. The Collector under the Rent Recovery Act is made subordinate to the High Court in some respects, but S. 76 seems to support the opinion of *Muthusami Aiyar* and *Best, J.J.* that the High Court cannot revise an order of ejectment passed by a Collector.

Kerala Varma Valiya Rajah v. **Shangaram,** I. L. R, 16 M, 452. We have before had occasion to refer to careless reporting of cases by the Madras Reporter, but we have not come across such a grossly

erroneous head-note as that in the case under notice. The case decided a point on which there is a considerable conflict of rulings, *viz.*, whether an application by a decree-holder for payment to him of money already realised towards satisfaction of the decree is a step in aid of execution so as to give the decree-holder a fresh period of limitation; see *Fazal Imam* v. *Metta Singh*, I. L. R,. 10 C, 549, *Venkatarayalu* v. *Narasimha*, I. L. R, 2 M, 174, *Paran Singh* v. *Jawahir Singh*, I L. R, 6 A, 366 *Koormayya* v. *Krishnamma*, 3 M. L. J. Rep., 296. The head-note is that an application in execution for the attachment of a debt which is dismissed for non-payment of process fees is a step in aid of execution. There is not the slightest reference to the latter point in the judgment, and it is hard to conceive that anybody could require authority for it.

Sankaran *v.* **Krishna,** I. L. R, 16 M, 456. A clear enunciation of what will be enough to make possession which was originally permissive or derivative adverse is very much required in the present state of the law. Can a person who comes into possession of properties as an agent make his own possession adverse by setting up an independent right in himself and repudiating the title of his principal? *Muthusami Aiyar* and *Handley, J.J.* have decided in the present case that he could, and rely on *Balwant Rao Bishwant Chandra Chor* v. *Purun Mal Chaube*, L. R, 10 I. A, 90 in support of their position, but the latter case only decided that a right to the office of trustee may be barred by limitation and did not deal with the question whether derivative possession can be converted into independent possession by the assertion of an untrue title. S. 201 of the Contract Act enacts that an agency may terminate by the agent renouncing *the business of the agency*; but can it terminate where the agent does not renounce the business which his agency casts on him, but merely asserts that he is principal? We are rather inclined to think that this will not make his possession adverse and that a suit for accounts against him will lie even after the expiration of 12 years from the time of his setting up a title in himself, provided the agency has not come to an end within one of the modes provided by the Contract Act.

Queen Empress *v.* **Nagappa,** I. L. R, 16 M, 461. This is another instance of careless reporting. There is a clear distinction between giving sanction to a person to prosecute another and the court itself sending the person under S. 476 to a Magistrate for being tried for an offence. In the case in question, a Head-assistant Magistrate took proceedings against a person under S. 476, but the reporter tells us that the Magistrate *sanctioned* his prosecution under S. 195. *Shephard* and *Best, JJ.* hold that under S. 476 a court is empowered to send a suspected person for trial before the nearest Magistrate whether the Magistrate is otherwise competent

to try the case or not, because the section does not require that the nearest Magistrate should be competent to try it. *Shephard, J.* says "the substitution of the description 'nearest' for 'having power to try' is significant." But what reason could the legislature have for empowering Magistrates to try such cases irrespective of the ordinary rules regarding the *forum*? The learned judges seem to have overlooked the second paragraph of the section which lays down that the Magistrate to whom the case is sent may transfer it to some *other competent* Magistrate. The other word *other* seems to show that the case must be sent in the first instance also to a competent Magistrate, that is under the ordinary rules as to jurisdiction. Moreover, suppose a Civil Court, say in the Tanjore District, send the accused for trial to a sub-divisional Magistrate of Trichinopoly as being the nearest Magistrate. How is the Magistrate to exercise his powers of transfer under S. 192, seeing that the transfer must be to a Magistrate subordinate to him and one at the same time competent to try the case? None of his subordinates is competent, and hence the power of transfer conferred by the second paragraph of S. 476 would be practically useless.

Queen Empress v. Paranga, I. L. R, 16 M, 463. It is not often that reported cases furnish illustrations of the necessity of separating revenue and magisterial functions, but here we have an instance. A double functionary in order, we suppose, to answer the exigencies of his revenue duties summoned a witness to appear before him as a Magistrate at a place not merely distant from the court-house, but not situated in British India at all. The witness was to attend somewhere in Cochin territory. Characteristically unable to sympathise with the difficulty of the witness he determined to punish the disobedient one under S. 174 of the Penal Code, but what does not generally happen happened in this case; the law happened to be in favor of the accused. The High Court held that supposing the witness was bound to obey the summons to appear in foreign territory, the disobedience must be taken to have occurred outside British India, and that the Magisirate had no jurisdiction to take cognisance of it; the learned judges were also of opinion that under S. 174 the place where a witness is summoned to attend must be in British India. We have no doubt the double-faced officer would have been glad if the High Court had found itself able to find or make a fiction that wherever as a matter of fact a witness may be ordered to attend, that place must always according to legal construction be taken to be the place where the Magistrate *ought to hold* his court and not the place where he in reality may hold it.

