The Madras Law Journal.

VOL. IV.] FEBRUARY 1894. [PART II.

LEGISLATION IN THE IMPERIAL COUNCIL.

We have more than once called attention to the unsatisfactory character of legislation in this country, and if we do so again, it is from no carping spirit, but from an earnest desire for improvement in the efficiency of our legislative machinery. Whatever difference of opinion there may be in England as to the desirability of codification, there can be none as to its desirability in this country where a system of law mostly alien has to be administered mostly by a native judiciary with the assistance of a native bar. Preponderating as are the arguments for codification in any country, they are conclusive with regard to India. The Government of this country has wisely adopted the policy of codification and it is therefore bound to adopt such methods as will secure the greatest possible benefit from its policy. It is not possible by a single legislative effort to produce laws which shall be perfect in provision for the various contingencies that may arise, or in clearness and precision of expression. The experience of judges and of the profession will be constantly revealing deficiencies, uncertainties, and incongruities in the law. Judge-made law is irrepressible. The legislature boils it down and makes a code of it, and thinking that it has all been satisfactorily disposed of, hopes for a little rest, when off it starts again with as much vitality as ever on its course of disclosing the deficiencies and deformities of statute law. The legislature has therefore to be constantly on the alert and take a good stride every now and then in the shape of corrections, explanations and additions to overtake the tortoise of judge-made law. We have four High Courts administering law in the country, and not to speak of divergences of views between them, they are constantly putting forth a mass of decisions and our reports are growing in number. The legislature must arrange to have all this mass of legal literature

regularly digested and secure the services of competent draughtsmen to frame the necessary amendments or rules.

The various High Courts also owe an important duty to the country to bring to the notice of the Government from time to time all matters in which they consider the legislature should interfere to rectify or explain the law. It would be well, if the Government asked the High Courts to submit their suggestions in this direction once every year or six months. And when the Government takes the amendment of any act in hand, it must amend it in all particulars in which an amendment has been shown to be necessary instead of undertaking piecemeal amendments. The motto of our Government however has been 'sufficient unto the day is the evil thereof.' If a hundred sections of an Act stand in need of amendment, our Government selects two or three of them alone for amendment and leaves the rest for future operations. Not merely has the legislation of the last few years been of this hand-to-mouth character, but it has also been distinguished by clumsiness and ineptitude. The Suits Valuation Act and many another Act passed in recent years stand forth as monuments of clumsy legislation. We may illustrate our remarks by a reference to the Civil Procedure Code which was passed in 1882 and with regard to which there have been no less than five amending Acts and a sixth measure has just been passed by the Supreme Council. Our complaint is not about the mere number of the amending Acts, but about the piecemeal character of the various amending Acts, none of which has dealt exhaustively with all the points on which up to the date of its enactment experience had shown the necessity for amendment. The latest enactment is the measure introduced by the Hon. Dr. Rashbehary Ghose for the purpose of affording an opportunity to judgment-debtors to save their immovable properties after an execution sale. Property sold in execution and especially immovable property rarely fetches an adequate price. The judgment-debtor has the privilege under the new section of applying within thirty days to get a sale of immovable property set aside on his depositing in court for payment to the decree-holder the amount due under the decree with costs and interest and for payment to the purchaser a sum equal to five per centum of the purchase-money. He will however lose this privilege if he applies to set aside the sale on the ground of irregularity. The object and provisions of the Bill command

our full approval. What we fail to understand is the selection of this single matter for amendment. On a rough calculation of the cases cited in Mr O'Kinealy's Commentaries on the Civil Procedure Code, we find over 7,500 cases quoted in the book. This is surely some evidence of the fact that there are very many matters in which the Code requires clearer expression, or alteration, or further provision. We ourselves have referred to several of these matters on a former occasion (2 M. L. J, 178) and shall refer to a few more now. S. 584 of the Code lays down under what circumstances a second appeal would lie to the High Court. A substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case upon the merits is made a ground of second appeal. But what the High Court is to do in such a case is nowhere laid down. Under S. 587 the provisions of Chapter XLI are made applicable to second appeals. Turning to Ss. 562 to 566 we find that they do not meet all the difficulties which arise in the case, unless we hold that the High Court can enter into the evidence. Suppose the Lower Appellate Court has refused to consider certain documents or to listen to the arguments of counsel, it is clearly guilty of an error of procedure. The High Court cannot remand the case, because the Lower Court has not disposed of the case merely upon a preliminary point. Section 566 will not apply because the Lower Court has not omitted to frame or try any issue or to determine any question of fact. We are then driven to the dilemma of holding either that the High Court can enter into the evidence as on a regular appeal and determine the case itself, or that though the High Court is competent to entertain a second appeal, it is powerless to do justice.* The Privy Councilseems inclined to regard the High Courts as impotent in such cases and their opinion, though not amounting to a decision, has really struck the High Courts with impotency (see *Venkata Varatha Thatha Chariar* v. *Anantha Chariar*, I. L. R, 16 M, 299). We consider it also necessary that in cases in which the lower appellate court differs from the first court on a finding of fact, the finding should be open to review by the High Court.

Again, the distinction between remanding a case under S. 562 and referring issues to the lower court for trial under S. 566 is a

* We have on a former occasion pointed out that this difficulty will not exist of the words as far as may be in S. 587 be given their due effect, and the power of remand of the High Court be taken to be larger than those of Lower Courts Sec. 3. M. L. J., p. 171.

needless and vexatious complication. If the lower court has omitted to frame or try any issue, the appellate court may under S. 566 send down issues for trial. If the lower court has disposed of the suit upon what is called a preliminary point, and its decision is reversed on appeal, the appellate court may remand the case under S. 562 for determination of the other issues. S. 564 provides that there shall be no remand except as provided by S. 562. The technical meaning attached to the word remand is not borne in mind even by High Court judges and we often find cases remanded where they can only be referred under S. 566. If instead of acting under S. 566 the court acts under S. 562, an appeal lies against the order and the appellate court has to solemnly determine under which of the two sections the lower court should have been asked to determine the issues. The only practical difference between the procedure under the two sections is that if the case is remanded, the party who is dissatisfied with the decision of the lower court upon the remand will have to put in a fresh appeal paying fresh stamp duty, whereas in the other case the appellate court continues to be seized of the appeal and can dispose of all matters in dispute, as soon as the lower court sends up its findings. The question what is a preliminary point is also one which gives not a little trouble to judges and the profession. The waste of judicial energy and the waste of litigants' time and money for which this diversity of procedure is responsible ought to be stopped by the repeal of S. 562. Again S. 622 of the Code requires to be amended so as to place larger powers of revision of the decisions of Subordinate tribunals in the hands of the High Court than are now held to belong to it. Section 539 of the Code has been the subject of conflicting Full Bench rulings and according to the latest ruling in Madras, a suit to dismiss a trustee must, where the value of the trust property is within the jurisdiction of a District Munsif, be brought in the District Munsif's Court, and a suit to appoint a trustee in his stead after he has been dismissed, in the District Court. Where an application is made to the court under S. 525 to file an award and objections are raised, different views are taken as to the course to be followed; one view being that the mere raising of the objections precludes the court from filing the award, another view being that the court should inquire whether the objections are *prima facie* good, and a third view being that the court must decide upon the validity

of the objections. If the objections do not fall within Ss. 520 and 521 the Code is silent as to what course should be followed. We can point to a number of other sections which require amendment but it is unnecessary. We think it is now time to overhaul the Code and do the work of amendment in a spirit of thoroughness.

Another Act just passed by the Council is the one to amend the Indian Stamp Act of 1879 which is open to similar observations to those we have made on the Act last mentioned. There is no objection to the bill so far as it goes but there are other matters besides those contained in the bill in respect of which amendment is even more necessary. The bill lays down certain requisites for the validity of policies of sea-insurance and the stamp duty leviable on such policies, and provides that S. 24 of the Stamp Act shall not apply to sale certificates mentioned in Article 16 of Schedule I of the Act. Where property is sold by a civil court or a revenue authority subject to a charge, the question whether under S. 24 of the Stamp Act the amount of the charge should be added to the purchase-money or not has been answered differently by the different High Courts and the doubt has been rightly set at rest by expressly declaring that the sale certificate should be charged with stamp duty on the amount of the purchase-money only. One important section which is in urgent need of amendment is S. 26 which provides that where the amount or value of the subject-matter of any instrument chargeable with *ad valorem* duty cannot be ascertained at the date of its execution, nothing shall be claimable under such instrument more than the highest amount or value for which, if stated in an instrument of the same description, the stamp actually used would, at the date of such execution, have been sufficient. The section is unscientific in principle and mischievous in effect, and would have worked far more mischief than it has, had it been more largely known to practitioners and judges than it fortunately has been.

