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Palaniandi Chetty v. Appavu Chettiar [1].

(Avoidance of Fraudulent Transfers—Necessity for Representative Actions.)

The recent decision of Coutts-Trotter and Seshagiri Aiyar, JJ. in the above case requires more than a passing notice. The suit was by a defeated claimant for a declaration that he was the absolute owner of the suit property by purchase and that it was not liable to be attached by the defendants in execution of a decree obtained by them against his vendor. The defendants contended (i) that the sale in favour of the plaintiff was merely colorable and passed no title to him and *(ii)* that it was in any event fraudulent and void as against them as it had been made with intent to defraud and defeat the creditors of the transferor. The Courts below found that the sale had been made with the intent alleged, held that it was binding to the extent of Rs. 9,000 and odd, the total consideration being Rs. 12,000 and odd, and dismissed the suit as regards the rest of the claim, They did not consider the plea that the sale was merely colorable. In Second Appeal a contention was raised for the first time that, as the defendants had not sued to set aside the transfer in favour of the plaintiff before they attached the suit property in execution of their decree, they were not entitled to resist the claim of the plaintiff in that suit. Both the learned Judges gave effect to this contention, reversed the decisions of the courts below on this ground, and sent the case back for a finding on the other question, *viz.*, whether the sale was a merely colorable transaction, Coutts-Trotter, J. thought that a suit brought by or on behalf of all the creditors of the transferor was necessary, while Seshagiri Aiyar, J. was of opinion that, though a representative action was not necessary and any person who was defrauded or defeated could impeach the transfer, still a suit to set aside the transfer was necessary, the creditors could have no remedy against the conveyed property until the transfer was so set aside, and the plea based on S. 53 of the Transfer of Property Act could not be set

1. (1916) 30 M. L. J. 565.

up in defence. Seshagiri Aiyar, J. held that there was no distinction in this respect between the case of a judgment-creditor and that of an ordinary creditor; but Coutts-Trotter, J. (as we read some portions of his Lordship's judgment) seems to have been of opinion that, though a judgment-creditor is not, as such, better than an ordinary creditor, yet, if he has gone further and attached the properties in execution, he is for the present purpose in a better position. We, however, find no little difficulty in reconciling this opinion with the actual decision of his Lordship, for, admittedly, there has been an attachment in the case which gave rise to the claim proceedings.

We have reason to believe that the decision has been regarded in several quarters as being at variance with long and well established practice in this country. (See the observations of Sundara Aiyar, J. in *Subramania Pillai* v. *Dakshinamurthy Mudaliar* [1] and the judgment of D. Chatterjee and N. Chatterjee, JJ. in *Abdul Kadir* v. *Ali Mia* [2] neither of which cases is referred to in the decision under notice). In view of this circumstance of the difference of opinion between Coutts-Trotter and Seshagiri Aiyar, JJ. on certain material steps in the reasoning, and of the evident inconsistency between the reasoning and the conclusion in the judgment of Coutts-Trotter, J. it seems desirable to examine the correctness of the actual decision in the case under notice and of the opinions of the learned judges as to (a) the necessity or otherwise for a representative action to set aside a fraudulent transfer, (b) the availability in defence of the plea based on S. 53 of the Transfer of Property Act, and (c) the existence or non-existence of a distinction in this respect between the case of a judgment-creditor and that of an ordinary creditor.

The provision in S. 53 of the Transfer of Property Act is that every transfer of immovable property, made with intent to defraud or to defeat or delay *the creditors* of the transferor is voidable at the option of *any person* so defrauded, defeated or delayed. The section, it will be noticed, uses different language in describing the scope of the intent required and the party who can avail himself of the section. While the intent required to vitiate the transaction is an intent to defeat the general body of creditors, the transaction is declared to be voidable at the option

1. (1912) 15 I. C. 193. 2. (1912) 15 C. L. J. 649=16 C. W. N. 717.

of any person so defeated. It would thus seem to follow from the terms of the section (apart from any precedents, English or Indian) that any one of the creditors may, without reference to the others, avoid the transfer although the necessary averments must be made to show that the transfer was made with intent to defeat the general body of creditors, and not merely this or that creditor of the transferor. As to the question whether the plea based on S. 53 can be set up in defence, it will be noticed that the section only declares the substantive right of the creditor and prescribes no particular procedure for exercising the option of avoiding the transfer; any act on the part of the creditor affected would *prima facie* seem sufficient, if it unmistakably manifests his intention to treat the transfer as not valid and effectual as against him. And this leads us to the further question whether there is any general principle of law which requires such right to be exercised only by a suit. Lastly, as to the question whether there is any distinction for the present purpose between a judgment-creditor and an ordinary creditor, the section itself makes no distinction between them. The decision of the question will therefore depend upon the true ratio *decidendi* of certain English precedents which seem to suggest such a distinction and on the applicability in India of the principle underlying the same.