Papireddi *v.* Narasareddi, I. L. R, 16 M, 464. There is no doubt that under S. 54 of the Transfer of Property Act, the property does

not pass until the vendor has executed a registered conveyance in all cases where the consideration exceeds Rs. 100. But this does not affect the relation between promisor and promisee according to the rules of the law of contracts. One of such rules we take to be that the promisor is not entitled to restitution of any money paid or property delivered in pursuance of the contract unless he can show that for some reason or other, he can no longer be required to carry out the whole of the contract. Where a vendor has prior to the execution of the sale-deed put the intending vendee in possession of the property in pursuance of the contract for sale, how can he seek to recover back the possession unless he can show that he is no longer bound to fulfil the terms of the contract? In the case in question the vendor alleged grounds which if true would free him from the obligations of the contract, but the District Judge held they were not true. The High Court did not go into the question, but reversed the decision on the ground that the property had not passed to the vendee and consequently the vendee could not keep possession of the property although he might be entitled to specific performance of the contract for sale.

Mahomed Abdul Hai *v.* **Gujraj Sahai**, I. L. R, 20 C, 826. When the certificate of unpaid demand describes as debtors the former proprietors of land, a sale of property cannot affect the right of the present proprietor although the demand had been served upon him. Their lordships of the Privy Council granted a declaration that the sale was invalid. They would also seem inclined to hold that if the arrears had really been paid before the sale the Collector would have no right to sell the property as for an arrear and the sale would be altogether invalid. See *Baij Nath Sahu* v. *Lala Sital Prasad*, 2 B. L. R, F. B., 1, *Lala Mobarik Lal* v. *The Secretary of State for India*, I. L. R, 11 C, 200, *Venkata* v. *Chengadu*, 1. L. R, 12 M, 176.

Ismail Ariff *v.* **Mahomed Ghous**, I. L. R, 20 C, 834. The plaintiff who has no title to the property but has been merely in possession thereof for six years is entitled to a declaration of his right to possession against a trespasser under S. 42 of the Specific Relief Act. S. 9 of the Act which limits the period to six months within which a plaintiff dispossessed may recover property even as against the true owner, does not affect the right to recovery or to a mere declaration even though more than six months have elapsed, as against anybody who is not the true owner or one deriving title from him. The language of *Sir Richard Couch* however in delivering the judgment of the Privy Council is somewhat unhappy. He says that "the possession of the plaintiff was

sufficient evidence of title as owner against the defendant." But as the High Court had found that the plaintiff had no title, which finding was not reversed by their lordships on appeal, the only ground on which relief could be granted to the plaintiff was that mere possession gives a person the right to be maintained in possession as against every person except the owner or one claiming through him; see 3 M. L. J, p. 9 *et seq*. It ought not to be possible after this decision of their lordships to misunderstand the decision in *Wise* v. *Ameerunnissa Khatoon*, L. R, 7 I. A, 73 as the High Courts have sometimes done.

Nilmoni Singh Deo Bahadur *v.* **Chunder Chowdhry**, I. L. R, 20 C, 847. The rule that concurrent findings of fact will not be interfered with by their Lordships of the Privy Council on appeal, covers a case in which although the findings are concurrent, the reasons that lead to those findings are different in the two courts below. To use the language of Lord Watson "It cannot detract from the weight of concurrent findings of fact, that different courts in arriving at the same result upon the same evidence have not been influenced by precisely the same considerations." We do not think however that this case affects the decision of *Ghose, J.* in *Ashghar Reza* v. *Hyder Reza*, I. L. R, 16 C, 287, where that learned judge held that the rule as to concurrent findings did not apply to a case where the findings of fact of the first court were dissented from by the appellate court but the result was the same in consequence of a finding upon a fresh question of fact untouched by the Court of First Instance. The sameness of result, he said, did not involve an "affirmance of the decision" within S. 596, Civil Procedure Code.

Girish Chunder Ghose *v.* **The Queen-Empress**, I. L. R, 20 C, 857. A person cannot be both prosecutor and judge. The explanation to S. 555 makes it perfectly clear that the personal interest which disqualifies a person to be judge is not necessarily interest as a private individual. The cases on the section are collected in Prinsep's notes to S. 555 of the Criminal Procedure Code.