We consider the section unscientific because it affixes a penalty to a case in which the parties to the instrument are perfectly free from blame and cannot possibly help doing what they do. The amount or value of the subject-matter of the instrument being *ex hypothesi* incapable of ascertainment, the parties cannot be said to be at fault and punished for their inability to foresee circum-

stances which may affect the value of the subject-matter. The mischievous effects of the section can be easily demonstrated. The language of the section may render it applicable to agricultural and other leases. In a large majority of agricultural leases in this country the rent is made payable in kind and it is impossible to foretell the price of produce in future years. This difficulty will exist even in the case of a lease for a term not exceeding a year and much more so in the case of a lease for a term of several years. The amount or value of the subject-matter is thus incapable of ascertainment within the meaning of the section. Article 39 of Schedule I provides that the duty shall be assessed on the amount deliverable under the lease, if it is for less than a year, and on the value of the average annual rent reserved, if it is for a longer term. For the purposes of our discussion it is unnecessary to consider the case of a fine or premium being paid or delivered. Suppose the lessee agrees to pay a rent of 100 measures of paddy per annum and the lease is for 10 years: he has to pay stamp duty on the value of the average annual rent *i.e.*, 100 measures of paddy. Let us further suppose that the parties honestly value the paddy at a Rupee a measure and pay stamp-duty accordingly. The price of the paddy may vary from year to year. One year it may be below the price which the parties contemplated, and another year it may be above that price. The very fact that the amount or value of the average annual rent is required to be taken as the basis of calculation shows that the value may vary from year to year. If paddy sells in the first year at Rs. 2 per measure, the lessor will be entitled under the contract to Rs. 200 but he cannot under S. 26 recover more than Rs. 100. If on the other hand the actual price of paddy falls below a Rupee, the lessor can not claim a hundred Rupees but only the actual value of the paddy contracted to be delivered. That the lessor should in no year be allowed more rent than the amount covered by the stamp *i.e.*, the average rent, but that in some years he may be compelled to take less is the height of absurdity and injustice. These difficulties will be aggravated, if the conditions of the problem are complicated by adding to indeterminateness of price, indeterminateness of quantity of produce also, as where a tenant agrees to pay a certain proportion of the produce. Another class of leases is pretty frequently met with in which for the purpose of encour-

aging cultivation, the lessor agrees to take a nominal or low rent for the first few years and charges a higher and fairer rent for the remainder of the term. Suppose in a lease for 10 years the lessor agrees to take 100 rupees a year during the first five years and 200 Rupees a year during the next five years, the stamp duty will be payable on Rs. 150 the amount of the average annual rent. If S. 26 is applicable he cannot recover more than Rs. 100 a year during the first five years, more than Rs. 150 per annum during the second five years. Here again, as before, the conditions of the problem may be complicated by introducing indefiniteness of price and quantity. Two possible solutions of these difficulties may be suggested, but neither is acceptable. It may be suggested that the lessor may wait till the end of the term and then bring a suit for the aggregate amount arrived at by multiplying the average rent by the number of years in the term. The suggestion is of course too absurd to require serious notice. In the first place the term may be indefinite, in the second place the law of limitation makes no concession in favor of such cases, and thirdly it may not be safe to allow the rent to accumulate in the hands of the lessor. Another solution which may be suggested is that while the lessor may be allowed from year to year to recover rent not exceeding the average annual rent which is covered by the stamp, he may at the end of the term be allowed to adjust his accounts with the lessee and recover any deficiency in the aggregate amount of rent. Here again the same difficulties confront us, as before. In the first place the lease may be for an indefinite term. Take however a lease for a definite term, say ten years, at annual rent of 100 measures of paddy estimated for purposes of stamp duty at Rs. 100. Suppose that during the first five years paddy sells at Rs. 2 a measure and during the next seven years at 12 annas a measure. The lessee can during the later period of seven years get the whole rent of Rs. 75 per annum that he is entitled to under the contract. But during the earlier period of five years he could get only Rs. 100 per annum though he was entitled to Rs. 200. There is thus a yearly shortfall of Rs. 100 during the first period of five years and his right to sue for the shortfall of each year will be barred in six years. When at the end of the term the accounts can be adjusted, there will be no sums legally recoverable by the lessor and no accounts to adjust. There is also no provision of law under which such an adjustment can be made.

On referring to the English Stamp Act of 1870 we find no provision resembling S. 26 of the Indian enactment. S. 97 of the English Act refers to cases in which the rent is payable in produce or goods but it is only when some permanent rate of commutation or conversion is expressly provided in the lease, that the duty is calculated on the value of the produce estimated at that rate. Where no such commutation rate is given, there is no provision that nothing more can be claimed than the amount covered by the stamp. On the other hand where a security is given for money to be lent or to become due upon an account, current S. 107 provides that the security is to be available only for the total amount limited in the instrument, or if it is not limited, for the amount covered by the stamp. There is a radical and obvious distinction between the case of a lease and a security of this kind. In the latter case it is open to the creditor to protect himself by stopping his advances, while in the former case the lessor cannot protect himself from loss by any precaution. The difficulties which we have found to arise under the Indian Act in regard to leases arise also in the case of securities for the payment of any rent-charge, annuity, or periodical payments, by way of repayment, or in satisfaction or discharge of any loan, advance, or payment intended to be so repaid, satisfied, or discharged. Under S. 108 of the English Act such a security is to be charged with the same duty as a similar security for the payment of the sum of money so lent, or advanced, or paid and there is no provision that nothing more can be recovered than the amount covered by the stamp. It is difficult to understand the fiscal instincts which impel the Government to inflict a penalty upon parties who honestly enter into a contract and pay the full amount of the stamp duty which under the circumstances within their knowledge or the knowledge of any body else can be levied from them. If our legislature is strong in anything, it is in the sphere of fiscal legislation and the section we have been criticizing is an instance of it. Section 26 should in our opinion be expunged and some sections similar to Ss. 107 and 108 of the English Act introduced. With regard to leases, and securities of the kind above mentioned, if it is necessary to determine whether the rate of conversion adopted by the parties for the purpose of stamp duty is a fair one, the commutation rates adopted by the settlement department may be taken as the standard.

Once a lease-deed is found to be duly stamped to the best of the lights available to the parties at the time of execution, the contractual rights of the parties should not be interfered with.

An important measure before the Supreme Council is the bill to amend the Presidency Small Cause Courts Act. We are glad to find that the bill proceeds on the lines advocated by the native public and press of this Presidency and contains many of the reforms which we have desired to see introduced. We shall therefore briefly notice the main provisions of the bill and offer a few observations on some of them.

Sir Alexander Miller who introduced the bill insisted very strongly upon two features in the bill one relating to the qualifications of the judges and the other to the creation of a right of appeal in suits above one thousand Rupees. We think Sir Alexander Miller was justified in laying stress upon these two matters and especially so in regard to the right of appeal. That some standard of qualification should be laid down for nomination to the judgeship must be admitted and that the qualification prescribed, *viz.*, five year's standing as a judge or as a member of the legal profession is not too high must also be admitted. We may also mention that as a matter of fact we have known few instances in which the Government has appointed men not possessed of such qualifications. There is however one clause in section (2) to which we must strongly objectand and that is the provision that no person other than a barrister, member of the faculty of advocates, or advocate of a High Court shall be appointed to be Chief Judge. Whatever reasons might have existed for such a provision in former times here is absolutely no justification now for the invidious exclusion of Vakils. Legal education has made great progress in the country and the ranks of Vakils are quite as conspicuous for ability and attainments as those of advocates. And if Vakils are competent for a puisne judgeship in the Small Cause Court and the High Court we are not aware of the existence of any specially onerous or delicate functions attached to the Chief Judgeship for which competent men cannot be found among the whole class of Vakils. The amendment of the chapter relating to new trials and appeals is the most important of the provisions in the new bill. The cum-

brous and costly procedure prescribed for a re-hearing in the present Act is repealed and the right of appeal to the High Court is conferred in all cases exceeding Rs. 1,000. Public opinion has been very strong in this Presidency as to the necessity of such a right of appeal being granted and credit is due to the Madras Government for having recognized it and pressed the matter upon the attention of the Supreme Government. Another change which has been strongly advocated by the public and the profession but which has not been adopted in the new bill is the creation of a power of revision by the High Court of the judgments of the Small Cause Court analogous to the power conferred by S. 25 of the Provincial Small Cause Courts Act. The powers of revision possessed by the High Court under S. 622 of the Civil Procedure Code are too limited to do any substantial good. The Presidency Small Cause Court may be guilty of the grossest errors of law and yet the High Court cannot under the present law interfere to set it right The powers of reference to the High Court vested in the Small Cause Court do not meet the evil because they need only be exercised where there is a difference of opinion among the judges of the Small Cause Court or the value of the subject-matter exceeds Rs. 500. If it was found necessary to vest in the High Courts a power of revising the judgments of Provincial Small Cause Courts on questions of law even in the pettiest suits and if experience has shown, as we undoubtedly think it has, the exercise of such revisional jurisdiction to be extremely beneficial not merely by the correction of errors of law which have been committed but also by the prevention of such errors by ensuring greater care and attention on the part of the judges, the creation of a similar jurisdiction over the Presidency Small Cause Courts must have a similar wholesome effect. The sense of superiority to correction has an exhilarating influence upon a Presidency Small Cause judge and as often as not he parts with his law-books and lightens his load of learning. The revisional powers of the High Court over the Presidency Small Cause Court must therefore be assimiltated to its powers over the Provincial Courts. It may be objected that such a power of revision will have the effect of inundating the High Court with revision petitions but the experience of the working of the Provincial Act shows that such a fear is unfounded. If however it is necessary to fix a minimum pecuniary limit we would suggest that

the High Court might have power to revise the judgments of the Small Cause Court in all suits above the value of fifty Rupees.