In support of the view that a representative action is necessary Coutts-Trotter, J. relies upon the cases of *Reese River Silver Mining Co.* v. *Atwell* [1], *Burjorj Dorabji Patel* v. *Dhunbai* [2], *Hakim Lal* v. *Mooshahar Sahu* [3], and *Ishvar Timappa* v. *Devar Venkappa* [4]. The learned Judge remarks, evidently by way of stating the reason of the rule, "the inconvenience of allowing each and every creditor in turn to attack the deed is obvious." Seshagiri Aiyar, J., who is of the contrary opinion, lays stress on the fact that the language of S. 53 is clear that any person defeated could impeach the transfer and observes that the English cases themselves do not in unmistakable terms lay down that a representative action is necessary. In answer to the argument of inconvenience from a possible multiplicity of suits, the learned judge points out that, by virtue of explanation VI to S. 11 of the Code of Civil Procedure, 1908, the decision in a suit brought by one of the creditors will be binding on other creditors as well. The learn-

1. (1869) L. R. 7 Eq. 347.
2. (1891) I. L. R. 16 B. 1.
3. (1907) I. L. R. 34 C. 999.
4. (1902) I. L. R. 27 B. 146.

ed judge considers that the Indian decisions relied upon by his learned colleague are not of binding authority for the reasons stated in his judgment and to be noticed below.

As to the law in England, there is nothing in the Statute 13th Eliz. C. 5, or in any other statute we are aware of, which requires that an action to set aside a fraudulent conveyance should be a representative action. But the following passage at p.89 of Vol. 15 of Halsbury's Laws of England fairly represents the view stated by most text-writers on the subject: "In an action to set aside an alienation under the statute a creditor should sue on behalf of himself and all other the creditors of the grantor, except where he has recovered judgment for his debt, in which case he can obtain an order declaring the alienation void as against him and containing consequential directions for the satisfaction of his debt alone, without mention of any other creditors or their debts." (For similar statements of the rule see May on "Fraudulent and Voluntary Dispositions of Property," 3rd Ed. p. 311; Daniell's Chancery Practice, 7th Ed. Vol. I, p. 171; Smith's Leading Cases, 12th Ed. Vol. I, p. 27; and White and Tudor's Leading Cases in Equity, 8th Ed. p. 902). Forms Nos. 2 and 3 given at pp. 2345 and 2346 of Vol. 2 of Seton's Judgments and Orders (6th Ed.) only show that the practice is to make an order declaring the alienation void as against all the creditors. Most of the text-books above referred to cite the case in L. R. 7 Eq. 347 in support of the rule that a representative action is necessary in cases in which the suit is brought by an ordinary creditor and the cases of *Smith* v. *Hurst* [1], *Spirett* v. *Willow's* [2], *Neale* v. *Day* [3], and *Blenkinsopp* v. *Blenkinsopp* [4] in support of the exception in favour of a judgment creditor. Some of them cite also *Bott* v. *Smith* [5], *Cornish* v. *Clark* [6], *Re Maddever, Three Towns Banking Co.* v. *Maddever* [7], *Re Mount* [8], and Ideal *Bedding Co.* v. *Holland* [9], in support of the rule.

The decision in *Reese River Silver Mining Co.* v. *Atwell* [10] affords no clue as to the basis of the rule for which it is commonly cited. So far as one can judge from the report of the case,

1. (1852) 10 Hare 30=68 Eng. Rep. 826. 2. (1865) 11 Jur. (N. S.) 70.
3. (1858) 28 L. J. (Ch.) 45.
4. (1852) 1 De. G. M. & G. 495 C. A.=42 Eng. Rep. 644.
5. (1857) 21 Beav 511=52 Eng. Rep. 957. 6. (1872) L. R. 14 Eq. 184.
7. (1884) 27 Ch. D. 523. 8. (1899) 1 Ch. 831.
9. (1907) 2 Ch. 157. 10. (1869) L. R. 7 Eq. 347.

the question of the necessity for a representative action does not appear to have been raised and considered. The report only shows that, at the close of the arguments, counsel for plaintiffs asked leave to amend by making the plaintiffs sue on behalf of themselves and all the other creditors of the defendant and that Lord Romilly M. R. gave the leave prayed for. The case can therefore be taken only to show that the practice in England is for the creditor to bring a representative action only. The cases of *Re Mount* [1], *Ideal Bedding Co.* v. *Holland* [2], *Cornish* v. *Clark* [3] and *Bott* v *Smith* [4] do not consider or decide the point. It was not even raised. All that we find from the reports of these cases is that in each of them the action was as a matter of fact brought by the plaintiff on behalf of himself and all other creditors of the transferor.