In the matter of Bolye Chund Dutt, I. L. R, 20 C, 874. The facts of this case are not clear. It appears from the statement of facts made by the reporter that the judgment-debtor was declared an insolvent although this does not appear from the judgment of the learned judge. If he was declared an insolvent he was entitled to a discharge under S. 341. And the last Clause of S. 341 precludes his re-arrest. In this view of the facts we fail to see any difficulty in this case. But if the judgment-debtor was not declared an insolvent, then the discharge not being under S. 341 the last Clause does not apply. The reasoning

of *Petheram, C J.* in the *Secretary of State for India in Council* v. *Judah*, I. L. R, 12 C, 652, no doubt warrants the position that however the judgment-debtor might have obtained his discharge there could be no re-arrest. That learned judge even goes the length of holding that where there has been one arrest, there could be no second arrest. This is however against the view of the Madras High Court in *Subba* v. *Venkata*, I. L. R, 8 M, 21. S. 341 would seem to suggest discharge under the section as alone precluding re-arrest under the decree.

Arunmoyi Dasi *v.* **Mahendra Nath Wadadar**, I. L. R, 20 C, 888. Letters of administration with will annexed were granted to a person as a residuary legatee. The widow of the testator who unsuccessfully opposed the grant filed a suit for the construction of the will. Was the character of the applicant as residuary legatee decided in the former proceeding so as to be *res judicata* in the suit? The proceeding for letters of administration was not a suit and therefore S. 13, Civil Procedure Code, has no application. But S. 41 of the Evidence Act renders the adjudication as to the genuineness of the will conclusive. Any determination that the applicant was a residuary legatee cannot have the force of *res judicata* in a suit because that adjudication was not in a suit, nor was it such as had a conclusive effect under S. 41 of the Evidence Act. The learned judges say that the determination was only incidental and could therefore not have the force of *res judicata*. We confess we are unable to understand what they mean by an incidental determination. If the determination as to the applicant being a residuary legatee was that of a necessary issue in the case, the decision would not be incidental.

Beni Pershad *v.* **Parbati Koer**, I. L. R, 20 C, 895. The decision in *Suraj Bunsi Koer's* case, L. R,6 I. A, 88 is followed by the Calcutta High Court when they hold that if in execution of a decree against a father of a Mitakshara family an attachment is made which subsists at the time of the father's death, the sons can be proceeded against under that attachment. If there was no attachment subsisting it is settled law that although the sons may be sued again, the decree against the father cannot be executed against them, *Hanumantha* v. *Hanumayya*, I. L. R, 5 M, 232.

Chukkun Lal Roy *v.* **Lolit Mohan Roy**, I. L. R, 20 C, 906. The rule established in the Tagore case is re-affirmed, that a gift to A for life and after him to his sons, grandsons, &c., in succession and on failure of male issue at any remote time, in favour of B is valid only to the extent of A's life estate. The creation of a new line of devolution, is invalid and the gift over dependent upon its validity is alike invalid.

A more important question touching the scope of Art. 120 of the Limitation Act is dealt with by the learned judges at p. 925 of the report. Does a suit for declaration of the plaintiff's rights under a will fall within Art. 120? It has appeared to us very doubtful whether a suit for a mere declaration, not dealt with by any other article, should be treated as dealt with by Art. 120. Declaration being merely an equitable relief ancillary to the primary remedies recognized by the law, it seems to us that a suit for declaration should never be barred where a suit for the primary remedy would not lie, unless of course where for special reasons the law makes special provision for certain kinds of declaratory relief as in articles dealing with declaration that an adoption is invalid or that an alienation by a widow is not binding on the reversioner. But the language of Art 120 providing a period of six years for "any other suit" creates some difficulty. We think however that as pointed out by *Ghose, J.* the right to a declaration is a continuing right. You can maintain a suit for declaration against any person interested to deny your right, see S. 42 of the Specific Relief Act, and can therefore institute it so long as the primary remedy is not barred. We have no doubt that if the true principle on which suits for a mere declaration are allowed to be instituted had been recognized, the legislature would not have used languages which is altogether misleading in Art 120.

Ram Harakh Rai v. **Sheodihal Joti,** I. L. R, 15 A, 384. We are inclined to doubt the correctness of this decision. If the plaintiff chooses to base his claim upon his title to the property, we see no reason why the court should give him relief on the ground that he was unlawfully dispossessed within six months before suit. The suit under S. 9 appears to be peculiar in several respects. It is confined to a claim for possession and there is no appeal from the decree. While the policy of the law may be in favour of preventing violent dispossession by giving a summary remedy irrespective of title, there is no reason why, when the party dispossessed does not rely upon dispossession within six months but upon his title, the legislature should provide a remedy for the plaintiff in spite of himself. The splitting of the decree for the purpose of an appeal upon a portion of it is not likely to have been contemplated. There is of course no particular form necessary for a suit under S. 9 and if the plaintiff will agree to confine his prayer to possession the court may be justified in granting the indulgence.