The next important provision in the bill is the one relating to court fees and we are glad to find that means are provided for reducing the exorbitant rates of court fees sanctioned by the present Act to the scale of the Court Fees Act. We would however suggest that instead of leaving it to the pleasure of the Local Governments to introduce the scale in the Court Fees Act, the scale should be applied directly by the new Act itself. Of the other provisions of the bill only two call for notice. Where the right of a plaintiff and the relief claimed by him in the Small Cause Court depend upon the proof or disproof of any right to or interest in immovable property or any other title which the court cannot finally determine, the court is empowered to return the plaint to be presented to a court having jurisdiction to determine the title. This section corresponds to S. 23 of the Provincial Small Cause Courts Act and is sound in principle. The Small Cause Court is a court of summary jurisdiction and its time ought not to be taken up by the trial of questions of title upon which its finding though arrived at after the most elaborate and patient investigation would not preclude the parties from re-opening the matter in a regular suit. The objection to this section that it involves a transfer of such suits to the High Court and that a reference to such a costly tribunal is a practical denial of justice does not touch this Presidency as we have got a cheaper and quite competent tribunal in the City Civil Court. The last section we would notice is S. 4 which provides that the Small Cause Court may allow a plaintiff at or before the first hearing of a suit in which a several liability is alleged on a cause of action arising either wholly or in part within the local limits of the jurisdiction of the court to abandon the suit as against any defendant who does not reside or carry on business or personally work for gain within such local limits and to sue for a decree against such defendants only as do so reside, carry on business, or personally work for gain.

Where persons are severally liable to another in contract, the latter may bring suits against them successively until his claim is satisfied. If under an erroneous impression that all the debtors reside within the jurisdiction of the Small Cause Court he sues them

all and then discovers that some of them are not within the jurisdiction it would be a fit case for allowing him to withdraw the suit as against those not so residing with liberty to file a fresh suit. In such a case there is no reason why he should be compelled to abandon the suit as against him as the price of obtaining a decree against the rest. The court has ample powers under S. 373 of the Civil Procedure Code to prevent an improper severance of a suit and it is unnecessary to introduce any conditions in this section as the price for the privilege of prosecuting the suit against the defendants within the jurisdiction. The amendment proposed to be made may also be effected in a less cumbrous form by merely adding at the end of clause (c) of S. 18 the words "or the suit is abandoned or withdrawn as against the defendants not so residing or carrying on business or personally working for gain."

CRITICAL NOTES.

VIGNESWARA *v.* BAPAYYA, I. L. R, 16 M, 436.

Limitation Act, Sections 7 *and* 8:—There was more than one question considered by the learned judges who decided this case but we shall confine our observations to the question of the scope of Ss. 7 & 8 of the Limitation Act, dealt with in the judgment. Two persons jointly entitled to certain immovable property were aggrieved by a court sale of the property and had a right to bring an action to set it aside. At the time when this right accrued one of them was *sui juris* but the other was under disability. When the action was brought the time provided by the statute had elapsed against the first, but as against the other the time had not run out as the disability only ceased within the period. The question then arose whether both were barred, or both were saved, or one was barred and the other saved. The learned judges answered it by holding that both were barred. Section 8, they held, did not operate to save them from the statute. They point out, following *Muthuswami Aiyar* and *Parker, JJ.* in *Seshan* v. *Rajagopala,* I. L. R, 13 M, 236 that S. 7 of the Act does not help the plaintiff who was a minor at the time when the right of action arose because that section is limited to the case where all the plaintiffs were under disability at the time from which the period of limitation was to be reckoned. They get rid of the second part of S. 8 with the remark

that it applies only where all the persons entitled to sue were under disability and in this they have the authority of the decision in *Anando Kishore Dass Bakshi* v. *Anando Kishore Bose*, I. L. R, 14 C, 50. If neither S. 7 nor the second part of S. 8 applied, it would follow as a matter of course even without the help of the first part of S. 8 that the entire suit would be barred for the general rule of limitation in S. 4 would apply. But the learned judges fortify themselves by appealing to the first part of S. 8, in accordance with which, they say, one of the joint claimants was capable of giving a valid discharge without the concurrence of the minor and so time ran against them all.

We feel inclined to agree with the interpretation of S. 7 by *Muthuswami Aiyar* and *Parker, JJ.* in I. L. R, 13 M, 236. We confess however that looking merely at the language of S. 7 it is by no means clear to us that it is intended to apply only to the case of a sole person entitled to sue but under a disability, or of several such persons all of whom are under disability. The section says "if a person entitled to institute a suit be a minor he may institute the suit within the same period after the disability has ceased." If one of several persons entitled to institute the suit is under disability there is nothing in the section which says, that he is not entitled to the benefit of the provision, whatever may happen to the others not under disability, who are jointly entitled with him to institute a suit. It cannot be said for example that Ss. 19 and 20 of the Act which treat of the effect of acknowledgment and part-payment, respectively, by the party against whom the right is claimed, or the person liable to pay, require for an acknowledgment or part-payment to have a valid operation that they should have been made by all the parties together against whom the right is claimed or all the persons together liable to pay. Nor do we feel much pressed by the decision relied on of *Lord Kenyon, C.J,* in *Perry* v. *Jackson*, 4 T. R, 519 for that decision does not lay down the broad principle that the language of the proviso, S. 7 of 21 James 1, Ch. 16, should be construed so as to mean that the disabilities mentioned in the section saved from the operation of the statute only if all the persons entitled to sue were under disability. It was a case of one of several persons entitled to sue having been resident abroad, which was a disability then recognised by the statute. The action was brought within six years after the return of

the absent man. There was no provision in the English statute corresponding to S. 8 of the Limitation Act. And *Lord Kenyon* used language which enunciated the principle underlying S. 8 and held the suit barred. He said, "The proviso on which the question arises was introduced into the statute, in order to protect the interests of those persons which there was no one of competent age, of competent understanding, or competent in point of residence in this country, to protect. Now two of the plaintiffs in this cause have all been resident here and it was their duty to watch over those interests in which they themselves were equally concerned *with the partner* who resided abroad. It is admitted *one partner* may do several acts to bind the interests of all; he may release as well as create a debt; he may also by his acknowledgment take a case out of the statute of limitations and I see no reason why the same rule should not hold also in the present instance." Thus even in the absence of a provision similar to S. 8 the Chief Justice put a construction upon the proviso of the English statute which brought about a similar result. And the grammatical construction also lent itself to this for the proviso reads "if any person or *persons* entitled to any such action, be" under the disabilities specified "then such person or *persons* shall be at liberty, &c." To show that it was the competency of the persons not under disability to give a valid discharge that induced *Lord Kenyon, C. J.* and *Ashhurst* and *Buller, JJ.* to hold that the person or persons referred to in the proviso should be all the persons entitled to sue and that the entire action was barred, we have only to refer to two cases, *Fannin* v. *Anderson*, 7 Q. B, 811 and *Towns* v. *Mead*, 16 C. B, 123 decided upon the language of S. 19 of 4 Anne, Ch. 16, which in respect of the matter under consideration is similar to that of S. 7 of 21 James I, Ch. 16. Section 19 runs as follows:—"if any person or persons against whom there shall be any cause of action be at the time of such cause of suit beyond the seas, then the person or persons, entitled to such action, shall be at liberty to bring the said action against the person and persons &c." Before this section was repealed by the Mercantile Law Amendment Act, 19 and 20 Vic., Ch. 97, Ss. 10 and 11, the question, whether in case some of the defendants liable to be sued were beyond the seas at the date of the cause of action, all the defendants could be sued within six years after the return of the absent persons, came

up before the Queen's Bench in *Fannin* v. *Anderson*, 7 Q. B, 811. *Lord Denman, C.J.* said, "It was determined in *Perry* v. *Jackson* that if one of several co-plaintiffs be within seas, the statute does run. The reason given by the court is that one plaintiff can act for the others and use their names in an action and therefore the prohibition of the statute is not wanted. With respect to defendants, however, the reason does not apply." And the court gave judgment for the plaintiff against all the defendants notwithstanding the similarity of language in S. 19 to that of the proviso in the statute of James I, holding that the distinction between a co-plaintiff and a co-defendant was a sound distinction. In *Towns* v. *Mead*, 16 C. B, 123 which was an action against one of the persons jointly and severally liable, who had returned from beyond seas more than six years before suit, while the other had died beyond seas within six years, *Jervis, C. J.*, in giving judgment for the plaintiff, said, "the words 'person or persons' in the 19th section are sufficient to let in the construction that if there be *a person* abroad the statute of Anne applies." When even the words "person or persons" do not compel the interpretation that *all the persons* entitled to sue or liable to be sued, should be beyond the seas at the date of the right to sue arising, it would seem difficult to contend that the words "if a person entitled to institute a suit" in S. 7 of Act XV of 1877 necessarily require the interpretation that all the persons together should be under disability to satisfy the section.