In *Crossley* v. *Elworthy* [5], the plaintiff was a person who had obtained a judgment for the recovery of a sum of money but whose attempt to put his judgment in force was stopped by a fraudulent settlement made by his judgment-debtor. He therefore sued to have the settlement declared fraudulent and void as against himself under the provisions of 13 Eliz. C. 5. The action, which was originally instituted against the judgment-debtor and the assignees under the fraudulent settlement, was not a representative action at all. In the course of the action the judgment-debtor was adjudicated a bankrupt and was thereafter represented by the assignees in bankruptcy. All that we gather from the report relevant to the present discussion is that counsel for the assignees in bankruptcy submitted that the proper form of decree would be to declare the settlement void as against all the creditors (p. 162) and that counsel for the plaintiff conceded that it was the proper form (see the remarks of Malins V. C. at p. 163). It will be noticed that the argument was directed to the form of the decree and not to the frame of the suit. In the case of *Re Maddever, Three Towns Banking Co.* v *Maddever* [6] also, although a specialty creditor sued on behalf only of himself and no objection was taken to the frame of the suit, the decree gave a declaration that the conveyance in question was void as against the plaintiff and the other creditors of the deceased debtor and the judgment also declared the deed void as against the plaintiff and all other, *if any*, the

1. (1899) 1 Ch. 831.
2. (1907) 2 Ch. 157.
3. (1872) L. R. 14 Eq. 184.
4. (1857) 21 Beav. 511=52 Eng. Rep. 957.
5. (1871) L. R. 12. Eq. 158.
6. (1884) 27 Ch. D. 523.

creditors of the deceased debtor. North J. observed in the course of his judgment (p. 529) "The decree, therefore, will be a declaration that the conveyance is void against the plaintiffs and the other creditors of Maddever deceased (the debtor). *It must be as against the other creditors also as matter of form, although it does not appear there are any others.*" This and the previous case recognise the maintainability of a suit by a creditor on his own account, although the decree in such action will be for the benefit of creditors generally.

The case of *Adames* v *Hallett* [1] carries the matter no further. The only point which arose for decision there was whether a creditor under a voluntary post-obit bond was entitled to the benefit of the Statute 13 Eliz. C. 5. The bill was for the administration of the estate of a deceased debtor and the question was incidentally raised as to whether a settlement made by the deceased in respect of a portion of his property was not fraudulent and void as against the plaintiff. When the settlement was found to be fraudulent and Giffard, V. C. gave judgment for the plaintiff and stated that there would be the ordinary declaration, counsel for the plaintiff referred to *Spirett* v. *Willows* [2] in which the declaration was that the deed was fraudulent and void as against the plaintiff. But Giffard, V. C. said that he could not make a declaration in that form as there might be other debts, and that the deed must be declared void as against all the creditors.

Vyse v. *Brown* [3] and *Gregg* v. *Bromley* [4] referred to in the judgment of Seshagiri Aiyar, J. do not seem to have any bearing on the question. The decision in the first of these cases was to the effect that, when a legacy payable to a person under a will was assigned by the legatee to the executor under the will, and the assignment was liable to be impeached as one in fraud of creditors, there was no debt, legal or equitable, payable by the executor to the legatee which could be attached by a judgment-creditor of his under S. 61 of the Common Law Procedure Act, 1854, as the assignment stood good as against the legatee. Williams, J. observed in the course of his judgment: "Even supposing that the *plaintiff (judgment-creditor) had taken the*

1. (1868) L. R. 6 Eq. 468.
2. (1865) 11 Jur. (N. S.) 70.
3. (1884) 13 Q. B. D. 199
4. (1912) 3 K. B. 474 C. A.

proper steps to set aside the settlement as void and had succeeded in doing so, even then Brown (the executor and assignee) could never have been placed in the position of being obliged to pay over the money to Vyse (the legatee and judgment-debtor) ; the settlement would be valid and subsisting between the parties ; and, although in *such a suit* Brown might be directed to pay over the whole or a sufficient part of the settled fund to the creditor, that could not be by reason of his becoming indebted to the judgment-debtor." Whatever may be the bearing of the italicised passage on the question whether a suit, representative or not, is the only procedure open for avoiding a fraudulent transfer, it is clear that it has no bearing on the question we are now considering. As to *Glegg* v. *Bromley* [1] the only question for decision there was whether a judgment-creditor could in garnishee proceedings challenge an assignment by his judgment-debtor on the ground of its being fraudulent under 13 Eliz. C. 5, the argument for the assignee being (p. 476) that, even if the assignment could have been attacked as being in fraud of creditors, the objection was not one that could be taken in garnishee proceedings. The Divisional Court had over-ruled the contention of the assignee, and, as the court of appeal held that the assignment was not fraudulent, it became unnecessary for it to consider the present question. It will be noticed that this case also has a bearing only on the question of the necessity for a suit to set aside a fraudulent transfer.

From the above resume it will be seen that there is no rule of law even in England that a suit to set aside a fraudulent conveyance should be brought by or on behalf of all the creditors though the decree in such a suit always declares the conveyance void as against all the creditors. We have not been able to find any case in which the question has been raised and discussed or any holding that an action, not purporting to be a representative, proceeding, is liable to be dismissed on that ground unless, of course, an amendment is allowed. The form of the declaration is presumably due to the language of the Statute which declares the conveyance null and void as against *the creditors*, their heirs, etc., and assigns.

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1. (1912) 3 K. B. 474 C. A.