J. J. Guise v. **Jaisraj,** I. L. R, 15 A, 405. We quite agree that there is no question of jurisdiction to call for interference under S. 622 if an erroneous order is made by a court below under S. 281, Civil Procedure Code. But we think the courts are limiting the scope of S. 622

unduly. They say that if relief can be had in any other way, as by a fresh suit or by an appeal from the final decree when an interlocutory order is complained of, S. 622 cannot be invoked. We have thought that courts had gone a little too far in extending the words "where no appeal lies to the High Court" so as to mean "where no appeal lies whether from the order complained of or from the decree in the suit in which the order is passed," see *In re Nizam of Hyderabad*, I. L. R, 9 M, 256, *Chattar Singh* v. *Lekhraj Singh*, I. L. R, 5 A, 293, *Motilal Kashibhai* v. *Nana* I. L. R, 18 B, 35. But the present decision rests upon a ground which goes even further.

Naik Parsotam Ghela *v.* **Gandrap Fatelal Gokuldas,** I. L. R, 17 B, 745. This case illustrates the proverbial danger of a claim to an ell upon the concession of an inch. The defendant having acquired a prescriptive right to allow the branches of his trees to overhang the plaintiff's land laid claim to an accessory right to go on the latter's land for the purpose of picking the fruit off the overhanging branches. The claim was rightly disallowed by the judges who held that the latter right could not be said to be accessory to the former in the sense of being within the limits of that right.

Nabab Mir Sayad Alamkhan *v.* **Yasinkhan,** I. L. R, 17 B, 755. Where a person seeks to set aside a conveyance executed by him and to recover possession of the lands conveyed, the Bombay High Court agrees with the Madras High Court (*Sundaram* v. *Sithammal*, I. L R, 16 M, 311, in holding that Art. 91 of the Limitation Act is not applicable. The *ratio decidendi* however is different from that adopted in the earlier case of *Boo Jinatboo* v. *Sha Nagar Valab Kanji*, I. L. R, 11 B, 78. The ground on which the learned judges proceed is that possession was not obtained by the defendant under the instrument sought to be set aside. For our part we prefer the reasoning in the earlier case which has been adopted by *Muthusami Aiyar, J.* in the Madras case referred to. We have discussed the question at length in our leader on the scope of Articles 91 to 93 of the Indian Limitation Act, see 3 M. L. J, 337.

Manilal Rewadat *v.* **Bai Rewa,** I. L. R, 17 B, 758. The devolution of *stridhan* is a subject of much intricacy and obscurity in the Hindu Law and is perhaps the least satisfactory portion of Mr. Mayne's treatise on Hindu Law. And notwithstanding the very luminous and elaborate exposition of the subject by *Mr. Justice Gurudas Banerjee*, there are parts of the subject upon which it is not possible to ventnre upon a confident opinion. One of such questions is the question of the devolution of non-technical *stridhan* under the Vyavahara Mayukha in Bombay. It is a treat to us to read the judgments of *Mr. Justice Telang* and none

has given us greater pleasure than the one above in which he discusses the question referred to with that spirit of unflinching thoroughness which is characteristic of him. Dissenting from the views of Messrs Mayne and West he comes to the conclusion that the phrase "sons and the rest" in Chap. IV, S. 10, placitum 26 of the Mayukha means merely sons, grandsons and great grandsons and is not intended to include the compact series of heirs beginning with the wife &c. He holds that after the sons, grandsons and great grandsons are exhausted, the subsequent heirs to non-technical *stridhan* are the same as those for technical *stridhan*. On this view the husband is shut out from the line of succession to the non-technical *stridhan* of his wife. *Mr. Justice Banerjee* would seem to incline to the view of *Mr. Justice West* and let in the husband to the place which the wife would have occupied.

NOTES OF ENGLISH CASES.

British South Africa Company *v.* **Companhia de Mocambique**, 1893, A.C, 602. The Supreme Court of Judicature has no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad.

Milson *v.* **Carter**, 1893, A.C, 638. Where in an order granting leave to appeal to the Privy Council, the Supreme Court failed to make a provision in accordance with the order in Council of the 13th June 1853 that the costs "should abide the result of the appeal in case the appeal should be dismissed for want of prosecution" and the appeal was dismissed for want of prosecution under Rule V of the order, held, that the respondent should apply to the Supreme Court to correct its order by directing in accordance with its manifest intention that costs should abide the result of the appeal and, in the event of such application being refused, should apply for special leave to appeal from such refusal.