But we are however forced to adopt this construction of S. 7 by reason of S. 8. Section 8 deals with some of several joint creditors or claimants being under disability, and enacts a rule with regard to suits instituted in such cases. If S. 7 also dealt with cases where some of the plaintiffs alone had been under disability, the language of S. 8 should be different from what it is. It is possible to contend that S. 8 is a proviso to S. 7 and that while S. 7 generally gives a period from the cessation of the disability, S. 8 takes away that privilege where a discharge could have been given in respect of all the persons entitled to sue by the co-creditors or claimants who were *sui juris*. If this was the object of the legislature, S. 8 would have said, "time will run against *him*" and not "time will run against them all" and the second part of S. 8 would be superfluous or would run as follows, "but where no such discharge can be given, time will run against him from the time one of them becomes

capable of giving such discharge &c." If S. 7 said that time did not run against any person under disability until cessation of disability, the proviso should specify when time runs notwithstanding, against him and not when it does not run. From a comparison of S. 13 with S. 7, we can also infer by parity of reasoning that if S. 13 does not allow a reduction in the computation where some only of the defendants are absent from British India, S. 7 does not delay the starting point of limitation where some only of several persons entitled to sue are under disability at the date of the accrual of the right to sue. We are therefore of opinion that the construction of S. 7 adopted by *Muthuswami Aiyar* and *Parker, J. J.* in I. L. R, 13 M, 236 is correct.

So far we have only paved the way for the proper interpretation of S. 8. Following the decision in I. L. R, 14 C., 50, *Collins, C. J.* and *Best, J.* hold that the second part of S. 8 only applies where all the persons entitled to sue are under disability at the time from which the period is to be reckoned according to the third column of the schedule. We are unable to accede to this proposition. The language of S. 8 seems to be plainly against it. The second part of S. 8 does not appear to have been considered at all by *Muthuswami Aiyar* and *Parker, J. J.* in I. L. R, 13 M, 236 for they held that S. 8 was not applicable to applications for execution. Having regard to the policy of S. 8 it seems to us that the word "claimant" is wide enough to cover a person applying for execution, more especially as S. 7 which is the complement of S. 8 includes an application for execution. The words "right to sue" in S. 2 have been held sufficient to include a right to apply for execution, see *Nursing Doyal* v. *Hurryhur Saha*, I. L. R, 5 C., 897. Whether or not the word 'claimant' includes one applying for execution, it is clear to us that the words "when one of several joint creditors or claimants is under any such disability" are common to both parts of the section for unless these words are read with the second part beginning with "but when no such discharge can be given" this part of the section will be absolutely unmeaning. The section goes on to say that "time will not run against any of them": Whom? Certainly, the joint creditors or claimants one of whom is under such disability. The point is not capable of argument. We could not for a time understand the process by which the Calcutta judges came to the conclusion that

the second part of S. 8 had no reference to a case where all were not under disability. But we think illustration (*b*) is responsible for the mistake. That puts a case where all the joint creditors were under disability. But the plain and unmistakable signification of the section cannot be controlled by the illustration. Section 8 then in both its branches provides for a case where some only are under disability. Where the others can give a valid discharge time runs against all, even against those under disability. When the others cannot give a discharge time does not run against any of them, even against those not under disability. But when one of them afterwards becomes capable of giving a valid discharge for all, then from that time the first rule applies. This seems to us to be the correct exposition of the meaning of S. 8. The rule is stated by Darby and Bosanquet at p. 136 of the 1st Edition of their work on limitation thus, "Where money is payable to several persons jointly and one or more of them is under any such disability as before mentioned, it is apprehended that if from the fact of such persons being partners or executors or from any other cause, a discharge can be given without the concurrence of the persons under disability, time will run as against all, *but otherwise it will not run as against any until all are free from disability.*" The language of S. 8 appears to have been taken by the Indian legislature from this paragraph. The same meaning is thus expressed in the second Edition at page 150, "In the event of one of several persons entitled to an action being under disability and it being impossible for the rest to sue in his name time would probably be held not to run against any until the disability had ceased." The managing member of an undivided Hindu family can give a valid discharge even on behalf of other members under disability. Where he is barred in respect of a claim, the other members if jointly entitled will likewise be barred, see *Surju Prasad Singh* v. *Khwahish Ali*, I. L. R, 4 A., 512. But we do not see that every joint creditor merely because he can institute a suit making the minor co-creditor a defendant, can give a valid discharge on behalf of the minor as *Collins, C. J.* and *Best, J.* seem inclined to hold in *Vigneswara* v. *Bapayya*. As pointed out by the judges in I. L. R, 14 C., 50 one of several persons jointly entitled against tort-feasors cannot give a valid discharge on behalf of all. In the absence of a finding that the elder brother was the manager and could have given a

valid discharge, we do not see how the decision in *Vigneswara* v. *Bapayya* can be supported.

There is however another question glanced at in a note upon this case in 3 M. L. J, at p. 350, which arises from the use of the word 'discharge' in S. 8. The word 'claim' is wide enough to cover all rights, but the word 'discharge' has reference to obligations, which are *in personam*, namely, debts and damages. And it may be questioned whether the use of the word discharge does not limit the scope of S. 8. It may on the other hand be fairly argued and the argument would probably be correct, that the word is also capable of an enlarged signification namely "the release of any right," that the word "claimant in the section must require an equally wide signification to be attached to the word "discharge" and that S. 8 making a provision where some of the claimants are under disability should be applicable to all the classes of rights that fall within the scope of S. 7 which deals with the disability of all the persons entitled to sue. Unless S. 8 covers all classes of rights, notwithstanding the disability of some of the persons entitled to sue in respect of rights *in rem*, all would be barred on the lapse of the period provided in the third column of the schedule. We may however refer to the following passage from Buswell on Limitation, p. 182, which presents a different view of the American law in which there is no statutory provision corresponding to S. 8 of the Limitation Act, "When an adverse possession has existed during the period of limitation against tenants in common one of whom is within the saving clause of the statute, the rights of the others are not thereby saved. And so it seems that if an estate descend to parceners one of whom is under a disability which continues for more than twenty years and the other does not enter within the twenty years the disability of the one does not preserve the title of the other. It was held by *Story, J.* in an action of trespass brought by several plaintiff co-tenants in which the disability of some of the plaintiffs was relied on in favour of all, that when the statute runs against one of the parties entitled to a joint action, it operates as a bar to such joint action. * * * * * It follows in the case of joint tenancy that where parties plaintiffs are compelled to join, the disability of one of them will afford no advantage to the others unless the party under disability shall sue alone in an action of ejectment, and his demise to the lessee be

construed as a severance of the joint estate and as a conversion of it into an estate in common." *Roe* v. *Rowlston*, 2 Taunt., 441. See also Angell on Limitation, Section 484.

NOTES OF INDIAN CASES.

Vaithyanatham *v* **Gangarazu**, I. L. R, 17 M, 9. The Calcutta and Madras High Courts are of opinion that although the rule against marriage brokerage contracts is based on broad principles of public policy and therefore applicable to this country quite as much as to England the circumstances of this country make the application of the principle slightly different. Infant marriage is the rule amongst the higher castes. The parents of the bride are often poor and unable to meet the expenses of the marriage and receive a bride-price to bear the cost of making ornaments for the girls and making various presents to her from time to time. The courts are of opinion that the rule against brokerage contracts ought not to be applied to cases when the promise to pay money is made in favor of the bride's parents and not in favour of a stranger and rely upon the fact that the *Asura* form of marriage though disapproved is still sanctioned by the Hindu Sastras. The concession is made in the interests of the bride, see *Visvanathan* v. *Saminathan*, I. L. R, 13 M, 83, *Ram Chand Sen* v. *Audaito Sen*, I. L. R, 10 C, 1054, *Juggessur Chuckerbutty* v. *Panchcowree Chuckerbutty*, 14 W. R, 154, *Ranee Lallun Monee Dossee* v. *Nobin Mohun Singh*, 25 W. R, 32; it may not therefore apply where the sum received or the circumstances of the case suggest that the payment was a bribe calculated to injure instead of benefiting the bride. And the courts have always set their face against contracts in favour of strangers as in the case under notice and in *Pitambar Ratansi* v. *Jagjivan Hansraj*, I. L. R, 13 B, 131.

Khadir Moideen *v.* **Rama Naik**, I. R. R, 17 M, 12. The lot of joint promisees is not always a happy one where there is discord amongst them. The accepted principle is that the right being joint, it must be enforced jointly by all the promisees. Where one of them refuses to join the others in a suit for the enforcement of the right, what are the others to do? Can they split the right, and ask the court to decide what their share is, and decree it to them? *Bishan Dial* v. *Manni Ram*, I. L. R, 1 A, 297 is an authority that this cannot be done. If this ruling be correct, then the other promisees alone should be entitled to enforce the whole promise the rebellious partner being left to seek his rights against them. In the case in question the judge of the lower court thought the court could not grant a decree in favour of some only of

the promisees and consequently directed the dissenting co-promisee to be made a plaintiff in order to fulfil the requirements of the law. But when this was done, the time for instituting the suit had expired. The question arose whether the suit should be dismissed on the principle of the rulings in *Ramsebuk* v. *Ramlall Koondoo*, I. L. R, 6 C, 815, and *Kalidas Kevaldas* v. *Nathu Bhagvan*, I. L. R, 7 B, 219. *Wilkinson* and *Handley*, *J.J.* held that the rule laid down in S. 22, Limitation Act, does not apply where the court of its own motion directs a defendant to be made a plaintiff. By its words S. 22 applies in all cases where 'a new plaintiff' is added. It is not easy to perceive that a new plaintiff is not added because the added plaintiff was a defendant before. Probably the correct course would have been to hold that the original plaintiffs were not barred because under the circumstances they were entitled to enforce the right without the sanction of the added plaintiff and to direct that their co-sharer should be restored to his original position of a defendant in the suit.