It may not be out of place here to refer briefly to the rule in America where too the statute of Elizabeth is substantially the basis of the law on the point. The American Cyclopedia of Law and Procedure states the law thus: A creditor desirous of setting aside a fraudulent conveyance may bring the suit in his own name and for his own benefit, without making other creditors standing in the same situation parties or do so in his own name and on behalf of himself and other creditors, all sharing alike whose claims are in the same class (Vol. 20, p. 711). A decree avoiding a deed as to creditors of the grantor is binding only as to such creditors (*Ibid.*, p. 821); and, as a general rule, the judgment or decree avails the plaintiff only and not those who are neither parties nor privies to the proceedings. Other creditors of the same class may, however, take advantage thereof in proper time and by proper pleadings (*Ibid.*, p. 822). It would thus appear that in America also there is no rule requiring a representative action for the purpose of setting aside a fraudulent transfer.

(*To be continued.*)

A. S. VISVANTHA AIYAR.

SUMMARY OF ENGLISH CASES.

British and Foreign Marine Insurance Co., Ltd. *v.* **Samuel Sanday and Co.**: (1916) A. C. 650.

Marine Insurance Policy—Construction—Constructive total loss of goods—Restraint of Princes—Meaning—Declaration of War—Frustration of contemplated adventure—Effect.

British merchants who had insured goods with British underwriters against the usual perils in a marine policy (including restraints of princes) upon a British ship for voyage to the port of Hamburg could, upon war being declared by His Majesty the King of England, whereby the further prosecution of the insured voyage to that port became illegal, give notice to the underwriters of abandonment, and recover as for a constructive total loss of the goods by restraint of princes, though the goods themselves remain unharmed and in the actual possession of the assured.

The declaration of war is the direct cause of the adventure being destroyed, although its only effect was to bring about a state of war during the existence of which trading with the enemy was, according to the common law, illegal.

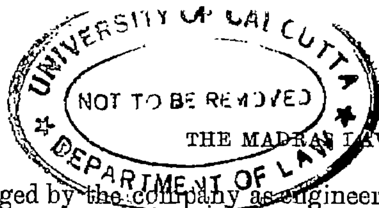
Potential as distinguished from actual physical force is sufficient to constitute a " restraint " within the meaning of the policy.

"Constructive total loss" is, subject to any express provision in the policy, defined to occur when the subject-matter insured is reasonably abandoned on account of actual loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

Herbert Morris, Ltd. *v.* **Saxelby**: (1916) A. C. 688.

Contract—Restraint of Trade—Validity—Public Policy—Contract between vendor and purchaser of goodwill of business—Contract between master and servant and between employer and employee—Distinction.

In this case their Lordships had to consider the validity of an agreement in restraint of trade between the plaintiff company, the leading manufacturers of hoisting machinery in the United Kingdom, and the defendant, who had been employed in the plaintiff company as draughtsman. The agreement was taken when, after several years' service, the defendant was



engaged by the company as engineer and provided, *inter alia*, that the defendant should not, for a period of seven years from his ceasing to be employed by the company, either in the United Kingdom of Great Britain or Ireland, carry on either as principal, agent, servant, or otherwise, alone or jointly or in connexion with any other person, firm or company, or be concerned or assist directly, whether for reward or otherwise, in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways or hand overhead travelling cranes. It was held, having regard to all the circumstances of the case that the agreement was not reasonable in reference to the respective interests of the parties concerned and was prejudicial to the interests of the public and was therefore void.

Held further, that there was a distinction in this respect between a covenant taken by a purchaser from his vendor at the time of his purchase of the goodwill of a business and that taken by a master from his servant or an employer from his employee.

The law on the subject reviewed.

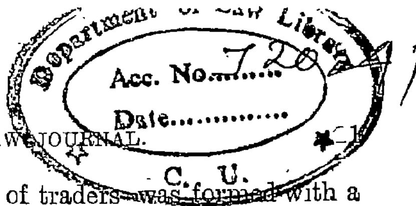
British Columbia Electric Railway Co., Ltd. *v.* **Loach**; (1916) A. C. 719.

Negligence—Suit for damages for injury due to—Contributory negligence of plaintiff—Liability of defendant—Condition—Continuing negligence of defendant cause of injury—Effect.

A person who is guilty of contributory negligence is not disentitled to recover damages for injury alleged to have been caused by the negligence of the defendant if the latter might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff. For the application of this rule it is not always necessary that the defendant should be guilty of a new negligence after that of the plaintiff. It is enough to make the defendant liable if the same conduct which constituted the primary negligence is repeated or continued and is the reason why he does not avoid the consequences of the plaintiff's negligence at and after the time when the duty to do so arises.

London Association for Protection of Trade *v.* **Greenlands Limited**, (1916) 2 A. C. 15.