Midgley *v.* **Midgley**, 1893, 3 Ch, 282. An executor who pays a debt barred by limitation is not as a general rule guilty of devastavit. But when there has been a judicial decision declaring that the debt is barred and irrecoverable, the executor has no right to pay the debt.

If in an action against several executors they plead different pleas, that which is most to the advantage of the testator should be received.

In re **Plenderleith**, 1893, 3 Ch, 332. Where a lunatic's estate is in the hands of the court, the court will sanction his maintenance out of the income and capital even though the capital may become insufficient to pay his judgment-creditors who have obtained charging orders on the fund.

In re **Head. Head** *v.* **Head,** 1893, 3 Ch, 426. Where after a deposit of a sum of money with a firm by a customer one of the partners dies and after his death the customer withdraws a portion of the money and receives a fresh deposit note for the remainder from the surviving partner, the receipt of the fresh deposit note is now in itself sufficient evidence of novation to discharge the original debtor from liability, when the giving of fresh deposit notes to customers who withdraw portions of their deposits is only a convenient and customary way of writing off a part of the debt due from the firm.

Goodier *v.* **Edmunds,** 1893, 3 Ch, 455. (1) A power of sale which is to come into operation beyond the period of a life in being and twenty-one years after, offends against the rule against perpetuities, as it would enable the donee of the power to vest in a purchaser an estate in fee simple after the expiration of the prescribed period. A testator cannot escape from the rule against perpetuities by vesting in his trustees an imperative instead of a discretionary power of sale. (2) There is no difference between a trust for sale and a power of sale in regard to the rule against perpetuities. (3) The invalidity of a trust for sale will not affect the interests of the beneficiaries for the purpose of a division among whom the property is directed to be sold. (4) Nothing short of an absolute and effective trust for sale can in equity create a conversion of realty into personalty.

In re **Beaumont,** 1893, 3 Ch, 490. The change in the domicil of a fatherless infant which may follow from a change of domicil on the part of the mother is not to be regarded as the necessary consequence of a change of the mother's domicil, but as the result of the exercise by her of a power vested in her for the welfare of the infants, which in their interest she may abstain from exercising, even when she changes her own domicil.

Richardson *v.* **Methley School Board,** 1893, 3 Ch, 510. Under the Elementary Education Act, 1870, under which a member of a school ceases to be a member if he "absents himself during six successive months from all meetings of the board, except from temporary illness or other cause to be approved by the board," it was held that the board could not declare a member who has absented himself on account of ill-health to be in default and elect a new member in his place without giving him an opportunity of defending himself.

Monntagu *v.* **Forwood,** 1893, 2 Q.B, 350. The plaintiffs who acted for the owners of a cargo employed B. & C., as their agents to collect from underwriters contributions in respect of a general average loss. B. & C.

not being brokers employed the defendants who were brokers to collect the money and they did so. The defendants did not know, nor was there anything to lead them to suppose that B. & C. were not acting as principals in the matter and they believed B. & C. were acting as principals. At the time they received the money there was a debt due to them from B. & C Held, that the defendants were entitled to stand in the position in which they would have stood if B. & C. had really been principals and that consequently they were entitled to set off against the demand of the plaintiffs for the money they had collected the amount due to them from B. & C.

In re **Vansittart**. *Ex parte* **Brown**, 1893, 2 Q. B., 377. Although S. 47 of the Bankruptcy Act 1883 (46 and 47 Vic., ch. 52) declares a voluntary settlement void as against the trustee in bankruptcy if the settler becomes bankrupt within two years after the date of the settlement, yet the title of a *bona fide* purchaser without notice of the settlement, from a beneficiary under it, is good as against the trustee.

In re **Brall**. *Ex parte* **Norton**, 1893, 2 Q. B, 381. The term "void" in S. 47 of the Bankruptcy Act 1883 means only voidable and a *bona fide* purchaser for value from the donee under such a voluntary settlement as is referred to in the previous note has a good title against the trustee in bankruptcy even if he purchased with notice that the donee claimed under a voluntary settlement.

Soar *v.* **Ashwell**, 1893, 2 Q. B., 390. A trust-fund held by trustees under a will was entrusted by them to a solicitor employed as solicitor to the trust to be invested. The solicitor invested it and afterwards recovered it and distributed one moiety among the beneficiaries but retained the other moiety. In an action against the personal representatives of the solicitor who had died, more than 12 years after the recovery of the money by the solicitor, claiming an account of the money retained by him, held that he must be considered to have been in the position of express trustee and therefore the lapse of time was no bar to the action; by *Lord Esher*, *M. R*, and *Bowen*, *L. J.* because he received the money in a fiduciary relation and as trustee for his clients the trustees; by *Kay*, *L J.*, because he, though a stranger to the trust, had assumed to act and had acted as trustee and received the money under a breach of trust in which he concurred.