Tribhuvandas Ruttonji Mody *v.* **Gangadas Tricumji,** I. L. R, 18 B, 7. A Hindu leaves a will directing his executor to purchase an estate for his grandson and convey it to trustees to be held by them in trust for the grandson for his life and after his death for his son or other male heir. The grandson has no son in existence at the time of the testator's death but a son is born after that event and before the execution of the trust-deed by the executor and another son is born after the date of the trust-deed. Are the limitations over valid and if so to what extent? The answer depends upon two questions. We have first to see at what point of time the competency of the persons who are to take the remainder should be determined. The other question is whether the rule of English law should be applied according to which if the gift fails with regard to some of the members of the class, it is held to fail with regard to all. Upon the latter point *Mr. Justice Starling* following recent cases has rightly declined to apply the English doctrine which appears to rest on very artificial and questionable presumptions as to the intentions of testators. Upon the former point however we are inclined to doubt the correctness of *Mr. Justice Starling's* decision. He held that the time for ascertaining the validity of the gift over was the date of the trust-deed. If the validity of the gift over had to be determined with reference to the state of things at the testator's death, the gift would clearly have been bad. Under the Hindu law no gift can be made to a person not in existence at the death of the testator and in this case the grandson had no son in existence at the testator's death. If the testator had possessed the estate and devised it directly

on the limitations of the will in question, there is no doubt the limitation over would have been bad. Can he be permitted to do indirectly what he could not have done directly? We apprehend that the intervention of the machinery of a conveyance to trustees ought to make no difference in the rule. See Jarman on Wills, 5th Ed, Vol. I, p. 259.

Chinto *v.* **Janki,** I. L. R, 18 B, 51. Where a mortgagee in possession is ousted by a trespasser, is the latter's possession adverse to the mortgagor also? The answer returned by the learned judges is that it depends on the circumstances of the case and that there may be a possession adverse to the interest of a mortgagee which is nevertheless not adverse to the interest of the mortgagor. As *Mr. Justice Telang* puts it, the question resolves itself into whether a mortgagor has a right to possession of mortgaged property if the mortgagor having been placed in possession should there-after lose such possession by trespass or otherwise on the part of a stranger. *Mr. Justice Telang* points out that by the English law the mortgagor would have no such right and inclines to the opinion that the same rule should obtain in this country. The same view is taken by Mr. Mitra in his Lectures on Limitation, pp. 108 & 131. Supposing however that the possession of a trespasser can be adverse to that of the mortgagor also, the burden of proof would lie upon the trespasser.

Krishna Velji Marwadi *v.* **Bhau Mansaram,** I. L. R, 18 B, 61. Where a District judge transfers execution proceedings in a Small Cause Court to a Subordinate Judge's court, any application in execution of the small cause decree would be an application to the subordinate court and would enable the holder of the small cause decree to rateable distribution along with persons holding decrees of the subordinate court itself. The last paragraph of section 25 of the Civil Procedure Code does not convert the sub-court into a Small Cause Court but merely provides for the trial of the suit being conducted by the court to which the suit is transferred, as a Small Cause Court suit.

Raghubar Dial *v.* **Madan Mohan Lal,** I. L R, 16 A, 3. *Tyrrell* and *Knox, JJ.* are no doubt right in holding that a suit to compel a party to an award to act up to its terms is not a suit for 'compensation for breach of a contract.' But we think it is equally clear that it is not a suit for specific performance of a *contract.* The learned judges themselves point out in the course of their judgment that an 'award' is not a contract, any more than a decree of a court, but S. 30 of the Specific Relief Act they think justifies the application to suits of the kind in question, Art. 113 of the Limitation Act. Section 30 of Act I of 1877 however

merely extends the provisions of Chapter II of that Act to awards; and as the chapter has nothing to do with limitation, we do not see how that section can make Art 113 of the Limitation Act applicable to such suits. Ch. II aforesaid relates merely to the cases in which specific performance may be enforced and the conditions which the courts will impose upon parties, claiming such relief.

Chunni *v.* **Lala Ram,** I. L. R, 16 A, 5. One effect of stringent laws is to sharpen the judicial intellect to see whether they cannot be evaded. The Indian Limitation Act has committed the mistake of providing unduly short periods of limitation in several cases and the courts are constantly exercised as to how to construe the articles so that lawful rights may not be defeated by such stringent rules of limitation. Art 12 of Sch. II provides a period of 1 year for setting aside sales either by revenue authorities or by landlords or by courts. The object apparently was to invest sales with a conclusive effect unless impeached within one year. But the courts hold that where the judgment has been satisfied as in the case which is the subject of this note or where there are no arrears of revenue or rent as in *Venkatapathi* v. *Subramanya*, I. L. R, 9 M, 457, the sale being held without jurisdiction it may be treated as void and Art. 12 will not apply, see also *Lala Mobaruk Lal* v. *The Secretary of State for India in Council*, I. L. R, 11 C, 200, F. B. But Art. 12 apparently requires only that a sale should have taken place and not that it should be valid. We think it not unwise policy to extend the period of limitation in such cases and the courts will then loyally carry out the intention of the legislature.

Ballu Ram *v.* **Raghubar Dial,** I. L. R, 16 A, 11. We agree with *Knox*, J. that it is difficult to compare a Small Cause and a Munsif's Court and to say that one of them is superior in grade to the other. But we think that that it is practically necessary to regard one of them as superior to the other for the purposes of S. 285. We have no doubt that the legislature ought to have declared which of the two should be regarded as superior for this particular purpose. We hope that the view of the majority of the Full Bench in the case in question will be adopted when the legislature amends the section.

Sahdeo Pandey *v.* **Ghasiram Gyawal,** I. L. R, 21 C, 19. Ordinarily the defendant in a suit is not entitled to notice of execution taken out against him, but there are two exceptions to this rule, where more than a year has elapsed between the date of the decree and the application for its execution and where the execution is sought against the representative of a deceased defendant. The object of a notice in the latter case is

pretty apparent. It is intended to enable the representative to show that execution cannot be had against him, because he is not in possession of the assets of the deceased defendant. But it is not quite clear why notice is required in the former case; possibly it is intended to allow the judgment-debtor an opportunity of proving any valid adjustment of the decree or other change in the circumstances of the parties since the passing of the decree. For ourselves we think it better that notice ought to be given to the defendant in every case. But suppose no notice is given in the two cases where it is prescribed by S 248 of the Code, what is to be the consequence? Both the Calcutta and Allahabad courts think that all proceedings in execution including any sale that may have taken place should be regarded as null and void, see *Imamunnissa Bibi* v. *Liakat Husain*, I. L. R, 3 A, 424, *In the matter of the petition of Ramessuri Dassee*, I. L. R, 6 C, 10?, but compare *Sheo Prasad* v. *Hira Lal*, I. L. R, 12 A, 440. We do not see why notice is considered to be an essential part of the proceedings in execution by the learned judges who decided these cases. They do not give any reasons for their view except that S. 248 lays down that notice shall be given. We rather think that the absence of notice is at the highest a mere irregularity and that the judgment-debtor should be required to prove that he has been prejudicially affected by the irregularity before he can be permitted to ask the court to cancel all its proceedings on that ground.

Gobind Pershad *v.* **Rung Lal**, I. L. R, 21 C, 23 *Rampini* and *Gordon*, *J.J.* may be right in holding that an application by a decree-holder that the judgment-debtor's application to set aside a sale in execution may be rejected and the sale confirmed is a step in aid of execution within the meaning of Cl. 4 of Art. 179 of Sch. II to the Limitation Act. At any rate we are not inclined to criticise very narrowly a ruling that a particular act of the decree-holder is an application to take a step in aid of execution, but is not the utter confusion that the vast mass of decisions on the question and on the other question what is an application "in *accordance with law*" sufficient to induce the legislature to give some indication at least as to what it means by these phrases? But though the Limitation Act is repeatedly amended the policy of the Law Member seems to be to amend nothing that is wrong or obscure.

Jadub Lall Shaw Chowdhry v. **Madhub Lall Shaw Chowdhry**, I. L. R, 21 C, 34. We think there can be hardly any doubt that S. 99 is not confined in its operation to cases where a mortgagee attempts to bring the mortgaged properties to sale for the mortgage-debt. The very terms of the section negative such an interpretation. But notwithstanding the

literal meaning of the section, we doubt whether the legislature could have intended to apply the rule where no suit can be brought on the mortgage under S. 67 on the ground that the time for payment of the mortgage-debt has not expired. *McPherson* and *Banerjee, J. J.* admit that such a construction would work injustice at least in some cases. The learned judges attempt to remove this injustice by suggesting that perhaps the suit under S. 67 referred to need not be on the mortgage, but might be on the charge created by the attachment. This we submit is hardly correct. In the first place as admitted by the learned judges themselves, "it is not easy to see what object can be gained by such a suit." Secondly, will a suit lie to enforce the charge created by the attachment? We think not. Section 99 does not give such a right of suit; and both the Civil Procedure Code and general principles are distinctly against it. Section 99 however is one of the least clear in an obscure chapter of the Transfer of Property Act; and we think the time has arrived when a thorough revision should be made of the law of mortgages as enacted in the Transfer of Property Act.