Libel—Privileged occasion—Association of traders for Mutual protection—Communication to Members.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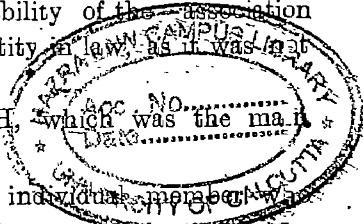
An unincorporated association of traders was formed with a view to making private inquiries as to the means, respectability and trustworthinerss of firm's and individuals, to enable its members to enter into business transactions with outside firms and individuals. The association did not trade for profit. The membership to the association was by a small annual subscription; and the members had to pay at certain rates for their enquiries which were made by letters addressed to the Secretary of the Association who would make private enquiries of the solvency or otherwise of the individuals and firms and communicate them to the members concerned. One K, a member wanted to enter into business transactions with G and wrote to H, the Secretary asking about the solvency of G. The Secretary made enquiry of a certain W about the solvency of G who out of malice mis-stated G's worth. This information was duly communictaed to K. On an action for libel by G against the Association, H and W express malice was found against W, damages were awarded against him and he did not appeal. As regards the liability of the association it was held, it cannot be sued as an entity in law, as it was not incorporated.

With regard to the liability of H, which was the main point of contention.

Held, that H was the agent of the individual member who makes the enquiry and not of the association, to make the inquiry about the credit; and as such the occasion was one of privilege and so he was not liable.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Evans v. Edinburgh Corporation, (1916) 2 A. C. 45.

Negligence—Road obstruction—Door opening outwards on the pavement of the road—Liability of the house owner.

The plaintiff who was passing along the street was wounded by the sudden opening of a door which opened outwards on the street; on the occasion in question, it was not opened either by the house owners or anyone in their service.

In an action against the house owners for negligence, in having on their premises a door of this dangerous construction.

Held, the house owners were not liable, as having a door opening outwards upon a street did not infer negligence *per se* on their part.

This case has to be distinguished from the class of cases, where a man has premises so constructed that they may become a danger to passers by, as for example by having affixed to his premises a projecting lamp which he negligently allows to get out of repair, so that it falls on the head of a passenger, the distinction being that in the present instance, the premises in themselves and apart from their use are perfectly harmless.

King *v.* **David Allen and Sons, Bill Posting, Limited.** (1916) 2 A. C. 54.

License—Revocation—Licensor assigning premises to which license is attached — Assignee refusing to continue license — License not an interest in land—Right of licensee against licensor.

The defendant, the owner of certain premises entered into an agreement with the plaintiff in July 1913 by which the defendant gave permission to the plaintiff to affix bills, posters and advertisements to the flankwall at side of the picture palace to be erected on the premises for four years from November 1913 or from the day the picture house opens for business, the plaintiff to pay for such permission rent at the rate of £12 per annum and the defendant agreed not to permit any other person to affix any bill poster or advertisement for that period.

The defendant demised the premises to a picture house company which demise did not make any reference to the agreement of July and the demisee refused permission to the plaintiff to affix bills.

Held, in an action for damages by the plaintiff against the defendant the agreement did not create any easement or license coupled with a grant. The agreement being therefore purely personal, and the defendant having put it out of his power to perform the agreement of July 1913, he was liable in damages for breach of contract to the plaintiff. *Mackinthosh* v. *Dun* (1908) A.C. 390 distinguished.

Distington Hematite Iron Company, Ld., *v.* **Possehl and Co.** (1916) 1 K. B. 811.

Executory contract between subjects of two nations—Outbreak of war between the nations—Effect on contract—Suspension —Dissolution.

In this case the question for decision was as to the effect of an outbreak of war between two nations on an executory contract between subjects thereof. It was *held* that the contract was suspended as opposed to dissolved only where the suspension did not involve the making of a different contract between the parties and that where postponement of the performance of mutual obligations, or the cancellation of mutual obligations which fell due during the war, involved a substantial alteration of the contract itself, no such postponement could take place.

Asiatic Petroleum Company, Ld. *v.* Anglo Persian Oil Company, Ld. (1916) 1 K. B. 822 C. A.

Practice—Documents—Discovery—Privilege—Rule as to—Scope of—Document in possession of private person—Production prejudicial to public interest.

The rule protecting documents from discovery, on the ground that disclosure would be injurious to the public interests, is not limited to state papers, reports, minutes, and other official documents or correspondence. The foundation of the rule is that the information cannot be disclosed without injury to the public interests, and not that the documents are confidential or official, which alone is no reason for their non-production.

The action was to recover damages for alleged breach of an agreement by the defendants to sell to the plaintiffs a cargo of crude oil. The defendants were also under contract with the Board of Admiralty for the supply of the said oil. The question arose as to whether a copy of a letter from the defendant company to their agents in Persia containing confidential information from the Board of Admiralty as to the progress of the campaign in Persia and as to the intentions of the authorities in reference thereto, was privileged from inspection on the ground that its production would be detrimental to the interests of the State. The information had been given to the defendants for the purpose of assisting them in maintaining the supply of oil and of keeping their agents properly instructed. *Held,* that, notwithstanding that the document was not a public Official document, it was privileged because its disclosure would be injurious to the public interests.

JOTTINGS AND CUTTINGS.