Per curiam: Where a person has assumed either with or without consent to act as a trustee of money or other property, or where a person, has knowingly assisted a nominated trustee in a fraudulent and dishonest disposition of the trust property, limitation cannot be set up as a defence to an action for the recovery of the property.

Hannay & Co., v. Smurthwaite, 1893, 2 Q. B., 412. The several shippers of different shipments of cotton shipped in the same ship for carriage from and to the same places, having joined as plaintiffs, in one action claiming against the ship-owners upon the bills of lading given to them respectively damages for short deliveries, held by *Lord Esher, M. R* and *Kay, L. J.*, (*Bowen, L. J.*, dissenting) that they were entitled to do so subject to the power of the court if it should subsequently appear that any of the claims could not conveniently be tried with the others, to order that separate trials should be had or to make such other order as might be convenient or necessary for the separate disposal thereof.

Budden v. Wilkinson, 1893, 2 Q. B, 432. In an action for trespass in which the defendants pleaded a right of way, the plaintiffs filed an affidavit of documents in which they specified a particular bundle containing a particular number of documents initialled and numbered which, they alleged, related solely to the plaintiff's case and not to the case of defendants nor tended to support it. The plaintiffs claimed privilege. On an application by defendants for an order for a further affidavit, held that the affidavit was sufficient as it contained a sufficient description for identification. *Taylor* v. *Batten,* 4 Q. B. D, 85 followed.

Semble: that the documents were privileged from production (*Bewicke* v. *Graham,* 7 Q. B. D, 400), and that it was not necessary that the affidavit should state that the documents did not tend to impeach the plaintiff's title.

In re **Weare,** 1893, 2 Q. B, 439. A solicitor had been summarily convicted of allowing houses of which he was the landlord to be used by the tenants as brothels. Held, that a solicitor may be struck off the roll for an offence which has no relation to his character as a solicitor, the question being whether it is such an offence as makes a person guilty of it unfit to remain a member of the profession. Conviction for a criminal offence *primâ facie* makes a solicitor unfit to continue on the roll; but the court has a discretion and will inquire into the nature of the crime and will not as a matter of course strike him off because he has been convicted. Held also, that the nature of the offence in this case was such that the solicitor ought to be struck off.

Per Lord Esher, M. R, and *Lindley, L.J*: "He is struck off the roll; but if he continues a career of honourable life for so long a time as to convince the court that there has been a complete repentance, and a determination to persevere in honourable conduct the court will have the right and the power to restore him to the profession."

Oriental Steamship Company v. Tylor, 1893, 2 Q. B, 518. A cargo was shipped under a charter-party which contained the following

clause, "The freight to be paid as follows:—One-third on signing bills of lading and the remainder on unloading, in cash." Bills of lading were to be signed within twenty-four hours after the cargo was on board. After the commencement of the voyage and before bills of lading were signed, the vessel sank and the cargo was lost. The charterers thereupon refused to present bills of lading for signature and the shipowner sued them for breach of the charter-party in so refusing.

Held, that the loss of the cargo did not relieve the charterers from their liability to present bills of lading and that the shipowner was entitled to recover damages equal to the amount of the advance freight.

Harris *v.* **Beauchamp Brothers,** 1893, 2 Q. B, 534. The fact that one of the members of a partnership which is sued in the firm name, is an infant, does not prevent judgment being obtained against the firm and execution from issuing thereon against the property of the partnership.

In the Goods of Hine, 1893, P., 282. When a will gave the widow an estate for life and the remainder to the two sons of the testator and she applied with the consent of the eldest son but without notice to the younger, who was abroad, for probate, held, that probate might be granted to her on her giving security for one-third of the personal estate to cover the share of the younger son on intestacy.

In the goods of Anstee, 1893, P., 283. The signature of the testator and the attesting witnesses appeared at the bottom of the first page of a will, immediately after an unfinished sentence which was completed overleaf on the second page; held, that probate might be granted of the first page.

Bernstein *v.* **Bernstein,** 1893, P., 292. Held by the Court of Appeal that condonation by the husband of the wife's adultery with one person is not avoided by the fact that she had previously to the condonation committed acts of adultery with another person of which he was not aware; and that, although at common law condonation by the husband of an act of adultery was no bar to an action for criminal conversation against the adulterer but only went in mitigation of damages, the case is different under the Divorce and Matrimonial Causes Act, 1857; and where, on a petition for divorce and for damages against the co-respondent, a divorce is refused on the ground that the adultery has been condoned, the petitioner is not entitled to a judgment even for nominal damages against the co-respondent, but the petition will be dismissed and the petitioner may be ordered to pay the co-respondent's costs.