NOTES OF ENGLISH CASES.

John Young and Co. *v.* **Bankies Distillery Company,** 1893, A. C, 691. Where a riparian proprietor had used the water of a stream for sixty years for purposes of distillation and the appellants, higher proprietors, without any prescriptive right, poured into the stream a body of water pumped from their mines, which would by mere gravitation not have reached the stream and which was of a different character and quality to that of the stream and prejudicially affected it for distillery purposes' held that the respondents were liable to an injunction.

Every riparian proprietor is entitled to have the natural water of the stream transmitted to him without sensible alteration in its character or quality. Any invasion of this right entitled the party injured to an injunction.

In re **Inman. Inman** *v.* **Rolls,** 1893, 3 Ch, 518. A testator gave his residuary estate to trustees in trust for sale and investment and to pay the income of the trust funds to his wife (who survived him) during her life; and from and after her decease to raise and pay to each of her sons J & F who should be living at his death and should attain twenty-one the sum of £5,000 and also a legacy to each of his two daughters; and subject to such payments he directed his trustees, after the death of his wife, to stand possessed of the trust funds in four equal shares upon trusts for his four children. F attained twenty-one after

the death of the widow. Held that the interest on F's legacy during the period between the death of the widow and his attaining twenty-one belonged to the residuary legatees.

Thorne *v.* **Heard,** 1893, 3 Ch, 530. In 1878, A the first mortgagee of property with a power of sale sold through his solicitor S. The solicitor received the sale moneys and after satisfying A's mortgage debt, retained the surplus moneys falsely representing to A that he had the authority of the second mortgagee to receive the same. S applied the surplus to his own use, and from 1878 to 1891 paid the second mortgagee interest on the second mortgage as though it were still existing. In 1891 S became bankrupt, when the true facts transpired. In an action against A by the second mortgagee, claiming an account of the sale moneys and payment of what was due to him on his second mortgage, held (1) that under the circumstances the payment of interest by S. did not keep alive the claim of the second mortgagee against A, because S did not make the payments as A's agent; (2) that although A had been guilty of negligence in not seeing that S paid over the surplus sale money to the second mortgagee, yet he was not a party or privy to the fraud of S and consequently the claim was barred under the Statute of Limitations and the Trustee Act, 1888.

Mayor, Aldermen and Citizens of Oxford *v.* **Crow,** 1893, 3 Ch, 535. Where a lessee of buildings belonging to a municipal corporation made proposals which were accepted by the committee through the town clerk but not under seal, held that the contract not having been under the seal of the corporation or signed on their behalf by any person authorized under seal to do so or ratified under seal or part performed or acted on, could not be enforced by the corporation.

Page *v.* **Midland Railway Co.,** 1894, 1 Ch, 11. Held by the Court of Appeal overruling *Hunt* v. *White*, 37 L. J, Ch, 396 that defects of title to the estate expressed to be conveyed by a sale deed, if they are covered by the terms of the covenants for title, are not to be excluded from their operation on the ground that the defects appear on the face of the conveyance or are otherwise known to the purchaser and that the purchaser is entitled to recover upon the covenants.

Bailey *v.* **Barnes,** 1894, 1 Ch, 25. The owner of freehold premises mortgaged them to A. A assigned the mortgage to B. B under a power of sale in the sale-deed sold the premises free from the equity of redemption to D, exercising the power improperly. D mortgaged the same to E and sold the equity of redemption to F who bought it *bona fide* and without notice of the defect in the sale by B to D. F on subse-

quently getting notice of the defect bought in the legal estate of the mortgagee E by paying him off. G, who became the purchaser of the equity of redemption from the original owner after setting aside the sale of B as fraudulent claimed against F, who at the time of the purchase of the equity of redemption from D had seen a valuation of the premises which showed that the purchase by D was at an undervalue but made no enquiries concerning the circumstances of the sale. Held that F was not affected by constructive notice of the impropriety of the sale and was protected against the prior equitable interest of G by his acquisition of the legal estate.

Ross *v.* **Woodford,** 1894, 1 Ch, 38. In the exercise of its discretion to grant or refuse a commission to take evidence abroad, the court will not regard the case of a defendant with the same strictness as the case of a plaintiff who has chosen his own forum.

In re **Beauchamp Brothers.** *Ex parte* **Beauchamp,** 1894, 1 Q. B, 1. Under the Bankruptcy Act 1883 and the rules made thereunder a receiving order cannot be made against a partnership firm, of which one of the partners is an infant. Unless all the members of the firm are guilty of an act of bankruptcy, the firm cannot be adjudicated bankrupt. *Esher, M. R.*, said, "Whether the creditors have any other remedy against the adult partners without the infant is a question not now before us and I express no opinion about it."

In re **Errington.** *Ex parte* **Mason,** 1894, 1 Q. B, 11. An assignee of the equity of redemption is not by the mere fact of assignment liable on his assignor's covenant to pay interest to the mortgagee; nor will payment of interest by the assignee for some time give rise to such a liability. *Vaughan Williams, J.* observed, "generally where there is a novation, the release of the original debtor is the consideration for the contract. If there were some other consideration, the new contract would probably be a contract of surety-ship."

In re **Hawkins.** *Ex parte* **Hawkins,** 1894, 1 Q. B, 25. Arrears of alimony payable by a bankrupt to his wife under an order of the Divorce Division of the High Court, which became due after the receiving order, cannot be proved for by the wife in the debtor's bankruptcy, because (1) there can be no proof for arrears of alimony incurred at any time, for a man can never be released altogether from the obligation to support his wife, (2) there is no contract to pay alimony, and the order of the court is liable to be varied and the liability cannot therefore be assessed.

Dane *v.* **Mortgage Insurance Corporation,** 1894, 1 Q. B, p. 54. The plaintiff entered into an agreement called 'a policy of insurance'

with the defendant company whereby the company agreed to pay the plaintiff a sum of money deposited by the plaintiff in an Australian bank if the bank should make default in paying the same. The bank made default. A scheme of arrangement between the bank and its creditors was under the provisions of an Australian statute sanctioned by a meeting of creditors and the Colonial Court. The scheme was binding upon the plaintiff by the Australian law, but the plaintiff did not assent to it. The effect of the scheme was that the bank was wound up and a new bank constituted and the creditors were entitled to certain rights against the new bank in satisfaction of their debts. Held that as soon as the bank made default in payment, the defendants became liable to pay the sum insured or guaranteed notwithstanding the scheme of arrangement.

Biggs *v.* **Evans,** 1894, 1 Q. B, 88. Where a person entrusts a jewel to a dealer in jewels who sold jewels for other people in his own name, and directed the agent not to sell the jewel at all to any person or at any price without his authority and that the cheque received in payment should be handed to him intact; and the agent sells the jewel in contravention of his powers, for a price fixed by himself, held that on account of the conditions imposed on him, the agent was acting entirely outside his authority, and that the vendee could acquire no title under the sale and the owner could recover it from him by action.

Bache *v.* **Billingham,** 1894, 1 Q. B, 107. By one of the rules of a friendly society, where arbitrators authorised to decide disputes between a member and the society did not make a decision within 40 days after the application for reference to arbitration the member was entitled to apply to a court of summary jurisdiction. The arbitrators in a certain case heard the complainant, but heard the witnesses in his absence, he being excluded from the room, and passed a decision. Held that the justices had no jurisdiction in the circumstances to hear a complaint by the aggrieved member, as the decision of the arbitrators was valid until set aside.

Long *v.* **Clarke,** 1894, 1 Q. B, 119. Held that in order to distrain for rent, a landlord or his bailiff may lawfully enter by going through the next house and into the yard at the back, then climbing over the wall into the yard of the house in which distraint is made.

MISCELLANEOUS.

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

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

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

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

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

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

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

REVIEW :—*Best on Evidence*—Eighth Edition (1893) by J. M. Sely and C. F. Chamberlayne—Published by Sweet and Maxwell, Limited, London and The Boston Book Company, Boston.

We owe an apology to the well-known publishers who have brought out the 8th Edition of the excellent treatise for the delay in bringing it to the notice of our readers. Mr. Best's treatise on the principles of the Law of Evidence has long maintained the position of a standard work on the subject and has enjoyed great popularity in India especially among the students of our Law Colleges. To the student who desires to obtain a grasp of the leading principles of the English Law of Evidence, there is no better book than that of Mr. Best which without going too much into details and bewildering the beginner by a multitude of cases presents the fundamental principles in a clear, systematic and attractive form and explains the grounds on which they are based The elaborate work of Mr. Taylor is better fitted for the practitioner than for the student. We have therefore great pleasure in welcoming a new edition of Mr. Best's book which contains very valuable addition in the shape of American notes at the end of every chapter by Mr. Charles F. Chamberlayne of the Boston Bar. America is making such rapid progress in her jurisprudence that in future authors will find it impossible to not consider and digest the American literature on the subject of their work. We hope the book will be appreciated by an ever increasing circle of readers in the legal world.