Where Quibbling is not popular:—Theophilus Harrington, a Vermont Judge in the early part of the last century, was a man who loved the right and cared little for mere legal quibbling. "If justice controls your verdict," he would often say to the jury, "you will not miss the general principles of the law." At one trial, when the possession of a farm was in question, the defendant offered a deed of the premises, to which the plaintiff's lawyer Daniel Chipman objected because it had no seal. "But your client sold the land, was paid for it, and signed the deed, did he not ?" Asked the Judge. "That makes no difference," said Chipman, "the deed has no seal, and cannot be admitted in evidence." Is anything else the matter with the deed " asked the Judge. " I don't know that there is." "Mr. Clerk," said the Judge, "give me a wafer and a three-cornered piece of paper." The clerk obeyed, and the Judge deliberately made and affixed the seal. "There, Brother Chipman," said he, "the deed is all right now. It may be put in evidence. A man is not going to be cheated out of his farm, in this Court, when there is a whole box of wafers on the clerk's desk."—*Law Students' Journal, May 1916.*

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Appeals to the House of Lords are in future to be brought within six months from the decision of the Court of Appeal, and the special privileges hitherto allowed to infants, married women, insane persons, and prisoners are done away with. *Law Students' Journal, June 1916.*

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Mediation.—The recent utterances of the President of the United States have caused much speculation as to the relation in which he is likely to place himself towards the belligerents. It should be clearly understood that mediation, whether before or after the outbreak of hostilities, is not a purely political matter, but partly a legal one, and it is dealt with as such in detail in the Hague Conventions. The Convention for the peaceful settlement of international differences of 1899 lays down the procedure to be followed for the offer and acceptance of meditation before, and in order to avert war, and, after the outbreak of war, in order to arrive at a basis for peace. Article 1 (unhappily, a dead letter) provides for a submission of every dispute to mediation, so far as

circumstances permit. Article 2 is more important, as it imposes a positive duty. The contracting powers agree that the right to offer mediation exists for all strangers to a dispute (who are, of course, signatories of the convention), whether before or after war. It is expressly and specially stipulated that such an offer of mediation can in no way be regarded by the power or powers to whom it is offered as an unfriendly act. It is important to note this, in view of the disposition of a section of the Press to regard the mere mention of the word 'mediation as an insult to Great Britain and her Allies. Such mediation might be acceptable, or it might not; but that is quite irrelevant to the consideration whether the power that proposes mediation commits by doing so, some breach of International Law or Comity. It does nothing of this sort. President Wilson is alive to his powers and under the Hague Convention, and with the assistance of his expert legal advisers may be trusted to do whatever he intends without offending against any propriety. It may be noted that it was in virtue of this provision in the convention that President Roosevelt in 1905 mediated between Russia and Japan, and gave a basis for the negotiations that led to the Treaty of Portsmouth which ended the conflict.—*Law Journal, June 3rd, 1916.*

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Jurymen and Counsel.—Mr. Justice Lush took, we think, the only possible course in requiring the withdrawal of the juryman who accused Mr. Gordon Hewart, the leading counsel for the defendant in the Hulton case, of cross-examining the plaintiff in bullying style. Jurymen have to determine the issues of fact submitted to them; it is no part of their function to interpose comments on the manner in which a trial is being conducted. It is for the Judge to see that witnesses are treated with fairness and courtesy. Nobody who knows Mr. Gordon Hewart can believe for one moment that he was making an improper use of his right of cross-examination, and nobody who knows Mr. Justice Lush can believe that he would fail to protect a witness who was being treated in a manner unworthy of the traditions of the Bar. If individual jurymen were at liberty to comment upon the way in which cases are conducted, the most mischievous opportunities of prejudice would be introduced into trials, and the parties would be put to intolerable expense and delay through the necessity of

re-hearing. It is no more the business of a juryman to censure the action of an Advocate than it is of an Advocate to criticise the conduct of a juryman. A juryman is protected from insult. Mr. Oswald, in his well-known work on 'Contempt of Court', refers to a trial at a Quarter Sessions at which the foreman of the Jury asked some quite legitimate questions whilst the evidence was being given. 'I thank God.' exclaimed the Counsel for the prisoner when he came to address the Jury, 'that there is more than one Juryman to determine whether the prisoner stole the property with which he is charged; for there was only one, and that one the foreman, from what has transpired to-day there is no doubt what the result would be.' For this gratuitous attack upon the enquiring juror the learned gentleman, being adjudged guilty of contempt, was fined 10£ (Ex parte Pater (1864) 5 B and S 299). There are other cases, however, in which the jurymen have been made to realise that they are not beyond the disciplinary authority of the Court. Some twenty-five years ago, in the Manchester Court of Records, an impatient juror exclaimed, 'I want to know what the devil I have been brought here for,' whereupon the Judge ordered him to be taken into custody. If jurymen were permitted to regard themselves as free to indulge in gratuitous criticism of the methods of counsel—methods based on facts and rules quite unknown to their critics—this disciplinary power might have to be exercised more frequently to the detriment, perhaps, of the dignity of the Courts.—*Ibid.*