MISCELLANEOUS.

We beg to acknowledge with thanks the receipt of the following legal publications:—

The Canada Law Journal for December (*in exchange*).

The Canadian Law Times for December (*in exchange*).

The Green Bag for December (*in exchange*).

The Western Law Times for December (*in exchange*).

The American Law Review for December (*in exchange*).

The Harvard Law Review for December (*in exchange*).

Best on Evidence, Eighth edition—Sweet and Maxwell, Ld.

Digest of Criminal cases—Cranenburgh.

Mr. Hukm Chand, Judge, City Court, Hyderabad, Deccan, writes to us:—

"I have read with pleasure your article on *res judicata* in the issue of your journal for November and agree with you as to the incompleteness and difficulty of the rule of *res judicata* as enacted in this country, as you will find from the preface of a work on the subject which I am now passing through press and hope to publish next month. I will just say a few words as to the conclusive effect of findings on law to which you have referred at some length.

"You may have cited the decision reported in I. L. R, 11 M 393* also in support of your view, but even in India the weight of authority is against that view. The Calcutta High Court (in Full Bench) and the Panjab Chief Court also have decided against it in *Gowrikoer* v. *Audhkoer*, I. L. R, 10 C, 1087† and *Mahommad Rustom Ali Khan* v. *Mahommad Azmal Ali Khan*, 1882, P. R. Cir: No. 64. As to the rule of the American Courts, you have merely given a quotation from Bigelow's work on Estoppel apparently from some old edition of the work. The passage is however given on p. 39 of the latest edition of the work. Dr. Bigelow however so far from being against you is about the only text-writer whom you may have quoted in support of your view, and on page 100 he appears to restrict his general remark you have cited, and says that the law applied in the first suit must be accepted so far as the conclusiveness of the facts decided in the first suit is concerned and *no further*. The Albama Supreme Court also has taken a view rather for, than against you, as you will find on referring to a later case reported in 65 Ala. 358. The weight of authority in the United States also is decidedly against that view. Mr. Herman has laid down the opposite

* There is an *Obiter dictum* of *Muthuswami Aiyar, J.* who was a party to the decision in *Parthasaradi* v. *Chinnakrishna*, I. L. R, 5 M, 304.—Ed.

† The subject matter of the two suits was the same in this case and there would of course be an estoppel in respect of every question decided in the prior suit.—Ed.

rule on page 100 of his commentaries. Mr. Wells in S. 219 of his work talks of the validity of a contract being *res judicata*. Almost every text-writer has taken the same view. The same view has been repeatedly taken by the Highest Courts also. I may refer to the well known case of *Lawrence* v. *Milwaukee* reported in 45 Wis., 308. The New York Supreme Court said in *Davies* v. *Mayor*, 93 N. Y, 250, that the doctrine of *res judicata* would apply conclusively even if the issue were one of law. In *Lorillard* v. *Clyde*, 122 N. Y, 41, a finding in a former suit as to the divisibility of a contract was held to be *res judicata* even though the finding was wrong, and the subject matter of the two suits different. Mr. Justice Vann in delivering the judgment of the Court observed, 'Its unity or divisibility was directly at issue in the action pleaded as a bar, and every material question of fact or *law* involved in an issue must be regarded as determined by the final judgment in the action.' The United States Supreme Court in *R. R. Co. v. R. R. Co.*, 20 Wall, 137, held the same with reference to the construction of a document also; and that view is enunciated by Mr. Wells in S. 378 of his work. Most of these and other cases are referred to and discussed in my forthcoming work on *res judicata*. To avoid a general misconception on a point of such every day importance you may publish this letter in the next number of your journal."

Police—Extracting confessions:—Mr. Justice Cave thus expressed himself with regard to police evidence on a recent occasion: 'It is the duty of police constables not to get evidence by cross-examining a prisoner and asking questions, but to depose to the facts. I have a great distrust of these things, and the system is carried on in this country to a very wrong extent. It is monstrous the way in which the police constables in this country try to extract confessions out of prisoners.' There is much truth in the remarks of the learned judge, for ever if there is a doubt as to the propriety of a given course of action, it ought to be solved in a manner favorable to a prisoner. Mr. W. S. Gilbert says rightly that 'A policeman's lot is not a happy one.' If he attempts to get evidence out of a prisoner he is reproached for excess of zeal; and if he fails to obtain convicting evidence he may lose his reputation for intelligence with some of his superiors.—*Law Journal.*

Sir George Lewis:—He first briefed Sir Charles Russell on behalf of Mr. Labouchere in a newspaper libel case, and he regards him as 'the greatest advocate' of his time. 'I knew both Serjeant Ballantyne and Serjeant Parry when in their best days practising at the Old Bailey. Ballantyne was famous for his power of cross-examination and Parry for his advocacy, but I question if they would be successful to-day.'