The Bench and the Bar:—In acknowledging the congratulation of Sir Charles Russell on his return from illness to the Court of Appeal, the Master of the Rolls is reported to have said, "you all know the feelings which I have always entertained towards the Bar. I am one of you and it is only while sitting in court that I cease in one sense to be a member of the Bar, but the moment I leave the court we are all

fellow-barristers and equal one with another." Thorough good-feeling between the Bench and the Bar can only exist where the Bench is entirely recruited from the body of professional men practising before it. Such a system is absent in this country and racial difference adds to the gulf separating the Bench and the Bar. It is no wonder that there is not much sympathy between the Bench and the Bar in this country.

Copies of judgments :—We very much wish that somebody will look into the inordinate delays in the granting of copies of judgments, decrees, and orders in the High Court and in the Mofussil Courts We have before us a copy of an order of the District Court of Trichinopoly granted nearly one year after the date of the application. We have also had copies from the District Court of South Arcot granted more than six months after the date of the application. The evil does not seem to be confined to particular places although it exists in an aggravated form where supervision is inefficient. If there was an inspection of the offices of the District and Subordinate Courts, the appalling dimensions of the evil would become manifest. The time of the pendency of causes is already long in the courts of the country and the law's delay has been much increased by the time taken between the end of a proceeding in one court and the institution of an appeal in another. There is a crying necessity for a thorough over-hauling of the whole judicial machinery. Speedy justice, such as it may be, the litigant world is anxious to get, but even this small compensation for weak judicial power seems difficult of attainment.

Suit for removal of trustee:—Does this come under S. 539 of the Code of Civil Procedure? And is it therefore to be instituted in the District Court in all cases? This question has come up repeatedly for decision before the Madras High Court. Last time it was considered by a Bench of three judges consisting of *Muthusami Aiyar*, *Best*, and *Weir*, *J.J.* in *Subbayya* v. *Krishna*, I. L. R, 14 M, 185. On that occasion *Best* and *Weir*, *J.J.* held overruling *Muthusami Aiyar J.*, that the suit fell within S. 539. Having been decided by a Bench of three judges, we thought the question was finally settled. But it was again brought before a Bench, this time also consisting only of three judges. This Bench, (we suppose, we must call it a Full Bench), was composed of the former dissenting judge, *Muthusami Aiyar*, *J.* and two other judges, *The Chief Justice* and *Shephard*, *J. Best*, *J*, who was one of the majority in the case in I. L. R, 14 M was not included in the composition of this Bench and we have now a unanimous decision of the *Chief Justice*, *Muthusami Aiyar* and *Shephard*, *J. J* dissenting from the majority in I. L. R, 14 Madras. We cannot but regard this as very

unsatisfactory. If a Bench of three judges is a Full Bench, we have had two Full Benches holding differently. The pity of it is that it did not occur to the *Chief Justice* to increase the number of judges on the 2nd Full Bench more especially when *Best, J* was here. We do not know whether *Best, J.* will consider himself bound by the latter decision. The rule in respect of the authority of judical decisions is thal the later prevails over the earlier.

The Monson Appeal:—We take the following from the Law Journal on the case of *Monson* v. *Tussaud* referred to in our leader on the "Right to privacy" in the January number of this year. It is to be regretted that the plaintiff's counsel did not press for a decision in his favor on the simple ground that the exhibition by one person of an unauthorised representation of the face or figure of another can be restrained by injunction. Says *The Law Journal*, "That the Court of Appeal was right in dissolving the interlocutory injunction recently granted by *Mr. Justice Mathew* and *Mr. Justice Henn Collins* in the cases of *Monson* v. *Madame Tussaud* (*Lim.*) and *Monson* v. *Tussaud* on the fresh evidence which was not before the Divisional Court, it is impossible to doubt. Whether Mr. Monson is or is not ultimately proved to have authorised the negotiation between Mr. Tottenham and the defendants Madame Tussaud (Lim.) for the sale of his gun and shooting clothes and the taking of a better effigy than the one that now stands in Napoleon Room No. 2 within the turnstile which admits curious visitors to the Chamber of Horrors, it is unquestionable that the conflicting affidavits laid before the Court of Appeal made it the imperative duty of that tribunal to leave the issue of alleged license for the jury without any provisional expression of opinion in regard to it. We have, therefore, no adverse criticism to pass on the actual *chase jugee* in these remarkable cases. But the condition in which the judgment of the Court of Appeal has left the numerous, varied, and highly important legal questions incidentally raised before it is eminently unsatisfactory. The plaintiff's counsel in both courts through which Mr. Monson's effigy has now passed judicially, did not press for a decision in his favor on the ground that the exhibition by one person of an unauthorised representation of the face or figure of another can be restrained by injunction; and this interesting practical question, therefore, remains undetermined. There is, of course, no doubt that the ingenious French artist who drew the face of King Louis after the likeness of an over-ripe pear would have met with as scant consideration from English judges as he received from those of France. It hardly needed Mr. Coleridge's elaborate review of the authorities from the time of Charles II—Sir John Culpepper's pillary,

La Belle et la Bete, and the rest—to establish the proposition that the exhibition of an effigy is libellous if it is intended to excite hatred, ridicule, or contempt. What we should have liked to know is whether in the opinion of the courts a person who objects to such permanent publicity as the Tussauds assigned to Mr. Monson is not entitled to have his objection enforced and made effective by due process of law. It is perfectly true that there is no authority for an affirmative answer to this question, for *Pollard* v. *The Photographic Company*, 58 Law. J. Rep. Chanc. 251; L. R, 40 Chanc. Div. 345, turned on contract and property in the negative. But neither is there any authority on the other side. *Mr. Justice Nerth's* query in that case, 'Do you dispute that if the negative likeness were taken on the sly the person who took it might exhibit or sell copies?' is not even an *obiter dictum*. Our American, and probably also our French, neighbours have already solved this question to some extent, and it is to be regretted that the courts in the *Tussaud cases* had not the opportunity of making a precedent on the subject. Other questions of equal importance have also been left open by the courts in these *causes celebres*. It must now apparently be taken that the old distinction between trade and other libels in the law of interlocutory injunction no longer exists, although *Lord Justice Lopes* clung with some tenacity to the opposite view during the argument, and said nothing in his judgment to indicate that he had undergone any change of opinion. But the Court of Appeal are far from unanimous on every other point in the cases. Does *Bonnard* v. *Perryman*, 60 Law. J. Rep. Chanc. 617; L. R, (1891), 2 Chanc. 269—where it was declared by the full Court of Appeal that the publication of an alleged libel ought not to be restrained by interlocutory injunction, except in the clearest cases—lay down a principle of law? *Lord Justice Lopes* and *Lord Justice Davey* hold that it does, and we think they are right; indeed, the notorious history of the case seems conclusive on the point. But *Lord Halsbury* strongly entertains the contrary opinion. Again, can a person take a photograph picture or representation of another who has been accused of a crime, exhibit it in a permanent form, and defend the exhibition by saying, 'I do this because the public are interested in this person; and it is true that he has been accused of a crime, which is the only allegation (if any) that I make'? Lord Halsbury says, 'No,' partly, it would seem on the authority of *Leyman* v. *Latimer*, 47 Law. J. Rep. Exch. 470; L. R, 3 Exch. Div. 15,352. *Lord Justice Lopes* apparently differs, and holds that in any event the question is one for the jury. *Lord Justice Davey* preserves a judicial silence. We trust that ere long, in some form or other, these moot points will come before the House of Lords. *Interest reipublicæ ut sit finis litium* is no doubt a

salutary principle; but *interest republicæ ut sit finis causarum litigandi* is a better one"—*Law Journal.*

Earl Cairns:—Lex writes as follows: "Earl Cairns was the most distinguished and not the least earnest of our great religious Chancellors. A stern Protestant in his views of ecclesiastical polity, he disliked with all the strength of his upright, austere nature, the excessive tolerance of modern politico-protestant thought. He labored faithfully to spread the growth of religious teaching, lent the aid of his voice and his purse to Dr. Barnardo's Homes, frequently presided at religious meetings at Exeter Hall, and was a Sunday-school teacher up to practically the end of his long career. Mr. Gladstone is believed to have expressed the opinion that Sir George Jessel, the later Master of the Roll, was 'the greatest legal genius of the century.' But there are few lawyers who would endorse this verdict. Sir George Jessel undoubtedly possessed a legal intellect of the highest order. He disposed of the most complex legal problems with the ease and vigor, although not without some of the coarseness, of a huge mastiff worrying an insignificant terrier. But he lacked what Cairns possessed, the cultured imagination and the vein of poetry which are essential to the exercise of the highest genius in the juridical art. In Cairns' best judgments Burke's idea that "all human law is properly declaratory" is realized. They are not so much ratiocinations as illuminations. Disregarding the slow, syllogistic processes by which ordinary judges arrive at their decisions, he goes straight to his mark, with the swift, strong, subtle instinct of a woman for truth, and when the conclusion is reached, one feels as if the last word on the subject had been spoken. And yet Cairns' mind was severely logical—he had attained that perfect mental discipline which enables a man to 'follow without reflecting upon the rule.' In spite of these great intellectual gifts, it is practically certain that the circumstances which prevented Cairns from succeeding to the authority of Lord Beaconsfield were of good men for the Conservative party. His austerity, his stern self-repression, would have been fatal obstacles to his success, and he never displayed either the faculty for evoking popular enthusiasm or the capacity for leadership which the responsibilities of office have developed in his successor. By his professional brethren Cairns was, and still is, regarded with almost superstitious veneration, but without any of the perfect love which has poured without measure on the erring head of Blackburn. Lord Coleridge has told us that he had a strong, rich vein of humor. But its pulsations were carefully concealed, and according to the traditions of the temple, a curious fancy for immaculate bands and tie in court, and for a flower in his coat at

evening parties, was the only human weakness that the great Lord Chancellor displayed.—*Green Bag.*