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Counsel in Treason cases.—The Casement trial has drawn attention to one or two points in connection with prosecutions for treason which are not very familiar even to Lawyers who practice at the Criminal Bar. In the first place, by an archaic anomaly prisoners accused of high treason are not entitled as of right to instruct counsel who will represent them at the actual trial, although there is no restriction on their rights in this respect as regards the preliminary investigation by Justices. This is due to the fact that at common law a prisoner indicted for felony, as opposed to misdemeanour, was not entitled to be defended by counsel. A series of statutes granted in succession various parts of this right, but the full claim to employ counsel for all purposes for which they could be employed in a civil action was

not considered until the trials for Felony Act was passed in 1836. But so long ago as 1695 the special interest felt by the public and by politicians in the case of persons accused of Treason led to the passing of the Treasons Act (7 and 8 William III, cap. 3), which provided that in such cases, where the prisoner requests the assistance of counsel, the Court shall assign him two members of the Bar, and no more, for his defence. The Court also nominates the defendant's solicitor. This procedure in the case of treason is apparently still necessary, unless the term 'Treason' is included in the term 'Felony' within the meaning of the Trials for Felony Act. The better view is that it is not, and indeed this view is covered by authority (Regina *v.* Frost, 4 State Trials N. S. 103). In the case quoted, Chief Justice Tindal after Sir Frederick Pollock and Mr. Kelly had been assigned as counsel to the Chartist Frost, refused to hear Mr. Thomas, a junior member of the Bar, who was instructed to assist them. The old practice, too, was that counsel so named by the Court, like others invited by the Bench to defend a prisoner, accepted no fees; but this rule of professional etiquette still surviving in the days of Lord Erskine was abandoned in the case of Frost, and is no longer binding on the Bar.—*Ibid.*

CONTEMPORARY LEGAL LITERATURE.

In the *Law Quarterly Review* for April, 1916 Mr. H. R. Pyke discusses the law that is to be administered by Prize Courts. The British Court like every other Prize Court is a purely municipal tribunal, deriving its authority from the British State and though rules of international law constitute, as it were, the common law of that court, those rules are liable to be supplanted by the acts of the legislature. The court is bound by its previous decisions unless it can be shown that there has been a subsequent change in the law of nations to which Great Britain has expressly or impliedly given consent or unless a change is necessary to adapt established principles to altered circumstances and conditions. The writer is of opinion that orders in Council also bind the tribunal but in this his view is opposed to that of the Judicial Committee of the Privy Council in the *Zamora* case where their Lordships hold that the King in Council has no authority to prescribe or alter the law to be administered and that in this matter the position of the Crown in Prize Courts is the same as in Ordinary Courts. The writer is

of opinion that their Lordships have not allowed sufficient weight to the peculiar prerogative of the Crown in international affairs under the British constitution and to the fact that in its origin the primary function of the Prize Court was to determine the acts of the commissioned agents of the Crown for which the latter, as representing the country in foreign relations will be responsible.

Mr. P. Gide gives an account of the French Law with reference to *Foreign Married Women.* The French Civil Code mentions four kinds of Marriage Contracts. They are known respectivelyas the (i) "*Communante,*" (ii) *Separation de biens,* (iii) *Regime de non-communante* and (iv) the dotal system. Under the first which on failure of the parties to adopt any other kind of contract is annexed to every marriage contract, all the personal property possessed by the contracting parties at the time of marriage and all the personality acquired during marriage by succession or gift unless the testator or donor has shown a contrary intention, all rents and revenues of such property and all the real property purchased during marriage becomes the assets of the community. The husband has the administration of this property which he may sell, alienate or mortgage without the consent of the wife, the wife cannot contract without the consent of the husband. He has also the administration of the wife's personal property but he cannot alienate her realty without her consent. Under the "*separation de biens*" system each party retains control over his or her own property, and each party contributes towards the expenses of the family, in the absence of any express contract, the wife's share being one-third. In the *regime de non-communante* each party retains his or her property. However, the husband administers the separate property of his wife. In the fourth system, the wife retains the property of her dowry but the husband administers it. The creditors have no right to proceed against it, the property being inalienable. Whether foreigners marrying in France are governed by the French law or their own, depends upon their intention at the time of the marriage which is to be determined as a question of fact in each case.

Mr. Norman Bentwich points out the many respects in which International law has developed during the present war with reference to the rights of belligerents and neutrals at *sea.* Some of the developments are utterly at variance with the previous concep-

tions, *e.g.* the German claim to sink merchantmen without warning but others are such as are called for by the altered circumstances, for instance a war zone, a larger right of search, &c.

The contributions of the April number of the Harvard Law Review are offered as a tribute to Mr. Justice Holmes on the occasion of his 75th birthday.