Speaking of Mr. Labouchere, whom he called the 'Napoleon of litigants,' he remarked, 'No litigant has been more successful than he, except that he has been left to pay some £s. 20,000 in costs.'—*Law Journal.*

Unanimous verdict :—Mr. Thomas M. Cooley speaking on the Administration of Justice in the United States of America in Civil Cases, said that the most important change likely to be brought about speedily seemed to him to be such a modification of the jury system of trial as would dispense with unanimity in rendering a verdict, and admit of the reception of the conclusion reached by some specified majority of the panel as the legal finding and that there was already considerable legislation in that direction.—(*Law Journal*). We seem to move much faster in this country. A majority of six out of nine is sufficient in the High Court, but the judge must agree with that majority if the verdict is to be operative.

Criminal law—Defilement of girl between thirteen and sixteen years of age—Indictment of girl for aiding and abetting :—"The prisoner, Jane Tyrell, was indicted for that she unlawfully 'did aid, abet, counsel, and procure' the commission upon her by one Thomas Froud of a misdemeanour, under section 5, sub-section 1 of the Criminal Law Amendment Act, 1885. A second count charged that she 'did unlawfully solicit and incite' the said Thomas Froud to commit the misdemeanour. The question for the opinion of the court was whether it is an offence for a girl between thirteen and sixteen years of age to aid and abet a male person in the commission of the misdemeanour, or to solicit and incite a male person to commit it.

The court (*Lord Coleridge, C.J., Mathew, J., Grantham, J., Lawrence, J.*, and *Collins, J.*,) held that as the Criminal Law Amendment Act, 1885, was passed in order to protect girls up to the age of sixteen, and as it contained nothing as to aiding, abetting, or inciting, the indictment could not be sustained, and the conviction must be quashed—*Law Journal.*

Criminal Law—Jurisdiction—Shooting at another :—Defendant while standing in South Carolina shot at, but missed, a man who was in Georgia. Held, defendant had committed the crime of shooting at another in Georgia. *Simpson* v. *State*, 17 S. E. Rep., 984 (Ga.)

The ground of objection taken by defendant's counsel was that the bullets took no effect in Georgia. This objection would not seem sound, as it is clearly a breach of the peace of the State of Georgia to fire bullets into it, whether any one is hit or not. The interesting question of a double crime is raised here. There is little authority on the subject, but it seems probable that defendant could be indicted in South Carolina

for an attempt to kill. Brown on Jurisdiction, 92.—*Harvard Law Review.*

Mandamus—Municipal Boards:—Held that it is the better practice to join, as parties defendants in mandamus, all the members of the board which, by a vote of the majority, has been placed in the position of a recusant body, although the minority has shown an entire willingness to do the act required. The members of a co-ordinate body of the city government which is not recusant should not be made parties defendants. *Littlefield* v. *Newell*, 27 Atl. Rep., 110 (Me).

Both propositions are thoroughly reasonable. The practice of treating the recusant body as a whole, apart from the individual disposition of its members, is more in accord with strict governmental relations, than the contrary view, which is well stated in *Lamb* v. *Lynd*, 44 Pa. St., 336—*Harvard Law Review.*

Municipal Corporations—Liability for tort:—The city of Brooklyn, having control of the general subject of the discharge of fireworks, granted a permit to one A. In the course of the discharge, the plaintiff's house was injured by the negligence of A. Held that the city was liable whether its act in this particular case was *ultra vires* or not, for it was in the power of the city to act in regard to such a matter. *Speir* v. *City of Brooklyn*, 34 N. E. Rep., 727 (N. Y.)

The general statement in regard to the liability of a municipal corporation for *ultra vires* acts is undoubtedly correct; but it may be doubted if the city is liable at all in such a case as this. See *Hill* v. *Boston*, 122 Mass, 344; *Lindley* v. *Salem*, 137 Mass, 171; 2 Dillon on Municipal Corporations, Sections 965, 966, in which the distinction is made that a municipal corporation is liable for injuries when acting in its corporate capacity,—*i.e.*, when it is incidently benefited,—but not when it is acting purely for the benefit of the public, whether voluntarily, or because of an obligation imposed in its charter. This distinction certainly applies to this case, and it is submitted that this decision is erroneous. *Lincoln* v. *Boston*, 148 Mass, 578, is directly *contra* to the principal case.—*Harvard Law Review.*