Real property—Adverse possession:—Defendant railroad company had bought certain land of plaintiff's father, and in putting up the fence made a mistake in its location, leaving the vendor in possession of a piece of land that belonged to the company, according to exact measurement. The vendor and his son, the plaintiff here, have occupied the land for more than twenty years, thinking the fence was on the true line. Held, one who by mistake occupies land, not covered by his deed, for twenty years or more, with no intention to claim title beyond his actual boundary, does not thereby acquire title by adverse possession beyond the true line. *Preble et al* v. *Maine Central R. Co.*, 27 Atl. Rep., 149 (Me).—*Harvard Law Review*

Quasi-contracts—Taxation—Voluntary payments under mistake of law.—The relator was a corporation exempt by statute from taxation. It voluntarily made a report to the comptroller, and without objection paid taxes on the basis of that report. Held, notwithstanding the statute, the relator cannot recover taxes voluntarily paid under a mistake of law. *People* v. *Wemple*, 23 N. Y. Sup, 661.

The decision is interesting, as showing a very strict construction of an important statute in accordance with the common law rule against recovery of money paid under mistake of law.—*Harvard Law Review.*

Prisoner giving evidence:—In a case recently tried at the Old Bailey Mr. Justice Hawkins stated that he was very strongly in favor of allowing a prisoner to give evidence on oath. But dealing with the statement of the prisoner's counsel that the prisoner's mouth was closed, he said that was hardly so, as every person when committed for trial was invited by the magistrate to make a statement, and this could be made without subjection to cross-examination. This opportunity, however, is seldom of any use to the prisoner. He is told that he may make any statement he likes, but that what he does say will be taken down and used in evidence against him. Often without professional assistance, the man understands the threat but fails to recognise his opportunity of stating facts in his favor. Under any circumstances this procedure is unsatisfactory; the facts are not stated on oath nor cross-examined too. A change in the law in this respect is absolutely necessary, and the experience gained in prosecutions under the Criminal Law Amendment Act shows that it may be made with safety.—*Law Journal.*

Call to profession :—The judges have decided the appeal from the decision of the Gray's Inn Benchers refusing to call a student of that Inn to the Bar in favor of the appellant. The case was an interesting one, the action taken by the Benchers having proceeded from a meeting of legal practitioners in India. The grounds on which the judges decided in this case were not stated in pronouncing the decision; but it is understood that, owing to the nature of the case and the novel questions involved, reasons are to be stated in writing, which doubtless will afford assistance to the Inns of Court in regard to their relations with students from India and the Colonies.—*Law Journal.*

Torts—Proximate cause—Injuries caused by fright :—Plaintiff was standing on a crossing at the foot of a hill, waiting for a chance to go aboard one of the defendant's cars, which was stationed opposite her. While she stood there a horse-car came upon her, driven downhill at such speed that before the driver could stop the horses, their heads were on either side of the plaintiff, who fainted from the fright and excitement. As the result of the shock she became ill, suffered a miscarriage, and was sick for a long time. Held, that the plaintiff may recover if her physical injury though caused by the mental shock, was the natural result of the defendant's negligence. *Mitchell* v. *Rochester Ry. Co.*, 25 N. Y, Supp., 744.—*Harvard Law Review.*

Sales—Fraud—Effect of judgment :—A sale induced by fraud is not affirmed by a judgment recovered in an action for the purchase-money brought by the vendor in ignorance of the fraud. *Rochester Distilling Co.* v. *Devendorf*, 25 N. Y, Supp , 200.

The decision is sound. Fraud makes a sale voidable at the election of the party who was deceived, and his acts before learning of the fraud do not affect the right of recission, provided third parties are not prejudiced. The precise point decided here seems to have come up only twice before, *viz.*, in *Krause* v. *Thompson*, 130 Mainn, 64, cited by the court and in *Foundry Co.* v. *Hersee*, 103 N. Y, 26.—*Harvard Law Review.*

Real property—Natural gas—Injunction :—Plaintiff induced defendants to drill a gas-well in their land adjoining plaintiff's, expecting to buy it when completed. There was a disagreement about the price, and defendants allowed it to burn without utilizing it in any way. This tended to drain the sandrock and reduce the flow in the wells on plaintiff's land. Plaintiffs went on defendants' land and closed the well. Defendants now threaten to remove the cap, and an injunction to restrain them is sought. Held, no injunction will be granted. Defendants

had the right to use the gas in this way as well as any other. *Hague et al* v. *Wheeler et al*, 27 Atl. Rep., 714, (Pa).—*Harvard Law Review*.

Evidence—Burglary—Evidence of other burglaries:—In a trial for burglary, evidence that other burglaries were committed on the same night was admitted, in connection with proof that footsteps found about the houses entered corresponded with the shoes worn by defendant. Held, that the evidence was properly admitted as tending to show a general system under which the crime in question was committed. *Frazer* v. *State*, 34 N. E, Rep., 817 (Ind).

Although questions of this nature are largely within the discretion of the trial judge, still it would seem that this was a case in which the upper court might well have interfered. The principle relied on is perfectly sound. Though in general in a trial for a crime, evidence that defendant committed another crime is inadmissible, or proving nothing but defendant's wickedness, yet such evidence is undoubtedly admissible where it tends to show the existence of a general plan, pursuant to which the crime in question was committed, *Commonwealth* v. *Robinson*, 146 Mass, 571. But it is submitted that the principle was misapplied in this case: The evidence submitted apparently shows not such a general plan, but rather several distinct burglaries, supposed to have been committed by the defendant, which have no logical bearing upon the crime for which he was being tried.—*Harvard Law Review*.

Evidence—Conjectural and misleading:—Defendant was a packing company, and plaintiff, as its employee, was engaged in piling barrels. A barrel in a lower row of the pile commenced to leak, and, by order of defendant's foreman, the head of the barrel was knocked out and its contents removed. Subsequently, some barrels on the top of the file fell off and struck plaintiff, breaking his leg. Plaintiff claimed that the injury was caused by negligence of defendant in allowing the empty barrel to remain in such a position. Defendant offered to prove by its foreman that experiments with similar piles of barrels had been made, and that a barrel in the same relative position as the empty barrel in this case had been removed without causing the pile to fall. This evidence was excluded at the trial. Held, no error. *Libby et al* v. *Scherman*, 34 N. E, Rep, 801 (Ill).

The court say that such evidence is conjectural merely, and would involve a multitude of collateral issues. Such questions seem to lie very largely in the discretion of the trial judges, and their rulings are not often reversed by the courts, unless a strong case is made out. This is,

therefore, a question on which courts may well differ. If it could be shown that the experiments were made under substantially the same conditions as existed in the case in question, it would seem that the evidence might be admitted as tending in some degree to disprove defendant's negligence, provided it was submitted to the jury with careful instructien as to its weight and bearing. Evidence of a similar kind was admitted in the following cases: L. R, 1 C. P., 300; 107 U. S, 519; 52 N. H, 401. In the following it was excluded; 3 Allen, 410; 33 N. J. Law, 260.—*Harvard Law Review.*

Contracts—Consideration:—Plaintiff had agreed to furnish wood to defendant at a certain price per cord, but was unable to carry out the agreement on account of the high wages that his workman demanded. He wrote defendant that he must ask for a better price, and defendant agreed to pay more per cord. Held, there was a consideration for the second agreement. *Foley* v. *Storrie*, 23 S. W. Rep, 442 (Texas).

The theory is that the first contract is waived by the making of this second agreement. And, of course, this being true, the mutual promises furnish sufficient consideration for the latter. Harp on Contracts, p. 220; 9 Pick, 298, 305; 3 Cush., 135; 6 Ex., 839; 69 Ill., 403; 36 N. Y., 388, 392; 128 Mass., 116; 47 Mich, 489; 28 Vt, 264. But the better view seems to be that plaintiff was already bound by the first contract; that defendant never agreed to a waiver of it, and consequently that there is no consideration. Walds' Pollock on Contract, p. 179, note V; 6 Ohio St. 1; 52 In, 478; 69 Pa. St, 216; 91 N. Y, 392.—*Harvard Law Review.*

Corporation—Libel:—In an action against a corporation for libel it was held, that evidence of the defendant's wealth was not admissible. *Randall* v. *Evening News Association*, 56 N. W. Rep, 361 (Mich).

The courts of Michigan allow this evidence in an action against an individual for libel; but it is considered a dangerous rule, to be used with great care. The court seems right, therefore, in refusing to extend the doctrine to the case of a corporation; but it is submitted that the argument that this sort of evidence is not so material in the present case as in that of an action against an individual is given too great weight n the decision.—*Harvard Law Review.*