Cosmopolitan Custom and International Law is an article contributed by Sir Frederick Pollock. In this article he considers the means hitherto in use for preserving peace and their defects and suggests a new device for the purpose. For instance arbitration, he says, is effective only when the parties have already made up their minds not to fight or desire to be fortified with good reasons for not fighting. Mediation is a more elastic method than arbitration but in operation it is one degree weaker.. For it supposes, in addition to previous willingness to agree that the same will continue throughout. On the whole, mediation and the less formal equivalent known as "good offices" are more useful for smoothing the way towards a settlement than for conducting the matter to an end. Conferences of ambassadors or special delegates have often been useful in effecting a settlement after the war and in confining local wars within the original limits But they are seldom called until great mischief has already been done and no case is known where formal conference has wholly averted an impending war. Direct negotiation is obviously the best way but it assumes the existence and continuance of a genuine will to agree. Moreover it can be easily misused by a power with a view to gain time. Such being the defects of all the remedies available without actual resort to arms, is it possible to have anything like an international law? If we could find a rule in the custom of nations anything like a collective reprobation of self-redress by arms without proved failure of peaceable means, there is a possibility of the vague moral sense hardening into a legal rule. To this there is a great obstacle in the doctrine of indefeasible rights of the State which asserts that all delegation of real authority outside the State's own jurisdiction is a derogation from its independence. On the other hand, domination by one nation which is the other alterative is unthinkable. The best solution so far seems to be *Balance of power*. Sir Frederick

Pollock is for a quasi federal alliance, a league of peace and international jurisdiction by the joint and several force of the allies. It is not necessary though desirable that such a league should include all the considerable civilised powers. The league as regards all states outside it would have to be a defensive alliance. It should warrant its members against attacks from without. The members should be strictly forbidden to commit hostile acts against one another and bound to be assisting the common authority both against external aggression and against any recalcitrant member. A judicial court for *justiciable* matters and a commission of conciliation to mediate and recommend in non-justiciable cases and also a mixed committee of selection which might sift out justiciable and non-justiciable questions in any case of unusual complexity is what Mr. Taft suggested in May 1915 and this scheme recommends itself to Sir Frederick.

Montesquieu and Sociological Jurisprudence is another interesting article in which Dr. Eugene Ehrlich examines *L'Esprit des Lois* of Montesquieu with a view to correctly appraise the value of the contributions of that great writer to sociological jurisprudence. In fact, *L'Esprit des Lois* must be considered, he says, as the first attempt to fashion a sociology of law. In strict contradiction to the law of nature school, which assumes a uniform everlasting law, Montesquieu teaches that law depends on multifarious conditions and varies with these conditions. This idea marks the greatest progress effected by a single man in legal science. It must be confessed however, that we find in *L'Esprit des Lois* more hints, suggestions and materials for sociology of law than in any way an investigation thereof. But there is already the nucleus of the future science, the perception of some natural accord with law in social life. Montesquieu's work naturally suffers from some of the defects incidental to the age in which he lived. His facts are neither accurate nor sufficiently wide and comprehensive. He was wholly unaware of the modern conception of evolution and development.

Professor Wigmore contributes a paper on Justice Holmes and the Law of Torts. According to him Justice Holmes is the only Judge who has framed for himself a system of legal ideas and general truths of life and composed his opinions in harmony with the system already formed. Another trait of his opinions which add to

their fascination is his epigram instinct; another commanding thing is the philosophy of life which decorates and dignifies his technical lore of the law. His instinct for the history of the law is another notable trait. With all his learning, he has a keen sense for the practical needs in the law of the day. His familiarity with the history of the law is only a phase of his broader interest in all literatures of life. As Mr. Wigmore puts it, his generality of absorption is certainly something that the young lawyers of to-day can afford to take notice of. His opinions are literature, not merely law, classics not mere technics. The above general observations are illustrated by the writer by reference to the valuable opinions of that Judge on various questions relating to the Law of Torts.

In another paper of interest Mr. Morris Cohen says that while at one time there was need to protest against the over emphasis of the logical element in the law now it looks as if people are coming to forget there are principles at all underlying the law and points out the necessity for a clear recognition of those principles for the orderly growth of law

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BOOK REVIEWS.

THE CURRENT INDEX OF INDIAN CASES, 1915. *Published at the Law Publishing House, Madras.*

The value of this Digest of Indian cases is too well known to the legal profession to need any words of commendation from us. We should therefore only invite the attention of our readers to the publication of this volume which is a complete digest of all the cases in the Indian Reports of the year 1915.

SANJIVA RAO'S *Digest of Privy Council Rulings, Vol. II.*

This volume brings down the Privy Council cases to the end of 1912 in the body of the book and at the end of the volume is a supplement which brings the cases to the end of 1915. The lines on which this Digest proceeds are those pursued by the late Mr. Sanjiva Rao in the 1st edition of this work, which commended itself to the professions so much, that they went in largely

for the publication though there were the other Digests like Woodman's which digested the Rulings of the High Courts and the Privy Council.

THE INDIAN DECISIONS (*old series) Vol. XV.*

We gratefully acknowledge the receipt of this volume which reprints volume 12, part 2, and volume 13, part 1 of the Bengal Sudder Dewanis Adaulet Reports. We have drawn attention to the merits of the publication in reviewing the earlier volumes and we do not think it necessary to repeat them here.